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| **Bulletin No. 124** Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by Lawlex on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson Waldron](http://www.bdw.com.au/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1. [Recent Corporate Law and Corporate Governance Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#h1)
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| EDITOR'S NOTE This is the final issue of the Bulletin for 2007. The next issue will be published in early 2008. I would like to take this opportunity to thank the supporters of the Bulletin - in particular, our sponsoring law firms listed above. I wish all of our readers an enjoyable holiday season. Professor Ian RamsayEditor[1. Recent Corporate Law and Corporate Governance Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1)[1.1 APRA releases Basel II prudential standards](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#h1.1) [1.2 APRA releases revised standards on governance](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#h1.2) [1.3 Changes to life insurance prudential standards](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.3) [1.4 SEC votes to allow exclusion of director nomination proposals by shareholders](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.4)[1.5 ASIC's priorities for 2007-2008](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.5) [1.6 CEO pay in the top 100 Australian companies](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.6) [1.7 Private equity guidelines for disclosure and transparency](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.7)[1.8 Guidelines for considering environmental, social and governance issues in investing](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.8) [1.9 Structure of UK boards](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.9)[1.10 Foreign issuers in the US permitted to use IFRS without reconciliation to US GAAP](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.10)[1.11 SEC votes to propose improvement of mutual fund disclosure](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.11)[1.12 Climate change strategies by ASX 200 companies](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.12)[1.13 House of Lords Select Committee publishes report on UK economic regulators](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.13)[1.14 IOSCO report on soft commission arrangements for collective investment schemes](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.14)[1.15 IOSCO report on private equity](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.15)[1.16 IOSCO report on the valuation of hedge fund portfolios](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.16)[1.17 Research report - Evaluating the shareholder primacy theory: evidence from a survey of Australian directors](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.17)[1.18 Research report - History of company law in colonial Australia](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007.htm#1.18)[2. 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| **1. Recent Corporate Law and Corporate Governance Developments**  |  | ext Section |

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| **1.1 APRA releases Basel II prudential standards** On 30 November 2007, the Australian Prudential Regulation Authority (APRA) released the suite of prudential standards that will give effect to the implementation of the new Basel II capital adequacy regime, known as the Basel II Framework, in Australia. The Basel II Framework is a major global reform of capital adequacy requirements for banking systems that seeks to harness into the regulatory process best practices in risk management. In Australia, all authorised deposit‑taking institutions (ADIs) - banks, building societies and credit unions - will be subject to the Framework. The Basel II prudential standards have been finalised after extensive industry consultation, dating back to 2005. This consultation process has aimed at ensuring that the adoption of the Basel II Framework in Australia maintains the integrity of APRA's prudential framework, is appropriately tailored to reflect local circumstances and takes into account practical implementation issues. The standards are accompanied by a response paper that addresses issues raised by industry on the final drafts of these standards. The vast majority of ADIs in Australia will adopt the Basel II standardised approaches. APRA will shortly announce those ADIs it has approved to use the Basel II advanced approaches as from 1 January 2008. The Basel II prudential standards will come into force on 1 January 2008.  The standards and response paper are available on the [APRA](http://www.apra.gov.au/ADI/Basel-II-implementation-in-Australia.cfm%22%20%5Ct%20%22_default) website. etailed Contents**1.2 APRA releases revised standards on governance** On 28 November 2007, the Australian Prudential Regulation Authority (APRA) released revised prudential standards on governance for authorised deposit-taking institutions (ADIs) and life insurers. The amendments to the prudential standards, which are minor in nature, were proposed in a discussion paper released by APRA in September this year. They follow recent changes to the Australian Securities Exchange (ASX) Corporate Governance Council's Corporate Governance Principles and Recommendations. The key amendments to the governance standards are that: * in addition to the principle of independence of directors set out in the standards, APRA has incorporated the "relationships affecting independent status" in the ASX Corporate Governance Council's Principles as circumstances that would preclude a director from being treated as independent on the Board of an ADI or life insurer; and
* a Board should give consideration to the length of service of directors as part of its Board renewal policy.

The ASX Corporate Governance Council's Principles advise Boards to consider the 'relationships affecting independent status' in determining the independence of a director. In APRA's approach, however, the 'relationships' represent a non-exhaustive list of circumstances that will not meet the principles of independence in the case of an APRA-regulated institution. This maintains APRA's approach of providing clarity about its expectations for the independence of directors. The revised standards will take effect from 1 January 2008. The revised Prudential Standard APS 510 Governance for ADIs is available on the [APRA](http://www.apra.gov.au/Policy/Prudential-Standards-Guidance-Notes-for-ADIs.cfm%22%20%5Ct%20%22_default) website and the revised Prudential Standard LPS510 Governance [here](http://www.apra.gov.au/Life/Prudential-Standards.cfm%22%20%5Ct%20%22_default).etailed Contents**1.3 Changes to life insurance prudential standards**  On 28 November 2007, the Australian Prudential Regulation Authority (APRA) released a package of new and amended prudential standards, including actuarial standards, for life companies (including friendly societies). The changes will come into effect on 1 January 2008. They result mainly from the Government's recent amendments to the [Life Insurance Act 1995 No. 4 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6638" \t "_default) ("Life Act") made under the [Financial Sector Legislation Amendment (Simplifying Regulation and Review) Act 2007 No. 154 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=98576" \t "_default) ("SRR Act"). In general, the new and amended prudential standards maintain the operation of APRA's prudential framework by reproducing sections from the Life Act that are better placed in prudential standards. The amended legislation also transfers responsibility for actuarial standards from the Life Insurance Actuarial Standards Board (LIASB) to APRA. These standards are being reissued as APRA prudential standards. Two new standards Prudential Standard LPS 230 Reinsurance (LPS 230) and Prudential Standard LPS 310 Audit and Actuarial (LPS 310) will ensure that key provisions relating to actuaries, auditors and reinsurance continue to operate. In particular: * LPS 230 will incorporate and replace prudential rules relating to the reporting of reinsurance arrangements (PR 23) and reinsurance contracts requiring approval (PR 24);
* under the new LPS 310, APRA will no longer approve auditors as this requirement was removed from the Life Act; and
* the criteria for the appointment of auditors and actuaries under LPS 310 will now be aligned with APRA's 'fit and proper' criteria.

By introducing these standards, APRA is also able to revoke two prudential standards for friendly societies relating to actuarial advice (PS1) and approved benefit fund requirements (PS2). These requirements have been incorporated into LPS 310. APRA is making minor changes to Prudential Standard LPS 510 Governance (LPS 510) and Prudential Standard LPS 520 Fit and Proper (LPS 520) to re-align references to the revised Life Act: * the revised LPS 510 is now consistent with the corresponding general insurance governance standard requiring, for example, that members of the Board Audit Committee be directors of the company and that the Board has an explicit Board renewal policy; and
* the revised LPS 520 requires that an Appointed Actuary be a Fellow or Accredited Member of the Institute of Actuaries of Australia.

The new amended and reissued prudential standards as well as a summary of the changes are available on the [APRA](http://www.apra.gov.au/Life/Prudential-Standards.cfm%22%20%5Ct%20%22_default) website. etailed Contents**1.4 SEC votes to allow exclusion of director nomination proposals by shareholders** On 28 November 2007, the US Securities and Exchange Commission (SEC) voted to adopt an amendment to Rule 14a-8(i)(8) under the Securities Exchange Act of 1934 to codify the Commission's longstanding interpretation of that rule.  Rule 14a-8 under the Exchange Act provides an opportunity for a shareholder owning a relatively small amount of a company's securities to submit a proposal for inclusion in a company's proxy materials, provided that the shareholder complies with certain procedural requirements and the proposal does not fall within one of thirteen substantive bases for exclusion. One of the thirteen substantive bases for exclusion, Rule 14a-8(i)(8), permits a company to omit from its proxy materials any proposal that "relates to an election for membership on the company's board of directors or analogous governing body".  The Commission voted to amend the language of the rule to read as follows: "If the proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election". This language was not revised from the proposal.The rule amendment will take effect 30 days after it is published in the Federal Register. The Commission's decision has been criticised by institutional investors. Further information is available on the [SEC](http://www.sec.gov/%22%20%5Ct%20%22_default) website.etailed Contents**1.5 ASIC's priorities for 2007-2008** On 26 November 2007, Tony D'Aloisio, Chairman of Australian Securities and Investments Commission (ASIC), spoke to the Australian Institute of Company Directors (AICD) about ASIC's priorities. In part of his speech, the Chairman spoke about issues of concern to AICD. Following is an extract from this part of his speech."The first of these, for the AICD, is in the area of continuous disclosure. There is a broad support that our system of continuous disclosure is the right model for Australia.  The concerns which have been raised are: * The infringement notice regime. With specific concern around the complexity and time consuming nature of the regime and that the regime does not achieve its legislative purpose.
* The particular operation of the continuous disclosure regime around takeovers - the application of the exemptions in Rule 3.1 of the ASX rules and companies being required to respond to market rumours.
* The operation of the continuous disclosure regime for companies operating in jurisdictions where a similar regime does not apply. Where there is business competition when it comes to needing to strike a partnership with a foreign company, there is a concern that foreign companies may chose to partner with non Australian companies not subject to the same disclosure rules. This is particularly relevant to our mining sector.
* An overlay to the concerns on continuous disclosure is the liability for damages to persons who traded when the market has not been fully informed. There are a number of class actions on foot claiming damages. Indeed ASIC, late in 2006 agreed to accept an enforceable undertaking with a commitment to compensate some buyers of Multiplex securities in the period the market was under informed.

The next issue which AICD has raised is to question the balance between corporate liability (i.e. relying on the corporate veil) and directors (individual) liability. The concern is that able and experienced women and men are shying away from the listed environment because of higher liability risks. It is argued that even if claims are not successful, the potential of reputation damage is too much risk to accept board positions.  From ASIC's perspective, we have run a series of court cases where we have said that it is in the public interest to pursue directors (i.e. individual liability). Examples are HIH where we were concerned that behaviour fell short of what the law expected. In OneTel, in the Greaves case, to ensure directors were across the company's financial position. In Water Wheel we wanted to send the message that insolvent trading would be treated seriously and directors would be held personally liable. We recognise, however, that it may be time for a stocktake in this area of personal liability - to assess this balance between ensuring our boards take risks (so that our economy keeps growing) with protection of shareholders and creditors and consumers where individual liability may be appropriate. A third issue is the shareholder primacy rule (i.e. directors must act in the best interests of shareholders). There is increasing pressure for Boards to examine what's in the best interests of shareholders in the context of employees and other stakeholders. Issues such as climate change are increasing pressure on boards.  Another issue is the area of conflicts of interest in management buyouts - cases such as Qantas and Alinta have provoked a lot of discussion in the past 18 months. Essentially conflicts of interest remain an area for Boards. The guidelines provided by the Takeovers Panel will assist Boards. What is pleasing here is that Boards and the market are sorting out the issues through the use of protocols. For the present, ASIC will monitor the situation and does not see the need to become actively involved."  The speech is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/AICD_speech_nov_07.pdf/%24file/AICD_speech_nov_07.pdf%22%20%5Ct%20%22_default) website.   etailed Contents**1.6 CEO pay in the top 100 Australian companies** ISS Governance Services was commissioned by the Australian Council of Super Investors (ACSI) to conduct an empirical analysis of CEO pay in the Top 100 listed Australian companies for the 2006 financial year. The study was published on 20 November 2007.  In several areas, the study revisits issues researched for ACSI for the 2001 to 2005 financial years. Comparative statistics are provided. For the 74 CEOs included in the survey, average total pay was $4.56 million, up substantially from $3.77 million in 2005 and $3.09 million in 2004. Median Top 100 CEO pay also increased, from $3.07 million in 2004 and $3.09 million in 2005 to $3.27 million in 2006. Average annual fixed remuneration for a Top 100 company CEO increased again between 2005 and 2006, from $1.53 million to $1.80 million, or 17.1%.  The average short term incentive (STI) received by a Top 100 company CEO also increased between 2005 and 2006, from $1.36 million to $1.66 million, or by 21.4% (conditional on an STI being received). This followed a 5.5% average increase between 2004 and 2005 and a 17.3% average increase between 2003 and 2004. The median STI (of those CEOs who received an STI payment), on the other hand, remained relatively constant in 2006, actually decreasing by 0.5%, or from $1 million to $995,000. However, this followed a sharp increase in the median between 2004 and 2005 of 11.1%.  The nature of the longitudinal study assesses the remuneration of CEOs of the Top 100 companies, rather than the year-on-year changes of individuals' remuneration. On a company-by-company comparison, of the 59 companies included in both the 2005 and 2006 longitudinal studies, 52 saw the fixed remuneration of their CEO increase, only five saw Australian dollar fixed remuneration for the CEO decrease (in two cases this was due to the appreciation of the Australian dollar between 2005 and 2006 decreasing the Australian dollar value of CEO pay in US dollars) and two CEOs had the same level of fixed remuneration. A similar pattern is discernable in STI payments - 41 of the 59 CEOs included in the 2005 and 2006 studies received a higher STI in 2006 compared with 2005, 17 received a lower STI and one had no change in their STI.  This suggests that the rises in fixed remuneration and STI would in fact have been higher but for the addition of new companies to the sample, usually at the lower end of the S&P/ASX 100 (companies with overall lower levels of remuneration), although it is also these smaller companies that are most likely to drop out of the Top 100 year-to-year.  There was relatively little change in the Top 10 highest paid CEOs in 2006 compared with 2005. Of the 10 CEOs in the 2005 Top 10 (all of whom were still Top 100 company CEOs in 2006), seven were again part of the Top 10 most highly paid.  The other three CEOs from the 2005 study were ranked 11th, 14th and 17th in the 2006 study based on total remuneration. Of the Top 10 CEOs in the 2005 survey, eight saw their remuneration in 2006 increase by amounts ranging between 1.5% and 37.4%. Of the two CEOs whose overall pay fell between 2005 and 2006, the fall was due to one-off events: The paying out of retirement benefits in the prior year and a negative accounting value for long term incentives. These two 2005 Top 10 CEOs who saw their remuneration decrease experienced falls of 12.9% and 35.4%.  To be part of the Top 10 CEOs in 2005, a CEO had to receive $6.49 million or more; in 2006 the threshold for entry increased to $8.41 million. The total remuneration of the highest-paid CEO of a Top 100 company rose between 2005 and 2006, from $18.55 million to $21.21 million (Macquarie's Allan Moss).   etailed Contents**1.7 Private equity guidelines for disclosure and transparency** On 20 November 2007, the UK Guidelines for Disclosure and Transparency in Private Equity were published by the Walker Working Group. The Guidelines, which are voluntary, operate on a comply or explain basis. They set out new disclosure standards for private equity firms and their portfolio companies (as defined in the Guidelines). The report also contains recommendations for the British Venture Capital Association (BVCA) to adopt. The report provides information on the background and context of private equity and summarises responses received to the Working Group's earlier consultation paper. **(a) Recommendations for portfolio companies** Under the Guidelines, portfolio companies are UK companies acquired by one or more private equity firms where certain size thresholds and employee numbers are met. A portfolio company:(i) should publish its annual report and accounts on its website within six months of the year-end and include: * the identity of the private equity fund or funds that own the company, the senior managers or advisers who have oversight of the fund or funds, and detail on the composition of its board;
* a business review that substantially conforms to the provisions of section 417 of the Companies Act 2006, including sub-section 5 that otherwise applies only to quoted companies, calling for an indication of main trends and factors likely to affect the future development, performance and position of the company's business and to include information on the company's employees, environmental matters and social and community issues; and
* a financial review to cover risk management objectives and policies in the light of the principal financial risks and uncertainties facing the company, including those relating to leverage.

(ii) should: * publish a summary mid-year update no later than 3 months after mid-year giving a brief account of major developments in the company; and
* provide data to the BVCA in support of its enlarged role in the gathering and aggregation of data and associated economic impact analysis.

**(b) Recommendations for private equity firms** (i) A private equity firm should publish either in the form of an annual review or through regular updating of its website: * a description of its own structure and investment approach and of the UK companies in its portfolio, an indication of the leadership of the firm in the UK and confirmation that arrangements are in place to deal with conflicts of interest;
* a commitment to conform to the guidelines on a comply or explain basis; and
* a categorisation of its limited partners by geography and by type.

(ii) Private equity firms should, in their reporting to limited partners, follow established guidelines, such as those published by EVCA, commit to follow established guidelines in the valuation of their assets; and should provide data to the BVCA in support of its enlarged role in data gathering and economic impact analysis, in part as the means of appropriately attributing private equity returns on an industry-wide basis respectively to financial structuring, market movements and operational improvement. (iii) In particular at a time of strategic change, a private equity firm should ensure timely and effective communication with employees, either directly or through its portfolio company, as soon as confidentiality constraints are no longer applicable.**(c) Recommendations for initiative by the industry association**(i) The BVCA should strengthen its capability in particular: * to represent more effectively the larger buyout end of private equity;
* to undertake rigorous evidence-based analysis of the economic impact of private equity activity so that it becomes the recognised authoritative source of intelligence and analysis and a centre of excellence for the industry; and
* to engage proactively with private equity-like entities to promote their commitment to the guidelines, and with other private equity and professional groups to develop improved standards for fund performance measurement.

(ii) The BVCA should establish an independent guideline review and monitoring group with a majority of independent members under the leadership of an independent chairman to keep the guidelines under review and to monitor ongoing conformity with them by private equity firms and portfolio companies.The final report is available at: [http://walkerworkinggroup.com/sites/10051/files/wwg\_report\_final.pdf](http://walkerworkinggroup.com/sites/10051/files/wwg_report_final.pdf%22%20%5Ct%20%22_default)  etailed Contents**1.8 Guidelines for considering environmental, social and governance issues in investing**  On 19 November 2007, the Australian Council of Superannuation Investors (ACSI) launched new guidelines to help superannuation funds consider environmental, social and corporate governance (ESG) issues in investing.  The Guidelines contain: * Suggestions for funds on how to incorporate ESG issues into investment processes and to facilitate the broader and deeper consideration of ESG issues across the investment industry.
* Suggestions for fund managers and asset consultants to assist with the consideration of ESG issues, and outline the expectations that superannuation funds may have of their service providers in the future.
* Broad expectations and suggestions for listed companies.
* A brief discussion of some of the key challenges in moving from ideas to action in this area.

The Guidelines also include: * Draft policy clauses to help ACSI members formulate their own policies on ESG issues.
* A list of questions ACSI members can ask their fund managers about ESG issues.
* Draft clauses that could be incorporated into investment management agreements or mandates in the future.

ACSI anticipates that the Guidelines will provide a catalyst for ACSI members to discuss with their fund managers, other service providers and investee companies how all parts of the investment chain can meaningfully consider ESG risks and opportunities in investment decision-making.   The guidelines are available on the [ACSI](http://www.acsi.org.au/documents/ACSI%20ES%20Guidelines%202007%20final%20version%20for%20web1.pdf%22%20%5Ct%20%22_default) website. etailed Contents**1.9 Structure of UK boards** FTSE 350 companies are increasingly complying with the provisions of the Combined Code; however, a significant number still fail to meet the recommended 50:50 boardroom ratio of executive to non-executive directors, according to research published by Deloitte on 19 November 2007. Independent directors make up less than half of the board at more than one in ten (11%) FTSE 100 companies and almost one third (29%) of FTSE 250 organisations. Change to the composition of boards has slowed and the number of non-executive directors appears to have stabilised, after five years of rapid growth following the Higgs Review. The composition of the board has changed at 59% of FTSE 350 companies in the past 12 months, compared to 68% in the previous year and 76% in the year before that. The increased responsibilities of non-executive directors has had a significant effect on fee levels which continue to increase at a higher rate than has historically been usual for these positions and are currently slightly higher than increases in executive salaries. Total fees in the past year grew by 7.3% compared to 7.1% last year. One emerging trend is the growing degree of structure around how the fees are determined. Typically, there will be a basic fee and then additional fees for the chairmanship of committees or the senior independent director role. The chairmanship of the audit committee tends to carry the highest additional fee, £15,000 in a FTSE 100 company and £7,000 in a FTSE 250 company. The chairman of the remuneration committee may get additional fees of £10,000 and £6,000 in FTSE 100 and 250 organisations respectively. Other key findings: * The median basic fee for a non-executive director in a FTSE 100 company is £52,750 compared with £38,250 in a FTSE 250 company.
* Typical fees for a non-executive chairman will be between 35% and 50% of the salary of the top full time executive in FTSE 100 companies and between 25% and 35% in FTSE 250 companies. This has not changed since last year.
* The appointed senior independent director is likely to receive an additional £10,000 in a FTSE 100 company, but only £5,000 in a FTSE 250 company.
* Deloitte's Board Structure report is based on information from the latest report and accounts of companies in the FTSE 350 as at 30 June 2007, excluding 36 investment trusts. The data is taken from annual reports and accounts published before this date which includes companies with financial year ends up to and including 28 February 2007. A total of 314 companies are included in the analyses.

etailed Contents**1.10 Foreign issuers in the US permitted to use IFRS without reconciliation to US GAAP** On 15 November 2007, the US Securities and Exchange Commission (SEC) voted unanimously to help US investors better analyze and get more readily comparable financial information from the US registered foreign companies in which they invest. The Commission's action responds to the record number of US investors who own the securities of foreign companies, and the growing need for high-quality accounting standards that transcend borders. Having considered extensive and informative public comment on its June 2007 proposal, the Commission approved rule amendments under which financial statements from foreign private issuers in the US will be accepted without reconciliation to US Generally Accepted Accounting Principles only if they are prepared using International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board. The purpose of the requirement to use the IASB-approved version is to encourage the development of IFRS as a uniform global standard, not a divergent set of standards applied differently in every nation. Consistency of application of IFRS will help U.S. investors who own foreign securities to have better comparability. The number of Americans who own foreign securities has risen significantly in recent years. Two-thirds of American investors own securities of foreign companies. That is a 30 percent increase in the past five years. The vast majority of US investors own securities of companies that report their financial information using IFRS. IFRS is mandatory in Europe and in several other countries, and its use is mandated or permitted in over 100 nations around the world. Chairman Cox also announced that the SEC will convene two roundtables, on 13 December and 17 December, to collect more feedback from the public on the issue of giving US domestic issuers the same option that foreign issuers have in our markets to use either IFRS or US GAAP. In addition to improving the consistency and comparability of financial reporting for US investors who own foreign securities, the Commission's rule amendments will also facilitate cross-border capital formation and increase investment opportunities available to US investors. The rule amendments will take effect 60 days after they are published in the Federal Register and apply to financial statements covering years ended after 15 November 2007.Further information is available on the [SEC](http://www.sec.gov/%22%20%5Ct%20%22_default) website.  etailed Contents**1.11 SEC votes to propose improvement of mutual fund disclosure** On 15 November 2007, the US Securities and Exchange Commission (SEC) voted unanimously to propose rule changes that are intended to improve mutual fund disclosure. The proposed rules would require that all mutual fund investors receive a clear, concise summary of key information needed to make an informed investment decision. The rule changes would also encourage funds to harness the power of the Internet to allow investors to choose the format in which they receive more detailed information and to provide that information in a more user-friendly format than is available today. The proposed rules are intended to enable investors to use and compare mutual fund information more effectively.The proposed rules to be published for comment include the following: * **Summary information at the front of the prospectus.** The proposal would amend Form N-1A, the form used by mutual funds to register under the Investment Company Act of 1940 and to offer securities under the Securities Act of 1933, by requiring every mutual fund to include key information in plain English in a standardized order at the front of the mutual fund statutory prospectus. Like the risk/return summary that is currently included at the front of every mutual fund prospectus, this summary would include a fund's investment objectives and strategies, risks, and costs. It also would include brief information regarding top ten portfolio holdings, investment advisers and portfolio managers, purchase and sale procedures and tax consequences, and financial intermediary compensation. The proposed amendments would require that the summary information be presented separately for each fund covered by a multiple fund prospectus. This requirement is intended to assist investors in finding important information regarding the particular fund in which they are interested.
* **New prospectus delivery option for mutual fund securities.** The proposed rule would permit a person to satisfy its mutual fund prospectus delivery obligations under the securities laws by sending or giving key information to investors in the form of a "summary prospectus" and providing the summary prospectus, statutory prospectus, shareholder reports, and other information on an Internet Web site in a format that enhances investors' ability to effectively use the more detailed information in those documents. In addition, the statutory prospectus and other information would be provided in paper to any investor who prefers to review more detailed information in that format. The summary prospectus would contain the same information in the same order as the required summary at the front of the statutory prospectus.The proposed rule would require that the Internet version of the summary prospectus and statutory prospectus be presented in a user-friendly format that permits investors, financial intermediaries, analysts, and other users to move readily back and forth between related information in the summary prospectus and the statutory prospectus. This is intended to allow investors and others to efficiently access the particular information in which they are interested. The proposed rule would also require that persons accessing the Internet information be able to permanently retain an electronic version of the summary prospectus, statutory prospectus, and other information. The proposal is intended to take advantage of technological developments and the expanded use of the Internet in order to provide investors with information that is easier to use and more readily accessible, while retaining the comprehensive quality of the information that is available to investors.

Further information is available on the [SEC](http://www.sec.gov/%22%20%5Ct%20%22_default) website.  etailed Contents**1.12 Climate change strategies by ASX 200 companies** On 15 November 2007, investment research and ratings firm, RepuTex, published a study of climate change strategies by the Australian Securities Exchange top 200 companies.  The research shows: * Only 20 per cent of Australia's top 200 companies are positioned to manage climate change risk.
* A direct correlation between a company's level of preparedness and its financial performance on the stock market.

In its paper, "Identifying carbon value: The carbon responsiveness of ASX 200 Stocks," RepuTex analyses the impact of macro economic factors such as regulatory and physical risk, along with each company's management response through effective strategy, such as energy efficiency and technology adoption. RepuTex's Carbon Valuation Model values companies on a scale from -1 (low) to +1(high). In its evaluation of the ASX 200, RepuTex's research shows that Australian companies are unprepared overall, with the market average valuation standing at negative 0.08. A positive rating indicates that a company has the risk management strategies in place to respond to carbon risks, and is positioned to deliver value to shareholders.The research shows that companies that receive a positive valuation have outperformed ASX benchmarks. For example, the RepuTex Climate Change Growth Index, consisting of positively valued stocks, has outperformed the S&P/ASX 300 Index by 11.37 per cent over the last three years ending 12 November 2007 (total returns), and 11.96 per cent year to date.Further information is available on the [Reputex](http://www.reputex.com.au/%22%20%5Ct%20%22_default) website.etailed Contents**1.13 House of Lords Select Committee publishes report on UK economic regulators** On 14 November 2007, the House of Lords Select Committee on regulators published its report on economic regulators in the UK. The report focuses on the economic regulatory work of major UK economic regulators, including the Financial Services Authority, the Pensions Regulator, the Competition Commission, and the Office of Fair Trading. In the report the Committee considers the statutory remit of such regulators, their working methods and effectiveness, working relationships and the value for money they provide. The report is available on the [UK Parliamentary](http://www.publications.parliament.uk/pa/ld200607/ldselect/ldrgltrs/189/189i.pdf%22%20%5Ct%20%22_default) website.  etailed Contents**1.14 IOSCO report on soft commission arrangements for collective investment schemes** In November 2007, the International Organization of Securities Commissions (IOSCO) published its final report on soft commission arrangements for collective investment schemes. The report contains the responses of IOSCO members to an earlier consultation paper and deals with issues such as: * The definition of soft commissions
* The benefits from soft commission arrangements
* Conflicts of interest in soft commission arrangements
* Regulatory responses to soft commission arrangements.

It is stated in the report that IOSCO may, if necessary, seek to develop general principles concerning soft commission arrangements. However, at this time, the development of general principles regarding soft commission arrangements would not be appropriate because the relevant law in many jurisdictions is changing. IOSCO will monitor those changes over the next two years and will determine whether and how general principles may be developed, especially in the areas of the limitation of the goods and services that can be acquired under soft commission arrangements, and prior and periodic disclosure of soft commission arrangements.  The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD255.pdf%22%20%5Ct%20%22_default) website.  etailed Contents**1.15 IOSCO report on private equity** In November 2007, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a consultation report on private equity.  In its 2007 work program, the IOSCO Technical Committee mandated a Task Force on private equity to conduct a preliminary review of private equity markets with a view to identifying any suitable issues which could be addressed through future IOSCO work. The Task Force approached this by identifying a set of issues which private equity markets may pose to capital markets; analysing which of these issues may be pertinent to IOSCO's stated objectives and principles; and forming recommendations for the Technical Committee as to what further work might be considered within the IOSCO and international regulatory framework. This analysis has identified seven specific issues relating to private equity markets that have been raised as potential risks to financial markets, of which six are relevant to IOSCO's objectives. The seven issues are: * Increasing leverage
* Market abuse
* Conflicts of interest
* Transparency
* Overall market efficiency
* Diverse ownership of economic exposure
* Market access.

These issues are outlined in detail in the main section of the report. The Technical Committee has agreed to pursue the following two pieces of work in future work programs. First, a survey of the complexity and leverage of capital structures employed in leveraged buyout transactions across relevant IOSCO jurisdictions. This would allow assessment of the potential impact that the default of large private equity portfolio companies could have on the efficient operation of related public debt securities markets and any systemic issues which may arise as a result.  Second, analysis of conflicts of interest which arise during the course of private equity business and the controls utilised across relevant IOSCO member states which aim to provide appropriate levels of investor protection. Key areas of focus will be public-to-private transactions and the listing (or subsequent re-listing) of private equity portfolio companies. These situations potentially have a heightened impact on public securities markets and investors. This work will incorporate both private equity firms and market intermediaries and will focus on identifying conflicts which are present, or are unique, within the context of private equity transactions as they relate to public markets.  The consultation report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD254.pdf%22%20%5Ct%20%22_default) website   etailed Contents**1.16 IOSCO report on the valuation of hedge fund portfolios** In November 2007, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published its final report on the valuation of hedge fund portfolios.  The paper is focused on principles for valuing the investment portfolios of hedge funds and the challenges that arise when valuing illiquid or complex financial instruments. The principles are designed to mitigate the structural and operational conflicts of interest that may arise between the interests of the hedge fund manager and the interests of the hedge fund. Hedge funds may use significant leverage in their investment strategies, the impact of which increases the importance of establishing appropriate valuations of a hedge fund's financial instruments. The chief aim of the principles is to seek to ensure that the hedge fund's financial instruments are appropriately valued and, in particular, that these values are not distorted to the disadvantage of fund investors. The paper identifies the implementation of comprehensive policies and procedures for valuation of hedge fund portfolios as a central principle. It recommends general principles that should guide the hedge fund's governing body and its manager in developing and implementing such policies and procedures. The paper also emphasizes that these policies and procedures should be consistently applied. In addition, it stresses the goals of independent oversight in the establishment and application of the policies and procedures in order to mitigate the conflicts of interest that managers face. IOSCO believes that investors will ultimately benefit if hedge funds follow these principles. Within the paper 'policies' refer to the high level valuation policies and 'procedures' refers to the pricing procedures which outline the detailed processes by which prices are obtained for valuing the financial instruments of an investment portfolio. The principles apply to all hedge fund structures, but IOSCO recognizes that hedge funds are varied in their size, structures and operations. The governing body of each hedge fund should take into consideration the nature of the fund's structure and operations when seeking to apply the principles. The goal of the principles is to promote, among other things, the consistent application of a set of valuation policies and procedures in the valuation of a hedge fund portfolio, and independence in, and transparency of, this valuation process. The principles are applicable across a wide range of jurisdictions as well as a number of different hedge fund and service provider structures and in all cases are relevant to the interests of investors. The report discusses the drivers of IOSCO's focus on hedge fund portfolio valuation. These drivers are: * The increasing importance of hedge funds to global capital markets
* The complexity of some hedge fund portfolio strategies and their underlying instruments
* The central role of financial instrument valuations to hedge funds
* Conflicts of interest can exacerbate valuation difficulties.

The nine IOSCO principles for the valuation of hedge fund portfolios are: * Comprehensive, documented policies and procedures should be established for the valuation of financial instruments held or employed by a hedge fund.
* The policies should identify the methodologies that will be used for valuing each type of financial instrument held or employed by the hedge fund.
* The financial instruments held or employed by hedge funds should be consistently valued according to the policies and procedures.
* The policies and procedures should be reviewed periodically to seek to ensure their continued appropriateness.
* The governing body should seek to ensure that an appropriately high level of independence is brought to bear in the application of the policies and procedures and whenever they are reviewed.
* The policies and procedures should seek to ensure that an appropriate level of independent review is undertaken of each individual valuation and in particular of any valuation that is influenced by the manager.
* The policies and procedures should describe the process for handling and documenting price overrides, including the review of price overrides by an independent party.
* The governing body should conduct initial and periodic due diligence on third parties that are appointed to perform valuation services.
* The arrangements in place for the valuation of the hedge fund's investment portfolio should be transparent to investors.

The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD253.pdf%22%20%5Ct%20%22_default) website.   etailed Contents**1.17 Research report - Evaluating the shareholder primacy theory: evidence from a survey of Australian directors** The Centre for Corporate Law and Securities Regulation at the University of Melbourne has published a new research report titled "Evaluating the shareholder primacy theory: evidence from a survey of Australian directors". An important debate in corporate governance concerns the validity of the shareholder primacy theory - a theory which depicts the role of company directors as primarily being to act in the interests of shareholders and maximise the wealth of shareholders.  This study reports the results of a survey of company directors that had, among its objectives, testing the validity of the shareholder primacy theory.The authors present the survey findings on four questions: 1. whether directors prioritise the interests of shareholders above the interests of employees and other stakeholders;
2. whether, if that is the case, the source of that prioritisation lies in legal obligation or duty;
3. whether directors in types of companies corresponding to the market/outsider model are more inclined to prioritise shareholder interests (the authors test two models derived from the work of others - the market/outsider model and the insider/relational model where the market/outsider model is based upon indicators such as the company being listed and higher levels of shareholdings by institutional investors); and
4. whether the prioritisation of shareholder interests tends to come at the expense of employees.

The key conclusions of the authors include: * The shareholder primacy view of directors' priorities has considerable cogency but the results of the survey indicate that this cannot be reduced to a simple proposition that directors will necessarily pursue shareholders' interests at the expense of other stakeholders. There is very little evidence, for example, that directors see short term returns to shareholders through share price or other short term gains as a priority. Clearly, though, shareholders are seen as important and, probably, the most important, of stakeholders.
* How this prioritisation plays out in directors' minds, however, is far from clear cut. It evidently does not follow that other stakeholders are not prioritised or that their interests are not attended to or seen as legitimate. Other evidence derived from the survey results indicates that employees, for example, are also ranked highly in these respects and sometimes ranked more highly than shareholders.
* Whatever the normative strength of the shareholder primacy view, shareholder primacy is not derived from a legal obligation on the part of directors, nor is it derived from a view by directors that they are under an obligation to pursue such a policy. Directors indicate that they are legally free to pursue any strategy which they feel will benefit all stakeholders.

The report is available on the [SSRN](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1031301" \t "_default) website or on the [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/go/news/index.cfm%22%20%5Ct%20%22_default) website.  etailed Contents**1.18 Research report - History of company law in colonial Australia**  The history of Australian company law has attracted little attention, perhaps because it has been mainly seen as a copy of English law with few if any important features worthy of note. This paper seeks to point out several interesting and significant aspects of the evolution of Australian company law and to consider this evolution in the context of the economic development of colonial Australia. Australian company law represents an example of the transplant of English law. This raises the question whether this transplant of law was successful. The central contention of this paper is that the evolution of company law in colonial Australia was innovative and responsive to the economic needs of the society and, in particular, it was instrumental in financing the development of the mining industry which played an important role in the economic success of colonial Australia. This paper is by Phillip Lipton of Monash University and is available on the [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/go/centre-activities/research/research-reports-and-research-papers/index.cfm%22%20%5Ct%20%22_default) website.etailed Contents |

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

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| **2.1 ASIC releases guidance on compensation and insurance arrangements for AFS licensees**On 27 November 2007, the Australian Securities and Investments Commission (ASIC) released a new regulatory guide, "Regulatory Guide 126: Compensation and insurance arrangements for AFS licensees" (RG 126). RG 126 outlines ASIC's policy for administering the new compensation and professional indemnity (PI) insurance requirements for Australian financial services (AFS) licensees who provide financial services to retail clients. These requirements are set out in the Corporations Act. The compensation and PI insurance requirements aim to reduce the risk a licensee might not have sufficient financial resources to compensate retail clients for losses they suffer as a result of a licensee breaching the law.Requiring licensees to have PI insurance cover will improve the current level of consumer protection, but will be limited by what insurance is currently available in the insurance market. ASIC has adopted a two-stage approach to administering the new rules to take this into account. Over time, ASIC aims to raise the standard of available PI to make sure it delivers effectively.ASIC will initially require licensees to have PI insurance based on what is commercially available in the market now, but has also set minimum standards to deliver some practical results for consumers. It will be enough for licensees to meet these minimum standards for two years after the requirements commence.At the end of the two-year implementation period, ASIC expects licensees to have a higher standard of PI insurance. It will work with industry to encourage the development of products or solutions that achieve this higher standard during the implementation period. ASIC is of the view that a staged approach of this kind is the best way to work towards a high standard of PI insurance cover in the industry and in the meantime provide consumers with a minimum standard of insurance protection.RG 126 follows "Consultation Paper 87: Compensation and insurance arrangements for AFS licensees" released on 23 July 2007. ASIC also undertook further consultation with insurer representatives and industry to develop a clear picture of what PI insurance is currently available. ASIC took this information into account in formulating the regulatory guide.Accompanying the regulatory guide are: * an outline of key issues raised in the submissions, together with ASIC's response to these issues; and
* a Regulation Impact Statement, discussing the costs and benefits of the various alternative options ASIC considered for administering the requirements.

The regulatory guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg126.pdf/%24file/rg126.pdf%22%20%5Ct%20%22_default) website.etailed Contents**2.2 ASIC updates its policy on training for financial product advisers**On 21 November 2007, the Australian Securities and Investments Commission (ASIC) released an updated version of "Regulatory Guide 146: Licensing: Training of financial product advisers" (RG 146). RG 146 sets out the minimum training standards for financial product advisers and explains how advisers can meet these training standards. The revisions to RG 146 follow a review ASIC carried out to deal with issues raised by industry stakeholders and reflected in the Corporate and Financial Services Regulation Review - Proposals Paper released by the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, in November 2006.The main issues raised were: * training standards may at times not be appropriate for services provided; and
* RG 146 may not adequately recognise prior study and training.

ASIC's review addressed these issues, but did not involve a broad review of the basic policy in RG 146. It also looked at concerns about the currency of courses on the ASIC Training Register and mechanisms to review the quality of courses on the ASIC Training Register.As part of the review, ASIC held detailed discussions with key industry stakeholders, and consulted formally through "Consultation Paper 88: Reviewing and updating RG 146: Training of financial product advisers".ASIC has decided to: * amend RG 146 to facilitate more tailored and flexible training requirements for some products that are relatively straightforward and do not involve an investment component (Tier 2 products);
* maintain the current requirements that advisers be trained across the range of products within existing specialist knowledge categories;
* maintain the existing policy on the recognition of prior study and training;
* amend RG 146 to clarify ASIC's capacity to deal with non-compliant courses;
* improve the currency of the information on the ASIC Training Register by requiring course providers to periodically re-register courses; and
* clarify some aspects of ASIC's policy and re-write it in the new regulatory guide format.

ASIC has also commenced work on changes to improve the functionality of the ASIC Training Register by: * improving the search function;
* updating the layout of the information on the Register; and
* transferring courses no longer provided to a separate section of the Register.

The regulatory guide is available at the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg146.pdf/%24file/rg146.pdf%22%20%5Ct%20%22_default).etailed Contents**2.3 ASIC report on reverse mortgages** On 21 November 2007, the Australian Securities and Investments Commission (ASIC) released a report capturing the experiences of home-owners with a reverse mortgage. A reverse mortgage is a loan where the consumer borrows money against the equity in their home. The loan and interest is not repaid until the home is sold.The report, "All we have is this house" (REP 109) reveals that while the borrowers interviewed were generally satisfied with the reverse mortgages they had taken out, several factors inhibited 'good consumer decision-making'. The report identified several factors that have the potential to hinder informed decisions and increase the risk of future problems, including: * a lack of familiarity with reverse mortgages;
* the complex nature of these financial products and their dissimilarity to other credit products,
* difficulties budgeting for the long-term with access to a large amount of credit, and estimating how much equity might be available at any time in the future;
* a reluctance to consider the risk of declining health in the future and the impact of this on their financial needs; and
* children encouraging their older parents to take out a reverse mortgage or use the funds for the benefit of these children, in inappropriate circumstances.

ASIC undertook the research to more clearly understand the factors that can influence consumer decision making. Specifically, this work sought to identify where these products had worked well, how borrowers might be vulnerable or easily misled and what changes could help consumer make better, more informed decisions. The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep109_reverse_mortgages_Nov07.pdf/%24file/Rep109_reverse_mortgages_Nov07.pdf%22%20%5Ct%20%22_default) website. etailed Contents**2.4 ASIC seeks further comments on competition for market services**On 21 November 2007, the Australian Securities and Investments Commission (ASIC) released a second consultation paper, "Consultation Paper 95: Competition for market services - response to CP 86 and further consultation" (CP 95). ASIC is considering applications from AXE ECN Pty Ltd (AXE) and from Liquidnet Australia Pty Ltd (Liquidnet) for Australian market licences to operate competing venues for trading in ASX-listed securities.ASIC welcomes the input it received from its stakeholders and market users in response to the first consultation under "Consultation Paper 86: Competition for market services - trading in listed securities and related data" ([CP 86](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP_86-Competition_for_market_services%20CP.pdf/%24file/CP_86-Competition_for_market_services%20CP.pdf%22%20%5Ct%20%22_default)). Respondents generally agreed with ASIC's proposals that competition for market services is desirable but that the current levels of market quality and integrity should be maintained. In this second consultation paper, ASIC responds to the comments it has received.The new consultation paper also sets out detailed proposals for mechanisms to allow competition but maintain market quality and integrity, and asks for comment on them.The Minister is the final decision-maker in relation to market licence applications, and part of ASIC's role is to provide advice to the Minister. Interested parties should read "Consultation Paper 95: Competition for market services - response to CP 86 and further consultation" (CP 95). The draft operating rules of AXE are available at the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/AXE_ECN_operating_rules_March%202007.pdf/%24file/AXE_ECN_operating_rules_March%202007.pdf%22%20%5Ct%20%22_default).  The [draft Australian operating rules of Liquidnet](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Liquidnet_Australian_rules.pdf/%24file/Liquidnet_Australian_rules.pdf%22%20%5Ct%20%22_default) are available at the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Liquidnet_Australian_rules.pdf/%24file/Liquidnet_Australian_rules.pdf%22%20%5Ct%20%22_default). Further information about the new market proposals is available at the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Competition_for_market_services-overview.pdf/%24file/Competition_for_market_services-overview.pdf%22%20%5Ct%20%22_default).  The consultation period closes on 29 January 2008. Submissions should be sent by post to:Tracey LyonsDirector, Markets RegulationAustralian Securities and Investments CommissionLevel 18No 1 Martin PlaceSYDNEY NSW 2000or by email to: tracey.lyons@asic.gov.au.A copy of the consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp95_competition_for_market_services.pdf/%24file/cp95_competition_for_market_services.pdf%22%20%5Ct%20%22_default) website. etailed Contents**2.5 ASIC reports on SFE Group**On 21 November 2007, the Australian Securities and Investments Commission (ASIC) released the findings of its fifth assessment of the Sydney Futures Exchange Limited (SFE) and SFE Clearing Corporation Limited (SFECC), and its third assessment of straclear Limited (Austraclear).Following the merger of the ASX and SFE in July 2006, the SFE licences are now under the umbrella of the ASX group. ASIC's next assessment of ASX, which commences in November, will encompass all six entities in the ASX group that hold a market licence or a clearing and settlement facility licence. Accordingly, this will be the last stand-alone report in relation to SFE.ASIC has concluded that during the assessment period, SFE had adequate arrangements for supervising the market, including arrangements for: * handling conflicts between its commercial interests and the obligation to operate the market in a fair, orderly and transparent way;
* monitoring the conduct of participants; and
* enforcing compliance with its rules.

AASIC has also concluded that SFECC and Austraclear have adequate arrangements for supervising their respective clearing and settlement facilities including arrangements for: * handling conflicts between its commercial interests and the need to ensure that the clearing and settlement facility's services are provided in a fair and effective way; and /li>
* enforcing compliance with its operating rules.

SFE's supervision arrangements have now been folded into ASX Market Supervision Pty Ltd (ASXMS), following the merger. ASIC assesses the efficiency and effectiveness of the combined arrangements on an ongoing basis through its regular interaction with ASXMS. It will report its findings after the next assessment of the ASX group.In August this year, SFE experienced technical problems that resulted in the halt of the trading platform while the problems were rectified. This event occurred outside the period covered by the report, and so it has not been referred to in detail. ASIC is continuing a useful and open dialogue with ASX about technology issues and ASX's plans for system upgrades and replacement programs going forward.The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep99_SFE_SFECC%2C_Austraclear_assessment%20report.pdf/%24file/rep99_SFE_SFECC%2C_Austraclear_assessment%20report.pdf%22%20%5Ct%20%22_default) website.etailed Contents |

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| **3. Recent Corporate Law Decisions** |  | ext Section |

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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20124%20December%202007_files/spacer%281%29.gif |
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| **3.1 Section 237 and the determination of the proper plaintiff**((By Ben Gauntlett, Freehills)             FWV Stanke Holdings Pty Ltd v O'Meara; Von Stanke v O'Meara [2007] SASC 413, Full Court of the Supreme Court of South Australia, Doyle CJ, Anderson and White JJ, 23 November 2007  The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/november/2007sasc413.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/november/2007sasc413.htm%22%20%5Ct%20%22_default)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_default)  **(a) Summary**The respondent, O'Meara, was successful in resisting an appeal by a company, FWV Stanke Holdings Pty Ltd, (of which she was shareholder) and another intervener, Von Stanke, against a decision allowing her to take over the defence of FWV Stanke Holdings Pty Ltd in oppression proceedings. The Full Court ruled O'Meara had satisfied the relevant criteria under s. 237(2) of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). Therefore, an appeal from the decision to grant leave was dismissed except for a variation as to the need to provide security for costs. **(b) Facts**   FWV Stanke Holdings Pty Ltd ('FWV') was the shareholder of two companies: H Stanke & Sons Pty Ltd ('HSS') and Cape Banks Processing Company Pty Ltd ('CBP'). HSS and CBP were formed by three brothers who had worked in partnership to carry out a lobster catching and processing business in Carpenter Rocks. These three brothers had incorporated three companies, FWV, RCV Stanke Estates Pty Ltd ('RCV') and JHV Properties Pty Ltd ('JHV'), to hold their respective interests.  Their families retained their respective interest with some of the brothers' sons now sitting on the boards of HSS and CBP. Frederick John Van Stanke created FWV. He and his wife had two children, O'Meara, the respondent, and her brother John, the intervener. The parents were both deceased. However, before this occurred each parent and the two children had owned one share in FWV. Upon dying, the parents left their shares to their children. John was executor of the estate and, because the estate had not been administered, controlled the voting rights of the shares.  Oppression proceedings had been brought under section 232 of the Corporations Act by JHV. In JHV's opinion, HSS was wrongfully using the fishing licences and pot allocations linked to those licences as security for finance for the directors of HSS and their families. Further, these fishing licences were being used for the benefit of the directors of HSS and their families. A request for specific accounts had been ignored since 1991 and neither HSS or CBP had declared a dividend. Instead, remuneration and non-cash benefits were provided to CBP's directors and their children. The defendants to JHV's action were HSS, CBP, FWV, RCV, the directors of HSS and the directors of CBP. Other than FWV and RCV, the substantive defence put forward by the defendants was that there had been a conventional understanding that HSS and CBP would be run as had occurred. This, in their opinion, meant, amongst other things, that whilst the family business was based at Carpenter Rocks there would be an attempt to look after those individuals that lived in the Carpenter Rocks Community.  FWV and RCV had filed separate defences claiming the action did not really concern them and JHV had no right of recovery against them. O'Meara sought leave to amend FWV's defence so as to generally admit JHV's allegations and file contribution proceedings that sought similar orders to those sought by JHV.       **(c) Decision**  On behalf of the Full Court, White J found no conventional understanding existed. His Honour put forward that for section 236 of the Corporations Act to be relied upon (so that a member of a company may bring proceedings on behalf of a company) leave must be granted in accordance with section 237.  The lower court had found section 237(2) had been complied with by O'Meara as all five criteria established in sub-paragraphs (a) - (e) of section 237(2) had been met. FWV appealed this decision and John, O'Meara's brother, intervened in the action as both a shareholder and executor of his parents' estate. O'Meara cross appealed against the orders of the judge regarding costs of her application and the costs arrangements regarding her representation of FWV. An effort to make O'Meara disclose more documents was unsuccessful. White J dismissed the arguments regarding the failure of the judge to make O'Meara disclose a wide range of documents. In his opinion, amongst other reasons, the excessive range of documents requested was inappropriate. In terms of the criteria found in section 237(2)(a) - (e), White J found the judge had not erred in finding the criteria satisfied. In assessing section 237(2)(a), it was found that it was probable FWV would not itself bring the proceedings or properly take responsibility for them. The lower court judge was deemed to have correctly concluded that John's conflict of interest, as a director of HSS and CBP and a user of a fishing licence and associated pot allocation, meant he would not take proper responsibility for the proceedings. O'Meara also had a conflict of interest in that her husband used a fishing license and fishing allocation. However, this did not preclude finding section 237(2)(a) had been complied with.  Compliance with section 237(2)(b) required a finding that O'Meara was acting in good faith. White J relied upon Swansson v RA Pratt Properties Pty Ltd to assess whether good faith existed. Palmer J in Swansson had put forward two inter-related factors; honest belief about a good cause of action and lack of a collateral purpose that would amount to an abuse of process, to assess this criterion. This approach was relied upon by White J in finding O'Meara had acted in good faith. O'Meara had seen and understood an opinion from her solicitors regarding the matter that suggested she had a good cause of action and her dominant purpose was that FWV obtain a share of the profits of HSS and CBP that it did not presently receive. Although O'Meara had other collateral purposes, like benefiting the whole Carpenter Rocks Community, these were not her dominant purpose and, in any event, White J distinguished purpose from altruistic motive.  Finally, in assessing good faith, his Honour mentioned complicity in the matters about which the complaint is made and delay. Complicity could negate a finding of good faith. However, although O'Meara and her family had received benefits from HSS and CBP, this was not enough to establish complicity. O'Meara had not been responsible for the arrangements that meant those benefits were provided. This, combined with her request for more benefits and recent agitation to change the level of benefits, meant she was not acting in bad faith. In terms of delay, the appellants' submissions concerning the alleged inordinate delay to file the application for leave to intervene were rejected. Section 237(2)(d) was considered before section 237(2)(c) and required it to be assessed whether there was a serious question to be tried. This involved the same threshold as an application for an interlocutory injunction. In the appellant's opinion this threshold had not been met because John's knowledge could be attributed to FWV and this meant FWV had no action against HSS and CBP. However, his Honour ruled the precise attribution of knowledge was a complex question and better reserved for trial. Likewise, whether O'Meara acquiesced in the conduct of HSS and CBP was better left for trial. Under section 237(2)(c), the relevant question was whether it was in the best interests of FWV for O'Meara to be granted leave to intervene. His Honour supported the lower court judge in finding it was in the best interests of FWV that O'Meara be given leave to intervene. The existing arrangements for the family business were, in his Honour's opinion, peculiar and this, amongst other things, like the prevention of multiple proceedings, supported O'Meara deciding FWV's attitude in the JHV litigation. O'Meara was deemed to have the capacity to conduct the litigation. However, his Honour had reservations as to O'Meara's ability to meet the costs of any litigation and therefore made leave conditional upon O'Meara providing security to FWV as to costs.  The cross appeal made by O'Meara regarding costs was rejected. However, the ability to be indemnified by FWV in the event FWV obtains a cost order beneficial to it in the contribution proceedings was left open. br> &  etailed Contents**3.2 Application for reinstatement under section 601AB**(By Kathryn Finlayson, Minter Ellison)  Vukasin v Australian Securities and Investments Commission [2007] NSWSC 1341, New South Wales Supreme Court, Austin J, 22 November 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/november/2007nswsc1341.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/november/2007nswsc1341.htm%22%20%5Ct%20%22_default)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_default)**(a) Summary**The applicant, as a shareholder and director of Hy-Lift Pty Ltd, had a sufficient factual interest to be 'a person aggrieved by the deregistration'.The reinstatement of Hy-Lift Pty Ltd's registration, provided that it was placed immediately under the control of a provisional liquidator, was fair in the circumstances of the case.**(b) Facts**Hy-Lift Pty Ltd was incorporated in 1983 and was deregistered and dissolved under section 601AB of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) on 4 November 2001.The applicant was one of two shareholders and directors of Hy-Lift.  Until its deregistration, Hy-Lift traded as a forklift repairer at Sydney Flemington Market.  The business was conducted by the applicant and the other shareholder/director.  They were also the only employees.  The applicant looked after the workshop and the other shareholder/director looked after the paperwork. Hy-Lift was named as the lessee of the Flemington Market premises from Sydney Markets Ltd under a registered lease for a term of 5 years commencing 1 June 2003.  The lease had an option to renew for a further 5 years.The applicant learnt of the deregistration of Hy-Lift in late 2005 or early 2006.On 19 November 2007, the applicant filed an application for reinstatement under section 601AH(2).  He also sought a number of other orders including that:ul>  uupon its reinstatement, Hy-Lift be substituted for ASIC as defendant;  the substituted defendant be wound up;  a provisional liquidator be appointed to Hy-Lift to investigate Hy-Lift's affairs and report to the court accordingly; and  Hy-Lift's execution of the lease of the premises at Flemington Market be validated. ASIC did not oppose the application for reinstatement provided that certain conditions were satisfied.**(c) Decision(i) Application for reinstatement**Justice Austin held that the applicant had a sufficient factual interest to be 'a person aggrieved by the deregistration' as he was a shareholder and director of Hy-Lift which, at the time of deregistration, operated a moderately successful business and was purportedly the lessee of a valuable lease.His Honour considered but did not decide whether a shareholder/director would have standing per se to make an application for reinstatement under section 601AH(2). Justice Austin concluded that the reinstatement of Hy-Lift's registration, provided that it was placed immediately under the control of a provisional liquidator, was fair in the circumstances of the case and would not lead to any unfair prejudice. **(ii) Winding up**Justice Austin considered that the applicant's evidence established a prima facie case of insolvency.  Accordingly, his Honour granted the applicant leave under section 459P(2) of the Corporations Act 2001 (Cth) to seek an order under section 459P(1)(c) that Hy-Lift be wound up and ordered that Hy-Lift be wound up.His Honour also ordered that a provisional liquidator be appointed, with appropriate powers, to investigate Hy-Lift's affairs and to report to the court accordingly.**(iii) Validating order**Justice Austin made a validating order under section 601AH(3) in respect of Hy-Lift's execution of the lease of the premises at Flemington Market.His Honour considered that the order was appropriate as it cured the deficiency in the lease caused by the deregistration of Hy-Lift and no unfair prejudice arose. etailed Contents**3.3/a> Setting aside GST related statutory demands issued by ATO**((By Trent Duffield, DLA Phillips Fox)Zolsan Pty Ltd v Deputy Commissioner of Taxation [2007] NSWSC 1326, New South Wales Supreme Court, Young CJ, 21 November 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/november/2007nswsc1326.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/november/2007nswsc1326.htm%22%20%5Ct%20%22_default)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_default)  **(a) Summary** Where a person has not challenged the validity of an ATO notice of assessment through the procedures set out in the [Taxation Administration Act 1953 No. 1 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6441" \t "_default) and a statutory demand is issued, a court may set aside that statutory demand if the relevant debt does not pertain to income tax. **(b) Facts** The plaintiff (Zolsan) received a statutory demand from the defendant (ATO) which alleged that Zolsan owed the Deputy Commissioner of Taxation (Deputy Commissioner) $1,717, 232.87.  The debt alleged by the ATO had arisen because the Deputy Commissioner had been dissatisfied with a valuation taken by Zolsan of its trading stock.  The Deputy Commissioner had then sought her own valuation from another Commonwealth department and used that revised valuation to conclude that Zolsan had been in breach of the relevant legislation and imposed a penalty tax in addition to billing additional GST.  The ATO had issued three notices of assessment to Zolsan for each of the three month periods terminating on 30 September 2001, 31 December 2001 and 31 March 2002. Only the final notice of assessment which had been accompanied by the penalty tax notice for alleged false and misleading statements with respect to GST returns was objected to by Zolsan. That objection was disallowed shortly thereafter by the ATO. There was no further action undertaken by either party until the ATO issued the statutory demand in April 2007. Relevantly, the statutory demand bore the signature of the Deputy Commissioner of Taxation at the Albury Branch.  Following the signature was the note:"The facsimile signature of Margaret Crawford Deputy Commission of Taxation at the Albury Branch of the Australian Tax Office, for and on behalf of the Commonwealth of Australia, the creditor, was affixed hereto by Pamela Joy Roth a duly authorised agent of the said Deputy Commission of Taxation".The court was asked to determine whether a Deputy Commissioner was empowered to sign a statutory demand for a tax debt in a case where there had been no judgment for the debt and, if the court determined that a Deputy Commissioner of Taxation was empowered to sign the statutory demand, should the statutory demand be set aside under section 459G of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("the Act")?**(i) Was the Deputy Commissioner empowered to sign the statutory demand?**Young CJ found that while there were some fine distinctions to be made as to when a Deputy Commissioner can do things in their own right as agent for the Commonwealth, it was clear that so far as issuing bankruptcy proceedings or a statutory demand, a Deputy Commissioner has the authority to make a demand even though the creditor was the Commonwealth.Young CJ further noted that any reference to the Deputy Commissioner being a creditor in the wording of the statutory demand should not affect that authority.**(ii) Should the statutory demand be set aside under section 459G?**Section 459G of the Act provides that a company may apply to a court for an order to set aside a statutory demand.A statutory demand may be set aside under section 459H(1) if a court is satisfied that there is a genuine dispute between the relevant company and its alleged creditor about the existence or amount of a debt to which the debt relates, or under section 459J if a court is satisfied that because of a defect in demand, substantial injustice will be caused unless the demand is set aside.  With respect to section 459H(1), Young CJ cited the judgment of M H McLelland CJ in Eq in Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785 where it was stated that a 'genuine dispute' connotes 'a plausible contention requiring investigation' and that this did not mean that every statement in an affidavit by a plaintiff must be uncritically accepted by the court. Young CJ also observed that there was a difference between determining whether there is a genuine dispute and determining the merits of, or resolving, such a dispute.  His Honour held that as the tax liability depended on the establishment by the Deputy Commissioner of the fact that the taxpayers' return and valuations were not properly made, there was a question of fact to be decided at law, unless this was somehow resolved by some statutory presumption (e.g. statute of limitations). Therefore there was a genuine dispute for the purpose of section 459H(1) and the statutory demand should be set aside.The Deputy Commissioner had sought to rely on the decision of the Full Federal Court in Hoare Bros Pty Ltd v Commissioner of Taxation (1996) 62 FCR 302 (Hoare Bros), where it was held that where a taxpayer has not challenged the validity of a notice of assessment through the procedures set out in the Taxation Administration Act 1953 (Cth), then so far as section 459H of the Corporations Act is concerned, the taxpayer is not able to challenge that the debt is due.br> HHowever, Young CJ observed that in Neutral Bay Pty Ltd v Commissioner of Taxation (2006) 205 FLR 470, McMurdo J had stated that Hoare Bros was a case dealing with income tax and its relevance to other taxes and different statutory provisions needed to be considered. Accordingly, Young CJ held that as the current proceedings were concerned with GST and a liability that had arisen outside of an assessment (i.e. the penalty which flowed from the allegedly flawed valuation), the chances of the existence of the debt being successfully challenged at law were not in the class of being feeble or non-existent and the matter therefore should be heard before a court. **(c) Decision** Young CJ ordered that the statutory demand be set aside and further ordered that the defendant pay the plaintiff's costs for the proceedings. etailed Contents**3.4 Director's duty of good faith restrains the practice of ring fencing**  (By Cherie Canning, Mallesons)Robb v Sojourner [2007] NZCA 493, New Zealand Court of Appeal, William Young P and Ellen France and Wilson JJ, 12 November 2007 The full text of this judgment is available at:[http://www.courtsofnz.govt.nz/from/decisions/documents/TAandMCRobbvCLSojournerandSailingCatCruisesLimited.pdf](http://www.courtsofnz.govt.nz/from/decisions/documents/TAandMCRobbvCLSojournerandSailingCatCruisesLimited.pdf%22%20%5Ct%20%22_default) **(a) Summary**TTwo creditors brought a successful action against the directors of a company contending that the directors had breached their duty of good faith set out in section 131 of the Companies Act 1993 (NZ) ("the Act")). The directors breached their statutory duty of good faith by engaging in a business restructure known as 'ring fencing' - where the profitable core of a distressed company's business is removed to a phoenix company. On appeal the court noted that policy considerations may favour ring fencing in certain circumstances, but warned that care must be taken, particularly where those who own and control the distressed company are also behind the phoenix company. In these circumstances the transaction was consciously not carried out for fair value, allowing the creditors to obtain full recovery of their proofs of debt.  **(b) Facts**Mr and Mrs Robb were the sole shareholders and directors of Aeromarine (Robb & Co) Ltd ("Aeromarine 1"). This company specialised in the manufacture of fibreglass products and, in particular, boats. In 1999, Aeromarine 1 began to construct catamarans. The plaintiffs, Mr Cliff Sojourner and Sailing Cat Cruises Ltd, entered into contracts for the construction of two catamarans, in 2000 and 2001 respectively. Work was carried out on both boats, but by late 2002 Mr Robb recognised that Aeromarine 1 was in trouble. The prices at which Aeromarine 1 had agreed to supply the two catamarans were less than the costs of construction. The company completed work on the catamaran for Sailing Cat Cruises Ltd, but the boat leaked and suffered a number of other deficiencies. Mr Sojourner became dissatisfied with the progress on his order and ultimately issued a stop work notice in January 2003. Between the end of January and the beginning of March 2003, Mr Robb, with the assistance and advice of his accountant, Mr Hornsey, planned and implemented a restructuring of the business. Aeromarine 1 sold the bulk of its assets (including goodwill) to Aeromarine Industries Ltd ("Aeromarine 2"), a company which was set up with the same ownership and control as Aeromarine 1. Aeromarine 2 took over the staff of Aeromarine 1 and continued to deal with its customers.  Aeromarine 1 continued to be involved in the dispute with Mr Sojourner. The dispute resulted in High Court proceedings which were to be heard in September 2003. Before this hearing Aeromarine 1 was placed into liquidation.  Mr Sojourner and Sailing Cat Cruises Ltd received nothing from the liquidation of Aeromarine 1. Their total losses amounted to approximately $320,000 (in terms of proofs of debt which were eventually accepted by the liquidator). Mr Sojourner and Sailing Cat Cruises Ltd brought proceedings against Mr and Mrs Robb alleging inter alia that they breached their duty to Aeromarine 1 under section 131 of the Act. Section 131(1) provides that:A director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the companyIt was alleged that Mr and Mrs Robb had not acted in good faith and in the best interests of Aeromarine 1 when they caused that company to enter into the transaction with Aeromarine 2. This claim was successful at first instance and Mr and Mrs Robb appealed. **(c) Decision**   The Court of Appeal upheld the trial judge's decision. **(i) Challenge to liability** The Court of Appeal upheld the decision that Mr and Mrs Robb had not acted in good faith in entering into the transaction with Aeromarine 2, and accordingly breached the duty of good faith owed under section 131 of the Act.  It was common ground between the parties that the director's statutory duty to act in good faith in what the director believes to be in the best interests of the company extends to a requirement to take into account the interests of the creditors. In addition, the fact that the director's misconduct in implementing the restructure was assented to by shareholders did not relieve their liability. The purpose of the sale of assets to Aeromarine 2 was to ring fence Aeromarine 1's core business (and associated assets). The court noted that the practice of ring fencing in a phoenix company the profitable core of a distressed company's business is not uncommon. Moreover, it has the advantage of preserving value and jobs which may otherwise be lost in liquidation and may result in payment of trade creditors. However, such restructuring will likely involve some conflict of interest. This will most obviously be where those who own and control the distressed company are also behind the phoenix company. The court noted that in practice, when examining such transactions, the courts have not rigorously applied the self dealing rules, instead the focus has been on whether the restructuring caused loss to the company (citing in support Re Welfab Engineers Ltd [1990] BCLC 833 (Ch D), Gray v Wilson (1998) 8 NZCLC 261, 530 (HC) and Lion Nathan Ltd v Lee (1997) 8 NZCLC 261, 360 (HC)).  The court referred to section 141(2) of the Act which provides that a transaction cannot be avoided if the company receives fair value under it. Under the ordinary equitable principles which apply in self-dealing cases, the fairness of the consideration is no answer to a later claim for an account of profits. However, the court observed that if section 141(2) has the consequence in this case that the transaction between Aeromarine 1 and Aeromarine 2 could not be avoided, it would be anomalous to allow a related claim to succeed against Mr and Mrs Robb and (perhaps Aeromarine 2) for an account of profits. Consequently, the court examined whether the sale to Aeromarine 2 was for fair value. The court indicated that directors should take a careful approach to proposed action of this sort and should, at the very least, obtain an independent valuation of the assets being acquired. The risk for a director is that, should a later examination find that the assets were undervalued, the Act would not provide limitation on the application of the equitable principles of relief. Potentially, the liability may exceed the discrepancy between the price paid and the fair value. In these circumstances there was some difficulty quantifying the hypothetical "fair" price because the value that an independent party would pay would be dependent, amongst other things, on the contractual commitments that Mr and Mrs Robb would be willing to make and the extent of any financial allowance which should be made in favour of Mr and Mrs Robb as consideration for those commitments. However, the court was satisfied that there was sufficient evidential basis to conclude that the sale was at undervalue. Essentially, this conclusion was due to there being no genuine allowance made in the agreed price for goodwill associated with the business. Whilst the contract for sale to Aeromarine 2 had included a figure for $50,000 for "goodwill (including the use of moulds)" it was held that this figure was only sufficient to cover the use of the moulds. In addition there was evidence that Mr Robb had ignored his accountant's suggestions to obtain an independent valuation for goodwill and instructed his accountant not to prepare or obtain an independent valuation of the goodwill of the company. This evidence established that Mr and Mrs Robb appreciated the sale was at an undervalue and had accordingly breached their statutory duty to act in good faith set out in section 131 of the Act. The directors submitted that they should be relieved of liability pursuant to section 138 of the Act, which allows a director to rely on professional advice given by an advisor. In this case, Mr and Mrs Robb sought to argue that section 138 applied because they relied on the advice of their accountant. This argument was unsuccessful as on the circumstances of this case there was no relevant advice from their accountant, which they can be said to have relied on in failing to account properly for goodwill in the transaction. **(ii) Challenge to approach to relief** The Court of Appeal upheld the trial judge's award of relief against the directors under section 301(1) of the Act which is based on the misfeasance provisions of the Companies Act 1862 (UK) section 165. The Court of Appeal rejected a narrow approach to awarding relief under that section. In particular the court rejected an argument that the maximum that could be awarded to Mr Sojourner and Sailing Cat Cruises Ltd was the difference between what they were paid on the liquidation of Aeromarine 1 (which was nothing) and what they would have been paid if Aeromarine 1 had been placed in liquidation at the time of the restructuring (which would have been nothing or next to nothing). Instead the court upheld the approach taken by Fogarty J at first instance, that focus needed to be on the implications of the directors selling the assets of the company to a new company owned by themselves and which continued to trade profitably. The Court of Appeal observed that relief under section 301(1) may be calculated on a restitution and not just compensatory basis. Accordingly, the court held that it was inappropriate to take an approach to damages based on an analogy to reckless trading cases that involve a comparison between the situation as it eventuated and what would have happened if the directors had stopped trading at the appropriate time. In these circumstances a scenario involving a February 2003 liquidation was never the subject of serious consideration. Moreover, a narrow compensatory approach failed to address the fact that Mr and Mrs Robb had an obligation to account to Aeromarine 1 for their gains, including, of necessity, the difference between what Aeromarine 2 paid for the assets of Aeromarine 1 and the fair value of those assets together with any other profits they derived from that acquisition. The court adopted an approach to relief comparable to that in the recent decision of Chirnside v Fay [2007] 1 NZLR 433 (SC). Instead of there being a formal account of profits, an assessment was made of the gains made by Mr and Mrs Robb and this formed the basis of the monetary award. This approach allowed the court to avoid having to quantify Mr and Mrs Robb's hypothetical contractual commitments and associated allowances. Instead, the focus was simply on the carrying value of the business, or its value to them as at 31 March 2004. The court held that a goodwill value of $700,000 would have been realisable by Mr and Mrs Robb if they had chosen to sell Aeromarine 1 in 2004. Accordingly, the sale of Aeromarine 1's assets for approximately $200,000 was at undervalue. Mr Sojourner and Sailing Cat Cruises Ltd were able to recoup their losses in full.  etailed Contents**3.5 Federal Court recognises existence and priority of prosecutor's lien over judgment debt for litigation costs** (By Duncan Longstaff, Blake Dawson) Arms v WSA Online Limited (ACN 081 121 495) (Subject to a Deed of Company Arrangement) [2007] FCA 1712, Federal Court of Australia, Ryan J, 9 November 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/november/2007fca1712.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/november/2007fca1712.htm%22%20%5Ct%20%22_default)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_default) **(a) Summary** The plaintiff (Arms) sought to secure a lien over $58,331 paid to the insolvent defendant (WSA) by its insurer (CGU) to cover a judgment debt arising from earlier proceedings involving the same matters and parties.  Arms contended that it should have priority over all other unsecured creditors in recovering the costs it incurred in prosecuting the earlier action because the judgment debt would not otherwise have been realised.  The court agreed with this argument, acknowledging the well-established priority of such liens in a range of insolvency contexts and seeing no reason for not applying these principles to the case of a judgment debtor.  Importantly, the court made it clear that an equitable lien for costs of recovering a fund for the benefit of an insolvent estate is not available only to the liquidator or trustee of the estate, but to anyone who has been instrumental to its realisation.  The lien is however restricted to costs reasonably incurred in obtaining judgment, and does not extend to granting any further priority to the prosecuting party in respect of the substantive debts owed to it by the insolvent company. **(b) Facts**  The earlier proceedings were issued against WSA and two other defendants, James Houghton and James Student (both employees of WSA), on 29 March 2001.  Shortly thereafter it emerged that WSA was insolvent and a Deed of Company Arrangement was entered into.  Arms was granted leave under section 444E(3) of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) to continue pursuing his claim against WSA, which was defended from that point on by solicitors instructed by WSA's insurer, CGU.  Arms received judgment for $58,331 from the court on 8 July 2005, and the full amount was paid to WSA by CGU under its Civil Liability Professional Indemnity Insurance Policy (Policy).  Arms then sought a ruling from the court that he be granted a lien over the moneys received by WSA to satisfy the judgment debt rather than the funds simply forming part of the insolvent company's asset pool. **(c) Decision**  His Honour Ryan J cited a range of authorities to support his finding that Arms was right in contending that the costs of obtaining the judgment debt stand in a different position from any of the other claims against the insolvent company.  Amongst his many quotes from judgments handed down by a range of courts over the course of more than a century, his Honour noted the comments of the Full Federal Court in Shirlaw v Taylor (1991) 102 ALR 551: ".where a party has by his efforts brought into court a fund in the administration of which various parties are interested, his costs and expenses should be a first claim upon the fund: Batten v Wedgwood Coal and Iron Co (1884) 28 Ch D 317 at 324-5; Re Universal Distributing Co Ltd (in liq) (1933) 48 CLR 171 at 174-5, per Dixon J".His Honour pointed out that the recognised categories of equitable lien are not closed by existing authorities and that it would clearly be unconscionable, unconscientious and unfair for other creditors to be permitted to take the benefit of the judgment without being subject to the lien for the payment of the costs of obtaining that judgment.  He further explained that: "It makes no difference that the costs of getting in the fund have been incurred by a person other than a liquidator or trustee in bankruptcy . The salient passages in the judgments of Murphy J and Tadgell J make it clear that the entitlement to the lien did not depend on the capacity of the person claiming it or the source of his entitlement".CGU's counsel cited Deputy Commissioner of Taxation v Government Insurance Office NSW (1993) 117 ALR 61 as authority for the proposition that only Arms' solicitors, Middletons, could properly enforce the lien over the amount paid to WSA under the Policy because it was they who were 'instrumental' in obtaining the judgment or compromise.  This argument, which contended that Arms' case should be distinguished from the established concept of a solicitor's lien on the fruits of litigation because Middletons did not seek to enforce the lien in their own right, was dismissed by Ryan J on the basis that Arms' agreement to pay his solicitors' costs and disbursements was equally 'instrumental' in obtaining the judgment.   As a final practical point, Ryan J noted: "It is likely that the fund will not nearly be sufficient to satisfy that lien even if the amount claimed is reduced to take account of costs and disbursements not referable to the action against WSA, eg those occasioned solely by the joinder of the second and third respondents, Houghton and Student or the litigation of issues confined to Arms and those respondents.  Questions of that kind can be resolved upon application pursuant to the liberty to apply which I propose to reserve". Arms was therefore granted a lien over the amount paid by CGU to WSA under the Policy to the extent of the costs and disbursements reasonably expended in prosecuting the action against WSA and having priority over the claims of the administrators and creditors under the Deed of Company Arrangement.    etailed Contents**3.6 HIH CFO sentenced to an additional 16 months**(By Sarah Hickey, Blake Dawson)  R v Fodera [2007] NSWSC 1194, Supreme Court of New South Wales, Bell J, 6 November 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/november/2007nswsc1194.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/november/2007nswsc1194.htm%22%20%5Ct%20%22_default)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_default) **(a) Summary**The case concerns Dominic Fodera, the former Chief Financial Officer of HIH Insurance Ltd (HIH).  Mr Fodera pleaded guilty to charges brought by ASIC under sections 232(2) and 1317FA of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), alleging that he had: * knowingly or recklessly failing to act honestly in the discharge of his duties; and
* done so with deliberate dishonesty, in order to gain a financial advantage for HIH.

Mr Fodera's conduct related to his role in negotiating reinsurance for HIH and its related entities.  The reinsurance ostensibly conferred a $92.8 million accounting benefit to HIH by increasing its operating profit by this amount, and, more broadly, by transferring the risk for certain claims to the reinsurer.  However, the reinsurance agreement was actually subject to a series of signed, undated letter of credit arrangements (LOCs) that effectively transferred the risk back to HIH.  The LOCs were not disclosed to HIH's Board, nor to its auditors.Justice Bell of the New South Wales Supreme Court found that Mr Fodera's failure to disclose the LOCs constituted deliberately dishonest conduct, and sentenced Mr Fodera to three years and four months imprisonment for the offence.  This term will be partially concurrent with another term of imprisonment that Mr Fodera is serving for authorising the issue of a prospectus with a material omission.**(b) Facts**Mr Fodera was the key negotiator of a reinsurance transaction for HIH and its related entities.  The reinsurer, Hannover Ruckversicherungs-Aktiengesellschaft, Hannover Reinsurance (Ireland) Ltd and E+S Reinsurance (Ireland) Ltd (the Hannover Re entities), agreed to issue two reinsurance slips to HIH.  The reinsurance slips operated to increase HIH's cover for claims that exceeded its excess of $2,869 million, in the event that a managed fund established by HIH to cover such claims had insufficient funds.Ostensibly, the slips transferred the risk of HIH's managed fund being insufficient to cover a claim under HIH's insurance policy from HIH to Hannover Re.  However, in return for the reinsurance slips, a number of HIH subsidiaries (including its underwriting subsidiary, HIH Underwriting and Agencies Services Limited (UAS)) provided Hannover Re with four signed, undated LOCs.  Under the LOCs, UAS effectively agreed to issue a letter of credit "topping up" the managed fund to an amount sufficient to pay for any claims above HIH's excess.  Mr Fodera and HIH's Chief Executive Officer, Raymond Williams, were members of the Boards of UAS and HIH, and were the signatories to the LOCs.  However, they did not disclose the existence of the LOCs to the HIH and UAS Boards, or to HIH's auditors.  As a result, HIH's auditors determined that, for accounting purposes, the reinsurance contract added $92.8 million to HIH's operating profit.**(c) Decision**While Mr Fodera pleaded guilty to "knowingly or recklessly" failing to act honestly in the discharge of his duties, he did not admit to acting in a deliberately dishonest manner.  Accordingly, Justice Bell was charged with the task of determining three matters: * whether Mr Fodera's conduct was deliberately dishonest;
* whether any of Mr Fodera's arguments mitigated against a finding that his conduct was deliberately dishonest; and
* the appropriate sentence (if any) to be imposed against Mr Fodera.

**(i) Did Mr Fodera act in a deliberately dishonest manner?**Justice Bell found that Mr Fodera's conduct was deliberately dishonest.  Her Honour noted that, while Mr Fodera was not the "architect" of the transaction, he played a primary role in HIH's negotiations with Hannover Re and supervised the preparation of the transaction documents (including the LOCs) by various HIH staff.Justice Bell also took note of evidence that, even after being made aware that a meeting of the Board of UAS should be convened to execute the LOCs, Mr Fodera failed to do so and did not discuss the LOCs with the other directors of UAS.  Rather, Mr Fodera and Mr Williams alone resolved to execute the documents.  The Crown also presented evidence that Mr Fodera failed to disclose the existence of the LOCs at HIH's Board, Audit Committee and Reinsurance Committee meetings.  **(ii) Did any of Mr Fodera's arguments mitigate against a finding that his conduct was deliberately dishonest?**Mr Fodera's counsel argued that certain matters mitigated against a finding that Mr Fodera's conduct was dishonest.  First, counsel argued that the "paternal" relationship between Mr Williams and Mr Fodera led Mr Fodera to act at the direction of (and in reliance upon) Mr Williams.  While Justice Bell acknowledged that Mr Fodera had a high personal regard for Mr Williams, her Honour stated that this did not override the "powerful inference" (conveyed most clearly through the withholding of material from the HIH and UAS Boards and auditors) that Mr Fodera himself acted dishonestly.Secondly, Mr Fodera's counsel noted that there is no clear Australian Accounting Standard dealing with the accounting treatment of transferred risk under reinsurance contracts.  This meant that Mr Fodera could not have been aware that the proposed accounting treatment of the $92.8 million was not false per se.  However, Justice Bell stated that even if Mr Fodera had not been aware of the ultimate outcome of how the reinsurance contracts would be treated for accounting purposes, he would have been aware that, had the auditors known of the LOCs, they would have given substantial further consideration as to how to treat the amount in HIH's accounts.Finally, Mr Fodera's counsel relied on the fact that the LOCs had been disclosed to HIH's tax advisors (who belonged to the same accounting firm as HIH's auditors), and, given the close working relationship between the tax and audit teams, the disclosure to the tax team undermined any argument that Mr Fodera had deliberately concealed the existence of the LOCs from the auditors.  Justice Bell demurred from this argument, stating that the disclosure to the tax team took place in order to secure advantageous tax treatment of the $92.8 million amount, and emphasised that the disclosure to the tax team took place after the announcement of the amount of HIH's operating profit (including the controversial $92.8 million) had been made to the ASX.Accordingly, her Honour found that none of the above factors detracted from the "only rational inference" that could be drawn from Mr Fodera's conduct, namely that he had engaged in a deliberate course of action to prevent the LOCs from being disclosed to the HIH and UAS Boards, and the HIH audit team.**(iii) What was the appropriate sentence for Mr Fodera's conduct?**Justice Bell acknowledged the strain of the HIH collapse on Mr Fodera's family, and took note of a series of Reverends and Pastors that gave evidence of Mr Fodera's remorse and ongoing commitment to the Christian faith.  However, Mr Fodera did not give evidence.  In light of this, Justice Bell remained unconvinced that Mr Fodera held a "significant degree" of contrition for his own actions (as opposed to regret over the broader circumstance of HIH's collapse and the impact of this upon the community).  In light of the above, her Honour imposed a sentence of three years and ten months, to be served in partial concurrence with Mr Fodera's pre-existing conviction for approving a prospectus containing a material omission (also in relation to the HIH collapse).  This sentence was expressed as subject to a minimum non-parole period of three years.  As Mr Fodera is currently serving a minimum of two years for his previous offence, her Honour's sentence will add an additional 12 to 16 months to Mr Fodera's term of imprisonment.etailed Contents**3.7 Compliance with the statutory maximum shareholding under section 289 of the Co-operatives Act 1992 (NSW)** (By Julian Rebechi, Freehills) Australian Co-operative Foods Limited v Dairy Farmers Milk Co-operative Limited [2007] NSWSC 1311, New South Wales Supreme Court, Hammerschlag J, 23 November 2007   The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/november/2007nswsc1311.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/november/2007nswsc1311.htm%22%20%5Ct%20%22_default)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_default)**(a) Summary**Justice Hammerschlag examined whether the defendant's 7.13% excess interest contravened section 289(1) of the [Co-operatives Act 1992 No. 18 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3882" \t "_default) ("the Act") and whether the defendant was therefore liable to forfeit it under section 290(1) of the Act.  The Act requires that a person must not have a relevant interest in shares of a co-operative where the nominal value exceeds 20% of the nominal value of the issued share capital of the co-operative.  However, section 289(3) allows the maximum to be increased by special resolution via a special postal ballot.  The decision therefore turned on whether his nour was satisfied that the resolutions passed by Australian Co-operative Foods Limited ("ACF") members met the requirements under section 289(3).The defendant cross claimed: * an order restraining ACF from declaring the excess interest to be forfeited;
* declarations that the resolutions were effective to permit it to have the excess interest; and
* orders under section 1322 of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) that it be relieved from any civil liability in respect of any contravention of section 289(1) of the Act.

The cross claims were dismissed. **(b) Facts**In 2004, the plaintiff, ACF, entered a Scheme of Arrangement ("the Scheme") to which the defendant, Dairy Farmers Milk Co-operative Limited bound itself by way of Deed Poll.  Stage 1 (which comprised two steps) provided for the establishment of the Supply Co-operative, and for the split of the then member capital of ACF into two component parts: 20% into shares in the new Supply Co-operative and 80% in ACF.  Members of ACF then had separate holdings in two co-operatives.  The shares held in ACF would be equal to 80% of the number originally held by members in ACF and the reduction in ACF shares would be balanced by a new holding in the Supply Co-operative equal to 20% of the members original holding in ACF.  In April 2004, the defendant became the Supply Co-operative. On completion of the Scheme the original ACF members held 100% of the Supply Co-operative and 80% of ACF and the Supply Co-operative held the remaining 20% of ACF, as Resolution No 1 (to approve the Scheme) and Resolution No 2 (to change ACF's rules) were passed with over 85% of votes received being in favour.  At the implementation date, the defendant held 19.999% of shares in ACF, however, by 31 July 2007 this had increased to 27.13% and became the primary issue of dispute. **(c) Decision** His Honour held that the defendant's 7.13% relevant excess interest was in contravention of section 289(1) of the Act.  However, before reaching this conclusion his Honour explored the defendant's submissions which essentially argued that the two Resolutions had increased the statutory maximum in accordance with section 289(3) of the Act.  His Honour held that section 289(3) applied only in respect of a "particular person" and that where that "particular person" is another co-operative, the section required the special resolution to meet three criteria: * it must be in respect of a particular person;
* it must be a resolution to increase above 20% the maximum percentage in which that person may have a relevant interest in shares of the co-operative; and
* it must be passed by means of a special postal ballot.

**(i) Resolution 1 - did it increase the statutory maximum?** It was not disputed that Resolution No 1 met the criterion of being passed by special postal ballot.  However, it failed to directly provide for any increase in the 20% maximum (despite the Scheme which it approved having done so).  His nour construed the terms of the Scheme to be unambiguous and its operation clear - the defendant would hold 100% of ACF, but only momentarily.  The reason this course was adopted was to comply with the Income Tax Assessment Act 1997.  His Honour held that an immediate reduction back to the 20% level was integral to the Scheme's operation and always intended.  **(ii) Resolution 2 - did it increase the statutory maximum?**His Honour also rejected the submission that Resolution 2 had increased the 20% maximum stating that it was clearly only intended to authorise an alteration to ACF's rules.  Accordingly, no special postal ballot was required for it and no procedural irregularity arose.  **(iii)  Would the result be capricious, unreasonable or unjust?**His Honour rejected the defendant's submission that if the resolutions did not increase the 20% maximum and it had to forfeit the excess interest, the result would be capricious, unreasonable or unjust.  The reasoning was based on Australian Broadcasting Commission v Australasian Performing Right Association Limited (1973) 129 CLR 99, 109 which held that the issue will only be relevant if words are ambiguous - here the Resolutions were considered clear and therefore the issue did not require consideration.  Nevertheless, his Honour discussed the issue in obiter.    etailed Contents**3.8 Removal of company directors: compliance with section 203D**  (By Andrew Hay and ren Obed, Clayton Utz, Brisbane) Scottish & Colonial Ltd v Australian Power & Gas Co Ltd [2007] NSWSC 1266, New South Wales Supreme Court, Bryson AJ, 5 November 2006 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/november/2007nswsc1266.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/november/2007nswsc1266.htm%22%20%5Ct%20%22_default)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_default)  **(a) Summary** The New South Wales Supreme Court held that a general meeting of shareholders of Australian Power and Gas Co Ltd ("APG") called by a director could not, by resolution, remove any director from office because the procedure for removal of directors under section 203D of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) had not been complied with.  **(b) Facts**  APG is a public company listed on the Australian Securities Exchange.   On 15 October 2007, a director of APG gave notice under section 249HA of the Corporations Act calling a general meeting of APG shareholders to be held on 15 November 2007.  The director acted without seeking a decision of the board to call a meeting. The notice of meeting set out five resolutions, which, if passed, sought to remove four directors from office, and appoint another person as a director.  The notice of meeting did not follow the procedure for the removal of directors under section 203D of the Corporations Act.  This section includes a requirement that a notice of an intention to remove directors should be given to the company at least 2 months before the meeting is to be held.  Clause 12.4 of APG's constitution allowed for the removal of directors, the only procedural condition being that the challenged directors be removed "by resolution".   Scottish & Colonial Ltd, a shareholder of APG, sought a number of injunctions, including an injunction restraining the challenged directors and APG from continuing to issue communications, relating to the meeting of 15 November 2007, which in any way sought to influence the outcome of the meeting. A cross-claim raised the question of the effect of non-compliance with section 203D on the proposed general meeting's ability to remove the directors from office. The court determined that the resolution of this issue potentially might lead to disposition of the whole of the proceedings. **(c) Decision**   The court rejected the argument that a general meeting could resolve to remove directors notwithstanding non-compliance with section 203D of the Corporations Act.  In short, the court held that section 203D prescribes a legal rule which operates despite any qualifications which would otherwise exist (ie despite the existence of clause 12.4 of APG's constitution).  Justice Bryson made the following comments: * section 203D means that if a director is to be removed the procedures required by the section must be taken; and
* if a company's constitution contains provisions for the removal of directors, whether they are procedural provisions or other conditions, it is nonetheless necessary that section 203D be complied with.

etailed Contents**3.9 Determining whether a corporation is insolvent** (By Mark Cessario, Corrs Chambers Westgarth) Austin Australia Pty Ltd v De Martin & Gasparini Pty Ltd [2007] NSWSC 1238, New South Wales Supreme Court, Barrett J, 2 November 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/november/2007nswsc1238.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/november/2007nswsc1238.htm%22%20%5Ct%20%22_default)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_default) **(a) Summary** The liquidators of Austin Australia Pty Ltd ("Austin") sought orders under section 588FF of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("Act") for the payment of money to Austin by each of several defendants.  The claims were based on the proposition that the defendants had each been a party to a transaction with Austin which involved the defendants' receipt of an "unfair preference" within the meaning of section 588FA of the Act, and was an "insolvent transaction" within the meaning of section 588FC of the Act. In this judgment Barrett J considered the separate question of whether Austin was insolvent at any time between 30 June 2003 and 31 December 2003 and, if so, for what periods. In answering this question, his Honour adopted the cash flow test for determining whether a company is insolvent. A report prepared by one of the liquidators of Austin was in evidence, which dealt with the issue of Austin's insolvency.  Barrett J also had regard to the usual indicia of insolvency referred to by Palmer J in Lewis v Doran (2004) 50 ACSR 175. Barrett J's finding was that Austin was insolvent at all times during the period commencing 30 June 2003 and ending 31 December 2003. **(b) Facts**  The liquidators of Austin were appointed as administrators of the company on 31 December 2003.  They commenced proceedings under section 588FF of the Act and an order was made in those proceedings that the following question be determined as a separate question:  Whether Austin was insolvent at any time between 30 June 2003 and 31 December 2003 and, if so, for what period or periods. The period in question related to the six month period ending on the "relation-back day". One of the liquidators of Austin, Mr Hutchison, prepared a report on the question of Austin's solvency, and that report was admitted into evidence as opinion evidence under section 79 of the Evidence Act 1995 (NSW). That report contained an analysis of Austin's cash position and stated that, in Mr Hutchison's opinion, Austin did not have enough cash on a month-by-month basis to cover its accounts due and payable from March 2003 to November 2003.   In his report Mr Hutchison also referred to a large number of cheques that had been drawn by Austin, but were not presented.  Barrett J referred to these and noted that a large proportion of them were cheques that had been drawn, but not released to payees and drew the inference that these were deliberately held back. Also in evidence was a memorandum dated 11 April 2003, sent by the Financial Controller of Austin to the Chief Executive of Austin.  That memorandum referred to the Financial Controller's concerns regarding the financial position of Austin and his opinion that the cash position was desperate and that its problems went "beyond any definition of temporary". No submissions were made on behalf of the defendants, each of them either consenting to the orders being sought against them, or not wishing to be heard on the question of Austin's solvency. **(c) Decision**  In considering the question for determination, Barrett J noted that of the two approaches to determining insolvency, the balance sheet test and the cash flow test, the latter approach was the correct approach.  His Honour noted that: * this approach requires an emphasis to be placed on the extent of cash and other liquid assets compared with the quantum of debts due and payable and to become due and payable in the immediate future; and
* insolvency will be confirmed where the cash and liquid assets are insufficient to cover the debts due and payable, and those to become due and payable in the immediate future, to the extent that there is an "endemic shortage of working capital".

Barrett J also referred to, and applied, the "usual indicia of insolvency", which were described by Palmer J in Lewis v Doran (2004) 50 ACSR 175: * A history of dishonoured cheques - in relation to this indicator, his Honour noted that whilst there was no evidence of cheques being dishonoured, the issue of cheques was managed by not presenting them.
* Suppliers insisting on "Cash on Delivery" terms - in this regard, Barrett J referred to services being supplied to Austin in August and November 2003 on a Cash on Delivery basis.
* The issue of post-dated or "rounded sum" cheques - in this regard, his Honour referred to the fact that the failure to present cheques had the same effect as post-dated cheques, and that there were a significant number of "rounded sum" cheques, which would indicate part payment was being made.
* Special arrangements with creditors - his Honour referred to arrangements made in July and December 2003 which were negotiated under threat of recovery proceedings.
* Inability to produce timely audited accounts. Unpaid group tax, payroll tax, workers' compensation premiums or superannuation contributions - in this regard, Barrett J referred to Mr Hutchison's report which indicated that Austin accounted for GST on an accrual basis and claimed GST credits for payments to creditors, even though they had not yet been made resulting in underpayment of GST.
* Demands from bankers to reduce overdraft and other evidence of deteriorating relations with bankers - in relation to this indicator, Barrett J referred to correspondence sent to Austin by its principal bank that indicated the bank had concluded that Austin's shareholders' funds had reached a "dangerously low level" and that it was commissioning a review of Austin's financial position.
* Receipt of letters of demand, statutory demands and court process of debt - in this regard there was evidence of there being a number of legal proceedings and statutory demands relating to the period relevant to the question for determination.

In the circumstances, Barrett J concluded that at each and every point during the period to which the separate question related, cash and other liquid assets of Austin were always insufficient to meet debts due and payable and to become due and payable in the immediate future.  His Honour was also satisfied that the insufficiency was not a temporary or transient problem but a deep-seated and continuing disability. Therefore, the answer to the separate question was "Yes, Austin Australia Pty Limited was insolvent at all times during the period commencing 30 June 2003 and ending 31 December 2003."  etailed Contents**3.10 Deemed insolvency of a company**(By Pablo Fernandez, DLA Phillips FoxTolcher v John Danks and Son Pty Ltd [2007] NSWSC 1207, New South Wales Supreme Court, Bryson AJ, 1 November 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/november/2007nswsc1207.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/november/2007nswsc1207.htm%22%20%5Ct%20%22_default)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_default)  **(a) Summary** The company and the defendant were parties to a franchise agreement. The defendant was the company's major supplier of trading stock (hardware materials) and had an arrangement with the company to provide it with trading stock on credit account. When the company began defaulting on payments, it devised a payment plan with the defendant in order to reduce its debt.Bryson AJ held that the defendant had received an unfair preference in relation to payments it had received from the company pursuant to the payment plan as it had received the payments in circumstances where the company was deemed to be insolvent. Bryson AJ ordered that the sum of $140,000 be repaid to the company by the defendant. **(b) Facts**  All references to sections are to the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("the Act").Waddell & Son Pty Limited ("the company") purchased a hardware retailer business at Kotara under the business name Home Timber and Hardware on 5 December 2003. In February 2006 the company then purchased another hardware retail business at Redhead. In November 2003 the company opened a monthly credit account with the defendant, John Danks and Son Pty Ltd. On 5 December 2003 the company then entered into a franchising agreement with the defendant under which the Kotara business was treated as a member of the hardware marketing and buying group 'Home Hardware' and/or 'Home Timber and Hardware'. The franchising agreement established a business relationship with the defendant for purchases of stock, marketing, promotional programs etc. Mr R G Tolcher and Mr R W Whitton (the plaintiffs) became administrators of the company on 22 February 2006 when the two directors of the company placed it into voluntary administration. Mr Tolcher and Mr Whitton became the company's liquidators on 21 March 2006 following a Creditors Voluntary Winding-up. The two directors of the company also became bankrupt in that same year.  In these proceedings the plaintiffs sought to recover a series of 20 payments of $7,000  each ("the payments") paid by the company to the defendant pursuant to a payment plan organised by the company when it had failed to pay its debts in accordance with the original November 2003 arrangement.  The plaintiffs claimed that each of the payments was an unfair preference (in terms of section 588FA) occurring at a time when the company was deemed to be insolvent (per section 95A).  In turn the plaintiffs sought a finding that the payments were voidable transactions under section 588FE and an order in accordance with section 588FF(1)(a) that the total amount of the payments ($140,000) be repaid to the company.  The defendant denied that it had received an unfair preference and alleged that it had received the payments in good faith and that it had no reasonable grounds to suspect that the company was insolvent.  The defendant further alleged that it had provided valuable consideration and had changed its position in reliance on the transaction (relying on section 588FG(2)).  **(c) Decision**  Bryson AJ found that the company was deemed insolvent as at the end of May 2005 as it could not meet its debts when they became due and payable (sections 95A and 588E(3)). Bryson AJ held that each of the 20 payments of $7,000 made by the company were insolvent transactions. As a consequence each of the payments was an unfair preference under section 588FA(1) as each one resulted in the defendant receiving from the company more than the defendant would receive if the transaction were set aside and the defendant proves for an unsecured debt. Therefore, each of these payments was a voidable transaction under section 588FE.  In relation to the section 588FG(2) defence, Bryson AJ held that it was not reasonable for the defendant to rely on this defence as the relevant officers of the defendant did not appear to have focussed on whether the company was solvent, but instead, whether the company's business could survive and the relationship between the defendant and the company could continue.  Bryson AJ therefore made an order in accordance with section 588FF(1)(a) that $140,000 be repaid to the company, with the parties to make further submissions regarding interest. The judgment centred around the finding of the company's deemed insolvency. **(i) Deemed Insolvency** On 30 May 2005, Mr Jason Waddell, one of the company's directors wrote to the defendant outlining reasons why the company was continually late in making its payments according to the original credit arrangement of November 2003.  Mr Waddell gave reasons such as, very large bad debtors and the purchase of another business (i.e. Redhead business), as well as outlining ways in which it would reduce costs in order to be able to comply with its debts.  It was through this letter that the company suggested a weekly payment scheme to get its debt to the defendant under control.  In this letter, Mr Waddell also sought to make a cash on delivery ("COD") arrangement for future orders of stock. Bryson AJ found that this in itself was evidence that Mr Waddell did not expect to get further credit from the defendant.  On 16 June 2005 Mr Waddell wrote to the defendant setting out the payment plan (i.e. $7,000 per week) under which it was intended that the company would pay its outstanding debts to the defendant and stating that all purchases made while the company was still indebted would be made only on a COD basis. Furthermore, the company would look to increase its payments to the defendant by September 2005. The series of payments of $7,000 per week began within a few days and these were the subject of the proceedings.  Bryson AJ held that the conduct of the company's directors leading to the statement on 16 June 2005 showed that the company was insolvent under section 95A as it was not able to pay its debts as and when they became due and payable. In particular, Bryson AJ noted the relevance of the fact that the company could not pay its debt to its major supplier. His Honour further noted the fact that the defendant had a choice of accepting broken up payment for overdue debts or it could lose a franchise outlet and it ultimately chose to accept broken up payments.  Bryson AJ held that while there was no proof which clearly established the grounds for presumed insolvency under section 588E(3), on the balance of probabilities, the company was insolvent in the period from the end of May 2005 until June and remained insolvent throughout the period when the payments were made.  Proof that the company remained insolvent was that it arranged to make the payments (by instalments), it accepted the COD restriction to its trading, and it never attempted to increase its repayments to the defendant. Other relevant matters noted by his Honour included the unreliable nature of the company's accounts; the large loans made to its directors that had not been called in; the company's debts to the ATO and unpaid superannuation payments; the non-availability of any further credit; and the company's lack of significant capital (other than trading stock), among other relevant matters.   etailed Contents**3.11 Application for replacement of liquidators, administrators and trustees** (By Tom McGregor, Mallesons Stephen Jaques) Rocke (as liquidator of ACN 080 794 636 Pty Ltd), In the matter of ss 502 and 506(4) of the Corporations Act [2007] FCA 1687, Federal Court of Australia, French J, 31 October 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/october/2007fca1687.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/october/2007fca1687.htm%22%20%5Ct%20%22_default)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_default) **(a) Summary** The case concerned three applications to replace external administrators of various entities.  In approving the applications, the court considered the prospects of administrative continuity, cost savings achieved through an application, and the liberty of creditors to apply to vary the orders made.  In relation to costs, the court found that the costs flowing from bringing the applications were not incurred in the winding up of the various entities, and in this regard there existed no right of indemnification from the assets of those companies. **(b) Facts**  Various plaintiffs brought three applications for the replacement of liquidators, deed administrators and trustees of Creditors' Trusts arising out of the combination of national accountancy firm McGrathNicol with accountancy firm PPB.  The orders sought arise in connection with the following three applications. **(i) First application: replacement of liquidators** Two companies, one designated as ACN 080 794 636 Pty Ltd (In Liquidation) ("ACN Coy") and the other, Keyros Pty Ltd (In Liquidation) ("Keyros"), were companies subject to a creditors' voluntary winding up.  In relation to each company, the plaintiffs applied for (i) declarations that each liquidator had resigned from their respective office, and (ii) orders that their vacancies be filled by the relevant incoming liquidator. With regard to: * ACN Coy, Clifford Rocke ("Rocke") and Jeffrey Herbert ("Herbert") sought declarations that they had resigned from their respective offices as liquidators, and were to be replaced by Andrew Birch ("Birch") and Simon Read ("Read"); and
* Keyros, Norman Ashton ("Ashton") sought a declaration that he had resigned from his office as liquidator, to be replaced by the appointment of Birch.

The plaintiffs also sought orders that creditors of the two companies be advised by letter within 21 days of the appointment of the new liquidators, and that any creditor has liberty to apply within 21 days of receipt of the letter to seek a variation of any orders made. **(ii) Second application: replacement of deed administrators and Creditors' Trusts** Rocke sought a declaration that he had resigned as deed administrator of Omegatrend International Pty Ltd, Omegatrend Australia Pty Ltd, and Omegatrend Global Pty Ltd (each entity subject to a Deed of Company Arrangement).  A further declaration was sought pursuant to section 449D of the Corporations Act 2001 (Cth) ("the Act") and, alternatively, section 447A of the Act, that any vacancy in the office of deed administrator would not be filled. Ashton sought a declaration that he had resigned as deed administrator of Kitcher Property Investments Pty Ltd, Banwell Pty Ltd, and Old Ferry Co Pty Ltd (each entity subject to a Deed of Company Arrangement with Receiver and Manager appointed).  An order was sought pursuant to section 449D of the Act and, alternatively, section 447A of the Act, that any vacancy in the office of deed administrator be filled by the appointment of Birch, to hold the office together with Read, an existing deed administrator. Declaratory orders were further sought that Ashton (in his capacity as trustee) resign from the KPI Creditors' Trust Deed and the Banwell Creditors' Trust Deed, and that Herbert (in his capacity as trustee) resign from the Carr Civil Contracting Pty Ltd Creditors' Trust.  Pursuant to section 77 of the Trustees Act 1962 (WA) ("Trustees Act"), orders were sought that the vacancies thus created be filled by the appointment of Birch as trustee, to hold that office with Read, an existing trustee of the relevant creditors' trust. The plaintiffs proposed that creditors of the companies and trusts with debts of A$50 or greater be notified by letter of any order made, along with national, international and electronic advertisements.  Creditors would be given liberty to apply to the court within 21 days of receipt of the relevant letter seeking a variation of any orders made. **(iii) Third application: replacement of liquidators** Rocke, Herbert and Ian Carson sought a declaration that they had resigned as liquidators of various corporations related to Westpoint Corporation Pty Ltd (In Liquidation), and of the unrelated company, Pasticceria Australia Pty Ltd (In Liquidation).  In their place, they sought the appointment of Birch, to hold office with Read, an existing liquidator of the relevant companies. **(c) Decision**  The court analysed the evidence relevant to the continuity of the external administrations following the proposed replacements and, in support of the applications, adopted the plaintiffs' submissions.  In relation to each of the applications, the court noted the following. **(i) First application** The plaintiffs relied upon section 502 of the Act, which states that the court may fill a vacancy in the office of a liquidator where such a vacancy exists.  Relying on Re McGrath and Anor (as liqs of HIH Insurance Ltd (in liq)) (2005) 54 ACSR 55, the court noted that it was empowered to make a prospective order appointing a liquidator contingent upon a vacancy being created by the liquidator's resignation.   With respect to ACN Coy, it was submitted that under section 499(5) of the Act a liquidator has the power to resign subject to lodging a Form 505 with ASIC.  Rocke and Herbert had been appointed as liquidators of ACN Coy and had provided Forms 505.  A similar position applied in relation to Ashton as liquidator of Keyros. In support of the application, the court accepted the continuity of the administrations by virtue of the control processes in place, including the existence of a job controller involved in a 'file review' of every external administration.  In this regard, French J stated that: .the proposed replacement appointees were persons involved in and familiar with the work of the various administrations and trusteeships and would be able to provide continuity in relation to them.In terms of cost savings, the court also agreed that the proposed application was preferable to the alternative procedure of conducting numerous and expensive creditors' meetings.  The external administrations in question were substantially complete and accordingly a consolidated court application was the most appropriate mechanism to effect the restructuring with minimum expense. **(ii) Second and third applications** Similar submissions were advanced with respect to the deed administrators and trustees proposed under the second application.  Pursuant to section 449D of the Act and the decision of Barrett J in Re Application of Vouris (2004) 49 ACSR 543, it was noted that the court can make a prospective order appointing a deed administrator contingent upon a vacancy being created by the resignation of a deed administrator.  Reference was made also to section 447A as providing the court with a very wide power to make such an order as it thinks appropriate.  French J adopted the reasoning of Barrett J who considered that the powers conferred on the court by section 447A of the Act were wide enough to give the court power to appoint a joint and several deed administrator. In relation to the Creditors' Trusts, the court relied upon section 93 of the Trustees Act under which an existing or incumbent trustee could bring to the court an application under section 77 of that Act. With respect to the resignation of Rocke as a joint and several deed administrator, reference was made to the difficulty identified by Barrett J in Vouris where a joint and several liquidator resigns leaving only one of the joint and several liquidators remaining. Barrett J held that two options were available to the court in such circumstances, either: * appointing a second liquidator jointly and severally to fill the vacancy; or
* removing the remaining jointly and severally appointed liquidator and then appointing the remaining liquidator as a sole liquidator.

The plaintiffs submitted that, in the case of a deed of administration, the difficulties identified in Vouris would not arise where two or more deed administrators remained jointly and severally appointed.  The plaintiffs submitted that Birch and Read remained jointly and severally appointed deed administrators of the companies from which Rocke had offered his resignation, so that no vacancy in the office of a joint and several deed administrator arose by reason of that resignation.  In addition, the court agreed that the interests of creditors would not be prejudiced by virtue of the proposed orders relating to the deeds of administration and the creditors' trusts.  In relation to the recourse available to creditors, French J stated that "notification and the liberty to apply would give any objecting creditor an opportunity to approach the court".   By virtue of similar submissions canvassed previously, the court found it unnecessary to restate its support for the submissions made in relation to the third application. In support of both the second and third applications, the court adopted similar evidence submitted in relation to ensuring the continuity of each respective external administration.  In this regard the court found that there were adequate controls and, significantly, knowledgeable replacement administrators proposed to effect completion of the respective administrations.  The court adopted similar submissions with regard to cost savings to justify the approval of the external administrations. **(iii) Applications granted** The court allowed the plaintiffs' applications for orders giving effect to the proposed replacements of the various liquidators, administrators and trustees.  French J noted: In my opinion orders giving effect to the proposed replacements of the various liquidators, administrators and trustees can and should be made. In relation to the application under the Trustees Act I regard that application as falling within the accrued jurisdiction of the court by reason of the close connection between the Creditors' Trusts and the Deeds of Company Arrangement to which they related. The replacement of the trustees arises out of the same set of events as has given rise to the application for the appointment of new liquidators and deed administrators.In relation to costs, however, the court declined to allow the costs of reorganisation to be regarded as an incident of the administrations.  According to his Honour: It is quite inappropriate that costs flowing from a voluntary restructuring of the firm whose members have assumed these various offices should effectively be visited upon creditors... The costs orders will be refused and I will make orders to make it clear that these costs are not recoverable out of the assets of the companies or trusts affected by them.etailed Contents**3.12 Corporate liability in respect of vehicle overloading offences**(By Sara Georgandas and John O'Grady, Corrs Chambers Westgarth) ThThe Roads and Traffic Authority of New South Wales v Alto Rural Pty Ltd [2007] NSWSC 1123, New South Wales Supreme Court, Associate Justice Malpass, 16 October 2007[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/october/2007nswsc1123.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/october/2007nswsc1123.htm%22%20%5Ct%20%22_default)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_default) **(a) Summary** The case confirms the position that access to "the reasonable steps defence" contained in section 87 of the [Road Transport (General) Act 2005 No. 11 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=84351" \t "_default) has been restricted with the requirement for corporate defendants to show proof as to the actual or constructive knowledge of directors and management of the corporation.  The acts or omissions of the driver are also relevant in establishing that defence for corporate defendants.**(b) Facts**Proceedings were commenced by The Roads & Traffic Authority of New South Wales ("RTA") against Alto Rural Pty Limited ("Defendant") for an alleged overloading offence under section 56 of the Road Transport (General) Act 2005 (NSW) ("the Act").  The Defendant did not dispute any element of the offence. The mass of the load over the vehicle's rear axle group was 21.76 tonnnes (the permitted maximum was 20 tonnes). The Defendant relied on "the reasonable steps defence" provided by section 87 of the Act. The two elements that must be demonstrated for the reasonable steps defence to be successful are that the Defendant: * did not know, and could not reasonably be expected to have known, of the contravention, and
* had taken all reasonable steps to prevent the contravention.

As the Defendant was a corporation, section 87(5) also applies.  It provides as follows: "(5) If the defendant is a corporation, then, in order to satisfy the court that the corporation did not know and could not reasonably be expected to have known of the relevant contravention, the corporation must satisfy the court that: (a) no director of the corporation, and(b) no person having management functions in the corporation in relation to activities in connection with which the contravention occurred, knew of the contravention or could reasonably be expected to have known of it."In the first instance, the Magistrate found that the management and the director in particular did not know, and could not reasonably be expected to have known, of the contravention and had taken all reasonable steps to prevent the contravention from occurring. The Magistrate made this conclusion despite her findings that the driver ought to have known that the truck was overloaded. The RTA appealed the Magistrate's decision on the basis of an error of law. **(c) Decision** On appeal Malpass AJ set aside the Magistrate's decision on the basis that her ruling on the first element of the defence ("the defendant did not know, and could not reasonably be expected to have known, of the contravention") was not open for her to make on her own findings of fact. Malpass AJ considered that subsection (5) was a threshold requirement in the case of a corporate defendant.  Malpass AJ considered the Second Reading Speech to be of assistance in demonstrating that the object of the legislation was to improve the effectiveness of enforcing mass limits of heavy motor vehicles and to restrict the availability of a defence to what is provided by section 87. Malpass AJ concluded that the statutory defence has been supplemented such that proof as to the actual or constructive knowledge of directors and management is required.  A defendant will fail to establish the first element of the defence unless the court is satisfied that the requirements of subsection (5) have been met.  As the Magistrate had not made such a finding of fact, it was not open for her to make such a decision.  Malpass AJ also considered that the acts or omissions of the driver are relevant when making a determination as to whether the first element of the defence is made out.  Consequently, the matter was remitted back to the Local Court for determination.etailed Contents |

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| **4. Contributions** |  |   |

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