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| **Bulletin No. 153**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%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](http://www.blakedawson.com/%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).[Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/153%20May%202010.htm#h1) [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/153%20May%202010.htm#h2) [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/153%20May%202010.htm#h3) [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/153%20May%202010.htm#h5) [Contributions](http://www.law.unimelb.edu.au/bulletins/153%20May%202010.htm#7) [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)  |

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

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| **1.1 Draft legislation - access to share registers and increased powers for ASIC**  On 20 May 2010, the Australian Government published for consultation the *Corporations Amendment (No 1) Bill 2010* (the Bill). The Bill amends the Corporations Act and the [Corporations Regulations](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default) to change the way people access information kept on company registers. The measures will:require persons seeking a copy of the register of members to apply to the company, stating the purpose for which they will use the register; provide that where a register is maintained on a computer that it should be able to be inspected on a computer; and provide for the Corporations Regulations to prescribe the formats in which a copy of the register can be provided. The Bill also amends the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and the [ASIC Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default) to:increase the magnitude of criminal penalties that can be imposed for breaches of the insider trading and market manipulation provisions of the Corporations Act; allow for telecommunications interception warrants to be applied for in the course of investigations into those offences; enhance ASIC's search warrant power to enable ASIC to apply for a search warrant under the ASIC Act without first having to issue a notice to produce the material; and clarify criminal liability in section 1041B of the Corporations Act in accordance with the requirements of the [Criminal Code Act 1995](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6244" \t "Default). Amendments to the ASIC Regulations will remove provisions that currently provide that a person who makes an off market offer is exempt from the unconscionable conduct provisions where they make certain disclosures.  The Corporations Act will also be amended to clarify the intended application of existing legislation to confirm that off‑market offers to purchase financial products must remain open for at least one month.The draft Bill and Explanatory Memorandum are available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1811" \t "_new) website.etailed Contents**1.2 Report on guidance for directors** On 20 May 2010, the Corporations and Markets Advisory Committee (CAMAC) published a report titled 'Guidance for Directors'. The report responds to a request from the Australian Minister for Financial Services, Superannuation and Corporate Law, the Honourable Chris Bowen MP, in August 2009 for advice on whether there is sufficient guidance provided to directors to ensure that they clearly understand their roles and responsibilities and whether their performance would be enhanced by the introduction of a code of conduct or best practice guidance by a regulator. The Committee has reviewed guidance available to directors in Australia and elsewhere. While there is already a good deal of guidance available to directors, there is always scope for improvement having regard to the experience of companies and boards and changes in the environment in which they operate. The provision of guidance in itself does not ensure improved governance, but efforts to assist directors to understand their role and enhance their effectiveness are worthwhile and should be pursued.A good deal of guidance in Australia focuses on the legal duties and responsibilities of directors and compliance, structural and process issues for boards. There is growing recognition of the benefits of guidance on broader behavioural issues that go to the effectiveness of a director and the effective functioning of a board. There is room for further attention to this area, with the aim of empowering directors to carry out the role expected of them and not to fall into a role of passive participant. The Committee does not see a need for the development of a new code of conduct or best practice guidance by a regulator. The Committee considers, however, that it would be timely for the ASX Corporate Governance Council to review its Principles and Recommendations in the light of international developments. The report draws attention to emerging themes in corporate governance reviews carried out in the United Kingdom and by the OECD and other international bodies, having regard to the global financial crisis and other developments. The Committee encourages continuing efforts by ASIC and other regulators to provide guidance in areas for which they are responsible, including to assist directors to understand their enforcement approach in particular areas.The Committee acknowledges the contribution of professional and industry bodies in encouraging high standards of performance by directors and boards. There is scope for leadership, including through peer group and mentoring programs, to help equip directors with the skills and understanding to operate effectively in a board context. The report is available on the [CAMAC](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal%2BReports%2B2010/%24file/Guidance_for_directors_Report_April2010.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.3 SEC to publish for public comment stock-by-stock circuit breaker rule proposals** On 18 May 2010, the US Securities and Exchange Commission (SEC) announced that in response to the market disruption of 6 May 2010, the national securities exchanges and the Financial Industry Regulatory Authority (FINRA) are filing proposed rules under which they would pause trading in certain individual stocks if the price moves 10 percent or more in a five-minute period.  The SEC is seeking comment on the proposed rules. The markets are proposing these rules in consultation with FINRA and staff of the SEC to provide for uniform market-wide standards for individual securities in the S&P 500® Index that experience a rapid price movement.  These rules reflect a consensus that was achieved among the exchanges and FINRA after SEC Chairman Mary Schapiro convened a meeting of exchange leaders and FINRA. That meeting took place within days after the market dropped significantly and after approximately 30 S&P 500 Index stocks fell at least 10 percent in a five-minute period. Under the proposed rules, which are subject to Commission approval following the completion of the comment period, trading in a stock would pause across US equity markets for a five-minute period in the event that the stock experiences a 10 percent change in price over the preceding five minutes. The pause would give the markets the opportunity to attract new trading interest in an affected stock, establish a reasonable market price, and resume trading in a fair and orderly fashion. Initially, these new rules would be in effect on a pilot basis through 10 December 2010.  The markets will use the pilot period to make appropriate adjustments to the parameters or operation of the circuit breaker as warranted based on their experience, and to expand the scope to securities beyond the S&P 500 (including ETFs) as soon as practicable.  The proposed rules will be available on the SEC's website as well as the websites of each of the exchanges and FINRA. The Commission intends to promptly publish the proposed rules for a 10-day public comment period, and determine whether to approve them shortly thereafter. The SEC staff is working with the markets to consider recalibrating market-wide circuit breakers currently on the books - none of which were triggered on 6 May 2010. These circuit breakers apply across all equity trading venues and the futures markets. etailed Contents**1.4 Government releases draft market supervision regulations** On 13 May 3010, the Australian Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, released an exposure draft of regulations which support the legislation that transfers responsibility for supervision of Australia's financial markets to the Australian Securities and Investments Commission (ASIC).  The regulations provide the details of how the transfer of supervisory responsibility to ASIC will work, including the additional powers ASIC will have to enforce the new market integrity rules. The proposed regulations: provide details of the infringement notice and enforceable undertaking regime; provide for transitional and grandfathering arrangements to ensure the smooth transfer of supervisory responsibility to ASIC; allow for specified markets to be exempt from ASIC supervision on day one of the transfer of responsibility; and make other minor consequential changes. The closing date for submissions on the draft regulations is 11 June 2010.Regulations to support the [Corporations Amendment (Fees) Act 2010](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=113012" \t "Default) are currently being finalised. These regulations, which detail how the costs of supervision will be recovered, will be released for consultation once drafting has been completed.  Further information is available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1805" \t "_new) website.etailed Contents**1.5 APRA releases discussion paper to update general and life insurance capital standards**  On 13 May 2010, the Australian Prudential Regulation Authority (APRA) released a discussion paper describing its proposals to update the capital standards for general insurers and life insurers. APRA's intention is to make its capital requirements more risk-sensitive and to improve the alignment of its capital standards across regulated industries, where appropriate. For general insurance, APRA is completing the refinements commenced in 2008. For life insurance, APRA is fully reassessing the capital standards in light of industry changes over the last 15 years.  The proposed changes for general insurers are relatively modest and ensure that all material types of risks, including asset/liability mismatch, asset concentration and operational risks, are adequately catered for within the capital standards. More fundamental changes are proposed to the capital standards for life insurers. APRA proposes to simplify the current dual reporting requirements for solvency and capital adequacy and align the capital structure for life insurers more closely with the capital structure for authorised deposit-taking institutions and general insurers in Australia. This improved alignment of capital requirements will also facilitate adoption of APRA's proposed supervisory framework for conglomerate groups. APRA is publishing this discussion paper as the first major outcome of its review process, and will release three supplementary technical papers in June 2010. APRA will also evaluate its proposals by conducting a quantitative impact study (QIS) on the impact of the proposed changes on the general and life insurance industries. APRA expects to release draft capital standards by the end of 2010 and final capital standards in mid-2011, to take effect in 2012.  The discussion paper is available on the [APRA](http://www.apra.gov.au/Policy/Review-of-capital-standards-for-general-insurers-and-life-insurers-May-2010.cfm%22%20%5Ct%20%22_new) website. etailed Contents**1.6 POB publishes its review of transparency reporting by auditors of public interest entities**On 13 May 2010, the UK Professional Oversight Board (POB) published its review of the first set of mandatory Transparency Reports produced by auditors of public interest entities. Under the Statutory Audit Directive and the subsequent Statutory Auditors (Transparency) Instrument 2008, auditors of UK companies with securities traded on a UK regulated market are required to produce a Transparency Report in respect of each financial year starting on or after 6 April 2008. The Statutory Instrument sets out certain mandatory information for inclusion in each report and this was supplemented in 2009 by recommendations from the Oversight Board on appropriate disclosures. The review of the first set of mandatory Transparency Reports includes a detailed commentary on common themes across the reports, an update on the extent to which issues identified in last year's review of voluntary reports have been addressed by the firms and an analysis of disclosures under each of the statutory requirements. Last year, seven of the ten largest firms chose to publish a voluntary transparency report. This year is the first in which the reports have been mandatory. So far 25 firms, out of a total of 40, have now produced transparency reports.  It was notable that, although many reports included a high quality narrative describing internal quality control and other systems, none provided any objective measures demonstrating the effectiveness of those systems. The POB encourages firms to give some consideration to including such objective measures, such as the firm's performance against internal key performance indicators (KPIs) in future reports.Although most of the reports mentioned the importance of audit quality, there was limited evidence of firms attempting to distinguish between themselves, and hence compete, on quality.  Although this year's reports were in general of higher quality than the voluntary reports looked at previously, very few reports met all of the requirements. There were also a number of common themes emerging. In particular, the POB would like firms to improve the quality of their disclosures in the following areas:International networks; Independence issues; and Financial information. The report is available on the [POB](http://www.frc.org.uk/pob/publications/pub2277.html%22%20%5Ct%20%22_new) website.etailed Contents**1.7 Government responds to Australia as a financial services centre report**  On 11 May 2010, the Australian Government responded to the Report of the Australian Financial Centre Forum "Australia as a financial centre: Building on our strengths". The Forum's report was released on 15 January 2010. The Government response provides in-principle or direct supports for nearly all of the Forum's 19 recommendations, including the introduction of an Investment Manager Regime, the establishment of an online regulatory gateway, and the development of an Asia Region Funds Passport.  In the area of taxation, the Government will phase down the interest withholding tax (IWT) paid by financial institutions. The main IWT rate will come down from 10 per cent to 5 per cent and we will reduce that to zero when fiscal circumstances allow. As an integrity measure, the Government will maintain the existing IWT rate on non-resident retail deposits in Australia. Consistent with Recommendation 4.5 of the Report, the Government has announced support for competition between markets for trading in listed shares in Australia. The matters dealt with in the Government's response are:**Taxation**Investment manager regime Offshore banking units Funds management vehicles Withholding tax on interest paid on foreign raised funding by Australian banks; on interest paid to foreign banks by Australian branches; and on financial institutions' related party borrowing LIBOR cap on deductibility of interest paid on branch parent funding Islamic finance products Remove state taxes and levies on insurance Monitoring and advising on financial services tax issues **Regulation and regulatory supervision**Avoiding unnecessary regulation Periodic reviews of the regulatory rules and framework The Asia Region Funds Passport Regulatory online gateway Increased competition on exchange traded markets Reduce regulatory requirements on corporate debt issuance to retail investors Standardise non prudential regulation of the insurance sector Removal of regulatory barriers to Islamic finance **Promoting Australia as a financial centre**Declaration of intent Financial services missions Financial Centre Task Force The government response is available on the [Treasury](http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/050.htm&pageID=003&min=ceba&Year=&DocType=0" \t "_new) website.etailed Contents**1.8 IOSCO and CPSS consult on policy guidance for central counterparties and trade repositories in the OTC derivatives market** On 12 May 2010, the Committee on Payment and Settlement Systems (CPSS) and the Technical Committee of the International Organization of Securities Commissions (IOSCO) issued two consultative reports containing proposals aimed at strengthening the OTC derivatives market. The first report 'Guidance on the application of the 2004 CPSS-IOSCO Recommendations for Central Counterparties (RCCP) to OTC derivatives CCPs, presents guidance for central counterparties (CCPs) that clear over-the-counter (OTC) derivatives products. The second report: 'Considerations for trade repositories in OTC derivatives markets' presents a set of considerations for trade repositories (TRs) in OTC derivatives markets and for relevant authorities over TRs. **(a) Guidance on the application of the 2004 CPSS-IOSCO recommendations for Central Counterparties to OTC derivatives CCPs**  In response to the recent financial crisis, authorities in many jurisdictions have set out important policy initiatives encouraging greater use of CCPs for OTC derivatives markets. Recently, several CCPs have begun to provide clearing and settlement services for OTC credit default swaps. A CCP interposes itself between counterparties to financial transactions, acting as the buyer to every seller and the seller to every buyer.  These issues were not fully discussed in the 2004 report of the existing RCCP. Consequently, the CPSS and the Technical Committee of IOSCO have identified such issues and developed international guidance tailored to the unique characteristics of OTC derivatives products and markets. The aim is to promote consistent interpretation, understanding and implementation of the RCCP across CCPs that handle OTC derivatives.  **(b) Considerations for trade repositories in OTC derivatives markets**  The financial crisis highlighted a severe lack of market transparency in OTC derivatives markets. As an important step in addressing this issue, OTC derivatives market participants, with the support of the regulatory community, are committed to establishing and making use of trade repositories. A TR in OTC derivatives markets is a centralised registry that maintains an electronic database of open OTC derivative transaction records.  Recognising the growing importance of TRs in enhancing market transparency and supporting clearing and settlement arrangements for OTC derivatives transactions, the CPSS and the Technical Committee of IOSCO have developed a set of factors that should be considered by TRs in designing and operating their services and by relevant authorities in regulating and overseeing TRs.  The first report 'Guidance on the application of the 2004 CPSS-IOSCO Recommendations for Central Counterparties (RCCP) to OTC derivatives CCPs' is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD320.pdf%22%20%5Ct%20%22_new) website.The second report, 'Considerations for trade repositories in OTC derivatives markets' is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD321.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.9 Regulations made supporting new margin loan regulatory regime** On 7 May 2010, the Australian Minister for Financial Services, Superannuation, and Corporate Law, Mr Chris Bowen MP, announced the prescribing regulations as part of the Commonwealth's new margin lending regime. In 2009 margin loans were inserted into Chapter 7 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ensuring that the investor protection regime contained in the Corporations Act applies to margin loans. The regime consists mainly of a range of licensing, conduct and disclosure requirements that apply to providers of financial products and services. Under the previous State and Territory-based consumer credit regime, margin loan borrowers did not benefit from any protection measures specifically tailored to their requirements. The new regulations state that a person providing both financial services and credit products can combine certain prescribed disclosure documents known as Financial Services Guides and Credit Guides. This is a measure that will save costs and effort for licensees, while making disclosure documents simpler and clearer for consumers. Finally, the regulations also ensure that a margin lending facility is a financial product for the purposes of the [Australian Securities and Investments Commission Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default) (ASIC Act). This ensures that the general consumer protection measures which apply to other financial products under the ASIC Act extend to margin loans, including prohibitions from engaging in unconscionable conduct or conduct that is misleading or deceptive, and from making false or misleading representations. The regulations will come into effect at the same time as the general margin loan provisions in the Corporations Act on 1 January 2011.etailed Contents**1.10 Australian securities class action filings reach record level**Securities class action filings in Australia set a new record in 2009, breaking the previous record set in 2008, according to a new study by NERA Economic Consulting. The six filings in 2009 bring the total for 2007-2009 to 14, exactly half of total number of filings since the first securities class action case was filed in Australia in the early 1990s. According to the study, "Trends in Australian Securities Class Actions: 1 January 1993 - 31 December 2009," a key factor in the recent increase in securities class action filings has been a change in the way securities class action litigation is funded in Australia. Until only a few years ago, there was a strong disincentive to bring an action due to the risk of incurring significant legal costs. The emergence of commercial litigation funding has improved the incentive and ability for investors to participate in class actions, say the study's authors. Since 2005, the large majority of class actions have been financed by a commercial litigation funder. The NERA study also found that: More than half the securities class actions filed between 1999 and 2009 alleged either misleading or deceptive conduct or failure by companies to promptly disclose information material to the value of their securities. More than half of all securities class actions were brought against companies in the financial industry (including insurance and real estate). Settlement is the most likely outcome of securities class action cases in Australia. Eight of the 12 class actions resolved by the end of 2009 were settled. This trend has become more pronounced in recent years - all of the resolved cases filed after 2003 were settled. Only two Australian securities class action cases have been resolved by final judgment. The report is available on the [NERA](http://www.nera.com/publication.asp?p_ID=4122" \t "_new) website. etailed Contents**1.11 APRA consults on prudential reporting requirements for Basel II enhancements** On 5 May 2010, the Australian Prudential Regulation Authority (APRA) released for consultation a discussion paper and proposed amendments to relevant prudential reporting standards and forms in relation to proposals to enhance the Basel II Framework in Australia.  In December 2009, APRA released a package of proposed changes to prudential standards and prudential practice guides (PPGs) for authorised deposit-taking institutions (ADIs) to reflect enhancements to the Basel II Framework adopted by the Basel Committee on Banking Supervision (BCBS) in July last year. The Basel II enhancements are part of a broader work program undertaken by the BCBS to strengthen regulatory capital, risk management and supervision requirements. In its December 2009 package, APRA indicated that the Basel II enhancements will require changes to APRA's reporting standards and reporting forms for both ADIs and consolidated banking groups. The consultation package released addresses proposed changes to reporting requirements for the following prudential standards:Prudential Standard APS 111 Capital Adequacy: Measurement of Capital (APS 111); Prudential Standard APS 116 Capital Adequacy: Market Risk (APS 116); and Prudential Standard APS 120 Securitisation (APS 120).  Subject to consultation, APRA intends to issue final reporting standards and reporting forms in mid 2010. These will accompany the release of the associated final prudential standards and PPGs and are expected to be implemented from 1 January 2011. The first submission of quarterly data required from ADIs will relate to the reporting period ending 31 March 2011. Further information is available on the [APRA](http://www.apra.gov.au/Policy/Enhancements-to-the-Basel-II-framework-in-Australia-May-2010.cfm%22%20%5Ct%20%22_new) website.etailed Contents**1.12 Class action legislative reform** On 4 May 2010, the Australian Minister for Corporate Law, Mr Chris Bowen MP, announced that the Australian Federal Government will draft regulations clarifying that funded class actions, as well as similar arrangements, are not managed investment schemes. The announcement is in response to the decision by the Federal Court on 20 October 2009, that funded class actions were managed investment schemes as defined in the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The court's decision had required all ongoing and new class actions to comply with a wide range of regulatory requirements, including licensing, conduct and disclosure requirements, before they could proceed any further. As a result, ASIC was required to provide transitional relief to allow ongoing class actions to continue. Class actions are already currently subject to a regulatory regime consisting of Commonwealth and State legislation, court rules, and the rules protecting the clients of legal practitioners. According to the Government's announcement, no evidence has been provided to indicate that consumer rights are being breached under the current class actions regulatory framework or that consumers are suffering losses or other detriments as a result of participating in class actions. As such, the Government considers that imposing a significant regulatory burden cannot be justified in these circumstances. While the Government will not be imposing this heavy regulatory burden; in order to ensure that the interests of class members are held as paramount, it is considering regulation to manage potential conflicts of interest through guidance issued by ASIC.etailed Contents**1.13 Regulatory implementation of the statement of principles regarding the activities of credit rating agencies consultation**  In May 2010, the Technical Committee (TC) of the International Organization of Securities Commissions (IOSCO) released a consultation report which addresses several of the recent regulatory initiatives that impact or will shortly impact credit rating agencies (CRAs) that are active in multiple jurisdictions. In particular, the paper reviews CRA supervisory initiatives in Australia, the European Union (EU), Japan, Mexico, and the United States (US) in order to evaluate whether, and if so how, these regulatory programs implement the four principles set forth in the 2003 IOSCO paper titled: 'Statement of Principles Regarding the Activities of Credit Rating Agencies' (IOSCO CRA Principles).  The four principles address: quality and integrity in the rating process; independence and conflicts of interest; transparency and timeliness of ratings disclosure; and confidential information.   **The first principle -** quality and integrity in the rating process - is given effect in the regulatory programs through, for example, explicit requirements on CRAs to adopt, implement and enforce measures to ensure that credit ratings are based on a thorough analysis of all available and relevant information and that the information they use in developing credit ratings is of sufficient quality and from reliable sources. The regulatory programs reviewed also give effect to the first principle through provisions that implicitly mandate measures designed to promote quality ratings by providing authority to the supervisor to deny or revoke the registration of, or to impose remedial measures on, a CRA that does not have adequate financial and managerial resources to consistently produce credit ratings with integrity.  **The second principle -** independence and conflicts of interest - is given effect in the regulatory programs through, for example, provisions that require a CRA to implement procedures designed to identify and eliminate conflicts of interest inherent in its business activities. Another provision that is common to the jurisdictions reviewed, requires a CRA to manage and publicly disclose to the market the conflicts of interest inherent in its business activities. Several jurisdictions' regulatory programs also identify certain conflicts that a CRA is prohibited from having under any circumstances. For example, CRA analysts generally are prohibited from participating in determining credit ratings for securities that they directly own. **The third principle -** transparency and timeliness of ratings disclosure - is given effect in the regulatory programs through, for example, provisions that require a CRA to publicly disclose to the market information about the methodologies it uses to determine credit ratings. Another common provision across the jurisdictions is the requirement to disclose statistics and other information about the performance of a CRA's credit ratings. **The fourth principle -** confidential information - is given effect in the regulatory programs through, for example, provisions that require CRAs to protect confidential information obtained from entities being rated so that the information cannot be used for inappropriate purposes (e.g., insider trading). Jurisdictions also commonly have provisions that require CRAs to implement processes to ensure that ratings decisions are not disclosed selectively but instead are broadly disseminated to the public (whether for free or through subscription). The TC notes that the CRA supervisory initiatives in the jurisdictions addressed in this consultative paper are in various stages of implementation. For example, the initiatives in Australia, Japan and the EU will become effective to varying degrees during 2010. The US CRA supervisory program became effective in June 2007, and the first set of CRAs registered pursuant to that program became subject to its full requirements in September 2007. However, the US has engaged in two subsequent rounds of rulemaking (largely in response to CRAs' roles in the credit crisis). Similarly the Mexican regulatory program for CRAs has been augmented through subsequent grants of authority and rulemaking since the initial grant of supervisory authority in 1993. The full report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD319.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.14 Banking remuneration policy report**  On 30 April 2010, the European Banking Federation (EBF) published a report titled 'Remuneration Policies after the Crisis'. In this report, the EBF gives an overview country by country of the various measures put in place to regulate remuneration in the sector.  The EBF stresses that endorsement of the FSB principles by the G-20, which help create stronger incentives in remuneration schemes for sustainable business policies is a politically binding action. It also highlights the importance of implementing these principles simultaneously at global level, particularly taking into account the latest developments at European level, in order to maintain a level-playing field between the various market places, and therefore a sustainable and fair competition. In this context, the EBF strongly supports an annual review of the implementation of the said principles.  The EBF advocates the need for banks to balance risk-taking and variable income, stressing that it should be linked to factors that represent real growth of the company and real creation of wealth for the company's shareholders. The report underlines many measures supporting that approach.  Finally, it stresses that, for the time being, banks must be given time and support to implement the FSB measures, and make them work. Further adjustments can always be made at a later stage if necessary.  The report is available on the [EBF](http://www.ebf-fbe.eu/uploads/27%20April%20Remuneration%20Policies.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.15 Super System review releases phase three preliminary report**On 29 April 2010, the Australian Super System Review released a report titled 'Self-Managed Super Solutions'. This report sets out the Panel's preliminary recommendations on self-managed superannuation funds (SMSFs).  The preliminary report is a response to issues raised in its Phase Three: Structure (including SMSFs) issues paper released in December 2009.  The Panel supports trustees keeping control over their SMSFs so it is not proposing compulsory education for trustees or requiring third party custodians to hold SMSF assets.  Key preliminary recommendations include:prohibiting investment in collectables and personal-use assets (such as artworks, wine collections, exotic cars and yachts); strengthening the competence and independence of approved auditors; an online SMSF resource centre to help SMSF trustees build skills and make better decisions; making the ATO's penalty regime more flexible to enable more effective and equitable regulation; tightening the SMSF registration process, including the introduction of member identity requirements, to reduce instances of fraud and illegal early release schemes; and reducing the potential to benefit illegally from related party transactions by prohibiting the acquisition of in-house assets and imposing restrictions on the way in which an SMSF can transact with related parties.  The Review has completed consultation in three phases: Governance; Operation and Efficiency; and Structure (including SMSFs). The Review has so far issued three other preliminary reports: 'Clearer Super Choices: Matching Governance Solutions' on 14 December 2009; 'SuperStream: Bringing the back office of super into the 21st century' on 22 March 2010; and 'MySuper: Optimising Australian Superannuation' on 20 April 2010.  The final report (encompassing all three phases) will be delivered to the Government by 30 June 2010. Further information is available on the [Super System Review](http://www.supersystemreview.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents**1.16 NZ Government announces 'super-regulator' for financial markets** On 28 April 2010, the New Zealand Commerce Minister Simon Power announced that the Government is creating a new regulator for New Zealand's financial markets. The Financial Markets Authority (FMA) will consolidate functions currently fragmented across the Securities Commission, the Ministry of Economic Development, including the Government Actuary, and NZX. A key focus of the FMA will be on visible, proactive, and timely enforcement.It will enforce securities, financial reporting, and company law as they apply to financial services and securities markets. It will also regulate and oversee, trustees, auditors, financial advisers and financial service providers including people who offer investments. The FMA will be responsible for approving exchange conduct rules, and may request changes to existing rules. NZX will continue to enforce its own rules, but the functions of the New Zealand Markets Disciplinary Tribunal will be transferred to a new statutory rulings panel serviced by the FMA. The FMA will have the power to require NZX to provide it with information to conduct market surveillance, including real-time trading information. The FMA will conduct an annual oversight review of NZX, based on a report prepared by NZX. The Government will have a power to make market conduct regulations that will replace or be inserted into NZX rules, where desirable to preserve the integrity of the market. The FMA would enforce these regulations through the rulings panel. The FMA will be responsible for the functions that were earlier envisaged to be carried out by the Registrar of Companies or a reconstituted Accounting Standards Review Board, including accreditation of professional accounting bodies, quality review of auditor practices, setting minimum licensing standards, and enforcement functions.  The Accounting Standards Review Board will still change its name to the External Reporting Board (XRB), and will be responsible for making Auditing Standards. It is proposed that the FMA will carry out the licensing and oversight of trustees under the regime established by the *Securities Trustees and Statutory Supervisors Bill* currently before the Commerce Select Committee.  Further information is available on the [New Zealand Government](http://www.beehive.govt.nz/minister/simon%2Bpower%22%20%5Ct%20%22_new) website.etailed Contents**1.17 Overhaul of financial advice** On 26 April 2010, the Australian Government announced reforms to financial advice sector.These reforms are the Government's response to the Parliamentary Joint Committee on Corporations and Financial Services' Inquiry into financial products and services in Australia. The Government's Future of Financial Advice package includes the following:A prospective ban on conflicted remuneration structures including commissions and volume based payments, in relation to the distribution and advice of retail investment products including managed investments, superannuation and margin loans. The measure does not initially apply to risk insurance. The introduction of a statutory fiduciary duty so that financial advisers must act in the best interests of their clients, subject to a 'reasonable steps' qualification, and to place the best interests of their clients ahead of their own when providing personal advice to retail clients. Increasing transparency and flexibility of payments for financial advice by introducing 'adviser charging' that will help align the interests of the financial adviser and the client; is clear and product neutral; and where the investor will be able to opt in to the advice in response to a compulsory, annual renewal notice. Percentage-based fees (known as assets under management fees) will only be charged on ungeared products or investment amounts and only if this is agreed to with the retail investor. Expanding the availability of low-cost 'simple advice' to provide access to and affordability of financial advice. Strengthening the powers of the Australian Securities and Investments Commission (ASIC) to act against unscrupulous operators. The examination of a statutory compensation scheme.  The majority of these reforms will commence from 1 July 2012 and the Government will consult with industry on the implementation of the reforms.The proposed reforms are available on the [Treasury](http://ministers.treasury.gov.au/Ministers/ceba/Content/pressreleases/2010/attachments/036/Future_of_Financial_Advice_Information_Pack.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.18 CEBS publishes its principles for disclosures in times of stress**  On 26 April 2010, the Committee of European Banking Supervisors (CEBS) published its principles for disclosures in times of stress intended to guide financial institutions in the preparation of public disclosures made to conform with existing disclosure requirements or recommendations or on an ad hoc basis, incorporating the lessons learnt from the financial crisis.Since June 2008, CEBS has performed four assessments of banks' disclosures made during the financial crisis. These principles, built on the conclusions and observations derived from these assessments are intended to contribute to further improvements in the quality of disclosures, in terms of substance, presentation and internal consistency. The principles do not set any additional requirements for items or information to be disclosed. Rather they aim to encourage enhanced quality of disclosures without amending, duplicating or adding to existing disclosure requirements or recommendations - such as IFRS, Pillar 3, listing rules or other regulations - institutions may be subject to.The disclosure guidelines are divided into three different parts, discussing respectively:General principles to be applied to high quality disclosures; Principles dealing with the content of disclosures on areas or activities under stress, in particular for the following topics: business models, impacts on results and risk exposures, impacts on financial position, risk management and critical accounting issues; and Guidance on presentational aspects of disclosures. The Principles are available on the [CEBS](http://www.c-ebs.org/documents/Publications/Standards---Guidelines/2010/Disclosure-guidelines/Disclosure-principles.aspx%22%20%5Ct%20%22_new) website. etailed Contents**1.19 Draft legislation to reverse High Court decision in Sons of Gwalia released**On 23 April 2010, the Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, released an exposure draft of legislation giving effect to the Government's decision to reverse the High Court decision in *Sons of Gwalia v Margaretic*.The Sons of Gwalia decision determined that, in a corporate winding up, certain compensation claims by shareholders against the company ranked equally with the claims of other creditors. "The Government has been concerned about the effects of the Sons of Gwalia decision on access to, and the cost of, debt finance and the potential uncertainty it created," Mr Bowen said.The Bill also introduces reforms relating to notices to creditors, shareholder voting and clarifies the position of shareholders bringing claims for damages against companies. The exposure draft of the legislation is available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1790" \t "_new) website. etailed Contents**1.20 Corporate governance policy and voting guidelines for investment companies**  On 23 April 2010, the UK National Association of Pension Funds (NAPF) published guidelines titled "Corporate Governance Policy and Voting Guidelines for Investment Companies". The NAPF Investment Companies policy is based on its "Statement of Underlying Principles" and "Additional Issues", which together with guidance from the UK Combined Code of Corporate Governance and the code published by the Association of Investment Companies, set the framework for the NAPF's detailed policies and voting guidelines. The matters dealt with in the Guidelines include an effective chairperson, board balance, tenure of directors, management engagement committees and management evaluation, remuneration committees and directors' remuneration, director appointments, share issues and share repurchases. The Guidelines are available on the [NAPF](http://www.napf.co.uk/DocumentArchive/Policy/Corporate%20Governance/20100423_NAPF%20Corporate%20Governance%20Policy%20and%20Voting%20Guidelines%20for%20Investment%20Companies%20April%202010%20.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.21 Report on progress in implementing the G20 recommendations for strengthening financial stability** On 23 April 2010, the Financial Stability Board (FSB) reported to the G20 Finance Ministers and Central Bank Governors on Progress in Implementing the G20 Recommendations for Strengthening Financial Stability. The progress report consists of two complementary parts: the first part on the policy development work at international level; and the second part describing implementation at national and regional levels by FSB member jurisdictions. A cover letter from the FSB Chair to the G20 highlights the areas in which progress is critical this year and next to achieve credible, global regulatory reform. The report includes the following information:Building high quality capital and liquidity standards and mitigating procyclicality Reforming compensation practices to support financial stability Improving over-the-counter derivatives markets Addressing systemically important financial institutions and cross-border resolutions Strengthening adherence to international supervisory and regulatory standards Strengthening accounting standards Other issues:        - Developing macroprudential policy frameworks and tools       - Differentiated nature and scope of regulation       - Hedge funds        - Credit rating agencies        - Supervisory colleges        - SecuritisationThe report is available on the [FSB](http://www.financialstabilityboard.org/%22%20%5Ct%20%22_new) website. etailed Contents**1.22 OECD publishes report on the impact of the financial crisis on insurers** On 22 April 2010, the Organisation for Economic Co-Operation and Development (OECD) published a report titled "The Impact of the Financial Crisis on the Insurance Sector and Policy Responses". The report sets out how the insurance sector has been affected by the crisis and suggests some key policy conclusions aimed at promoting financial stability, enhancing the protection of policyholders and ensuring a level and competitive playing field. The report also sets out a country by country analysis of governmental and supervisory responses to the insurance sector as a result of the crisis. The main topics dealt with in the report are:Impact of the financial turmoil (key balance sheet and investment indicators, premiums, claims, combined ratios, profitability, solvency and impact of the crisis on credit insurance markets); Government and supervisory responses to the crisis in the insurance sector (liquidity and short tem financing arrangements and the special case of AIG, capital levels and arrangements, corporate governance and risk management, investments and reporting and disclosure, insurance groups and financial conglomerates, policyholder protection schemes and restructuring and insolvency regimes, credit insurance markets; Key policy and regulatory issues; and General policy conclusions. The report is available on the [OECD](http://www.oecd.org/dataoecd/42/51/45044788.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.23 European Commission publishes report on reducing obstacles to the transfer of assets within a cross border banking group during a financial crisis**On 21 April 2010, the European Commission published a final report titled "Study on the feasibility of reducing obstacles to the transfer of assets within a cross border banking group during a financial crisis". The report is in three main parts - identification of the obstacles, solutions to removing the obstacles and feasibility of the solutions and impact assessment.  The report is available on the [European Commission](http://ec.europa.eu/internal_market/bank/docs/windingup/200908/final_report20091218_en.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.24 ICSA publishes board evaluation report**On 21 April 2010, the UK Institute of Chartered Secretaries and Administrators (ICSA) published a report on board evaluation and reporting.  According to the report, only 16% of the top 200 UK listed companies undertook some form of external board evaluation process in 2009. The report is based on ICSA's annual review of how companies choose to undertake and report their annual evaluation of the performance of the board and the audit, nomination and remuneration committees and the individual members of the board.  The Walker review recommended that BOFI boards should undertake an external evaluation process every second or third year. The Financial Reporting Council has proposed in the draft UK Corporate Governance Code review that externally facilitated board reviews should be carried out at least every three years.  The report is available on the [ICSA](http://www.icsa.org.uk/assets/files/pdfs/Publications/ICSA%20Board%20Evaluation%20Review%202009.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.25 Report on the lessons learned from the financial crisis with regard to the functioning of European financial market infrastructures** On 19 April 2010, the European Central Bank (ECB) published a report on the lessons learned from the financial crisis with regard to the functioning of European financial market infrastructures. During the crisis, financial market infrastructures proved to be vital in terms of support for the liquidity and stability of financial markets. The report focuses on the challenges that European financial market infrastructures and participating financial institutions faced during the financial crisis with respect to:information flows following a default; default management; behavioural factors that affected market liquidity conditions adversely; and issues relating to over-the-counter (OTC) markets. Based on the experience reported, the Eurosystem has identified procedures and rules that might be enhanced so that financial market infrastructures, their participants and relevant public authorities are better equipped to cope with similar events in the future.The Eurosystem supports efforts to address the lessons learned from the financial crisis. Follow-up work on the conclusions drawn in the report has already started, at the initiative, or at least with the involvement, of the Eurosystem in its role as overseer and catalyst, in close cooperation with other relevant public authorities and, in particular, the European Commission. This work relates to:the improvement of information sharing between authorities and, if possible, financial market infrastructures and their participants; the enhancement of the coordination/cooperation of oversight authorities at both the European level and the global level; the evaluation of the potential need to harmonise the default procedures of interconnected financial market infrastructures; the review of existing international oversight standards for financial market infrastructures, including liquidity management standards; and the establishment of a sound infrastructure for OTC derivatives.  In the report, the Eurosystem also identifies further follow-up actions addressed, in particular, to financial market infrastructures and their participants, such as:the enhancement of the direct monitoring of critical counterparties' creditworthiness; the definition of criteria for, and the identification of, critical participants; and the enhancement of financial market infrastructures' stress-testing exercises.  The report is available on the [ECB](http://www.ecb.int/pub/pdf/other/reportlessonslearnedfinancialcrisis201004en.pdf?939f96226f4d0092462601aa1c801dba" \t "_new) website.etailed Contents**1.26 IMF report: Meeting new challenges to stability and building a safer system**In April 2010, the International Monetary Fund (IMF) published the Global Financial Stability Report which provides semi-annual assessments of global financial markets and addresses emerging market financing in a global context. The report deals with the following issues:**Resolving the crisis legacy and meeting new challenges to financial stability** How has global financial stability changed? Could sovereign risks extend the global credit crisis? The banking system: Legacy problems and new challenges Risks to the recovery in credit  Assessing capital flows and bubble risks in the post-crisis environment  Policy implications **Systemic risk and the redesign of financial regulation**  Implementing systemic - risk-based capital surcharges   Reforming financial regulatory architecture taking into account systemic connectedness   Policy reflections  **Making over-the-counter derivatives safer: The role of central counterparties** The basics of counterparty risk and central counterparties   The case for over-the counter derivative central clearing  Incentivising central counterparty participation and the role of end-users  Criteria for structuring and regulating a sound central counterparty  How should central counterparties be regulated and overseen?  One versus multiple central counterparties?  **Global liquidity expansion: Effects on "receiving" economies and policy response options**Overview of the 2007-2009 global liquidity expansion Effects of the global liquidity expansion on the liquidity-receiving economies Policy response options for liquidity-receiving economies Effectiveness of capital controls  The report is available on the [IMF](http://www.imf.org/external/pubs/ft/gfsr/2010/01/pdf/text.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

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

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| **2.1 Market update on confidential information and rumours**On 12 May 2010, the Australian Securities and Investments Commission (ASIC) announced it will continue working closely with the market over the next six to nine months to improve industry standards on the responsible handling of rumours and corporations' management of confidential information but will not issue regulatory guidance on either subject at this stage.ASIC's decision follows industry and public consultation on these two issues. In September 2009, ASIC set out principles to assist market participants when handling rumours in Consultation Paper 118 'Responsible handling of rumours'. The principles were developed noting concerns that confidence in the integrity of Australia's markets could be undermined if investors believe rumours are actively spread in the market to distort proper price discovery. These concerns were also noted by CAMAC in its report 'Aspects of Market Integrity' (June 2009). The concerns were highlighted during the market volatility at the time of the Global Financial Crisis.In response to CP 118, ASIC received 12 submissions. Many of them noted the practical difficulties involved in drafting specific regulatory rules that define rumours and distinguish those from genuine expressions of opinion to inform price discovery. Cost and benefit implications were also raised.ASIC acknowledges these concerns merit further discussion. ASIC remains of the view that, at a minimum and in line with practices in the major overseas capital markets, AFS licensees who are actively involved in the market should consider:having in place written procedures which provide clear guidance for operational areas involved in the market about how to deal with rumours; training employees in the relevant areas about these procedures; and monitoring compliance with these procedures and being able to demonstrate compliance with the procedures. As a next step, ASIC will monitor the market and work further with industry over the next six to nine months to understand their concerns and how these principles on rumours might be adopted in practice before making a decision about whether and what further regulatory action may be needed.In December 2009, to help improve market practices on listed entities' handling of confidential information, ASIC released Consultation Paper 128 'Handling confidential information' (CP 128). The Consultation Paper proposed best-practice guidelines to assist entities manage their information, and thus promote confidence in Australia's capital markets.In response to CP 128, ASIC received 25 submissions. While the submissions welcomed guidance in the area, many had specific comments or suggestions on particular situations. ASIC's goal is for the guidelines to be widely adopted and applied as broadly as possible, so ASIC intends to work with industry bodies so they might finalise this important guidance on behalf of their members. ASIC will do this over the next six to nine months.**Background**In March 2008, ASIC commenced Project Mint, a major market integrity investigation that focused on false rumours and their effect on market prices. This investigation was intended to be a disruptive enforcement technique, that is, it sent a reassuring signal to the market that ASIC was actively engaged and this helped shape market behaviour.According to ASIC, the objective of Project Mint is now well understood - that making false statements and spreading false rumours is illegal and that ASIC will act to address possible breaches in this area to promote market integrity.Since January 2009, ASIC has achieved 11 convictions:Three insider trading convictions; Five market manipulations convictions; and Three false and misleading conduct convictions. etailed Contents**2.2 ASIC extends hardship relief to apply to a 'frozen fund' in winding up**On 11 May 2010, the Australian Securities and Investments Commission (ASIC) announced that it will facilitate operators of 'frozen funds' making hardship payments to members where the fund is in the process of winding up.This relief is an extension of the relief ASIC has granted since October 2008 to improve investor access to funds by allowing the operators of frozen mortgage funds to pay hardship withdrawals, subject to certain conditions. This relief only operated while the fund was operating, and did not extend to the situation where a fund is being wound up. **What are the hardship grounds?**The hardship grounds that apply are the same as the existing hardship relief for frozen funds. The member must be able to satisfy the operator that they meet one of the following criteria:  member is unable to meet reasonable and immediate family living expenses;  compassionate grounds (e.g. medical costs for serious illness, funeral expenses or to prevent foreclosure);  permanent incapacity; and  member is unemployed for at least three months, without other means. **What conditions apply?**The conditions on the hardship relief are also the same as the existing hardship relief for frozen funds. They include:  the cap on hardship withdrawals for each member is $100,000 each calendar year; and  an investor can make up to four hardship withdrawals a calendar year (subject to the overall cap of $100,000). In deciding whether to grant hardship relief for a frozen fund that is in the process of winding up, ASIC will pay particular attention to whether the fund can make a full return of capital to members. In balancing the interests of all investors, ASIC may decide not to grant relief if it considers that members suffering hardship may receive a full return of capital, and other members may not. **Background**A 'frozen fund' is a term that is often used to describe a registered managed investment scheme, such as a mortgage fund, originally marketed on the basis that investors had an ongoing or periodic right to redeem their investments on request, which has since suspended that right.In October 2008, ASIC announced relief to facilitate operators of mortgage funds providing early withdrawal for members where there is hardship. This relief was expanded in August 2009 to expand the circumstances in which operators are able to make payments to fund members who demonstrate the need to access funds on hardship grounds (see ASIC Media Release 08-214 ASIC facilitates withdrawals from frozen funds and ASIC Media Release 09-148MR ASIC expands relief for hardship withdrawals from frozen mortgage funds respectively).In December 2009, ASIC granted conditional relief from some of the requirements of the withdrawal provisions in the Corporations Act. The relief enables a responsible entity to implement a 'rolling' withdrawal offer over a 12-month period. See ASIC Media Release 09-269] ASIC grants conditional relief to improve access to capital for investors in frozen mortgage funds.  Further information is available on the [ASIC](http://www.asic.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents**2.3 Prospectus relief to help corporate bond market**On 11 May 2010, the Australian Securities and Investments Commission (ASIC) announced that it has provided class order relief which will help promote the issue of vanilla corporate bonds to retail investors.The ASIC initiatives will simplify the disclosure requirements for certain offers of listed vanilla bonds by allowing such offers to be made with reduced disclosure under a short-form prospectus. The measures will also allow vanilla bonds to be offered under a two-part prospectus, comprising a base prospectus (which may be used for a number of different offers) and a second part prospectus (which will relate to a particular offer).ASIC has also provided class order relief to facilitate offers of convertible notes to wholesale investors.The relief is subject to the following conditions:the size of the issue is at least $50 million to maximise the prospects of a liquid secondary market (this requirement will lapse after 2 years unless ASIC renews it); the bonds will be publicly quoted on an exchange on issue; the issuer must provide certain upfront and ongoing disclosures in relation to the bonds; companies issuing the bonds are listed and have a good continuous disclosure history; they have not been suspended for more than five days over a period of 12 months; the bonds are vanilla, that is, they are do not have complex or unusual terms of conditions; the bonds have a maximum term of ten years; and the relief does not currently extend to the issue of subordinated debt (ASIC intends to consult further on relief for offers of subordinated bonds within the next 12 months). The outstanding value of debt securities, as measured by the Reserve Bank of Australia, grew three fold between 30 June 2000 and 31 March 2010, from $586.3 billion to $1,786.8 billion.The relief is contained in Class Order [CO 10/321] Offers of vanilla bonds and in Class Order [CO 10/322] On-sale for convertible notes issued to wholesale investors and took effect on 12 May 2010. Further details about the relief are contained in Regulatory Guide 213 Facilitating debt raising. ASIC has also made minor updates to Regulatory Guide 173 Disclosure for on-sale of securities and other financial products to reflect the relief in [CO 10/322].Further information is available on the [ASIC](http://www.asic.gov.au/ASIC/asic.nsf/byHeadline/MR10-98%20Prospectus%20relief%20to%20help%20corporate%20bond%20market?opendocument" \t "_new) websiteetailed Contents**2.4 Information for trustee companies providing traditional services**On 7 May 2010, the Australian Securities and Investments Commission (ASIC) released updated policy and regulatory guidance to assist trustee companies providing traditional trustee company services (traditional services) to comply with the licensing and conduct requirements under the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). These traditional services include administering deceased estates and powers of attorney.In March 2010, ASIC released consultation paper 132 titled 'Trustee companies: Financial requirements and conduct obligations' (CP 132) seeking public comment on the financial requirements that should apply to trustee companies that provide traditional services. ASIC also sought feedback on whether there are any other conduct obligations where specific guidance to trustee companies might be desirable. **Policy and regulatory guidance** Under legislation enacted late last year, the provision of traditional services by trustee companies will be regulated as a financial service under the Corporations Act. Trustee companies providing traditional services will be required to hold an Australian Financial Services (AFS) licence, and will be subject to the licensing and conduct obligations under Chapter 7 of the Corporations Act. Trustee companies that will have to comply with the Corporations Act requirements are specifically named in a Schedule to the [Corporations Regulations](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default).A number of ASIC's existing regulatory guides have been updated to take into account, among other things, the provision of traditional services by trustee companies as a financial service:Regulatory Guide 1 AFS Licensing Kit: Part 1 - Applying for and varying an AFS licence (RG 1), Regulatory Guide 2 AFS Licensing Kit: Part 2 - Preparing your AFS licence application (RG 2) and Regulatory Guide 3 AFS Licensing Kit: Part 3 - Preparing your additional proofs (RG 3); Regulatory Guide 166 Licensing: Financial requirements (RG 166); and Pro Forma 209 Australian financial services licence conditions (PF 209). ASIC has also released INFO 106 Trustee companies: Minimum standards for trustee companies holding estate assets (INFO 106).Further information is available on the [ASIC](http://www.asic.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents**2.5 ASIC grants interim class order relief from regulation for all funded representative actions and funded proof of debt arrangements**On 7 May 2010, the Australian Securities and Investments Commission (ASIC) announced its intention to grant interim class order relief to lawyers and funders involved in legal proceedings structured as funded representative proceedings and funding claims lodged with liquidators to prove in the winding up of an insolvent company (proof of debt arrangements). The relief, which will apply until 30 September 2010, is from the requirements that would otherwise apply to funded representative proceedings and funded proof of debt arrangements as 'managed investment schemes' under Chapter 5C and Chapter 7 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Corporations Act). The relief means that current funded representative proceedings and proof of debt arrangements can progress, and new funded representative proceedings and proof of debt arrangements can be commenced without needing to comply with specific requirements, including: registering the scheme with ASIC; adopting a complying constitution and compliance plan for the scheme; appointing an AFS licensed public company as 'responsible entity'; preparing a Product Disclosure Statement; and providing ongoing disclosure to members of the scheme. The relief follows an announcement on 4 May 2010, by The Honourable Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law, of the Federal Government's intention to exempt, by way of regulation amending the Corporations Act, representative proceedings and proof of debt arrangements from the definition of managed investment scheme in section 9 of the Corporations Act.The relief granted by ASIC will allow time for the implementation of the new legislative and policy regime for these representative proceedings and proof of debt arrangements. The form of the relief is similar to the individual relief granted for some class actions and proof of debt arrangements previously granted by ASIC and does not necessarily reflect the proposed regulations.The Minister also announced that the Federal Government is considering providing an exemption from the licensing and other requirements in Chapter 7 of the Corporations Act, subject to appropriate arrangements being put in place to manage conflicts of interest. To supplement the proposed regulations and provide clarity for industry participants, ASIC may produce a regulatory guide about managing the conflicts of interest that may arise, following a public consultation process.**Background**On 20 October 2009, the Full Court of the Federal Court handed down its decision in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147. The Full Court held that a funded representative action being maintained against Brookfield Multiplex was a 'managed investment scheme' within the meaning of section 9 of the Corporations Act.In November 2009, ASIC granted transitional relief to lawyers and litigation funders involved in legal proceedings structured as funded class actions commenced before 4 November 2009. Applications in respect of class actions to be commenced after that date have been considered on a case-by-case basis. (See ASIC media release 09-218MR ASIC grants transitional relief from regulation for funded class actions).A managed investment scheme must be registered with ASIC in certain circumstances, including where it has more than 20 members or is promoted by a professional promoter. To qualify for registration, it must be operated by a public company that holds an Australian financial services licence and must have a constitution and compliance plan that meet the requirements of Chapter 5C of the Corporations Act.The offer of interests in a registered managed investment scheme must generally be made through a complying Product Disclosure Statement that contains information about the scheme.The class order is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co10-333.pdf/%24file/co10-333.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.6 Access to dispute resolution for consumers of credit and margin lending financial services**From 1 July 2010, Australian consumers will have much greater access to free, independent external dispute resolution services when they have a problem with their credit provider or broker following the release of updated regulatory guidance from the Australian Securities and Investments Commission (ASIC). To ensure that the dispute resolution system appropriately deals with consumer credit disputes, ASIC has released updated regulatory guidance that will apply to registered persons, credit licensees, credit representatives and margin lending financial service providers.The updated regulatory guidance is set out in: Regulatory Guide 165 Licensing: Internal and external dispute resolution (RG 165); and Regulatory Guide 139 Approval and oversight of external dispute resolution schemes (RG 139). The new dispute resolution requirements for credit will deliver assistance to consumers who are in hardship or financial difficulty.For example, a lender's contact details for making a hardship application (i.e. telephone number, and where possible, a fax number, postal address and email address) will be posted and kept updated on an external dispute resolution (EDR) scheme's website. This will assist consumers and their representatives to find where to direct a hardship application.There will also be quick response times for the handling of urgent credit disputes at internal dispute resolution (IDR). That is a credit licensee's in-house complaints handling process, usually the necessary first step in the dispute resolution process before, where it is necessary, a dispute progresses to external dispute resolution (EDR). Instead of the current maximum 45 days for handling disputes at IDR under RG 165, lenders will have shortened timeframes for handling certain types of credit disputes. These shorter timeframes will apply to: disputes involving default notices - a maximum 21 days; and disputes involving hardship variations or postponement of enforcement proceedings - no further time beyond what the National Credit Code provides for the credit provider to determine an application for hardship variation or request for postponement of enforcement proceeding, and to document any agreement reached. Credit EDR schemes will also need to update their Terms of Reference or Rules to ensure a consistent approach to handling credit disputes. From 1 July 2010, EDR schemes will be required to follow a priority system for disputes involving credit representatives. Under the new national credit regime, credit representatives, unlike unauthorised representatives of AFS licensees, are required to be separate members of EDR schemes, in addition to their credit licensees. To reduce consumer confusion about where to complain when a dispute involves a credit representative who is a member of a different EDR scheme to their credit licensee, the EDR scheme of the credit licensee must be used as the EDR scheme of first instance. Where the credit licensee ceases to carry on business and the EDR scheme of the credit licensee does not exercise its jurisdiction to handle the dispute, the dispute may be handled by the EDR scheme of the credit representative. This approach will help reduce consumer confusion about where to complain, streamline compensation arrangements and best align with current dispute resolution requirements for AFS licensees, particularly where a credit representative is also an authorised representative of an AFS licensee.ASIC's update of RG 165 and RG 139 for credit will also deliver other improvements to the dispute resolution system, including: ensuring EDR schemes cover the vast majority of types of credit disputes, including where disputes involve responsible lending or the types of matters under section 199 of the [National Consumer Credit Protection Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "Default) (small claims procedures) and the value of the contract or amount of compensation sought exceeds $40,000; and refining the time limits for bringing a credit dispute to EDR to align with shorter time limits for bringing legal proceedings for certain types of credit matters under the National Consumer Credit Protection Act 2009. As part of ASIC's ongoing role and regulatory oversight of the dispute resolution system, ASIC will review the dispute resolution requirements once the new national credit regime has had a sufficient time in operation. Regulatory Guide 165 titled 'Licensing: Internal and external dispute resolution' (RG 165) is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RG165.pdf/%24file/RG165.pdf%22%20%5Ct%20%22_new) website. Regulatory Guide 139 titled 'Approval and oversight of external dispute resolution schemes' (RG 139) is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RG139.pdf/%24file/RG139.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.7 ASIC releases guidance on short selling obligations**On 23 April 2010, the Australian Securities and Investments Commission (ASIC) released regulatory guidance to assist with compliance with new legal requirements under the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and [Corporations Regulations 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default) in relation to short selling.ASIC's guidance is contained in a revised version of Regulatory Guide Short selling 196 (RG 196), which was first published in September 2008 as Regulatory Guide 196 Short selling: Overview of section 1020B. The revised RG 196 clarifies the legal position about what short sales are permitted, as well as specific reporting and disclosure obligations. It contains an overview of short selling concepts and new provisions in the Corporations Act as a result of the changes to the legislation about short selling, and various relief that ASIC has granted in relation to some of these provisions, in certain circumstances. Importantly, RG 196 outlines the two types of reporting obligations (i.e. reporting of short sale transactions and of short positions), as well as an exemption from reporting short positions below a certain threshold (contained in ASIC Class Order [CO 10/135] Relief for small short positions). It also clarifies ASIC's policy for granting relief to allow naked short selling in some circumstances. ASIC has reviewed the exemptions over time in regards to liquidity in the market.ASIC also encourages short sellers and system developers to continue to monitor ASIC Information Sheet 98 Short selling: Short position reporting (INFO 98), which includes key tasks and practical information they must be aware of prior to the start date for the new reporting requirements.**Background**In September 2008, ASIC took emergency action to temporarily ban short selling in Australia, including naked short sales and covered short sales. The ban on covered short selling of non-financial securities was lifted on 19 November 2008. The ban on covered short selling of financial securities was lifted on 25 May 2009.The Federal Government introduced new legislative requirements to regulate the use of short selling in Australia in December 2008 and December 2009, under the [Corporations Amendment (Short selling) Act 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=105282" \t "Default) and the [Corporations Amendment Regulations 2009 (No 8)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=110735" \t "Default). These requirements include a ban on naked short selling, subject to some minor exceptions, and the imposition of specific reporting obligations in relation to covered short sales. The legislation that commenced in December 2008 also clarified the scope of ASIC's powers in relation to the short selling provisions in the Corporations Act. The guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RG196.pdf/%24file/RG196.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.8 ASIC confirms proxy documents can be lodged electronically**On 22 April 2010, the Australian Securities and Investments Commission (ASIC) advised that a listed company may accept proxy votes for general meetings that are lodged by electronic means without amending its constitution to expressly permit that. ASIC has written to the Chartered Secretaries Australia, a professional body for company secretaries, with a request that this advice be communicated to its members. ASIC has taken this action following the Productivity Commission's recommendation in its report on executive remuneration that ASIC issue a public confirmation to companies that electronic voting is legally permissible without the need for constitutional amendments.The [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Corporations Act) specifically allows for both the electronic authentication and the electronic receipt of documents appointing a proxy to vote for a shareholder at a company meeting. This is the case even if a company's constitution does not provide for the electronic authentication or electronic receipt of proxy documents. Further, the relevant provisions in the Act will override any inconsistent provisions which may be in a company's constitution. In forming this view, ASIC notes the judicial approach taken in *Bisan Ltd v Cellante* (2002) 43 ACSR 322 which held (at paragraphs 23-24) 'the requirements of ss 249Y, 250A, 250B and 250BA of the [Corporations] Act would override any inconsistent provisions in the corporate constitution.'Section 250BA only applies to listed companies. In the unlikely event that an unlisted company has a prohibition in its constitution that would prevent it specifying an electronic means of receipt for proxy documents in a notice of meeting, it will need to take its own advice.etailed Contents |

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

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| **3.1 Reports** On 5 May 2010, the Australian Securities Exchange (ASX) released:the ASX Group Monthly Activity Report; and the SFE Monthly Volume and Open Interest Report for April 2010. These reports are available on the [ASX](http://www.asx.com.au/index.htm%22%20%5Ct%20%22_new) website.etailed Contents**3.2 ASX Market Rules amendments - reducing overlap with ASIC requirements** On 26 April 2010, the ASX Market Rules 4.9.7 (Audit of internal control procedures) and 7.10.9 (Provision of audit reports) were amended and 7.10.3 (Dealing in Cash Market Products of Market Participant) was deleted to reduce overlap with ASIC. ASX Market Rule 4.9.7 was amended to allow ASX to rely on the same audit report that is prepared for ASIC, thereby reducing duplication and cost of compliance for Participants. ASX Market Rule 7.10.9 was amended to reduce duplication with the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) which already requires audit reports to be given to ASIC. ASX will only need to be provided with a report where that report indicates a potential problem.  ASX also retains its ability to request any audit report required to be provided to clients under ASIC Class Order 04/194. ASX Market Rule 7.10.3 was deleted as the objective of this rule is adequately addressed in ASIC Regulatory Guide 179 which requires MDA operators to contract to act in the best interests of the client and not use information obtained through providing MDA services to gain an improper advantage. Related consequential amendments have also been made to ASX Market Rules Procedure 4.9.7 and Appendices to Procedures 4.9.7 to delete the existing pro-forma format from the ASX Market Rules Procedures and Appendices and replace them with reference to the required form FS71 under the Corporations Act. Further information is available on the [ASX](http://www.asxonline.com/%22%20%5Ct%20%22_new) website.etailed Contents**3.3 Proposed changes to Corporate Governance Principles and Recommendations** On 22 April 2010, the ASX Corporate Governance Council released for public comment an Exposure Draft outlining proposed changes to the Corporate Governance Principles and Recommendations.  These changes relate to publishing gender diversity statistics with annual reports; the composition of remuneration committees; the requirement to adopt and disclose a company trading policy; and guidance relating to the notification, accessibility and record keeping of group analyst briefings. Public submissions on the proposed changes are invited by 31 May 2010.  Final changes to the Principles and Recommendations are expected to be released on 30 June 2010, with a start date for the first financial year of listed entities beginning on or after 1 January 2011. The media release is available on the [ASX](http://www.asx.com.au/about/pdf/mr_220410_exposure_draft_cgc_principles.pdf%22%20%5Ct%20%22_new) website. The exposure draft is available on the [ASX](http://www.asx.com.au/about/pdf/20100421_proposed_changes_to_corporate_governance_principles.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.4 Listing Rule amendments - new requirements for a remuneration committee and a company trading policy** On 22 April 2010, ASX released an Exposure Draft outlining the proposed amendments to the ASX Listing Rules introducing requirements for:listed entities to adopt and disclose a company trading policy; and the top 300 ASX listed entities to have a remuneration committee that is comprised solely of non-executive directors.  The Exposure Draft reports on the outcomes of public consultation undertaken on the proposed listing rule requirements for a company trading policy, and the revisions made to the proposed rules to take account of the key issues raised in the submissions responding to ASX's Consultation Paper "Listing Rule Amendments - Company Policies on Trading 'Windows' and 'Blackout' Periods", dated 4 December 2009. Comments are sought in relation to the proposed remuneration committee requirements, and whether the requirement to have a remuneration committee should be extended to the top 500 ASX listed entities, by 31 May 2010. The exposure draft is available on the [ASX](http://www.asx.com.au/about/pdf/20100422_exposure_draft_listing_rule_amendments.pdf%22%20%5Ct%20%22_new) website. etailed Contents**3.5 Update to clearing and settlement arrangements for potential operators of trade execution platforms for CHESS - eligible ASX-quoted securities** ASX has released new documentation on the Trade Acceptance Service testing program which is expected to commence by 1 July 2010. It is anticipated that the Australian Securities and Investments Commission (ASIC) will begin to supervise real-time trading on Australia's domestic licensed markets in the third quarter of 2010.  The Government has indicated that moving to whole-of-market supervision by ASIC is the first step in the process towards considering competition for market services. In anticipation of these developments, and to enable a timely process of engagement with Potential Market Operators, clearing and settlement participants and other stakeholders, development work for the provision of the Trade Acceptance Service is well underway. Subject to regulatory clearance and participant readiness, ASX's cash market clearing and settlement facility operators, Australian Clearing House Pty Limited (ACH) and ASX Settlement & Transfer Corporation Pty Limited (ASTC), intend to be ready to provide the Trade Acceptance Service in accordance with the Government's announced timetable for its consideration of outstanding licence applications by Potential Market Operators. The documentation is available on the [ASX](http://www.asx.com.au/professionals/trade_acceptance_service/index.htm%22%20%5Ct%20%22_new) website. etailed Contents**3.6 ASX Listing Rules Guidance Note 15 - changes to fees for ASX Foreign Exempt Listings** Some changes have been made to Guidance Note 15, ASX Schedule of Listing Fees.  The changes to the Guidance Note are to align the basis for levying listing fees on listed entities in the Foreign Exempt category with that for standard ASX Listings. Companies Update 05/10 mentions these changes as well as describing further Listing Rule amendments that are scheduled to take effect in June. Further information is available on the [ASX](http://www.asx.com.au/resources/newsletters/companies_update/archive/CompaniesUpdate_20100507_0510_HTML.htm%22%20%5Ct%20%22_new) website.etailed Contents |

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

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| **4.1 Litigation funding in corporate group insolvencies**  (By Joseph Scarcella, Emanuel Poulos and Daniel Solomons, Blake Dawson) McGrath re HIH Insurance Ltd [2010] NSWSC 404, Supreme Court of New South Wales, Barrett J, 6 May 2010  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/may/2010nswsc404.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/may/2010nswsc404.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** Self-funding is now an option for liquidators presiding over an insolvent group. According to this decision, where one company in liquidation has a legal claim but insufficient funds to prosecute it, a related company (also in liquidation) may be permitted to use its surplus assets to fund the litigation of the first company's claim.   **(b)  Facts** Certain companies in the HIH group (the "claimant companies") had legal claims against various parties which, if made out, were expected to yield a substantial award for damages.  However, the claimant companies did not have sufficient funds to pursue the proceedings or to participate in attempts to settle the proceedings before trial.  Other companies in the group that were also in liquidation (the "funding companies") had significant cash reserves which could be used to provide financial assistance to the claimant companies in pursuit of the anticipated litigation.  Importantly, the liquidators of the claimant companies were also the liquidators of the funding companies.  The liquidators of the companies applied to court for approval of a funding arrangement which the liquidators proposed be put in place between the claimant companies and the funding companies.  The terms of the proposed arrangement provided for the distribution of proceeds from a successful prosecution or settlement of the claim between the funding companies and the claimant companies. The court's approval of the proposed arrangement depended on it being satisfied of two issues:1. Since the arrangement was to last more than three months, the first issue was whether the court should grant its approval pursuant to section 477(2B) of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act").  That section provides that, except with the approval of the Court or the committee of inspection or of a resolution of creditors, a liquidator must not enter into an agreement if the obligations of a party to the agreement may be discharged more than three months after the agreement is entered into. 2. Since the liquidators of the claimant companies were also the liquidators of the funding companies, the second issue was whether the proposed arrangement gave rise to any conflict of duty on the part of the liquidators; and if it did, how that could be addressed? **(c)  Decision** **(i) Seeking the court's approval of the arrangement** Before granting approval of the proposed funding agreement, Barrett J needed to examine the terms of the arrangement in light of the separate interests of the two counterparties - the funding companies, on the one hand, and the claimant companies, on the other.  From the perspective of the claimant companies, the relevant features of the arrangement were:the borrowing of money; the granting of a charge in favour of the funding companies; and the assignment of the proceeds from the claim to the funding companies. Barrett J held that, from the standpoint of the claimant companies, the liquidators' entry into the funding arrangement was supported by the following heads of power:the power to dispose of the property of the company (which included causes of action) as conferred by section 477(2)(c) of the Act; and the power to obtain credit, whether on security of the property or otherwise, as conferred by section 477(2)(g) of the Act.  The proposed arrangement was more complicated from the perspective of the funding companies. The arrangement involved the funding company outlaying surplus cash reserves, which in the ordinary course would be deployed in normal types of investments entailing minimal risk. Section 543 of the Act provides that, unless the court orders otherwise, the surplus assets of the company in liquidation are to be invested:in a manner which a trustee is authorised at law to invest trust funds; on deposit with an eligible money market dealer; or on deposit at interest with any bank.  The liquidators of the funding companies were therefore confronted with two interrelated issues in seeking the court's approval of the proposed agreement.  First, they needed to identify a head of power which authorised them to enter into the proposed arrangement.  Second, they were required to seek the Court's approval that the surplus assets of the funding companies should be invested in a manner which is not otherwise permitted by section 543 of the Act.   The liquidators proposed to enter into the arrangement on behalf of the funding companies in reliance on the general head of power conferred by section 477(2)(m) of the Act.  That section provides that liquidators have the power to "do all such other things as are necessary for winding up the affairs of the company and distributing its property".   Barrett J remarked that section 477(2)(m) would not support the provision of litigation funding by a liquidator to some entirely unrelated litigant, purely for the sake of the returns (or the prospects of returns) that might be generated by the terms of the arrangement.  Such a transaction would be in no sense "necessary for winding up the affairs of the company and distributing its property". The proposed arrangement in this case, however, was clearly distinguishable from that hypothetical case.  Each funding company was a creditor of the claimant company to which it proposed to give financial assistance.  Therefore, the funding companies stood to benefit from the successful prosecution of the contemplated proceedings, in addition to the returns which those companies would receive under the terms of the proposed funding arrangement.   The mere fact that the funding companies were creditors of the claimant companies was not enough to establish that the proposed funding arrangement was "expedient" for the winding up of the funding companies.  Barrett J held that in order for a liquidator to depart from the ordinary and expected types of investment permitted by section 543 of the Act, the liquidator would need to put before the court an analysis of the pros and cons of the proposed investment exclusively from the viewpoint of the funding companies and having regard solely to their selfish interests.  The liquidators were able to satisfy the court that the proposed arrangement was expedient for the winding up of the funding companies by putting the following evidence before the court:opinions of counsel regarding prospects of success of the major claims to be funded; evidence which showed an enhancement of dividends for the creditors; a report from an independent insolvency practitioner, unconnected with the liquidations of the funding companies and the claimant companies, of the advantages and disadvantages of the proposed arrangement.  **(ii) The conflict of interest issue** A crucial factor in the application was that the liquidators of the claimant companies were also the liquidators of the funding companies.  Since liquidators are fiduciaries, they are under a duty to act with singled-minded regard to the selfish interests of each of the companies in liquidation.  Translated into this case, this duty meant that the liquidators could not exercise their powers as liquidators of the funding companies for the benefit or gain of the claimant companies without disclosing the claimant companies' interests in the proposed arrangement to the funding companies and obtaining the funding companies' consent. Barrett J confirmed that the court has inherent jurisdiction to authorise a court-appointed liquidator to cause the company in liquidation to undertake a transaction that would otherwise entail a breach of fiduciary duty by that liquidator.  The liquidators in this case needed to seek specific relief to address the competing fiduciary duties owed by the liquidator to each company.  The factual basis for the relief was similar to the factual basis of the application for the court's approval under section 477(2B) of the Act. etailed Contents**4.2 "Mere assertion" of a debt is not enough to vote as a creditor on the approval of a scheme** (By Mae Comber, Graduate, Freehills) Bacnet Pty Limited v Lift Capital Partners Pty Limited (in liquidation) [2010] FCAFC 36, Federal Court of Australia, Full Court, Keane CJ, Finkelstein and Jacobson JJ, 4 May 2010 The full text of this judgment is available at: <http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/may/2010fcafc36.htm> or<http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp> **(a) Summary** This decision demonstrates that creditors must be able to prima facie prove to the chairperson of a scheme meeting that a debt is more than "mere assertion" to be entitled to vote at the approval stage. This remains separate from the requirements to prove debt at the subsequent distribution stage. The nature of appeals on the issue remains unclear; however, Finkelstein J supports a hearing de novo to offer a more accurate and final judgment to that of the chairperson which is decided summarily. **(b) Facts**  The Full Federal Court of Australia in Bacnet Pty Limited v Lift Capital Partners Pty Limited (in liquidation) considered the approval of schemes of arrangement between Lift Capital Partners Pty Ltd (in liq) (Lift Partners) and Lift Capital Nominees No 1 Pty Ltd (in liq) (Lift Nominees) with its respective creditors. The schemes were approved by the court in early 2010 in circumstances in which the "Famularo Parties", a group of companies, were not entitled to vote as a creditor. The Famularo Parties claimed a voting entitlement based on a dispute arising under Margin Loan Facility Agreements between themselves and Lift Partners. The joint judgment of Keane CJ and Jacobson J (with Finkelstein J concurring) dismissed the appeal with costs from the first instance decision of Barrett J in *Lift Capital Partners Pty Limited v Merrill Lynch International* (2009) 73 NSWLR 404.  The Margin Loan Facility Agreements provided for Lift Partners to advance the purchase price for shares in listed companies to the Famularo Parties on condition that those securities, and additional put options and sold call options, were mortgaged to Lift Partners as securities for the loans. The essence of the agreements was that the Famularo Parties held the beneficial interest of the securities but Lift Partners as the mortgagee would be entitled to exercise a power of sale of those securities if the Famularo Parties defaulted. The relevant terms included that Lift Partners were entitled to call for full payment within three days notice (Clause 4.7) and the Famularo Parties were able to sell the securities provided that Lift Partners consented (Clause 7.1 and/or 7.2). Lift Partners and Lift Nominees transferred those securities to Merrill Lynch without notice to the Famularo Parties (purportedly in accordance with Clause 17.2). On 7 April 2008, Lift Partners sought to exercise their right for full payment within three days notice of the outstanding amounts estimated at $331 million. The repayment was not made. At that time, administrators were appointed to Lift Partners and Lift Nominees and later, joint liquidators when it was resolved that those companies should be wound up. Merrill Lynch thereafter sold the shares and put options and closed out the sold call options. There was a surplus from the sale of the shares and put options but a loss was incurred on the closing out of the sold call options. The loss was found to be substantial (at [30] per Barrett J at first instance). This loss formed the basis of the proofs of debt submitted by the Famularo Parties to the Chairman of the scheme meetings. The Famularo Parties claimed that they were substantial creditors to Lift Partners in excess of $140 million for Merrill Lynch having dealt with the shares and options at a time when the Famularo Parties were not in default. The Famularo Parties claimed that they could have actioned an alternate investment trading strategy which would have avoided the loss. The proofs of debt were assessed by the Chairman after obtaining advice to be of nil value and not entitling the Famularo Parties to vote.  The schemes themselves were approved by a large majority of creditors with the result being, among other compromises, that Merrill Lynch would include a cash contribution to the scheme fund in return for a release of any claims against it. The Famularo Parties appealed the decision of the Chairman to disregard their voting rights pursuant to regulation 5.6.26 of the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default). **(c) Decision**  The appeal was dismissed. The Famularo Parties failed to demonstrate that the primary judge had made an error of principle.   **(i) No entitlement to vote** The joint judgment concluded that the Chairman had exercised his discretion reasonably. The claim by the Famularo Parties was "ephemeral or speculative" (at [85]) such that it was not justifiable to admit the claim which could block the schemes for the benefit of the majority of creditors. Their Honours drew an analogy with *Re UDL Holdings Ltd* [2000] HKCFI 1567 which held that a claim which may or may not succeed in being established is not sufficient to allow a party to vote at a meeting. The court in that case questioned what value could be attributed to an unproven claim and reasoned that as the "unproven" creditor does not have standing to present a winding-up petition, it should not be able to bring about liquidation by voting at a scheme meeting. **(ii) Demand of repayment valid** Their Honours rejected the submission of the Famularo Parties that Lift Partners were not entitled to demand repayment of the loans at a time when they could not be given immediate access to the securities because they had been transferred to Merill Lynch. This was based on three reasons: first, it was contrary to clause 7.2 of the Margin Loan Facility Agreement (as stated above) and ordinary commercial principles that securities would have to be made available immediately upon giving demand for payment; second, that the Famularo Parties did not seek the consent of the Lift Partners to sell the securities to meet the repayment demand; and third, that there was evidence that other securities had been transferred to Merrill Lynch on an earlier occasion but had nonetheless been made available to the Farmularo Parties to sell.  **(iii) Breach of trust** The Famularo Parties also sought to rely on a breach of trust by Lift Partners as a result of the transfer of the securities to Merrill Lynch. This was held to be irrelevant to the application. The existence and scope of the fiduciary relationship was based on the contractual obligations in the Margin Loan Facility Agreements which permitted Lift Partners (or Merrill Lynch acting on its behalf) to exercise its power of sale. The primary judge had concluded that the exercise of this power had been carried out reasonably and it was not unconscionable for Lift Partners to insist on the express provisions to seek repayment which had been negotiated by parties who were both sophisticated traders. This was supported on appeal and their Honours concluded that the rights of Lift Partners as mortgagees to recover its loan were not vitiated by a breach of trust.  Moreover, no loss for the breach of trust could be made out. The Famularo Parties failed to take steps to seek to sell the shares or deal with the options and as a result, there was no causal link with the shortfall. In any event, the liquidators submitted they would have exercised the power of sale in the same way as Merrill Lynch. The joint judgment affirmed the primary finding that any submission by the Famularo Parties to an alternate investment strategy was "plainly informed by hindsight" (at [134]) and could not have been implemented immediately and possibly, not even at all.  **(iv) Interests of justice** The schemes were held to be fair to the body of creditors as a whole even though they may not have been fair to every particular creditor. The overwhelming majority of the creditors in support of the schemes "reflected a sound appreciation of the commercial realities of the situation" (at [151]) which should not be overshadowed by the alleged claim of the Famularo Parties which was "commensurately exiguous" (at [143]). Any question of whether Merrill Lynch had entered into the arrangement other than as a creditor in accordance with section 411(1) should have been dealt with at the meeting for final approval.  One important theme which was addressed by the primary judge and the majority on appeal is the distinction between proofs of debt for the purposes of voting entitlements at approval of a scheme and those for the purpose of entitlement to a distribution in a winding up. The role of the chairperson at the former stage does not anticipate detailed inquiry but a prima facie conclusion that a claim exists in more than "mere assertion" (refer to Barrett J at first instance at [103] to [104]). **(v) Nature of appeal** The latter point goes to the nature of the appeal. Although it was left open by the joint judgment, Finkelstein J in a separate judgment offered some interesting observations. In his Honour's view, an appeal under regulation 5.6.26(3) was one of de novo. This was based on a line of authority in England (most recently, *Power v Petrus Estates Ltd* [2008] EWHC 2607 (Ch) referred to at [159]) to the effect that the chairperson's judgment of whether proofs of debt should be admitted contemplates a quick decision and not one of substantive analysis. Accordingly, an appeal should not be confined to the material before the chairperson but to the "possibility of a more leisurely examination" (at [159]). Justice Finkelstein departed from the English authority to the extent that evidence should not necessarily be taken from the date of the meeting because further evidence may come to light which requires consideration to produce a fair outcome. Moreover, in the bankruptcy regime, a review is not limited to the material before the trustee in bankruptcy.  His Honour is ultimately in favour of accuracy and finality on the question of whether a person is a creditor and entitled to vote, a right which should not be diminished by a summary decision of the chairperson.etailed Contents**4.3 A review of executive retirement benefits**(By Natalie Krahe and Greg Midgley, Clayton Utz)Dr Nair v Arturus Capital Limited [2010] NSWSC 329, New South Wales Supreme Court, Davies J, 30 April 2010The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/april/2010nswsc329.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/april/2010nswsc329.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** *Dr Nair v Arturus Capital Limited* [2010] NSWSC 329 addressed the legislative regulation of benefits provided to senior managers and executives of companies on retirement from office. Section 200B of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) restricts retirement benefits unless the entitlement is approved by the company's members in accordance with section 200E. Section 200F, however, states that certain benefits are exempt from member approval if they are given under a contract entered into before the person held the office from which they are retiring. The case concerned a termination entitlement due to be paid to a retiring CEO, namely the plaintiff, Dr Nair. The disputed entitlement arose under an agreement entered into four months before the plaintiff's retirement. Notwithstanding that the plaintiff was already holding the post of CEO when the agreement was entered into, the court found that the entitlement was exempt from member approval because the exemptions under section 200F of the Act include benefits provided as consideration for entering a new employment arrangement. Davies J also addressed the requirement for member approval, concluding that section 200E of the Act contemplates a binding resolution specifically approving the benefit. The non-binding approval in respect of a remuneration report was determined to be insufficient.**(b)  Facts**Dr Nair commenced employment with Life Therapeutics Limited (LT) in May 1998. In October 2003, he was promoted to Chief Executive Officer (CEO) and Managing Director (MD). Dr Nair's promotion was formalised in an Executive Employment Deed (the First Agreement), entered into in December 2004. The First Agreement terminated automatically on 22 November 2007 unless it was renewed beforehand by written agreement of the parties. During his employment, Dr Nair relocated to the United States of America (US) to work on LT's proposed merger with or acquisition by a Swiss company. Dr Nair commenced discussions with LT in early 2007 regarding his continuing employment. Subsequently, Dr Nair signed a Workplace Agreement on 23 July 2007 (the Second Agreement) which superseded his previous arrangement with LT. The new agreement could be terminated at any time by approval of the parties in accordance with the *Workplace Relations Act 1996 (Cth)* on one month's notice. The Second Agreement conferred on the plaintiff a right to a termination payment. Although his role under the Second Agreement was listed as MD, it was clear that Dr Nair's appointment extended to his role as CEO. In a meeting on 28 August 2007, shortly after entering the Second Agreement, Dr Nair advised the board of directors that he would resign as CEO at the company's Annual General Meeting (AGM) on 28 November 2007. In October 2007, an announcement to that effect was released to the Australian Securities Exchange (ASX). In November 2007, Dr Nair resigned from his post as CEO of LT. Dr Nair subsequently initiated proceedings for the payment of the termination entitlement under the Second Agreement. **(c)  Decision** [The judgment refers to the wording of section 200F after it had been amended in 2009 (by the [Corporations Amendment (Improving Accountability on Termination Payments) Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=110569" \t "Default)). The authors submit that the changes made in 2009 do not affect the specific issue considered by the Court. Accordingly, this note follows the statutory wording referred to in the judgment.] Section 200B of the Act prohibits a company from providing a person with benefits in connection with that person's retirement from a managerial or executive office, unless there is member approval under section 200E. As mentioned above, certain retirement benefits are permitted under section 200F of the Act. The plaintiff conceded that the termination entitlement in the Second Agreement was a termination payment for the purposes of Division 2 Part 2D of the Act. Accordingly, in determining the legality of Dr Nair's termination entitlement, the legislative framework posed two issues for the court to decide, which are examined separately below:First, whether the plaintiff's termination benefit was exempt from the member approval requirement in section 200B because it fell within the ambit of section 200F(2)(a)(ii); and Secondly, if approval of the members was required, whether Dr Nair's termination entitlement was, in fact, approved by the members in compliance with section 200E(1) of the Act.  **(i)  Issue one:  Was the termination entitlement exempt?** Section 200F(2)(a)(ii) of the Act provides that subsection 200B(1) "does not apply to a benefit given in connection with a person's retirement from an office or position in relation to a company if ... the benefit is given to the person under an agreement made ... before the person became the holder of the office or position as the consideration, or part of the consideration, for the person agreeing to hold the office or position." In addition, the value of the retirement benefit must not exceed the statutory limit imposed by section 200F(2)(b), calculated in reference to the recipient's base salary. The argument which ensued over the applicability of section 200F(2)(a)(ii) of the Act derived from the plaintiff's position as CEO under the First Agreement.The defendant submitted that the termination entitlement under the Second Agreement did not fall within the exemption because the agreement was not made "before" Dr Nair became holder of the office of CEO. The defendant asserted that Dr Nair was appointed as CEO and MD under the First Agreement. The plaintiff countered that the Second Agreement was a separate arrangement with the company made prior to him accepting a new role. Dr Nair contended that the termination entitlement formed part of the consideration for him accepting the office of MD under the Second Agreement and, therefore, the exemption under section 200F(2)(a)(ii) applied. In settling the issue, Davies J had recourse to the decision of Einstein J in *Randall v Aristocrat Leisure Ltd* [2004] NSWSC 411 (Aristocrat Leisure). In that case, a relocated CEO was held to have assumed a new office pursuant to a varied agreement. Einstein J considered that the term "agreement" extended to "an agreement that varies or replaces an existing agreement [515]." In addition, the word's etymological origins were explored to conclude that "office" encompasses more than merely a person's title. Einstein J relied on an array of authorities supporting the proposition that a new contract of employment arises where the location or the duties of an employee have substantially changed. Davies J, in the present case, noted that the decision in Aristocrat Leisure implied that the exemption in section 200F(2)(a)(ii) was applicable even where a person held an office previously, provided there were different incidents of the office for which the termination benefits were consideration. Ultimately, in applying the facts of the case, Davies J found that there were "sufficient indications that the office that Dr Nair occupied pursuant to the [Second Agreement] was not identical with the office he had held under the [First Agreement] [16]," because the Second Agreement:required Dr Nair to remain in the US; entailed duties additional to those in the First Agreement; and contained an express term that the Second Agreement superseded all previous agreements.  Thus, the court determined the issue in favour of the plaintiff, finding that the termination entitlement was consideration for the plaintiff agreeing to the terms of his new, albeit similar, office. On the same reasoning, Davies J dismissed the plaintiff's claim that the relevant period for calculating the statutory limit on the payment should extend to his entire tenure as CEO and MD. Regardless, the termination benefit fell within the scope of section 200F(2)(a)(ii) of the Act, and thus, was exempt from the requirement of member approval. **(ii)  Issue two:  Had the members approved the termination entitlement?** Notwithstanding finding for the plaintiff in the above matter, his Honour deemed it appropriate to examine whether the termination benefit had been approved by the members in accordance with the procedure expounded in section 200E of the Act. The procedure for member approval of a retirement benefit is set out in section 200E. Among other things:the resolution must be approved by the members at a general meeting of the company; details of the benefit must accompany the notice of the meeting considering the resolution; and the details must include the amount, or an estimated value, of the benefit.  The reader will recall that the company announced an AGM to take place on 28 November 2007. On 10 October 2007, an ASX announcement was made by the company regarding Dr Nair's retirement as CEO. The court's determination of the issue hinged on the facts, in particular, the notice of the AGM issued to the members. Crucially, the notice did not refer specifically to the approval of Dr Nair's termination entitlement. However, it did contain, as Item 2, the "Approval of the Remuneration Report" suggesting an ordinary resolution be passed adopting the report. Notwithstanding this, an explanatory statement attached to the notice made no direct reference to Dr Nair's entitlement, and informed members that the vote on the remuneration report would not bind the directors of the company. The remuneration report was included within the annual report of the company. A sub-section of the report, relating to the directors' employment contracts, dealt explicitly with Dr Nair's termination payment. Despite this, the report was silent on the plaintiff's impending retirement. The remuneration report was approved by a majority vote of the members at the AGM. The plaintiff submitted that the giving of the benefit had been approved, and the requisite detail provided, in order to satisfy section 200E. In determining the issue, Davies J remarked that "what section 200E(1) contemplates is that there will be a resolution at a general meeting which approves the giving of the benefit to the person concerned. The section requires the approval of the benefit ('it must be approved') [38]." The Court distinguished the non-binding approval of the remuneration report in emphasising that section 200E requires a binding resolution. His Honour found that approval of the remuneration report did not discharge, in some vicarious way, the company's duty to obtain the approval of the termination entitlement by its members.Davies J held that the threshold for approval was determined by whether the informed consent of the members was obtained. His Honour speculated that this required a resolution specifically directed to approval of the benefit, stating that "it is not sufficient to approve either an agreement or information such as the remuneration report in the present case by resolution to satisfy the provisions of s 200E(1) [43]." Accordingly, the court found that the approval of the remuneration report at the AGM did not satisfy the benchmark for member approval of a termination benefit outlined in section 200E of the Act.etailed Contents**4.4 Court has limited powers to review a trustee's exercise of absolute and uncontrolled discretion** (By Jiayue Li, DLA Phillips Fox) Manglicmot v Commonwealth Bank Officers Superannuation Corporation [2010] NSWSC 363, New South Wales Supreme Court, Rein J, 28 April 2010 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/april/2010nswsc363.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/april/2010nswsc363.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 plaintiff brought this action against the corporate trustee of his superannuation fund ('Fund') claiming that the trustee breached duties owed to him by changing the superannuation fund's insurer as the terms of the new insurance policy in relation to Total and Permanent Disablement ('TPD') were more restrictive. As a result of the new insurance policy, the plaintiff argued that he was denied benefits which would have been available under the old policy. The plaintiff contended that not only was there a right to question the trustee's decision under general trust law principles, the general law right has been significantly altered by section 52 of the [Superannuation Industry (Supervision) Act 1993 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "Default) ('SIS Act'). However, Rein J held that the general law test was not altered by section 52 of the SIS Act. His Honour also held that the grounds upon which a decision made by a trustee with an absolute discretion can be challenged are the same regardless of whether or not the trustee has provided reasons for their decision. The court can only examine whether the trustee acted with honesty, integrity and fairness in exercising their discretion, in other words that the trustee had applied a proper process. The court's inquiry could not be extended to examining the accuracy or merits of the trustee's decision. Rein J held that the trustee had exercised its discretion properly and the decision was a reasonable one in all the circumstances.  **(b) Facts** The plaintiff was employed as a bank teller by the Commonwealth Bank of Australia Limited ('Bank') from 1998 to 2003 and was a member of the Bank's Fund. The plaintiff was injured in 2000 which rendered him unfit for full time work. At times, the plaintiff had difficulty even working 15 hours per week. Eventually, in August 2003, the plaintiff was offered and accepted a redundancy package. The plaintiff made a claim to the trustee for TPD and the matter was referred to the Fund's insurer, CommInsure Pty Ltd ('CommInsure'), which rejected the plaintiff's claim. Prior to the end of 2003, the Fund's existing insurer Hannover Life Re of Australasia Ltd indicated that it required a 130 per cent increase in premiums to renew the existing policy ('Hannover policy') or a 100 per cent increase if the insurance policy was not subject to a rebate for low claim years. CommInsure offered a policy to replace the Hannover policy at an increase of 80% on the existing premium and guaranteed premiums for three years. The trustee and CommInsure entered into an agreement in relation to a policy of insurance offered by CommInsure ('CommInsure policy') in June 2003 but the trustee sought amendments to this agreement from July 2003 to December 2003 on the basis of CommInsure's promise to match or better the current terms and conditions in the Hannover policy. The plaintiff contended that as a result of the trustee's decision to enter into the new CommInsure policy, he was not entitled to recover the same benefit he would been entitled to under the Hannover policy. **(c) Decision** Rein J held that the trustee's decision to change the Fund's insurer to CommInsure was not open to attack under general law, as the trustee had acted in good faith and with the interests of its members in mind. Additionally, his Honour held that there was no breach of the covenants contained in section 52 of the SIS Act. Rein J further held that CommInsure's and the trustee's decision to decline the plaintiff's claim was appropriate because the plaintiff did not have six months' absence from work as a result of his disability before choosing to end his employment with the Bank and hence was not eligible for TPD benefits, irrespective of whether the CommInsure policy was more restrictive in its definition of TPD. **(i) Grounds for challenging a trustee's decision** After reviewing the relevant authorities, his Honour confirmed that the court's supervision over a trustee's conduct is confined to the question of honesty, integrity and fairness with which the trustee's deliberation has been conducted, and will not extend to the accuracy of the conclusion arrived at, except in limited circumstances. Where the trustee has provided reasons for their decision and the reasons do not justify their conclusion, then the court may have scope to find that the trustee has acted in error, and correct the decision. However, Rein J emphasised that the principles by which a court will determine whether a trustee has acted properly in its exercise of discretion is the same whether the reasons for the trustee's exercise of its discretion are disclosed or not. Rein J commented that from a practical point of view, this approach avoids the undesirable consequence of discouraging trustees from providing reasons for their decisions for fear of giving rise to a wider power of review over those decisions. **(ii) Decision to change insurers was reasonable** Rein J concluded that the trustee's decision to enter into the CommInsure policy was a reasonable one. There was no evidence to indicate that the trustee's decision was not exercised in good faith, or that it was not exercised upon a fair or real and genuine consideration. The trustee was bound not only to have regard to the benefits under any particular policy, but also to the premiums payable, which came out of the Fund. By entering into the CommInsure policy, the trustee not only obtained a 20 per cent (or better) reduction in the premium from that offered by Hannover, but it also obtained a freeze on premiums for three years. In addition, it obtained a commitment from CommInsure to match the terms of the Hannover policy.  The trustee also sought legal advice from its solicitors who did not discern any difference in the two policies or bring it to the trustee's attention.  **(iii) Duties under section 52 of the SIS Act** The plaintiff also asserted that section 52 of the SIS Act imposed duties on the trustee in addition to any general law duties. In particular section 52(2)(c) imposed a duty on the trustee to act in the best interests of the beneficiaries. The plaintiff argued that by entering into a policy which had a less favourable TPD definition, the trustee had breached that covenant. Rein J rejected the plaintiff's arguments and accepted the trustee's submission that a requirement to ensure that duties and powers are performed and exercised in the best interests of the beneficiaries could not be taken literally, as it could effectively make trustees liable for any outcome which turned out to be unbeneficial to members. Rein J held that the SIS Act did not impose a higher standard on a trustee than the general law, namely that a trustee must follow due process and an appropriate motive. Consequently, the trustee did not breach the covenant under section 52 of the SIS Act by entering into the CommInsure policy.etailed Contents**4.5 The exercise of a court's discretion in approving a proposed scheme of arrangement** (By Amruta Bapat, Blake Dawson)  Seven Network Limited (ACN 052 816 789), in the matter of Seven Network Limited (No 3) [2010] FCA 400, Federal Court of Australia, Jacobson J, 27 April 2010 The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/april/2010fca400.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/april/2010fca400.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/april/2010fca400.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/april/2010fca400.htm%22%20%5Ct%20%22_new) **(a) Summary** The applicant, Seven Network Limited ("Seven"), sought orders under section 411 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) granting approval of two proposed schemes of arrangement.  The proposed schemes had already been approved by the requisite majority of shareholders voting at scheme meetings. This case considered the factors relevant to the exercise of a court's discretion to grant its approval of the schemes.  After a proposed scheme of arrangement has received member approval, the court must approve the scheme under section 411 of the Corporations Act in order for the scheme to be binding.  Jacobson J approved the schemes proposed by Seven.  In reaching this decision, Jacobson J was influenced by the following factors: the shareholders had cast their votes in good faith and for a proper purpose; the proposed schemes were fair and reasonable; the shareholders' meetings were representative and carried out with fairness and integrity; counsel for the plaintiff had fully disclosed to the Court all matters that may be relevant to the exercise of the Court's discretion; all material information had been disclosed to the shareholders to the standard required by the [Corporations Regulations](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default); and the Australian Securities and Investments Commission ("ASIC") had extensively reviewed the schemes and did not oppose them. **(b) Facts** Seven proposed two schemes of arrangement, referred to by the court as the "Share Scheme" and the "TELYS3 Scheme" respectively.  The Share Scheme was proposed between Seven and its ordinary shareholders.  The TELYS3 Scheme related to the holders of security interests known as Transferable Extendable Listed Yield Securities ("TELYS3"), issued by Seven.  On 16 March 2010, Jacobson J had granted orders convening shareholders' meetings in relation to these proposed schemes.  The schemes had been approved by the required majority of shareholders voting at these meetings.  Seven then sought orders requesting the Court's approval of the proposed schemes, which is necessary for the schemes to take effect.  **(c) Decision** Jacobson J approved the schemes proposed by Seven.  The following considerations were relevant to His Honour's decision: whether shareholders voted in good faith and for a proper purpose when approving the schemes; whether the proposed schemes are fair and reasonable; whether the shareholders' meetings considering the schemes were representative and conducted with fairness and integrity; whether counsel for the applicant alerted the court to all matters that may be relevant to the exercise of the court's discretion to approve the schemes; whether all material information was fully and fairly disclosed to shareholders; and whether ASIC had reviewed the schemes. Jacobson J noted that the court is not obliged to approve a proposed scheme merely because orders convening scheme meetings were granted, or because the requisite majority of shareholders had approved the scheme.  However, it is only in limited circumstances that a court will refuse to approve a proposed scheme that has been endorsed by a majority of shareholders.  Jacobson J emphasised that shareholders are best placed to determine what is in their commercial interests, and that the court's role is ultimately a supervisory one.  Jacobson J found that when approving the scheme, the relevant shareholders had voted in good faith and for a proper purpose.  Seven's proposed schemes were found to be fair and reasonable such that an intelligent, properly informed shareholder would be likely to approve them.  His Honour held that the voting process during the shareholders' meetings had been conducted fairly and with integrity.  Jacobson J noted that the court may withhold approval if the shareholders' meeting is found to be unrepresentative.  However, this was not the case here as the votes cast at the meeting of unrelated shareholders represented approximately 70% of the total votes eligible to be cast.  His Honour also commented on the important role played by counsel in bringing to the court's attention all features of the proposed schemes which are relevant to the court's exercise of its discretion.  Jacobson J found that in this case, counsel for Seven had satisfactorily performed this role.    Finally, his Honour was influenced by ASIC's decision not to oppose the proposed schemes.  The evidence showed that ASIC had extensively reviewed the schemes and found that all material information had been disclosed to the standard required under the relevant regulations.  ASIC also concluded that there were no public policy reasons to oppose the schemes in question.  This was an influential factor in Jacobson J's judgment, and his Honour observed that ASIC plays a pivotal role in helping the court to decide whether a proposed scheme should be approved.etailed Contents**4.6 Disqualification of officers and pecuniary penalties: Considering character, contraventions and the need for deterrent** (By Steven Grant, Minter Ellison) Australian Securities & Investments Commission v Soust (No 2) [2010] FCA 388, Federal Court of Australia, Goldberg J, 23 April 2010 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/april/2010fca388.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/april/2010fca388.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** This case concerns the balancing of factors the court will consider when determining whether a person should be disqualified from managing corporations and a pecuniary penalty imposed in respect of contraventions of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act). **(b) Facts** This decision follows the adjournment of proceedings to enable the parties to make submissions as to whether any, and if so what, orders should be made pursuant to section 206C(1) of the Act that the defendant, Dr Martin Soust, be disqualified from managing corporations for a period that the court considered appropriate and whether any, and if so what, orders should be made pursuant to section 1317G of the Act that the defendant pay a pecuniary penalty in respect of his contraventions of sections 181(1), 182(1), 1041A and 1041B of the Act.   Relevantly, section 1317G enables the court to impose pecuniary penalties and sections 181(1), 182(1), 1041A and 1041B, respectively impose:a duty of good faith on officers of a company; a duty not to misuse one's position as an officer of a company; the obligation not to take part in, or carry out a transaction that has or is likely to have, or two or more transactions that have or are likely to have, the effect of creating an artificial price for trading in financial products on a financial market, or maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on a financial market; and an obligation not to do, or omit to do, an act if that act or omission has or is likely to have the effect of creating, or causing the creation of, a false or misleading appearance of active trading in financial products on a financial market, or with respect to the market for, or the price for trading in, financial products on a financial market.   On 15 February 2010 Goldberg J concluded that pursuant to section 1317E the defendant contravened:section 1041A by taking part in, and carrying out, a transaction that had the effect of creating an artificial price for trading in shares in Select Vaccines Limited (Select Vaccines) by placing an order with Bell Potter Securities to purchase $2,550 worth of shares in Select Vaccines at market price on the Australian Stock Exchange Limited (ASX); and section 1041B(1) by doing an act which had the effect of creating a false and misleading appearance with respect to the market and the price for trading in shares in Select Vaccines on the ASX by placing that same order to purchase shares in Select Vaccines with Bell Potter Securities.  As a result of those contraventions Goldberg J found that the defendant contravened section 181(1) by failing to exercise his powers and discharge his duties as a director in good faith, in the best interests of the company or for a proper purpose, and section 182(1) by improperly using his position as a director to gain an advantage for himself and Martin Soust & Co Pty Ltd and cause detriment to Select Vaccines by:placing the order to purchase $2,500 worth of Select Vaccine shares at market price with Bell Potter Securities on the ASX; thereby contravening Select Vaccine's Share Trading Policy; failing to inform the other directors of Select Vaccines of his involvement in that purchase; and deliberately concealing his involvement in that purchase from the other directors of Select Vaccines.  Goldberg J also made orders enabling the plaintiff, Australian Securities and Investments Commission (ASIC), and the defendant, to file further evidence and submissions in relation to these matters.  The defendant relied on an affidavit in which he set out his assets and liabilities and the fact that he was unemployed, but did not mention the terms of his late mother's will or of the trusts created under it, and five affidavits comprising character references.  Subsequent to the filing and service of the defendant's affidavit, ASIC filed an affidavit by a lawyer in its employ whose evidence related to searches undertaken in the Victoria Lands database and in the probate records of the Registry of the Supreme Court of Victoria.  Those searches disclosed that:the defendant and his wife were registered as joint proprietors of the matrimonial home with a current market value of $1.8 million, for which a transfer of the defendant's interest in the property to his wife for no consideration other than natural love and affection which was registered on 6 October 2008; probate of the will of the defendant's mother was granted to the defendant on 23 July 2009; under the will the residuary estate was divided into two equal shares and into two trusts, the trustees of one of them being the defendant's sister and the defendant and the trustee of the other of them being the defendant solely; the will set out the terms of each trust, the beneficiaries of the trust of which the defendant was the sole trustee, were the defendant and his children and their children, their spouses and their lineal descendants; the defendant was empowered under the terms of the trust of which he was sole trustee to pay in his absolute and uncontrolled discretion the whole or any portion of the income of the trust to any of the beneficiaries including himself; although the trust was to terminate one day less than eighty years from the date of death of the defendant's mother, under the terms of the trust the defendant was empowered in his absolute discretion to terminate the trust at any time during that period and distribute the assets of the trust to any of the beneficiaries, including himself; one of the assets in the residuary estate was a property which had been sold pursuant to a contract of sale dated 25 July 2009 for $1.4 million, the transfer of which was stamped with duty on 4 December 2009.  It followed that approximately $700,000 was distributed into the trust of which the defendant was sole trustee and one of the beneficiaries.  ASIC submitted that the defendant should be disqualified from managing corporations for eight years and should pay a pecuniary penalty of $100,000 whilst the defendant submitted that he should face a disqualification period of no more than five years.   **(c) Decision** **(i)  Should the defendant be disqualified from managing corporations?** Noting the 15 propositions by Santow J in *Re HIH Insurance Ltd (in prov liq)* and *HIH Casualty and General Insurance Ltd (in prov liq)*; *Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80, Goldberg J observed that although considerable guidance can be derived from the principles and propositions extracted from the cases referred to by Santow J, it must be remembered that each case in which disqualification was considered turned on the particular facts in that case.   Goldberg J noted that the defendant's conduct did not occur in respect of one isolated incident, but rather, the defendant behaved in a dishonest manner repeatedly and over a period of months commencing in December 2007 and continuing to August 2008.  Goldberg J considered the principal focus of consideration should be on the character and nature of the contraventions and their importance within the context of the obligations cast on directors of corporations and participants in the market found in the corporations legislation, rather than on the character of the contravener and the impact and consequences of the contravener's conduct.  However, both are factors to be weighed in the balance.  In this respect, Goldberg J considered the lack of any explanation for his conduct and the absence of any expression of contrition, remorse or shame are matters which bear heavily upon the extent and period of any disqualification and the level of any pecuniary penalty. The defendant submitted that evidence of contrition and remorse was to be found in the repayment of the performance bonus which should be regarded as an acknowledgement that the sum was improperly gained and properly to be repaid.  However, Goldberg J rejected that submission on the basis that the repayment was not made by him personally, it was made very late in the proceeding and more than 12 months after the proceeding was instituted by ASIC, it was made without any admission of liability and there was no evidence that the defendant was under any obligation to reimburse the third party who made the repayment. The defendant further submitted that the impact of his actions on the market had little impact on market perceptions or other conduct in the market. Goldberg J rejected this submission as the defendant's contraventions were not apparent to the market and were only brought to light as a result of the ASIC investigation. Whilst there was nothing in the defendant's affidavit which was incorrect, the defendant did not disclose the transfer of his interest in the matrimonial home to his wife in June 2008 or his interest in the residuary estate of his late mother or the trusts created thereunder.     Despite these observations, Goldberg J considered that when viewed in totality the contraventions did not constitute the most serious case of an impact upon the market or of the proscribed conduct having such a consequence.  However, this did not detract from the significance of the contraventions which demonstrated the defendant's dishonesty, bad faith, self interest and a desire for personal gain and improper purpose of conduct.  Goldberg J considered that the gravamen of the case lied in the litany of personal dishonesty calculated to obtain and maintain personal gain.   **(ii)  Should a pecuniary penalty be imposed?** Relying on the affidavit of its lawyer, ASIC submitted that in considering the defendant's submission as to his lack of means the court ought not to take into account the fact that his wife alone was the registered proprietor of the family home but rather proceed on the premise that any equity in the family home was accessible by the defendant himself as well.  Accepting this submission, Goldberg J was also satisfied that the defendant, in his capacity as trustee of that trust, had an unfettered discretion as to the exercise of powers relevant to the disposition of either income or capital from the trust.  Although he did not have an interest which had vested in respect of any part of the trust or its assets, he had the opportunity to distribute income and capital to himself. The defendant submitted that the employment market and the biotechnology industry had effectively exacted a penalty upon him by leaving him unemployed since the date he left the employment of Select Vaccines in August 2008.  However, Goldberg J did not accept the proposition, noting that at the time the defendant left the employment of Select Vaccines, he did so on the basis of his resignation and there was no evidence that it was known outside Select Vaccines that the defendant's resignation occurred because Select Vaccines was entitled to terminate his employment for cause.   Whilst the period of disqualification Goldberg J proposed to order would have a significant impact on the defendant's ability to earn income, Goldberg J considered it was necessary to impose the payment of a pecuniary penalty having regard, in particular, to the character and nature of the contraventions and the need for a specific deterrent to the defendant component and a general deterrent to the other company officers.  The reasons underlying Goldberg J's decision to disqualify the defendant from managing corporations, equally supported the imposition and amount of the pecuniary penalty.   **(iii) Orders** Accordingly, Goldberg J ordered that the defendant:be disqualified from managing corporations for a period of 10 years commencing from the date of the order; pay a pecuniary penalty of $80,000; and pay the plaintiff's costs of and incidental to the proceeding, including any reserved costs. etailed Contents**4.7 Potential asbestos liabilities no obstacle to approval of meeting for CSR scheme of arrangement**(By Alex Bowen, Mallesons Stephen Jaques) CSR Ltd, in the matter of CSR Ltd [2010] FCAFC 34, Federal Court of Australia, Full Court, Keane CJ, Finkelstein and Jacobson JJ, 23 April 2010 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/april/2010fcafc34.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/april/2010fcafc34.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 court found that only a limited inquiry should be conducted into the scheme of arrangement at the hearing of the application for approval to hold a meeting of shareholders. The scheme should only be rejected in cases where it was obviously or blatantly unfair. The risk that the smaller CSR resulting from the scheme would be unable to pay its creditors (including asbestos claimants) was theoretical rather than material. As a consequence, there was no basis for the court to block the scheme at this initial stage. **(b) Facts** This was an appeal from an application for an order to convene a shareholder meeting to vote on a scheme of arrangement under section 411(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"). The scheme seeks to divest CSR's sugar and renewable energy businesses into a new company. This involves a reduction of capital of CSR and a scheme of arrangement between CSR and its shareholders. ASIC, the NSW Attorney-General, James Hardie and the Asbestos Injuries Compensation Fund Ltd intervened in the application because they were concerned the scheme would affect prospects of recovery for persons exposed to asbestos by CSR. The capital reduction was not part of the scheme, but it was clear that the demerger would not proceed without it. So they were effectively considered together. The court did not address the issue of whether the purpose of the demerger was to protect the new sugar and renewable energy company from the asbestos liabilities, but it was implied on some level that this was one of the commercial objectives of the scheme. In its last financial statements, CSR made a provision of $446.8 million for current and future asbestos liabilities. This represented 10% of its net assets, but would rise to 18% of the net assets of CSR post-demerger. **(c) Decision** **(i) The scope of the initial assessment of the scheme under section 411(1)** If the meeting was approved by the court, the scheme would then be voted on by shareholders and, if successful, presented to the court again for final approval. The exercise of the court's discretion at this preliminary stage should be limited to avoid pre-empting the court's final decision to approve the scheme after the meeting of shareholders. The court said that 'the inquiry under section 411(1) is not intended to resolve difficult questions on which reasonable minds may differ'. However, the court should refuse to approve a meeting if 'the order would be futile because the scheme as proposed is unlikely to be finally approved'. **(ii) Whether the risk of non-payment was material** The main argument of the interveners was that while the provisions made by CSR were reasonable, there was a risk that the actuarial assessments were wrong, and this risk should not be borne by asbestos claimants. However in spite of this uncertainty it was ultimately agreed that the exercises of prediction and projection were exercises which could reasonably and responsibly be undertaken. In other words, the accounting provision made by CSR was a real estimate of the likely liabilities, however uncertain it might be. There was also argument about the worst case scenario and how CSR would meet its liabilities in various contingencies. The court rejected the argument that CSR's ability to pay its creditors would be materially prejudiced if it had to resort to asset sales to fund the liabilities. Ultimately, there was no evidence of any specific scenario in which there would be a difficulty meeting CSR's liabilities. The court concluded that the increase in risk of non-payment of the new company's creditors was theoretical rather than material. A purely theoretical risk did not justify rejecting the application for approval of the meeting on any of the grounds argued. **(iii) Public policy under section 256B(1)(b) (reductions of capital)** On an application under section 256B(1)(b), CSR would be required to prove that its reduction of capital does not materially prejudice its ability to pay its creditors. The availability of this action is once again a reason why that issue did not need to be resolved in the course of the present application. The relevant public policy considerations, even under the most expansive reading of section 256B(1)(b) of the Act, did not extend to rejecting the scheme on the basis of a purely theoretical increase in the risk of non-payment. **(d) Result** In expressing its conclusions, the court said it 'should be circumspect in expressing its conclusions on matters which might be litigated either at the application for final approval of the scheme or in proceedings pursuant to section 1324 of the Act'. As there was no consideration raised which was clear enough to justify refusing to order the first meeting, the appeal was allowed and the court ordered that the meeting be convened to vote on the scheme. The court has clearly indicated that the appropriate time to assess the fairness of the scheme is the second hearing to approve the scheme after it has been voted on. It seems likely that the same arguments will be raised again at that hearing and they may require a more in-depth evaluation by the court.etailed Contents**4.8 Transfer of future property under a scheme of arrangement**(By Dean Bao, DLA Phillips Fox) Achieve Foundation Limited v ACNewCo Limited; In the Matter of Achieve Foundation Limited and The Crowle Foundation Limited [2010] FCA 382, Federal Court of Australia, Foster J, 21 April 2010  The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/april/2010fca382.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/april/2010fca382.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 Achieve Foundation Limited (Achieve) and the Crowle Foundation Limited (Crowle) proposed to merge by transferring their respective undertakings and liabilities to ACNewCo (NewCo). They sought court approval for the relevant schemes of arrangement, and an issue arose as to whether future bequests made to either of Achieve and Crowle fell under section 413 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act). The court determined that the definition of 'property' included contingent property, and as such future bequests made to Achieve or Crowle should be transferred to NewCo. **(b) Facts**  Achieve and Crowle both provided accommodation, training, employment and community access services to adults with disabilities. To ensure their survival, long term viability and success, Achieve and Crowle proposed to merge. Under the merger, they sought to transfer their respective undertakings and liabilities to NewCo (with minor exceptions, as ordered by the court).  The schemes of arrangement proposed that Achieve and Crowle were to seek a special order from the court that bequests received by either Achieve or Crowle after the merger date would be required, by order of the court, to be transferred to NewCo immediately after such bequests were received by either Achieve or Crowle. This was on the basis that each company would continue in existence following the merger for the sole purpose of receiving any such future bequests.  In deciding whether to grant orders approving the scheme, the court had to decide whether the bequests fell under the definition of 'property' under section 413 of the Corporations Act, and as such whether an order of the kind sought could be made under that provision. **(c) Decision** Bequests made to either Achieve or Crowle were not current property, because a bequest was a potential future asset that would become effective at some time in the future. Hence, Foster J observed that (as at the merger date) the subject matter of such bequests could be described as contingent property. In determining whether the definition of 'property' under section 413(4) of the Corporations Act included contingent property, Foster J considered the decision of Lindgren J in *Re Stork ICM Australia Pty Ltd* (2007) 25 ACLC 208, which held that inchoate, potential or contingent liabilities were capable of being transferred under a scheme of arrangement. This meant the definition of 'liabilities' under section 413(4) of the Corporations Act included contingent liabilities.  Foster J concluded that since the definition of 'property' under section 413(4) of the Corporations Act mirrored the definition of 'liabilities' in the same subsection, a similarly expansive view of the definition of 'property' under section 413(4) could be taken by analogy. This meant that the definition of 'property' would include contingent property. As such future bequests made to Achieve and Crowle fell within the scope of section 413(4).  Foster J also considered the general definition of 'property' under section 9 of the Corporations Act, which was to apply unless a contrary intention appeared in section 413. Since the definition under section 9 makes reference to any legal or equitable estate or interest 'whether present or future and whether vested or contingent' in real or personal property of any description, the definition in section 9 was consistent with the specific definition in section 413(4) of the Corporations Act. Hence, the definition of 'property' in section 413(4) should be interpreted expansively. Accordingly, Foster J ordered that any bequests received by Achieve or Crowle after the merger should be paid to NewCo as proposed. etailed Contents**4.9 High Court says Deed of Company Arrangement cannot limit claims against third parties** (By Michael Power, Mallesons Stephen Jaques) Lehman Brothers Holdings Inc v City of Swan [2010] HCA 11, High Court of Australia, French CJ, Gummow, Hayne, Heydon, Kiefel JJ, 14 April 2010 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/high/2010/march/2010hca11.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2010/march/2010hca11.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 High Court has held that a Deed of Company Arrangement ("DOCA") cannot limit the rights of creditors to make claims against third parties.   The case concerned a DOCA adopted by a narrow majority of the creditors of Lehman Brothers Australia Pty Ltd ("Lehman Australia").  The DOCA was passed largely due to the votes of two other Lehman companies: Lehman Brothers Holdings Inc ("Lehman Holdings") and Lehman Brothers Asia Holdings Pty Ltd ("Lehman Asia").  The DOCA purported to prevent creditors making claims against other Lehman companies.  The court held that it was not effective to do this. The cases is significant for three reasons:the court established limits to how far the quick and cheap commercial solution of a DOCA may go in resolving creditors' competing claims; the court's conclusion in respect of Pt 5.3A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") is the opposite of that reached in respect of Pt 5.1 in F*owler v Lindholm* (2009) 178 FCR 563; the case can be seen as an assertion of the Court's willingness to intervene in private company arrangements to prevent large companies using their voting power to oppress smaller stakeholders.  **(b) Facts** The plaintiffs were a group of local councils from New South Wales and Western Australia who had invested in collateralised debt obligations through Lehman Australia.  They and a number of other investors had made or were planning to make claims against Lehman entities alleging negligence, misleading and deceptive conduct and the like in connection with those investments.   In September 2008, Lehman Holdings - the ultimate holding company of Lehman Australia and Lehman Asia - sought bankruptcy protection in the United States.  Lehman Australia appointed administrators under Pt 5.3A of the Act, and in June 2009 the Lehman Australia adopted the DOCA in question. The DOCA was adopted at a meeting of creditors by a narrow majority in number (61 to 57) and value ($256.7 million to $70.2 million) primarily due to the votes of Lehman Holdings and Lehman Asia.  Clauses 9 and 11 of the DOCA prevented creditors bringing claims not only against Lehman Australia, but also against other offshore Lehman entities (including Lehman Holdings and Lehman Asia).   The plaintiffs (who had voted against the DOCA) instituted proceedings in the Federal Court challenging its validity.  In *City of Swan v Lehman Brothers Australia Ltd* (2009) 179 FCR 243, the Full Federal Court declared the DOCA invalid.  Lehman Holdings and Lehman Asia appealed that decision to the High Court. **(c) Decision** The case boiled down to the interpretation of section 444D(1) of the Act: in particular, whether section 444D(1) authorised the DOCA to bind the creditors as against the other Lehman entities.  Section 444D(1) provides that, "[a] deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i)."   **(i) Submissions** Lehman Holdings and Lehman Asia both argued that the words "so far as concerns claims" included claims against them, on different grounds.  Lehman Holdings argued that that phrase included claims "connected or associated" with claims against Lehman Australia.  Lehman Asia argued that since the DOCA included provisions for claims against third parties, it "concerned" those claims.  It also argued that section 444D(1) includes claims against companies which form part of "a group of companies with interlocking claims against them." The plaintiffs argued that section 444D(1) did not relate to claims against third parties, and therefore did not bind them to that extent. **(ii) French CJ, Gummow, Hayne and Kiefel JJ** The majority essentially accepted the plaintiffs' submissions, finding that the words "so far as concerns claims" imposed a limitation on section 444D(1).  Their Honours recognised many of the appellants' arguments.  Notably, they accepted that claims against the Lehman entities were 'interlocked' with claims against Lehman Australia, because they arose from the same transactions and would likely be swept up in any future claim against Lehman Australia.  Ultimately, however, the majority found that "none of these observations confronts the critical observation that section 444D(1) limits" the binding effect of a DOCA, concluding that section 444D(1) binds creditors "so far as concerns claims against the subject company that arose before a specified date." This part of the majority's reasoning is curious.  Their Honours insisted that the terms of the section only authorise limitation of claims "against the subject company", yet in the text of the provision these words are nowhere to be found.  The majority judgment provides little justification for this 'ipse dixit' interpretation of section 444D(1). **(iii) Heydon J** In this respect, Heydon J's separate concurring judgment is more instructive.  Unlike the majority, his Honour candidly pointed out that the words "so far as concerns claims" are "elastic words, capable of signifying a wide degree of connection in some contexts and a quite narrow degree in others."  In this context, however, they must be read narrowly for two reasons.   First, section 444D(1) must be read narrowly because it permits the abrogation of property rights.  His Honour adopted the principle expressed by Deane and Gaudron JJ in *Mabo v Queensland* [No 2] (1992) 175 CLR 1, 111, that "clear and unambiguous words [must] be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation."  His Honour rejected Lehman Asia's submission that this principle is "inconsistent with modern experience and borders on fiction", affirming that it protects "a fundamental right of our legal system." Second, the legislation as a whole supports a broad construction.  Other provisions of the Act dealt in great detail and at great length with the position between creditors and the debtor company, but not at all with the position between those creditors and other debtors.  For example, section 444D(2) protects secured creditors of the company from being bound by a DOCA that they have not voted for, but secured creditors of third party companies are afforded no such protection.  His Honour expressed concern that if the appellants' arguments were accepted, a Deed of Company Arrangement could be used to limit a whole range of claims against other companies, unrelated to the debtor company in question.etailed Contents**4.10 Finding of oppression following diversion of corporate opportunities**(By Steven Rice, Freehills) Vadori v AAV Plumbing [2010] NSWSC 274, Supreme Court of New South Wales, Ward J, 13 April 2010 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/april/2010nswsc274.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/april/2010nswsc274.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 court ordered the compulsory purchase of the share held by the plaintiff, Vadori, in AAV Plumbing (AAV), in circumstances where the two respondent directors of AAV had engaged in conduct that was oppressive. **(b) Facts** AAV was incorporated in March 1998 and operated a plumbing business. At the time of incorporation, AAV assumed the plumbing business of a partnership carried on since 1988. By late 2006, AAV also acted as a trustee for two trusts: a superannuation trust and the 'AAV Investment Trust' (the latter being a trust wholly-owned by the superannuation trust and holding interests in a number of properties). The three shares in AAV were held one each by the spouses of the directors, but the business of AAV was conducted by the directors. By 2006, AAV had an annual turnover of $1.64 million and generated an annual profit of $375,000. Tension between the directors built over the years since AAV's incorporation. Vadori alleged that, without reference to herself, in late 2006 the directors of AAV agreed to divide the assets of AAV between themselves and divert business to new entities (which ultimately transpired to largely flow to a company associated with the two respondent directors of AAV). Vadori sought relief for oppression (and compulsory purchase of her share or a winding up of AAV), or, failing that, leave to commence a statutory derivative action for breach of statutory and fiduciary duties as directors. **(c) Decision** **(i) The issues** Ward J summarised the issues facing the court at [2010] NSWSC 274 at [33] as:Whether the cessation of AAV's plumbing business and division of assets of the company without reference to members, was oppressive conduct or otherwise in breach of section 232 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act)? If it was, what remedy should be granted under section 233 of the Act? Alternatively, should leave be granted to commence a statutory derivative action for breach of statutory and fiduciary duties as directors?  **(ii) Conduct held to be oppressive** After examining the relevant circumstances, Ward J held the conduct of the two respondent directors was in breach of their duties as directors and oppressive. There was conflicting evidence given about some of the conduct which constituted this oppression. However, the court held that in late 2006 the three directors discussed amongst themselves the division of AAV's business and assets in equal shares between them, and agreed to put this division into place, without consulting the members of AAV. Ultimately, the corporate opportunities were effectively transferred to an entity associated with the two respondent directors. The court stated at [2010] NSWSC 274 at [279]:". what [the respondent directors] did was, in effect, to take for themselves and their new company the benefit of AAV's resources (both in terms of its manpower and the facilities available to it, including its business premises which it occupied rent-free for a number of months), at least two-thirds (or more, depending on how the stock is viewed) of the company's plant, equipment and tangible assets; and the benefit of both its existing work and the business opportunities it had based on [a respondent director's] relationship with the clients, without the consent of at least Mrs Vadori. Consent from her, as a one-third shareholder, was simply not sought (and seems to have been regarded as unnecessary)". The court found at [2010] NSWSC 274 at [280] that "[this] conduct [was] in clear breach of [the respondent directors'] duties as directors (both under statute and by reason of their position as fiduciaries), and was oppressive in breach of s 232 of the Corporations Act". **(iii) Defendant's position not accepted** The court did not accept the defendant's position that AAV was effectively a "shell" at the time it was decided to divide its business. The court also did not accept that Vadori was estopped from denying the division of AAV's business and assets because one of the directors was acting as her agent, or because that director did not object to the division of the business and assets. **(iv) Compulsory purchase of Vadiori's share ordered** Ward J ordered compulsory purchase of Vadori's share in AAV as the remedy. The value of Vadiori's share in AAV was calculated on the basis of one-third of:the value of the business (less consideration already received for that third share); the stock of the business on hand at late 2006; the work of AAV taken over to the new company established by the two directors; and the likely profit of AAV for the 2007 year.  In valuing Vadiori's share, the court accepted the conclusions of a joint experts' report that the absence of a restraint covenant on the directors of AAV meant that any goodwill which may have been in the company was valueless by the end of 2006 (when it was decided by the directors to cease the operations of the company). **(v) Derivative action would have been available if oppression not found** Ward J also held that it would have been appropriate to grant leave to commence a derivative action against the respondent directors if her Honour had not found that the conduct of the affairs of AAV was oppressive and had her Honour not ordered compulsory purchase of Vadori's share. The issue of winding up AAV ultimately did not arise given the order to compel purchase of Vadori's share in AAV.etailed Contents**4.11 Director's hope that sale of assets will repay all debts not reasonable grounds to expect solvency**  (By Sharon Burnett, Clayton Utz) Commissioner of Taxation v Venkatesh Paditham [2010] FCA 334, Federal Court of Australia, Graham J, 8 April 2010 The full text of this judgment is available at: <http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/april/2010fca334.htm>or<http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp> **(a) Summary** In these proceedings the Commissioner of Taxation was successful in obtaining judgment against the defendant, Venkatesh Paditham, in his application seeking payment by Mr Paditham of $106,256.56 by way of indemnity under section 588FGA(2) of the [Corporations Act (Act)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  In answer to the Commissioner's application, Mr Paditham sought to establish the defence provided by section 588FGB(3) of the Act by demonstrating that, at all relevant times, he had an expectation that the company was solvent as he considered its value was greater than its debts and there was a prospect that a purchaser would be found. Mr Paditham also sought relief from liability under section 1318 of the Act.**(b) Facts** On 7 January 2008 the Commissioner of Taxation served a statutory demand upon Strategy New South Wales Pty Limited (In Liquidation), formerly known as Vensys Australia Pty Limited and Supora Australia Limited, (Vensys), claiming $80,028.45.  Vensys failed to comply with the statutory demand and proceedings to wind up Vensys were commenced by the Commissioner.  There were numerous adjournments of the proceedings.  Ultimately Vensys was not wound up by the court pursuant to the originating process filed by the Commissioner.  However, on 23 October 2008, Vensys appointed administrators to the company and on 4 February 2009, pursuant to a meeting of creditors, a resolution was passed that the company be wound up.   On 16 May 2008, 27 June 2008 and 15 October 2008 three separate payments were made by Vensys to the Commissioner of Taxation.  The liquidators applied to the court asserting that the payments made to the Commissioner were voidable as insolvent transactions under section 588FE(2) of the Act and on 25 August 2009 the court ordered the Commissioner of Taxation to pay to the liquidators the sum of $141,000 together with prejudgment interest of $4,171.85.  It was common ground in these proceedings that each of the payments was made when Vensys was insolvent.  The Commissioner of Taxation then commenced the subject proceedings by filing an interlocutory process seeking an order that Mr Paditham, as a director of Vensys, pay to the Commissioner an amount said to be payable by him under section 588FGA(2) of the Act.  Section 588FGA(2) of the Act applies if the Court makes an order under section 588FF against the Commissioner.  Section 588FGA(2) provides that "Each person who was a director of the company when the payment was made is liable to indemnify the Commissioner in respect of any loss or damage resulting from the order." Mr Paditham sought to defend the Commissioner's claim under section 588FGB(3) of the Act which provides that "It is a defence if it is proved that, at the payment time, the person had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if it made the payment".   The sole issue for determination was whether, as at 16 May 2008, 27 June 2008 and 15 October 2008, Mr Paditham had reasonable grounds to expect, and did expect, that Vensys was solvent at those times and would remain solvent even if it made the relevant payment to the Commissioner which it did make on the relevant day.  To establish this defence, Mr Paditham relied on his expectation that he had a valuable asset which was in demand at the relevant time and that could be sold, allowing the payment of all debts.  He also relied upon an expert report of one of the liquidators as to the solvency of Vensys and the numerous adjournments of the winding up proceedings noting that Emmett J had allowed the company to continue to trade having regard to the potential sale of the business.**(c) Decision** **(i) Defence under section 588FGB(3) of the Act** His Honour noted that an expectation of solvency within the meaning of section 588FGB(3) requires a "higher degree of certainty than mere hope or possibility or suspecting.  Rather the defence requires an actual expectation that the company was and would continue to be solvent, and that the grounds for so expecting are reasonable."   In considering the evidence put forward by Mr Paditham his Honour noted that Mr Paditham confused his perception of value, primarily in respect of the goodwill of the business, with solvency.  His Honour stated that in providing grounds for his expectations, Mr Paditham did not really address Vensys' current and other liabilities, or how or when the company proposed to meet those liabilities.   As noted by his Honour, Mr Paditham conceded that, as at 16 May 2008, Vensys' ability to pay its historical debts was dependent upon the business of Vensys being sold and, without a sale, the company was insolvent.  At that time, nobody had offered to pay any particular sum of money for Vensys.  Mr Paditham had only a mere hope of being able to organise the sale.   In relation to the solvency report of 18 June 2008 relied upon by Mr Paditham, his Honour noted that it relied on a number of assumptions including that an expressed offer to purchase Vensys would produce a result.  That offer was subject to numerous assumptions including the outcome of a due diligence.  No audited financial statements for the year ending 30 June 2009 were in existence.  In his Honour's opinion the expert report could not, under any circumstances, be construed as an expression of opinion that as at 18 June 2008 Vensys was solvent.  As his Honour noted, it was pregnant with "many ifs and buts and assumptions such that it could hardly be described as providing reasonable grounds for Mr Paditham to expect that the company was solvent at the material time".   In May 2008 Mr Paditham had advice from an accountant that the company should be placed into administration. Mr Paditham had stated that it was a pure business decision not to follow that advice and again relied on a "reasonable business value".  His Honour found that Mr Paditham had been conscious of Vensys' lack of working capital from at least April 2008 and that, although he had made extensive efforts to secure funds for the company which could be used to enable it to pay its debts, he had been unsuccessful in his endeavours.  His Honour found that Mr Paditham's view as to the value of Vensys' business was plainly unrealistic and he noted that he had disregarded the extensive advice he had received to place the company into administration.  The possibility that the company might be able to meet its debts was totally dependent on a purchaser being found for the business who was willing to pay a purchase price in excess of the amount of the company's debts.   His Honour found that at all relevant times Mr Paditham had nothing more than a hope that Vensys was and would remain solvent even if the relevant payments were made. Accordingly, his Honour found that Mr Paditham had failed to make good a defence under section 588FGB(3) of the Act.   **(ii) Relief provided by section 1318 of the Act** Late in the day, Mr Paditham also sought to rely on section 1318 of the Act.  That section provides that the Court may grant relief for company officers against the consequences in civil proceedings for negligence, default, breach of trust or breach of duty in circumstances where the officer has acted honestly and, having regard to all the circumstances of the case, the person ought fairly to be excused. His Honour determined that the proceedings brought by the Commissioner for Taxation did not answer the description of a civil proceeding for default as an officer.  Further, it did not seem to his Honour that, having regard to all of the circumstances of the case, Mr Paditham ought fairly be excused for any default on his part even if it were assumed that he had acted honestly and that his failure to indemnify the Commissioner constituted a default.   His Honour noted that the intended operation of section 1318 of the Act must be decided primarily by reference to its own terms and, in the case of a director, those of the provisions imposing a liability in relation to which it is sought to be applied.  His Honour stated that the statutory scheme in respect of voidable transactions contained in Division 2 of Part 5.7B of the Act was inconsistent with an intention to allow a court to exercise a broad discretionary power to grant relief to a director in circumstances where Division 2 has otherwise imposed liability, subject to its own regime of defences (referring to Baston JA in *Deputy Commissioner of Taxation v Dick* (2007) 242 ALR 152 and McDougall J in *Deputy Commissioner of Taxation v Keck* (2006) 63 ATR 310 at [144]).etailed Contents**4.12 Enforceability of bank guarantee delivered without authority**(By Sabrina Ng and Ellen White, Corrs Chambers Westgarth) Yu v Brownvalley Investments Pty Ltd [2010] NSWSC 253, Supreme Court of New South Wales, Brereton J, 1 April 2010 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/april/2010nswsc253.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/april/2010nswsc253.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 plaintiffs were partners of a firm who procured a bank guarantee from the Commonwealth Bank of Australia (CBA) at the request of the Nevada corporation Golden Harvests LLC (Golden Harvests).  The guarantee was delivered to Brownvalley Investments Pty Ltd (Brownvalley), who had agreed to invest $552,000 with Golden Harvests.  When Golden Harvests defaulted on this agreement, Brownvalley presented the bank guarantee for payment.  The plaintiffs attempted to negotiate with Brownvalley, and agreed to provide further bank guarantees to delay Brownvalley's enforcement of the original guarantee.  Eventually Brownvalley presented one of the guarantees for payment, and the plaintiffs sought perpetual injunctions restraining Brownvalley from calling on the guarantee, and restraining CBA from paying out the guarantee. The plaintiffs also sought damages from Golden Harvests, and an order pursuant to sections 1324(10), 1317H and/or 1317HA of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) that Golden Harvests reimburse the plaintiffs for amounts payable to CBA under the guarantee.  Brownvalley brought cross-claims against CBA for failure to honour the guarantee on demand, and against Golden Harvests for breach of contract. Justice Brereton found that as the delivery of the original guarantee to Brownvalley was not authorised, Brownvalley had acquired no legal title to the guarantee and could not enforce it.  However, his Honour found that the subsequent guarantees were enforceable as they had been provided in full knowledge that they would be delivered to and enforceable by Brownvalley.  In respect of the claim against Golden Harvests, Brereton J found that the plaintiffs were entitled to damages for breach of contract. In respect of the cross-claims, Brereton J refused to enter judgment against the CBA, but found that Brownvalley was entitled to recover from Golden Harvests for breach of contract. **(b) Facts** On 7 July 2007, the first defendant, Brownvalley, entered into a Memorandum of Understanding with Golden Harvests (First MOU), under which Brownvalley was to invest $460,000 with Golden Harvests secured by bank guarantee.  Golden Harvests was required to repay Brownvalley $540,000.  The parties later agreed to increase these amounts, such that Brownvalley would provide $552,000 and Golden Harvests would repay $648,000. The plaintiffs, along with the eighth defendant Bai Shan Li, are the registered partners of the NSW firm United Antler Corp (Antler).  Under the terms of a Memorandum of Understanding entered into on 16 July 2007 with Golden Harvests (Second MOU), Antler agreed to procure a bank guarantee in the amount of $500,000 in favour of Brownvalley, in return for which Golden Harvests was to pay Antler $80,000.  Golden Harvests was also required to return the guarantee to Antler within one month.  The bank guarantee was procured on 31 July 2007 (First Guarantee) by Antler from the CBA.  Antler was of the understanding that the guarantee was only for the purpose of evidencing financial capacity, and that Antler would retain the original guarantee so that it could not be called upon by Brownvalley. Luke Atkins was an authorised agent of Antler for the purpose of negotiating and arranging the First Guarantee.  Mr Atkins advised Antler that Brownvalley was not entitled to rely on the guarantee if Antler was in possession of the original guarantee.  He was therefore given express instructions to provide Golden Harvests with a colour copy of the First Guarantee, and return the original to Antler.  Despite this, the First Guarantee came to be delivered to Golden Harvests, who in turn provided it to Brownvalley.   On Golden Harvests' default under the First MOU, Brownvalley presented the First Guarantee to the CBA for payment.  After negotiations between the parties, Brownvalley withdrew its demand for repayment and a series of further bank guarantees were provided in substitution of the original guarantee.   The fifth guarantee provided by Antler on 4 June 2008 was in the amount of $550,000 and was to expire on 4 September 2008 (Fifth Guarantee).  Brownvalley demanded payment under the Fifth Guarantee on 3 September 2008, and the plaintiffs sought injunctions against Brownvalley and the CBA to prevent the parties from paying it out. **(c) Decision** The issue to be decided in this case was whether Brownvalley was entitled to enforce the guarantee despite its delivery not being authorised by Antler.  In deciding this, Brereton J was required to consider the effect of the unauthorised delivery of the First Guarantee to Brownvalley. **(i) Enforceability of first guarantee** Justice Brereton concluded that Antler had not authorised the delivery of the First Guarantee to Brownvalley.  His Honour rejected the argument that as agent for Antler, Mr Atkin had either actual or ostensible authority to deliver the original guarantee to either Golden Harvests or Brownvalley.  The applicable legal principle is that simply "arming" a party with a document of title, without more, does not authorise that party to deal with the document.  In this case, Mr Atkin was given mere possession of the guarantee, and the facts did not support a finding that he had been given ostensible authority to deal with it.  His Honour also rejected the argument that Golden Harvests had authority to deliver the guarantee to Brownvalley on behalf of Antler. After concluding that the delivery of the guarantee was unauthorised, Brereton J considered the effect of the unauthorised delivery on Brownvalley's position.  His Honour referred to principles that apply in circumstances where a third party receives delivery of money or negotiable instruments (such as cheques) from a party without good title. First, in respect of money, a third party who provides valuable consideration and receives money from an agent acting in excess of authority is entitled to retain that money if unaware of the excess of authority.  This is because in such circumstances the money is considered to have passed into currency.  Second, in respect of negotiable instruments, unauthorised delivery conveys good title provided that the third party is a bona fide purchaser for value and without notice. In applying these principles to the facts of the case, Brereton J found that a bank guarantee is not equivalent to either money, or a negotiable instrument.  Rather, his Honour considered that a bank guarantee is a promise to pay upon the satisfaction of certain conditions.  For this reason, even though Brownvalley was a bona fide purchaser for value and without notice, it could only acquire good title if the delivering party, being Golden Harvests, had good title.  On this basis, Brereton J found that Brownvalley had never acquired legal title to the First Guarantee and was not entitled to enforce it. **(ii) Enforceability of subsequent guarantees** Unlike the First Guarantee, the subsequent guarantees (including the Fifth Guarantee) were executed by Antler with the knowledge that they would be delivered to, and enforceable by Brownvalley.  The fact that Antler only procured the subsequent guarantees to delay exposure under the First Guarantee did not render them unenforceable.  For this reason, Brereton J held that there was no basis for restraining Brownvalley or the CBA from enforcing the Fifth Guarantee. **(iii) Claims against Golden Harvests** The plaintiffs' claim against Golden Harvests was for breach of Golden Harvests' obligations under the Second MOU to pay $80,000 to Antler, and to return the First Guarantee to Antler within the relevant time period.  Justice Brereton held that Golden Harvests was liable to reimburse the plaintiffs for the amount they became liable to CBA under the Fifth Guarantee, being $550,000, and also for the $80,000 owing under the Second MOU. **(iv) Cross-claims** In respect of Brownvalley's cross-claim against the CBA, Brereton J found that it was inappropriate to enter judgment.  In his view, the CBA had only failed to honour Brownvalley's demand for payment because it was restrained by court order.  His Honour concluded that CBA had always intended to pay on the guarantee and made no order against CBA. Brownvalley also brought a cross-claim against Golden Harvests, one of its directors, and its company secretary.  The director and secretary had signed a promissory note during negotiations in 2007 in the amount of $700,000 on behalf of Golden Harvests, in return for which Brownvalley had agreed not to call on the First Guarantee.  In respect of this cross-claim, Brereton J held that Brownvalley was entitled to judgment in the amount of $700,000 against each of Golden Harvests, the director, and the company secretary.  However as Brownvalley, Golden Harvests and the director had already settled their portion of the claim, Brownvalley was only entitled to recover from the company secretary.etailed Contents**4.13 Scheme to divert assets to another company - voidable transactions and directors' duties** (By Eliza Metherall and Tim Lee, Corrs Chambers Westgarth) Parker, in the matter of Purcom No 34 Pty Ltd (in liq) [2010] FCA 263, Federal Court of Australia, Gordon J, 24 March 2010 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/march/2010fca263.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/march/2010fca263.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** Purcom No 34 Pty Ltd (Purcom) and its liquidator Gregory John Parker (Parker) (the Plaintiffs) sought orders unravelling the purported sale of Purcom's stock and assets to Purcom No 34 Admin Pty Ltd (Admin).  The stock and assets were sold for a nominal price and the sale was part of a scheme to divert the assets and business undertaking of Purcom to Admin in an effort to avoid obligations that attached to Purcom. Justice Gordon found that the sale agreements were both susceptible to equitable intervention and voidable under Part 5.7B, Division 2 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act). The director of Purcom was held to have breached his directors' duties and fiduciary obligations, and the director of Admin was found liable for knowing receipt of property subject to fiduciary obligations. Both directors were found liable to pay equitable compensation. Her Honour postponed her decision as to the final form of relief to a later hearing.   Further claims against other defendants were settled prior to this decision and are not relevant to Justice Gordon's judgment. **(b) Facts** Tucker Senior was the sole director of Purcom, which operated a tyre retailing business. Purcom entered into a franchise agreement (for a term of ten years) with JAX Quickfit Franchising Systems Pty Ltd (JAX), which allowed Purcom to operate a JAX tyre retailing franchise only at a specified location (the Site). Purcom was also granted a territory around the Site within which it had the exclusive right to operate a JAX franchise. By August 2008 Tucker Senior had become dissatisfied with the franchise arrangement and wished to terminate the agreement. He did intend to continue operating a tyre retailing business at the Site, although the franchise agreement was subject to a restraint clause preventing Tucker Senior from operating a similar business within the franchise territory for 24 months after termination. In any event, Tucker Senior had no grounds for terminating the franchise agreement. Tucker Senior embarked on a plan to circumvent the franchise agreement. This plan involved Purcom selling the business, excluding the franchise rights, to Admin for a nominal price. Admin could then continue operating a tyre retailing business at the Site without the JAX franchise obligations, while Purcom would become a shelf company ostensibly consumed with the search for new premises to which it could relocate the franchise. Tucker Senior believed he could avoid the restraint clause by having Admin owned and operated by his son, Richard Tucker, who would hold his interest on trust for Tucker Senior. The sale was constituted by two separate contracts, one for stock and the other for equipment. Once JAX became aware of this arrangement it terminated the franchise agreement, issued a statutory demand for amounts owing under the agreement and moved to appoint a receiver to Purcom under a charge that Purcom had granted JAX over its property as part of the franchise agreement (the Charge). As the dispute escalated and Purcom had no assets or earning capacity and significant liabilities, JAX successfully applied to have a provisional liquidator (Parker) appointed to Purcom under section 472(2) of the Act (Purcom was eventually wound up). Parker and Purcom then brought a claim against the defendants seeking the unravelling of the sale and equitable relief. **(c) Decision** **(i) Tucker Senior** Justice Gordon found that Tucker Senior was in breach of both statutory and general law directors' duties. In discussing these duties her Honour relied on Justice Santow's opinion in *Re HIH Insurance Ltd (in prov liq)* and *HIH Casualty and General Insurance Ltd (in prov liq)*; *Australia Securities and Investments Commission v Adler* (2002) 168 FLR 253 (HIH). Her Honour began by considering Tucker Senior's duty under section 180 of the Act, which requires that a director act with the degree of care and diligence that a reasonable person in that position would exercise. It was found that Tucker Senior had breached the section as no reasonable person acting in his position would have participated in a plan that divested Purcom of its assets for a nominal price, stripped it of its entire earning capacity, rendered it insolvent and placed it in breach of its franchise agreement thus exposing Purcom to greater losses under the agreement and the Charge. Her Honour then considered Tucker Senior's liability under sections 181 and 182 of the Act. Section 181 requires that a director act in good faith towards the corporation, and section 182 forbids a director from improperly using their position to gain an advantage for themselves or cause detriment to the corporation. Her Honour found that Tucker Senior's actions were deliberate and calculated to benefit himself at the expense of Purcom, and thus for an improper purpose and without good faith.  Her Honour then turned to Tucker Senior's duties under the general law. Citing HIH she noted that the duties imposed by section 180 of the Act are largely replicated in the general law. Accordingly, on the basis of her findings in relation to section 180 Justice Gordon found Tucker Senior in breach of his fiduciary duties to Purcom and liable to pay equitable compensation to restore Purcom to its prior position and make good any loss. **(ii) Richard Tucker** Justice Gordon found that Richard Tucker was liable for knowingly participating in and assisting Tucker Senior's breaches of his duties (see above), and liable for knowing receipt of property (Purcom's assets) that was subject to fiduciary obligations. Her Honour found that Richard Tucker had actual knowledge of, or was at least wilfully blind to, the existence of the obligations and the fact that the property was transferred in breach of those obligations.  Richard Tucker was found liable to pay equitable compensation to restore Purcom to its prior position and make good any loss occasioned by his and Tucker Senior's wrongful conduct. In reaching her decision her Honour applied Justice Owen's test from *Bell Group Ltd (in Liq) v Westpac Banking Corporation (No 9)* (2009) 225 FLR 1 (Bell). Although she noted that Bell was concerned with the misapplication of trust property, her Honour found that the fiduciary relationship a director has with company property is analogous to a trustee's fiduciary obligations towards trust property for the purposes of knowing receipt. She did however exhort considerable caution when using the words 'trust' and 'trustee' in a director-company context, and recommended the case of *Visnic v Sywak* (2009) 257 ALR 517 as a guide to properly using the terms. **(iii) Admin** Her Honour considered whether Admin was liable for knowing receipt. She found that because Richard Tucker was Admin's 'directing mind and will', his knowledge and conduct could be imputed to Admin. After considering Justice Owen's comments in Bell regarding equitable relief, she concluded that equitable intervention was warranted, but left the nature of that intervention to a further hearing. **(iv) Voidable transactions** Justice Gordon then considered whether the sale agreements were voidable under Part 5.7B, Division 2 of the Corporations Act, which was applicable as Purcom was insolvent due to the scheme to avoid the franchise agreement. The Plaintiffs had submitted that the transactions were uncommercial transactions under section 588FB, insolvent transactions under section 588FC and director related transactions under section 588FDA. Her Honour found that the sale agreements were uncommercial because no reasonable person in Purcom's circumstances would have agreed to them. They were also insolvent transactions because Purcom became insolvent as a result of entering into them. Her Honour deemed it unnecessary to consider whether they were director related transactions. Her Honour found that the sale agreements were voidable under section 588FE, but postponed her consideration of what relief the court should grant under section 588FF to a later hearing.etailed Contents**4.14 SEC v Bank of America - US court reluctantly approves US$150m settlement with SEC**(By Jonathon Redwood, Barrister)Securities and Exchange Commission v Bank of America Corporation, United States District Court, Southern District of New York, Rakoff USDJ, 22 February 2010 The full text of this judgment is available at:[http://www1.nysd.uscourts.gov/cases/show.php?db=special&id=108](http://www1.nysd.uscourts.gov/cases/show.php?db=special&id=108" \t "_new) **(a) Introduction** On 22 February 2010, the US District Court reluctantly approved a settlement between Bank of America ("the Bank") and the SEC arising out the SEC's action against the Bank for the material nondisclosure of important information in connection with a shareholder vote on a merger with Merrill Lynch. Judge Rackoff was critical of the terms of the settlement but held that the law required him to give substantial deference to the SEC in approving the agreed settlement terms. He said he accepted the settlement despite its "very modest, compensatory, and remedial measures that are neither directed at the specific individuals responsible for the nondisclosures nor appear likely to have more than a very modest impact on corporate practices or victim compensation".  **(b) Background** The court had previously refused an earlier settlement proposal [see Corporate Law Bulletin No 145, September 2009]. The SEC had brought an action against Bank America for failure to disclosure material information to shareholders in the proxy statement sent to them on 3 November 2008 soliciting their approval of the merger with Merrill Lynch.  Specifically, it failed to disclose the Bank's agreement to allow Merrill to pay its executive and certain other employees $5.8 billion in bonuses at a time when Merrill was suffering huge losses and failed to disclose the scope of Merrill's "historically great" losses during the fourth quarter of 2008 (ultimately amounting to a net loss of US$15.3 billion, the largest quarterly loss in the firm's history). The SEC and the Bank took the position that the nondisclosures were the product of negligence on the part of the Bank, its relevant executives and inside and outside lawyers.  A parallel investigation by the Attorney General of the State of New York had concluded, however, that the Bank's executives had purposefully defrauded its shareholders. **(c) The terms of the proposed settlement** The proposed settlement comprised a fine of US$150m and the following prophylactic measures:the Bank's engagement, in consultation with the SEC, of an independent auditor to assess over the next three years whether the Bank's accounting controls and procedures are adequate to assure proper public disclosures; the Bank's engagement, in consultation with the SEC, of an independent disclosure counsel to report solely to the Bank's audit committee on the adequacy of the Bank's public disclosures over the next three years; the Bank's engagement of an outside compensation consultant to advise a fully independent compensation committee of the Bank's board as to the terms of executive compensation over the next three years; and the Bank's submission of executive compensation recommendations to the shareholders, for a nonbinding vote of approval or disapproval, over the next three years.  **(d) The court's decision** As a preliminary matter, the court concluded that the SEC's conclusion that the Bank and its officers acted negligently, rather than intentionally, in causing the nondisclosures that are the predicates to the settlement, was a reasonable conclusion and therefore proceeded to evaluate whether the proposed settlement was fair, reasonable, adequate and in the public interest on that basis.  As to the proposed remedial measures, the court had suggested two modifications to strengthen the effect of these prophylactic measures.First, the independent auditor and disclosure counsel not just be chosen in consultation with the SEC, but be fully acceptable to the SEC, with the court having the final say if the two sides could not agree on the selections. This change was accepted by the parties.Secondly, that the compensation consultant be chosen jointly by the compensation committee, the SEC and the court. The court's concern was that too many compensation consultants had a skewed focus on executive compensation and tend to favour large compensation packages and that the involvement of the court in the selection of the compensation consultant might provide "a modicum of objectivity in that selection". The Bank vigorously resisted this change and the court accepted that its proposed change was not sufficiently important as to constitute a reason for not approving the proposed settlement, particularly in light of the other requirement of a nonbinding vote on compensation.etailed Contents |

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