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|  | |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  | | --- | --- | | **Bulletin No. 136**  Editor: [Professor Ian Ramsay](mailto:i.ramsay@unimelb.edu.au" \t "_new), Director, Centre for Corporate Law and Securities Regulation  Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/" \t "_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/" \t "_new), the [Australian Securities Exchange](http://www.asx.com.au/" \t "_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/" \t "_new), [Clayton Utz](http://www.claytonutz.com/" \t "_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/" \t "_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/" \t "_new), [Freehills](http://www.freehills.com/" \t "_new), [Mallesons Stephen Jaques](http://www.mallesons.com/" \t "_new).   1. 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[Contributions](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20%281%29.htm#h7) 7. [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)   **EDITOR'S NOTE** This is the final issue of the Bulletin for 2008. The next issue will be published in early 2009. 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 Ramsay Editor | [bout SAI Global](http://www.saiglobal.com/) | | |  | | --- | | COPYRIGHT WARNING Use of this product must be in accordance with our licence agreement and the relevant licence fee paid by your organisation. We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** |  | | |  | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  |  | | |  | | |  | | --- | | **1.1 External administration reforms**   On 11 December 2008, the Corporations and Markets Advisory Committee (CAMAC) released a report on "Issues in External Administration".  The report responds to a request from the former Government to advise on various proposals that were raised during public consultation on amendments to the insolvency provisions of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). It contains recommendations to improve the efficiency of the external administration process.   The Committee has made recommendations to assist the efficient and expeditious conduct of external administrations of distressed companies, including by enhancing the flow of information to creditors and others.   In the Committee's view, greater use of the Internet for conveying information to creditors as well as to the general public would enhance the efficiency, and reduce the cost, of external administrations. Creditors in particular will be empowered by ready access to information about the identity of fellow creditors and the progress of an administration. This can be achieved by:   * requiring administrators to publish the name and contact details of each creditor on a designated website and to publish the estimated amount due to each creditor, other than in relation to any creditor who requests that the amount not be made public; * giving an external administrator the right to inform creditors in the initial notice to them that all subsequent information will be made available on a designated website, with creditors having the right to request printed copies of that information; and * implementing a staged move of mandatory public notices relating to external administrations from the print media to an ASIC website.   The report also recommends measures to enhance procedural efficiency, including:   * enabling an administrator who for good reason cannot chair the major meeting of creditors in a voluntary administration to appoint a suitably qualified nominee subject to creditor approval; * giving creditors the power to determine the remuneration of a provisional liquidator; and * allowing a liquidator to conduct a postal vote of creditors on certain administrative matters.   The report also recognises the importance of ensuring continuity where the office of an external administrator becomes vacant. For this purpose:   * ASIC should be able to replace a liquidator if there is a vacancy in that office; and * ASIC should be able to take possession of and transfer the books of a company if there is a vacancy in the office of external administrator.   The report covers a number of other proposals where the Committee was not persuaded of the need for change.  The report is available on the [CAMAC](http://www.camac.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.2 Share ownership in Europe**  On 10 December 2008, the Federation of European Securities Exchanges (FESE) published a survey of the share ownership of listed European companies.   Some of the main findings include:   * The proportion of non-resident investors of the listed shares of European markets during 1999-2007 has increased, and this trend has spread in 2005-2007. The weighted average amounts to 37%. * There are significant differences in the participation of private non-financial companies/organisations in the different markets. In Bulgaria and Germany they account for almost 40% of market capitalisation while in the United Kingdom it is only 2.7%. * Individual investors / households hold 14% of the market value of listed shares in Europe but there are also significant differences between markets. Only two countries have individual investor participations of more than 20% and seven countries are below 10%. * The participation of the public sector in European Exchanges is 5%, the lowest of the large sectors analysed. In 16 out of 22 countries, the participation of the public sector is less than 10% and in seven markets it is less than 1%. Between 1999 and 2007, with few exceptions, there was a decline.   The survey is available on the [FESE](http://www.fese.be/_mdb/news/Share%20Ownership%20Survey_2007_Final.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.3 APRA outlines approach on executive remuneration**    In October 2008, the Australian Prime Minister announced that the Government would be examining with the Australian Prudential Regulation Authority (APRA) what domestic policy actions on executive remuneration would be appropriate to avoid excessive risk‑taking in Australia's financial institutions. In light of industry and public interest in this topic, APRA issued a media release on 9 December 2008 to outline its intended approach.   APRA is developing a principles‑based framework for executive remuneration structures that would apply to APRA‑regulated institutions. These institutions cover a range of corporate structures including listed and unlisted companies, mutually owned organisations, locally owned and foreign‑owned companies and branches of foreign companies.   The proposed framework would be an extension of the governance, risk management and capital requirements to which regulated institutions are already subject, and would be monitored through the supervisory review processes that APRA staff undertake regularly with individual institutions.   According to APRA Executive Member John Trowbridge: "APRA does not intend to focus on the levels of compensation paid to executives. APRA will concentrate instead on the structure of executive remuneration and, in particular, on the incentives built into these arrangements. It will be a principles‑based approach aimed at encouraging management behaviour that protects and supports the interests of the beneficiaries (depositors, policyholders and superannuation fund members) of APRA‑regulated institutions".   PRA is developing a discussion paper on principles for executive remuneration for APRA‑regulated institutions and anticipates issuing the paper in the second quarter of 2009. This paper will take into account global initiatives in this area as part of the G20 Action Plan announced in November 2008, in which APRA is participating. The paper will invite submissions from interested parties.   After considering submissions received, APRA will issue a response paper along with draft principles and guidance to be applied by the boards of APRA‑regulated institutions. This second set of published material, more detailed than the first, will give another opportunity for submissions before APRA finalises its approach, expected to be during the second half of 2009.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.4 Short selling Bill passes Australian Parliament**  On 5 December 2008, the [Corporations Amendment (Short Selling) Act 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=105282" \t "Default) was approved by Parliament. The Act includes three key measures:   * a legislative ban on naked short selling; * a clarification and expansion of the Australian Securities and Investments Commission's powers; and * a detailed disclosure regime for permitted covered short selling, including placing a positive obligation on brokers to enquire of a client whether a sale is a covered short sale when a client places an order, and a direct obligation on market operators to publicly disclose short selling information they obtain from brokers.   The Act will become law upon Royal Assent early in the New Year.  The Act is available on the [ComLaw](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/bills/bynumber/49F4524D2E962432CA25750100174592?OpenDocument&mostrecent=1" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.5 PCAOB issues Staff Audit Practice Alert on audit considerations in the current economic environment**   On 5 December 2008, the US Public Company Accounting Oversight Board (PCAOB) issued a Staff Audit Practice Alert to assist auditors in identifying matters related to the current economic environment that might affect audit risk and require additional emphasis in audits of financial statements and audits of internal control over financial reporting.   The Staff Audit Practice Alert discusses the following six matters:   * Overall audit considerations; * Auditing fair value measurements; * Auditing accounting estimates; * Auditing the adequacy of disclosures; * Auditor's consideration of a company's ability to continue as a going concern; and * Additional audit considerations for selected reporting areas.   These alerts are prepared by PCAOB staff to highlight new, emerging, or otherwise noteworthy circumstances that may affect how auditors conduct audits under the existing requirements of PCAOB standards and relevant laws.    This is the third Staff Audit Practice Alert that the PCAOB has issued to date. The first alert was issued in July 2006 on the topic of options backdating. The second alert was issued in December 2007 on auditing fair value measurements in financial statements.    All alerts are available on the [PCAOB](http://www.pcaobus.org/News_and_Events/News/2008/12-05b.aspx" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.6 PCAOB report reviews first 4 years of inspections of the 8 largest US audit firms**   On 5 December 2008, the US Public Company Accounting Oversight Board (PCAOB) released a report summarizing the inspection findings of the eight domestic accounting firms that were subject to annual inspections over the past four years.    The PCAOB focuses its inspections on those areas of an audit likely to pose the most significant challenges for an auditor or to pose the most significant risk to investors of misstated financial statements. These include areas that are fundamental to any audit, such as testing of revenue, as well as areas that pose increasingly challenging issues in current market conditions, such as testing of fair value measurements.    The report describes deficiencies observed in these areas, as well as deficiencies in the following additional audit areas: identifying departures from generally accepted accounting principles (GAAP), auditing of management's estimates, income taxes, and internal control, performing analytical procedures and audit sampling, using the work of specialists, and assessing materiality, audit scope and audit differences.    The report also includes information on changes in the quality control systems that firms have described in remediation plans submitted in response to the first years of inspection reports. These include changes to their structure, partner evaluation processes, internal inspection programs, procedures for using the work of foreign affiliates, and processes for compliance with independence requirements.    The eight domestic firms covered by the report that have been inspected annually for each of the past four years are together responsible for the audits of approximately 66 percent of all US based public companies. Four of these firms audit public companies representing 98 percent of the total US market capitalization.    The report is available on the [PCAOB](http://www.pcaobus.org/Inspections/Other/2008/12-05_Release_2008-008.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.7 Report on disclosure for charities and non-profit organisations**   On 4 December 2008, the Senate Standing Committee on Economics of the Australian Parliament published a report titled "Disclosure regimes for charities and not-for-profit organisations". The report makes a series of recommendations which are as follows:   **Recommendation 1**  All Australian Governments agree on common terminology for referring to organisations within the Third Sector. Governments should also develop a common meaning for terms referring to the size of these organisations, including 'micro', 'small', 'medium' and 'large'. This standard terminology should be adopted by all government departments.   **Recommendation 2**  The Government establish a unit within the Department of Prime Minister and Cabinet specifically to manage issues relating to Not-For-Profit Organisations. The unit should report to a Minister for the Third Sector.   **Recommendation 3**   There be a single independent national regulator for Not-For-Profit Organisations.   **Recommendation 4**   The Australian National Regulator for Not-For-Profit Organisations should have similar functions to regulators overseas, and particularly in the UK, including a Register for Not-For-Profit Organisations with a compulsory sign-up requirement. The committee recommends consultation with the Sector to formulate the duties of the National Regulator.   As a minimum, the Regulator should:   * Develop and maintain a Register of all Not-For-Profit Organisations in Australia. Once registered, ASIC should issue each organisation with a unique identifying number or allow organisations with an ABN to use that number as their Not-For-Profit identifier. This could be enabled using existing ASIC website resources. * Develop and maintain an accessible, searchable public interface. * Undertake either an annual descriptive analysis of the organisations that it regulates or provide the required information annually to the Australian Bureau of Statistics (ABS) for collation and analysis. * Secure compliance with the relevant legislation. * Develop best practice standards for the operation of Not-For-Profit Organisations. * Educate / Advise Not-For-Profit Organisations on best practice standards. * Investigate complaints relating to the operations of the organisations. * Educate the public about the role of Not-For-Profit Organisations.   The voluntary codes of conduct developed by ACFID and FIA respectively should be considered by the Regulator when implementing its own code of conduct.   **Recommendation 5**  The Commonwealth Government develop the legislation that will be required in order to establish a national regulator for Australia.   **Recommendation 6**  Once a Register is established and populated, this information should be provided to the ABS, who should prepare and publish a comprehensive study to provide government with a clearer picture of the size and composition of the Third Sector.   **Recommendation 7**  A single, mandatory, specialist legal structure be adopted for Not-For-Profit Organisations through a referral of state and territory powers. Given the degree of change such a legal structure would mean for some Not-For-Profit Organisations, the legal structure must be developed in full consultation with these organisations.  **Recommendation 8**  The Henry Review of taxation include an examination of taxation measures affecting Not-For-Profit Organisations with a view to simplifying these arrangements and reducing confusion and cost of compliance for these organisations.   **Recommendation 9**   A National Fundraising Act be developed following a referral of powers from states and territories to the Commonwealth.  This Act should include the following minimum features:   * It should apply nationally. * It should apply to all organisations. * It should require accounts or records to be submitted following the fundraising period with the level of reporting commensurate with the size of the organisation or amount raised. * It should include a provision for the granting of a license.   **It should clearly regulate contemporary fundraising activities such as internet fundraising.**   **Recommendation 10**   A tiered reporting system be established under the legislation for a specialist legal structure Not-For-Profit Organisations.  **Recommendation 11**   The tiers be assigned to organisations based on total annual revenue.   **Recommendation 12**    The Commonwealth Government work with the Sector to implement a standard chart of accounts for use by all departments and Not-For-Profit Organisations as a priority.   **Recommendation 13**   A new disclosure regime contain elements of narrative and numeric reporting as well as financial, in acknowledgement that the stakeholders of the Sector want different information to that of shareholders in the Business Sector. The financial reporting should be transparent and facilitate comparison across charities.   **Recommendation 14**  The national regulator investigate the cost vs benefit of a GuideStar-type system (a website portal that publishes information on the aims and activities of Not-For-Profit Organisations) in Australia to encompass all Not-For-Profit Organisations.   **Recommendation 15**  A Taskforce be established for the purposes of implementing the recommendations of the report. The Taskforce should report to COAG. Its membership should include:   * a government representative from the Commonwealth; * a COAG-elected representative to speak for states and territories; * one or more qualified legal experts with expertise with the major pieces of legislation affecting Not-For-Profit organisations; * a representative from an organisation which manages private charitable foundations; * an accountant with not-for-profit expertise; and * a number of representatives from the peak bodies of Not-For-Profit Organisations, including a representative from a peak body for social enterprises.   The Taskforce should actively seek to ensure that the measures of reform that it implements do not impose an unreasonable reporting burden on small and micro Not-For-Profit Organisations.  The report is available on the [Committee's](http://www.aph.gov.au/senate/committee/economics_ctte/index.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.8 Legislation to ensure banned foreign company directors are disqualified in Australia**   On 3 December 2008, Senator Nick Sherry, Minister for Superannuation and Corporate Law, introduced into the Parliament the [Corporations Amendment (No 1) Bill 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=104970" \t "Default) which will ensure that individuals who are disqualified from managing companies in foreign countries will also be automatically disqualified in Australia.   The legislation will in the first instance operate only in relation to banned company directors from New Zealand, although other jurisdictions may be added in the future.   The Bill will ensure that persons disqualified by a court in their home jurisdiction from managing companies will be automatically disqualified in Australia.    In addition, where disqualification of a director has occurred by automatic operation of the law in a persons' home jurisdiction, as opposed to by a court, there will now be legal grounds for the Australian Securities and Investments Commission (ASIC) to apply to an Australian court for an order that that person also be disqualified in Australia. ASIC will also be required to record the name of any person who has had a court order made against them under the proposed section on its disqualified persons register and ensure a copy of that court order is retained on the register.   Additionally, the Bill also establishes that a corporation cannot indemnify a director for the legal costs of an unsuccessfully defended action brought by ASIC under the new law.    The Bill is available on the [ComLaw](http://www.comlaw.gov.au/comlaw/Legislation/Bills1.nsf/0/0F092406853AAABFCA2575140020FFFC?OpenDocument" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.9 Consultation on the cost-effectiveness of FRC regulation - feedback statement**  On 3 December 2008, the Financial Reporting Council (FRC), the UK regulator responsible for promoting confidence in corporate reporting and governance, published a statement summarising the responses to its discussion paper 'Cost-effectiveness of FRC Regulation' and giving its feedback.   The discussion paper highlighted a range of actions by the FRC to reduce the costs to market participants of the regulation for which it is responsible. It invited stakeholders to comment on further opportunities to reduce regulatory costs whilst preserving confidence in corporate reporting and governance. The main focus of the discussion paper was on opportunities to reduce the costs associated with FRC regulation rather than on its internal costs.   The FRC has taken action to address some of the key issues which were raised. It has:   * Implemented an updated policy for publishing consultation responses on its website. * Published an overview of all current consultations on the website. * Provided additional training for FRC staff on best practice in preparing impact assessments.   The discussion paper is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/Cost-effectiveness%20of%20FRC%20Regulation%20-%20Draft%20discussion%20paper%20_10%20March%202008_2.pdf" \t "_new) website.  The feedback statement is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/Cost-effectiveness%20consultation%20-%20Feedback%20statement1.pdf" \t "_new) website.  The responses are available on the [FRC](http://www.frc.org.uk/about/feedback2008.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.10 SEC approves measures to strengthen oversight of credit rating agencies**   On 3 December 2008, the US Securities and Exchange Commission (SEC) approved a series of measures to increase transparency and accountability at credit rating agencies, and ensure that firms provide more meaningful ratings and greater disclosure to investors.   The new measures impose additional requirements on credit rating agencies, whose ratings of residential mortgage-backed securities backed by subprime mortgage loans and of collateralized debt obligations linked to subprime loans contributed to the recent turmoil in the credit markets. The SEC also proposed additional measures related to transparency and competition concerning credit rating agencies. The SEC's actions were informed by the agency's extensive 10-month examination of three major credit rating agencies that found significant weaknesses in ratings practices.   This is the second set of credit rating agency reforms since the SEC received its new regulatory authority from Congress to register and oversee credit rating agencies. The initial rules were implemented by the Commission under the Credit Rating Agency Reform Act in June 2007. The regulatory program established through the Credit Rating Agency Reform Act allows the SEC to promulgate rules regarding public disclosure, recordkeeping and financial reporting, and substantive requirements to ensure that credit rating agencies conduct their activities with integrity and impartiality.   Further information is available on the [SEC](http://www.sec.gov/news/press/2008/nrsrofactsheet-120308.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.11 Global securitization organizations response to the market crisis**  On 3 December 2008, the Global Joint Initiative to Restore Confidence in the Securitization Markets, including representatives from the global securitization industry, published a response to the current financial crisis. The response identified the multiple factors which contributed to the current market crisis, presented the near and medium term market outlook, and outlined the significant threat to global economic growth if the securitization sector does not recover. In addition, the industry prioritized the areas of focus for the industry response which are likely to have the greatest near-term impact, and offered recommendations to enhance industry practices in the securitization and structured credit markets. The response was issued by the Securities Industry and Financial Markets Association (SIFMA), the American Securitization Forum (ASF), the European Securitisation Forum (ESF) and the Australian Securitisation Forum (AuSF).    The industry groups identified multiple factors as contributing to the current crisis, noting that many of the factors which contributed to the rapid growth in securitization and structured credit over the last several years also left the market particularly vulnerable to any misstep. These factors also contributed to the severity of the crisis and the speed with which the securitization and broader credit markets deteriorated. These include deteriorating loan underwriting standards, overreliance on credit ratings, growth of complex, highly leveraged positions, misjudgment of liquidity risk, lack of a sense of shared responsibility, and rising losses in the US subprime market which triggered a global crisis in confidence.   At the same time, the industry notes the importance of securitization to the global economy and the importance of its recovery. Market conditions are expected to remain difficult through 2010, which puts at risk the benefits of securitization such as reduced cost and availability of credit and reduces alternatives for investors. Banks may fail to meet US$2 trillion of demand for credit origination over the next three years in the absence of well-functioning securitization markets.   The industry groups note that there is no single action or combination of actions the industry can take which will be sufficient to restore the securitization market to a more normal level of functionality, let alone restore it to the level of the last few years. The groups also caution against using the volumes of 2006 and early 2007 as benchmarks for success in returning the markets to health.    However, the Global Joint Initiative has identified four priorities for immediate action by the industry. These are:  1. improve disclosure of information on underlying assets for residential mortgage-backed securities;  2. enhance transparency with regard to underwriting and origination practices;  3. restore the credibility of CRAs; and  4. improve confidence in valuations, methodologies and assumptions.    Finally, the Global Joint Initiative offers the following eight recommendations for restoring confidence in the securitization markets:  1. Increase and enhance initial and on-going pool information on US non-agency RMBS and European RMBS into a more easily accessible and more standardized format. 2. Establish core industry-wide market standards of due diligence disclosure and quality assurance practices for RMBS.  3. Strengthen and standardize core representations and warranties as well as repurchase procedures for RMBS.  4. Develop industry-wide standard norms for RMBS servicing duties and evaluating servicer performance.  5. Expand and improve independent, third-party sources of valuations and improve the valuation infrastructure and contribution process for specified types of securitization and structured products.  6. Restore market confidence in the CRAs by enhancing transparency into the CRA process.  7. Establish a Global Securitization Markets Group to report publicly on the state of the market and changes in market practices.  8. Establish and enhance educational programs aimed at directors and executives with oversight over securitized and structured credit groups, as well as at investors with significant exposure to these products.  The response is available on the [SIFMA](http://www.sifma.org/capital_markets/docs/Survey-Restoring-confidence-securitization-markets.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.12 External audit quality and banking supervision: new Basel Committee paper**  On 2 December 2008, the Basel Committee on Banking Supervision published 'External Audit Quality and Banking Supervision'. This paper describes the importance of audit quality in banks, particularly due to an increased reliance on sound audits and because high-quality audits can enhance market confidence during times of severe market stress.    The paper also highlights that bank audits are highly specialised, which can be complicated by escalating complexity of banking products and the related accounting and auditing rules for those instruments. Most of the world's banking assets are audited, and banking supervisors are increasingly reliant on high-quality audits to complement supervisory processes.    As noted in the paper, the Basel Committee intends to build upon its ongoing efforts to address audit quality through continued support of groups with direct influence over external audit firms and promotion of enhanced sound audit guidance, practices and standards. It also calls for enhanced transparency over the structure and financial positions of global network audit firms.    This paper is available on the [Bank for International Settlements](http://www.bis.org/publ/bcbs146.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.13 EPC/EFC publish review of measures undertaken on executive pay**  On 2 December 2008, the Economic Policy Committee (EPC) and the Economic and Financial Committee (EFC) of the Council of the European Union published a review of measures undertaken by the European Commission and Member States on executive pay. EFC members have updated the state of play on executive pay and recent measures taken, with a focus on:   * legislative measures already taken or envisaged; * codes of conduct; and * specific measures taken in the context of the national rescue packages for the banking sector.   The review is available on the [EU](http://register.consilium.europa.eu/pdf/en/08/st16/st16487.en08.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.14 IPO activity stagnates at historical low**   On 1 December 2008, analysis published by PricewaterhouseCoopers shows the stagnation of IPO activity in Australia for the 11 months to 30 November 2008 after an initial slowing in the first half of this year.   PricewaterhouseCoopers' IPO analysis, which excludes resources, compliance and backdoor listings, shows only 24 IPOs raising $796 million were completed in the 11 months to 30 November 2008. In the same period last year, there were nearly three times as many IPOs (68) which raised ten times the amount of capital ($7.8 billion).    Only two of the 24 IPOs in the year-to-date have held or exceeded their issue price since listing - a first in the 16 years PricewaterhouseCoopers has been analysing float activity. This, together with a decline in the S&P/ASX 300 Industrials Index of 45 per cent for the 11 months to 30 November, has contributed to poor investor sentiment for IPOs.   **(a) Small and large cap float activity**   The top five floats in the 11 months YTD 2008 raised $692 million, less than 15 per cent of the $4.6 billion raised by the corresponding top five listings in the same period last year.  The top five floats for the 2008 YTD period accounted for 87 per cent of the total funds raised, with the balance comprising relatively small listings (last year 60 per cent).   For the first time in six years, float activity is missing a billion dollar capital raising. The largest IPO in 2008, BrisConnections' first tranche, would not have made the 'top five' list in 2007.   There has also been a dramatic shift in the composition of total floats between Small and Large Cap listings. Traditionally, Large Caps are seen as having a lower risk profile, greater liquidity and stability of earnings and, on average, are more strongly supported by investors.    Not surprisingly in the current conditions, Small Caps with less than $100 million market capitalisation on listing accounted for most (79 per cent) floats in 2008 YTD. In comparison, for the same period in 2007, Small Caps accounted for just over half of the total floats (54 per cent).   Median funds raised per company have also dropped from $15.6 million last year to just $5.6 million in 2008 YTD. Similarly, the median market capitalisation of companies listing on the ASX has more than halved from $59 million in 2007, to a relatively low $24 million in 2008, arguably too small to justify, or support, a public listing.   **(b) Share price performance**   The PricewaterhouseCoopers IPO analysis reveals that only two of the 24 floats to 30 November 2008 met or exceeded their issue price since listing. All of the others (22) are trading at a discount.   Median absolute share price performance since listing has declined by a hefty 60 per cent, falling further than an equally underperforming S&P/ASX 300 Industrials Index (down 45 per cent).   On average, pricing for all IPOs based on 'year one' forecast P/Es has fallen by 32 per cent from 12.2 times in YTD 2007 to 8.3 times YTD 2008.   **(c) Sector analysis**   Up more than 150 per cent on 2007, five of the 24 listings in the 11 months to 30 November 2008 have been relatively small renewable energy and clean technology companies seeking capital to fund development and the commercialisation of proprietary technology.    Listing activity for most other sectors has declined dramatically. IPOs in Financial Services, once a leading part of the markets in 2006 and 2007, have all but dried up. There were only three floats 2008 YTD in comparison with 11 listings for the same period last year. Industrials also suffered, dropping from 14 IPOs in 2007 November YTD, to just six in the same period this year.   Historically strong contributions from Property Trusts & Investment Funds and the Health & Biotechnology sector have fallen considerably with four and three listings, respectively, in each sector YTD. This compares with 10 and 11 IPOs, respectively, for the same period last year.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.15 Improving conduct in Australian franchising**  On 1 December 2008, the Parliamentary Joint Committee on Corporations and Financial Services tabled in Parliament the committee's report entitled 'Opportunity not opportunism: improving conduct in Australian franchising'.  The Parliamentary Joint Committee on Corporations and Financial Services inquired into the operation of Australia's Franchising Code of Conduct (the Code) with a view to identifying justifiable improvements to the Code. The committee has made eleven recommendations which are consistent with its overall aim of raising the standard of conduct in Australian franchising.  Variable contracts underpinning the franchising relationship can impair the viability and success of individual franchise agreements for the following reasons:   * differing expectations about the obligations of each party to the agreement; and * an asymmetric power dynamic within franchise agreements, with potential to lead to abuse of power.   Suggestions for improving dispute resolution outcomes included: an increased focus on pre-mediation strategies; the creation of a tribunal to make determinations; or the introduction of a franchising ombudsman.   Other recommendations include:   * a requirement that franchisors disclose to franchisees, before a franchising agreement is entered into, the process that will apply in determining end of term arrangements; * the [Trade Practices Act 1974](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) be amended to include pecuniary penalties for breaches of the Code; * the government consider the benefits of developing an online registration system for Australian franchisors; * disclosure documents include a clear statement by franchisors of the liabilities and consequences applying in the event of franchisor failure and the government explore ways to better balance the rights of franchising parties in the event of franchisor failure; * consideration be given to amending the Trade Practices Act 1974 to provide for pecuniary penalties in relation to breaches of section 51AC, section 52, and the other mandatory industry codes under section 51 AD; and * the government consult with the ABS to develop mechanisms for collecting and publishing relevant statistics on the franchising sector.   The report is available on the [Committee's](http://www.aph.gov.au/senate/committee/corporations_ctte/franchising/index.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.16 Clearer segments for UK listing regime**   On 1 December 2008, the UK Financial Services Authority (FSA) published a feedback statement following its review of the structure of the Listing Regime. The proposed changes will provide further clarity to the Listing Regime and help maintain the integrity of the UK markets enabling issuers and investors to make informed decisions.    In particular, the paper sets out proposals on how the UK listing regime can be clearly marked out into 'Premium' and 'Standard' so market participants understand the differences in the obligations issuers have to meet.      Under the proposals, Premium Listings will have to meet the UK's super-equivalent standards which are higher than the EU minimum requirements. The Premium segment will only be open to equity securities issued by commercial companies and closed and open-ended investment entities.  Standard Listings will cover issues of equities (excluding issues by investment entities), Global Depository Receipts (GDRs) and Debt and Securitised derivatives which are only required to comply with EU minimum requirements.      Premium and Standard Listings will be open to both UK and overseas companies.    Following the widespread responses from the market, the FSA is also proposing to:   * provide a level playing field for UK companies by allowing them to also list on the Standard Listing segment; * ensure greater clarity around the corporate governance disclosure requirements of overseas companies with a Premium Listing; * introduce a new pre-emption rights disclosure regime for overseas companies with a Premium Listing; * maintain the current disclosure regime for GDRs and not require sponsors for issuance of GDRs; * make it easier for listed companies with equity securities to migrate to other categories without first cancelling their current listing; and * extend the Company Reporting Directive's requirement for an annual corporate governance statement to overseas companies.   The FSA will consult on changes to the Listing Rules to reflect the proposals and aim to provide feedback in 2009.   The feedback statement and consultation paper are available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/CP/2008/08_21.shtml" \t "_new) website.   The proposed structure of the listing regime is available on the [FSA](http://www.fsa.gov.uk/pubs/cp/cp08_21_roadmap.pdf" \t "_new) website.  The discussion paper "A review of the Structure of the Listing Regime" published in January 2008 reviewed the structure of the UK listing regime and is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/DP/2008/08_01.shtml" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.17 Assessing fair value practices: Basel Committee issues consultative paper**  On 28 November 2008, the Basel Committee on Banking Supervision issued the consultative paper "Supervisory guidance for assessing banks' financial instruments fair value practices". The paper provides guidance to banks and banking supervisors to strengthen valuation processes for financial instruments.    The guidance supports one of the key recommendations for enhancing transparency and valuation set out in the April 2008 Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience.    The main principles in the Basel Committee guidance include:   * strong valuation governance processes; * use of reliable inputs and diverse information sources; * independent verification and validation processes; * communication of valuation uncertainty to internal and external stakeholders; * consistency in valuation practices for risk management and reporting; and * strong supervisory oversight around bank valuation practices.   The consultation paper is available on the [Bank for International Settlements](http://www.bis.org/publ/bcbs145.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.18 Business rule accountability**    On 28 November 2008, Australian Attorney-General, Robert McClelland, launched the Administrative Review Council's 49th report, 'Administrative accountability in business areas subject to complex and specific regulation'.    The report investigates the increasing complexity of regulatory regimes which apply to Australian business, and proposes a set of guidelines to ensure accountability and transparency in the application of business rules. It covers regulation by government agencies, as well as self regulation by industry bodies and other non-government entities.    The Council monitors and advises the Government on matters relating to the Commonwealth administrative law system primarily through the publication of reports and best practice guidelines. The Council also advises Government on the sorts of decisions that should be subject to tribunal and judicial review.    The report contains a framework of guideline principles and recommended actions which are the following:   **(a) The development of business rules**   1. The development of all business rules should be open and transparent, and there should exist procedures for effective and timely consultation with people whose interests are likely to be affected by the application of the rule.  In general, consultation with interested parties should occur at all stages in the development of business rules. The nature of this consultation should reflect the character, scope and effect of a business rule.   The circumstances in which consultation will not be appropriate are limited-for example, where prior public notification would be inappropriate because the rule is designed to foreclose a tax avoidance loophole or to prevent an imminent threat to financial markets.   The Australian Government's Best Practice Regulation Handbook outlines procedures designed to ensure that government agencies consult fully in the development of business rules arising under both legislation and soft law.   The Government should also endorse a set of consultation benchmarks developed by industry bodies and other non-government entities to guide them in the development of co- and self-regulatory soft law business rules. To ensure their effectiveness and efficiency, the benchmarks should be consistent with the consultation procedures described in the Best Practice Regulation Handbook.   2. All business rules should be expressed in clear, understandable language and be readily accessible.  Legislation, including legislative instruments to which the [Legislative Instruments Act 2003 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74901" \t "Default) applies, is subject to rigorous drafting standards and parliamentary scrutiny.   To ensure their effectiveness and efficiency, government and non-government soft law business rules should also be drafted in plain language, the drafting process being overseen by someone with legal training and expertise in the relevant area.   All new and amended business rules and complaint-handling and review mechanisms should be widely accessible to those to whom they relate. The information should be available on a well-publicised internet site and in print. Targeted education programs should be considered where new or amended business rules effect major changes to the regulatory environment.   **(b) The application of business rules**  3. All business rules should be applied in a manner consistent with the administrative law values of lawfulness, fairness, rationality, openness (or transparency) and efficiency. Application of the values in business areas subject to co- and self-regulation is also essential.   **(c) Review of business rules**   4. There should be an opportunity to seek review of any decision that applies a business rule in a way that directly affects the rights or interests of a person or business.   Administrative law review is generally available if the decision of a government agency affects or is likely to affect a person or business in an individual manner. A right to seek review of a decision should similarly exist where the application of a non-government business rule has a direct effect on the individual rights or entitlements of a person or business as a result of a decision that relates specifically to that person or business.    The mechanisms for seeking review might differ from the administrative law review mechanisms that apply to government regulation. Examples of the sorts of mechanisms that can be adopted to achieve these ends are peer review, remedies under codes, and industry dispute-resolution schemes.  A balance should be maintained between cost and accountability in all review mechanisms for decisions made with regard to business rules.   **(d) Monitoring of business rules**   5. There should be continuing monitoring of the accountability mechanisms that apply to action taken on the basis of soft law business rules, whether the action is taken by a government or a non-government agency.  Government regulation and decision making are generally subject to administrative law review mechanisms. A range of internal and external monitoring and reporting requirements apply to the operation of such mechanisms.   Regulation by non-government bodies and co-regulation by government and non-government bodies are subject to different accountability requirements. Continuing monitoring and internal quality controls should apply to those accountability requirements, to ensure that business rules are applied properly and in accordance with administrative law values.   In the case of co- or self-regulation, an independent external evaluation should be conducted within at least three years of the introduction of business rules and at regular intervals thereafter, to gauge the effectiveness of the accountability mechanisms applying to the regulation.   The report is available on the [Council](http://www.ag.gov.au/agd/www/archome.nsf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.19 FRC alerts directors to the corporate reporting challenges arising from current economic conditions**   On 27 November 2008, the UK Financial Reporting Council (FRC) published:   * an analysis of some of the challenges for audit committees arising from current economic conditions and some suggested questions that audit committees may need to address; and * an update for directors of listed companies on reporting on going concern and liquidity risk.   The purpose of the documents is to assist directors by identifying key questions that they may wish to consider when preparing for the year-end and in meeting their responsibilities in relation to annual reports and accounts. These documents do not impose any new requirements on companies or their auditors.    The update also notes that the absence of confirmations of bank facilities does not of itself necessarily cast significant doubt on a company's ability to neither continue as a going concern nor necessarily require auditors to refer to going concern in their reports.    The update for directors of listed companies on reporting on going concern and liquidity risk is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/Challenges%20for%20audit%20committees%20November%2020081.pdf" \t "_new) website.    The FRC has also published the results of a study of companies' disclosures on going concern and liquidity risk with conclusions and recommendations for improvements. This study is available on the [FRC](http://www.frc.org.uk/corporate/goingconcern.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.20 Rights issue reform in the UK**  The UK Rights Issue Review Group has published its report to the Chancellor of the Exchequer on rights issues.   The Group, established in July 2008, was asked by the Treasury to review the rights issue process in light of the challenges faced by some transactions earlier this year. It was co-chaired by the Financial Services Authority (FSA) and the Treasury and included representatives from advisers, underwriters, issuers and investors.   In the short term, the Group recommends that:   * the FSA and Department for Business, Enterprise and Regulatory Reform (BERR) consult on reducing the rights issue subscription period from 21 days to 14; * the Association of British Insurers (ABI) reviews its guidance on the annual ceiling on allotments in light of the Group's recommendation that it be increased from one-third to two-thirds of an issuer's issued share capital; * the FSA continues to maintain oversight of the conflict of interest regimes with a view to reinforcing transparency between issuers and underwriters; * the FSA facilitates the development by market participants of non-prescriptive guidance on the issues that an issuer could usefully consider when embarking on a capital raising by way of a rights issue; and * the FSA takes forward consultation on a new form of open offer (an invitation to existing shareholders to subscribe to new shares in proportion to their holdings which is not made by means of a renounceable or tradable entitlement) which would provide compensation for shareholders who do nothing (in the way a rights issue does). An open offer of this kind could be run over a 14 day period in conjunction with an issuer's general meeting notice period.   In the medium term, the Group recommends that:   * the FSA works at the EU level for the adoption of a short form prospectus for rights issues; * market participants and the FSA explore, where possible, the increased use of shelf registration for equity issuance; * the FSA considers further a basis for conditional dealing in rights issues to allow the general meeting notice period and the rights issue subscription period to be run in parallel; * the FSA undertakes further informal discussions on the usefulness of   progressing more accelerated rights issue models, including for this purpose the Australian RAPIDS model; and * the FSA consults on a more permanent position in relation to short selling in rights issues.   The Report is available is available on the [HM Treasury](http://www.hm-treasury.gov.uk/d/pbr08_rightsissue_3050.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.21 IOSCO Technical Committee task forces to respond to financial crisis**   On 24 November 2008, the International Organization of Securities Commissions (IOSCO) Technical Committee launched three task forces to support G-20 aims to address the continuing market turmoil, focused on strengthening financial markets and investor protections.    The Technical Committee Task Forces will consider the following issues:  Short Selling: The Task Force will work to eliminate gaps in various regulatory approaches to naked short selling, including delivery requirements and disclosure of short positions. In this connection, the Task Force will also examine how to minimize adverse impacts on legitimate securities lending, hedging and other types of transactions that are critical to capital formation and to reducing market volatility. The Task Force will be chaired by the Securities and Futures Commission of Hong Kong;  Unregulated Financial Markets and Products: Given the impact unregulated financial markets and products have had on global capital markets, the Task Force will examine ways to introduce greater transparency and oversight to unregulated market segments, such as OTC markets for derivatives and other structured financial products. The Task Force will be co-chaired by the Australian Securities and Investments Commission and the Autorité de Marché Financiers of France; and  Unregulated Financial Entities: The Task Force will examine issues surrounding unregulated entities such as hedge funds, including the development of recommended regulatory approaches to mitigate risks associated with their trading and traditional opacity. The Task Force will be chaired by the CONSOB of Italy and the Financial Services Authority of the United Kingdom.    The Task Forces will present their reports at the next Technical Committee meeting in February 2009 and to the next G-20 summit in spring 2009.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.22 Revised merger guidelines issued**   On 21 November 2008, the Australian Competition and Consumer Commission (ACCC) issued its revised Merger Guidelines 2008.   The guidelines outline the general principles underpinning the ACCC's approach to merger analysis under section 50 of the [Trade Practices Act 1974](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default).   There have been a number of changes made in response to the comments received. The most notable of these is the simplification of the notification threshold the ACCC introduced to filter and thereby limit the merger reviews it conducts to those mergers which, in its view, may potentially raise competition concerns.    The 2008 Merger guidelines are available on the [ACCC](http://www.accc.gov.au/content/index.phtml/itemId/809866" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.23 Australian Government releases guarantee scheme documents**    On 21 November 2008, the Australian Government published its guarantee facility under which Australian authorised deposit-taking institutions (ADIs) may apply to have deposit amounts over A$1 million and certain funding liabilities guaranteed by the Government. Foreign banks authorised to carry on banking business in Australia under the [Banking Act 1959](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6665" \t "Default) may also apply to have certain deposits and funding liabilities held by Australian residents guaranteed by the Government.   The Guarantee Facility took effect on 28 November 2008 and replaced the interim Deed of Guarantee issued on 2 November 2008.   The Guarantee Facility comprises a Deed of Guarantee, executed by the Treasurer, and a set of Scheme Rules which set out the eligibility criteria and application process for how ADIs may apply for the Guarantee. The Guarantee Facility and the Scheme Rules are available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=017&ContentID=1431" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.24 Strategy to address the lessons of the banking crisis announced by the Basel Committee**   On 20 November 2008, the Basel Committee on Banking Supervision announced a strategy to address the fundamental weaknesses revealed by the financial market crisis related to the regulation, supervision and risk management of internationally-active banks.    The key building blocks of the Committee's strategy are the following:   * strengthening the risk capture of the Basel II framework (in particular for trading book and off-balance sheet exposures); * enhancing the quality of Tier 1 capital; * building additional shock absorbers into the capital framework that can be drawn upon during periods of stress and dampen procyclicality; * evaluating the need to supplement risk-based measures with simple gross measures of exposure in both prudential and risk management frameworks to help contain leverage in the banking system; * strengthening supervisory frameworks to assess funding liquidity at cross-border banks; * leveraging Basel II to strengthen risk management and governance practices at banks; * strengthening counterparty credit risk capital, risk management and disclosure at banks; and * promoting globally coordinated supervisory follow-up exercises to ensure implementation of supervisory and industry sound principles.   The Basel Committee expects to issue proposals on a number of these topics for public consultation in early 2009, focusing on the April 2008 recommendations of the Financial Stability Forum. The other topics will be addressed over the course of 2009.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.25 Action to further enhance market integrity**   On 19 November 2008, Senator Nick Sherry, the Australian Minister for Superannuation and Corporate Law, announced that the Government has commissioned the Corporations and Markets Advisory Committee (CAMAC) to review a range of market practices with a view to further enhancing the integrity and transparency of the Australian market.   These include the use of margin lending by company directors, 'blackout' trading by company directors, the spreading of false rumours and the potential disclosure of market sensitive information at analysts' briefings.   Further information (including a timetable for this project) is available on the [CAMAC](http://www.camac.gov.au/camac/camac.nsf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.26 SEC improves disclosure for mutual fund investors**  On 19 November 2008 the US Securities and Exchange Commission voted unanimously to improve mutual fund disclosure by requiring that funds provide investors with a concise summary - in plain English - of the key information they need to make informed investment decisions. The new summary prospectus will appear at the front of a fund's prospectus.   The Commission also approved amendments to encourage funds to make greater use of the Internet so investors can receive more detailed information in a way that best suits their needs.    Specifically, the Commission adopted the following improvements to mutual fund disclosure:   **(a) Summary information at the front of the prospectus**  The Commission adopted amendments to Form N-1A, the registration form for mutual funds, to require that every mutual fund include key information at the front of its statutory prospectus about the fund's investment objectives and strategies, risks, and costs. The summary will also include brief information regarding investment advisers and portfolio managers, purchase and sale procedures, tax consequences, and financial intermediary compensation. Funds will be required to provide the summary information in plain English and in a standardised order.    **(b) New prospectus delivery option for mutual fund securities**  The Commission adopted a new rule that permits sending a summary prospectus to satisfy prospectus delivery requirements provided that the mutual fund's summary prospectus, statutory prospectus, and other specified information are available online. The summary prospectus must have the same information in the same order as the summary at the front of the statutory prospectus. In addition:   * The online materials must be in a user-friendly format that permits investors and other users to move back and forth between the summary prospectus and the statutory prospectus. This will allow investors and others to efficiently access particular information that is of interest to them. * Investors have to be able to download and retain an electronic version of the information. * The statutory prospectus and other information must be provided in paper or by e-mail upon request so investors can choose the format in which they receive more detailed information.   The rule changes are effective on 28 February 2009 and funds must begin complying with the form changes on 1 January 2010.   Further information is available on the [SEC](http://www.sec.gov/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.27 NASAA outlines core principles for regulatory reform in financial services**  On 19 November 2008, the North American Securities Administrators Association (NASAA) released five core principles to help guide the ongoing policy debate over the changes necessary to strengthen the US's financial services regulatory structure.  The five core principles of regulatory reform are:   * Preserve the system of state/federal collaboration while streamlining where possible. * Close regulatory gaps by subjecting all financial products and markets to regulation. * Strengthen standards of conduct, and use "principles" to complement rules, not replace them. * Improve oversight through better risk assessment and interagency communication. * Toughen enforcement and shore up private remedies.   Further information is available on the [NASAA](http://www.nasaa.org/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.28 Audit firms: European Commission consults on ways to help create more market players**  On 18 November 2008, the European Commission launched a public consultation on control structures in audit firms. This follows an independent study on the ownership rules of audit firms and their consequences for audit market concentration (IP/07/1570). The purpose of the consultation is to examine possible ways for finding catalysts to stimulate the emergence of new players in the international audit market. This may include deregulation of the capitalisation of audit firms (unbundling) and other catalysts related to human capital of audit firms. The Commission invites stakeholders to give their views on the issues by 28 February 2009.  The Commission invites stakeholders to give their views on two possible options for opening up the international audit market:   * Particular focus on deregulation of the capitalisation of audit firms (unbundling) as the catalyst for opening up the audit market. Deregulating the capital structure implies modification of Article 3 (4) of the 2006 Directive on Statutory Audit, which requires that auditors hold a majority of the voting rights in an audit firm and that a majority of auditors control the management board. This should however not be to the detriment of robust independence rules. * Wider focus on a range of catalysts. Other barriers than access to capital can also play an important role in affecting entry into the audit market: reputation; quality and expertise of staff; low switching rates (reasons for companies not to change their auditor); differences among firms in their international outreach; and differences in independence rules.   Further information is available on the [Europa](http://ec.europa.eu/internal_market/auditing/market/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.29 PWG announces initiatives to strengthen OTC derivatives oversight and infrastructure**    On 14 November 2008, the US President's Working Group (PWG) on Financial Markets announced a series of initiatives to strengthen oversight and the infrastructure of the over-the-counter derivatives market.    Initiatives announced include the development of credit default swap central counterparties, some of which will commence operations before the end of 2008, and the establishment of a Memorandum of Understanding regarding CDS central counterparties among the Federal Reserve Board of Governors, the Securities and Exchange Commission and the Commodity Futures Trading Commission. The PWG also announced a broad set of policy objectives to guide efforts to address the full range of challenges associated with OTC derivatives and issued a progress summary to provide an overview of the results of ongoing efforts to strengthen the infrastructure of OTC derivatives markets.   According to the PWG, over-the-counter derivatives are integral to the smooth functioning of complex financial markets and, with appropriate regulatory oversight and prudent management can enhance the ability of market participants to manage risk. The rapid growth of OTC derivatives markets over the past several years reflects their increasing importance to market participants.    **(a) Development of CDS central counterparties**   The PWG's top near-term OTC derivatives priority is to oversee the successful implementation of central counterparty services for credit default swaps. A well-regulated and prudently managed CDS central counterparty can provide immediate benefits to the market by reducing the systemic risk associated with counterparty credit exposures. It also can help facilitate greater market transparency and be a catalyst for a more competitive trading environment that includes exchange trading of CDS.    At the prompting of the PWG, several potential central counterparty providers have accelerated the development of their efforts. The relevant regulatory authorities are assessing these central counterparty proposals by conducting detailed on-site reviews of risk management and other key design elements. After completing the on-site reviews, regulators expect to proceed toward regulatory approvals and/or exemptions expeditiously and anticipate that one or more CDS central counterparties will commence operations before the end of 2008.    **(b) Memorandum of Understanding among the CFTC, SEC and Federal Reserve**   To facilitate the regulatory approval process and to promote more consistent regulatory oversight, the Board of Governors of the Federal Reserve System, the Securities and Exchange Commission and the Commodity Futures Trading Commission signed a Memorandum of Understanding. The Memorandum of Understanding establishes a framework for consultation and information sharing on issues related to CDS central counterparties.    **(c) The PWG's policy objectives for OTC derivatives**   The PWG is announcing a set of additional policy objectives to guide efforts to address challenges associated with OTC derivatives, consistent with the recommendations of the Financial Stability Forum.    US and foreign supervisors embarked on an effort in 2005 to improve how market participants manage their OTC derivatives operations, which had not matured sufficiently to support increased trading volumes. These efforts sought to enhance other elements of the market infrastructure, reduce systemic risk and address operational risks that have accompanied the growth of OTC derivatives.    In light of recent developments, the PWG is issuing broader objectives than those that motivated the PWG's previous OTC derivatives recommendations in the 13 March 2008 PWG Policy Statement on Financial Market Developments.   The PWG has established the following policy objectives:   * improve the transparency and integrity of the credit default swaps market; * enhance risk management of OTC derivatives; * further strengthen the OTC derivatives market infrastructure; and * strengthen cooperation among regulatory authorities.   The agencies in the PWG will work with other regulators and market participants to achieve these goals over the next several months. Where necessary, they will support legislative change.    The PWG Policy Statement on Financial Market Developments is available on the [PWG](http://www.treas.gov/press/releases/hp871.htm" \t "_new) website.  The Memorandum of Understanding is available on the [Treasury](http://www.treas.gov/press/releases/reports/finalmou.pdf" \t "_new) website.     The Progress Summary is available on the [Treasury](http://www.treas.gov/press/releases/reports/progresssummary.pdf" \t "_new) website.    The Policy Objectives are available on the [Treasury](http://www.treas.gov/press/releases/reports/policyobjectives.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1)  **1.30 Employee share ownership in unlisted entities**   The Employee Share Ownership Project at Melbourne Law School, University of Melbourne, has published a new research report by Ann O'Connell titled "Employee share ownership in unlisted entities: objectives, current practice and regulatory reform".  The report is available on the [ESOP](http://cclsr.law.unimelb.edu.au/go/centre-activities/research/employee-share-ownership-plans-current-practice-and-regulatory-reform/index.cfm" \t "_new) project website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  |  | | |  | | |  | | --- | | **2.1 ASIC review of 30 June 2008 reports and areas of focus for upcoming reporting period**  On 3 December 2008, the Australian Securities and Investments Commission (ASIC) issued guidance to entities preparing their 31 December 2008 financial and audit reports.   The guidance incorporates specific issues identified through ASIC's review of 30 June 2008 financial reports. ASIC is moving to publish the results of its regular reviews half-yearly so that entities are better informed about ASIC's key areas of focus and the specific issues that should be addressed to comply with the relevant accounting standards.  The following information summarises the key findings of ASIC's recent review and specific guidance for the upcoming reporting period.  **(a) Going concern**  Given the extent and nature of current market conditions, directors should continue to focus on the appropriateness of the going concern assumption in the preparation of financial reports. This assessment includes having regard to reduced liquidity and ability to refinance debt or raise new funds, as well as compliance with lending covenants.  **(b) Impairment of assets**  ASIC's review of reports found write-downs of intangible assets at 30 June 2008 were less than one per cent of the total value. Given changes in international and domestic markets since 30 June 2008, ASIC expects further write-downs. Directors should maintain a strong focus on impairment of intangibles and other assets not reported at fair values (including relatively recently acquired assets) at 31 December 2008.  In its review of the 30 June 2008 reports, ASIC noted a number of instances where entities did not disclose:   * discount rates and growth rates used in value-in-use calculations; * explanations for using forecast periods of greater than five years; and * sensitivity analysis in relation to changes in key assumptions.   ASIC highlights that impairment review processes must be robust and transparent so that investors can have confidence in reported asset values.  Cash generating units should be identified at sufficiently low levels in entities' businesses for the purposes of impairment testing. Where the units are identified at a lower level, there may be greater impairment losses with surplus cash flows from one unit not being used to support the values of assets in other units.  **(c) Determining fair values**  The entities reviewed at 30 June had $187 billion of assets at fair values, including infrastructure assets, investment properties and financial instruments.  Financial instruments at fair value were most significant for banks and insurance companies.   Infrastructure and property trusts reported $53 billion of their $55 billion of assets at fair values using directors' valuations, with $20 billion guided by independent valuations. In ASIC's view, many trusts should have further described the methods and significant assumptions used, including whether fair value was supported by market evidence or disclosed other factors used.  Some entities made greater use of models to value financial instruments this year. To assist financial report users, entities should make maximum use of appropriate market-based information and fully disclose methods and assumptions.  In the upcoming reporting period, ASIC advises directors to continue to focus on the use of market information for 31 December 2008 financial reports, including exposures to changes in the values of assets held by sponsored defined benefit superannuation funds.  **(d) Off balance sheet arrangements**  In its recent review, financial reports and other public information for some entities indicated the possible existence of off balance sheet arrangements. However, the financial reports provided no explanation of the nature and scale of the arrangements or the reasons why assets and liabilities were not on balance sheet.   ASIC will ask entities to explain why some have been equity accounting rather than consolidated even though the ownership interest is close to 50 per cent and other ownership interests are diversely held.   In the upcoming financial reporting period, directors should understand the risks and benefits to the entities, and the circumstances under which assets and liabilities are not recognised on the balance sheet. Regard should also be given to the risks that could flow under future adverse economic and market conditions in determining whether an off balance sheet arrangement should be on balance sheet.  **(e) New financial instrument disclosures**  ASIC's review found that some disclosures did not indicate the extent of use of financial instruments. Quantitative measures of risk were omitted, risk and hedging disclosures were provided on a net basis, and there was no information on exposures to notional underlying amounts under derivatives.  While most entities made disclosures under new accounting standard AASB 7 Financial Instruments: Disclosures, ASIC was concerned that many entities did not provide better information to explain the risks associated with financial instruments and how they are managed. Some entities provided minimal or 'boilerplate' disclosures that did not follow the principles and intent of the accounting standard.  Further, a number of entities did not meet specific detailed AASB 7 disclosure requirements, resulting in:   * lack of information about security provided on borrowings; * poor disclosure of debt maturity profiles; * insufficient disclosure of risks associated with financial instruments; and * poor disclosure of hedging arrangements.   In the 31 December 2008 reports, directors should review the adequacy of their financial instrument disclosures.   Entities should also focus on the information needs of external financial report readers and include meaningful disclosures that provide a proper understanding of the business and the risks faced. This includes information that is, or should be, used by management.  As a result of its review of 30 June 2008 reports, ASIC will be contacting certain entities to better understand their impairment of assets processes, determination of fair values, and off balance sheet arrangements as reported at 30 June 2008. ASIC will also be focused on the impact of subsequent market movements on asset values in the context of continuous disclosure obligations.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  |  | | |  | | |  | | --- | | **3.1 Review of directors' trading during the blackout period Q3 2008**   On 11 December 2008, ASX released its latest review of securities trading by directors during the 'blackout' period. The review was based on the disclosure of Directors' Interest Notices by listed entities.  The report is available on the [ASX](http://www.asx.com.au/about/pdf/20081212_Q3_report_on_blackout_trading.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h3)  **3.2 Australia's equity settlement system - consultation paper**  On 9 December 2008, ASX released a consultation paper requesting comment on enhancing Australia's equity settlement system. Formal responses should be provided in the designated areas of the document and forwarded to ASX by 20 February 2009.  The consultation paper is available on the [ASX](http://www.asx.com.au/about/pdf/consultation_paper_enhancing_equity_settlement_system.doc" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h3)  **3.3 Delivering efficiencies to the marketplace through the harmonisation and linking of CCP activities - consultation paper**   On 9 December 2008, ASX released a consultation paper requesting comment on delivering efficiencies to the marketplace through the harmonisation and linking of CCP activities. Formal responses should be provided in the designated areas of the document and forwarded to ASX by 20 February 2009.  The consultation paper is available on the [ASX](http://www.asx.com.au/about/pdf/consultation_paper_harmonisation_linking_ccp_activities.doc" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  |  | | |  | | |  | | --- | | **4.1 MYOB Limited - Declaration of unacceptable circumstances and orders**   On 26 November 2008, the Takeovers Panel announced it had made a declaration of unacceptable circumstances and final orders in relation to an application dated 10 November 2008 by MYOB Limited in relation to its affairs.   On 30 October 2008, Manhattan Software Bidco Pty Ltd announced an off-market takeover bid for MYOB.  The announcement of the bid and page 12 of the bidder's statement discloses that:  "A number of MYOB institutional shareholders have already indicated to Manhattan Software that they will accept the Offer as soon as the Offer opens for all of their MYOB shares. These shareholders are Guinness Peat Group Australia, Colonial First State Global Asset Management Australian Equities, Growth Team and Octavian Special Master Fund, LP. MYOB's other significant institutional shareholder, Schroders Investment Management, has also indicated an intention to accept the Offer once it is open on the basis that acceptance will increase the likelihood of the Offer being increased to $1.25. In aggregate, MYOB Shareholders that have indicated they will accept the Offer once it is open represent 34% of the outstanding shares and 48% of the non Board member shareholdings."   The Panel considers that the unqualified intention statements, to which each of the identified shareholders had consented, evidenced an agreement, arrangement or understanding Manhattan has or had with each of those shareholders to accept Manhattan's bid as soon as it opened.  Moreover, Manhattan had made it clear to those shareholders that the success of its bid depended on firm, upfront and public support of its bid.     The Panel was satisfied that there was an agreement, arrangement or understanding with each of those shareholders resulting in Manhattan obtaining a relevant interest in approximately 34% of the issued shares in MYOB held by those shareholders prior to the bid which contravened section 606 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and was unacceptable.   The Panel was also satisfied, regardless of whether there was a contravention, that the circumstances of Manhattan approaching the investors and their unqualified intention statements to accept the offer as soon as it opened:   * inhibited an efficient, competitive and informed market in MYOB shares; and * affected control or potential control of MYOB or the acquisition of a substantial interest in MYOB.   This gave rise to unacceptable circumstances.   The Panel did not consider it against the public interest to make the declaration, and in making the declaration had regard to the matters in section 657A(3). On 17 November 2008, Manhattan lodged a replacement bidder's statement with ASX.  The Panel considered that the replacement bidder's statement dealt with the other issues raised in MYOB's application.   The Panel considered that orders which enabled a competing proposal to emerge were sufficient in this case.    Accordingly it made orders that the investors cannot accept Manhattan's bid before 9 December and must accept a superior proposal if it is announced before that date, in the absence of a further superior proposal. If the investors have already lodged an acceptance into an institutional acceptance facility, it must be withdrawn. Manhattan is also required to lodge a supplementary bidder's statement explaining the Panel's orders.  Further information is available on the [Panel](http://www.takeovers.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  |  | | |  | | |  | | --- | | **5.1 NSW Court of Appeal favours broad interpretation of directors' powers under company constitution**  (By Benjamin Kiely, Mallesons Stephen Jaques)   Dome Resources NL v Silver [2008] NSWCA 322, New South Wales Court of Appeal, Beazley, Basten and Bell JJA, 27 November 2008    The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/november/2008nswca322.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/november/2008nswca322.htm" \t "_new) or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   The New South Wales Court of Appeal has held that constitutional provisions which confer powers on directors should be construed as broadly as is reasonably possible, and that courts should be slow to find that a constitution imposes procedural constraints on the exercise of a board's powers unless some "contextual indication or purpose" requires it.   The court also found that, where a director makes his or her services available through a third party, and requests payments to be made to that third party, it should generally be accepted that these payments were made available, indirectly, to the director without the need for specific evidence that the payment ultimately made its way to the director.   **(b) Facts**    Silver had been the managing director and subsequently a non-executive director of Dome Resources NL ("Dome"). His services in these roles had been formally provided through a consultancy agreement between Dome and Goldspark Pty Ltd, an entity controlled by Silver.  Towards the end of his directorship, Fair Choice Ltd replaced Goldspark as Silver's nominee company.   Dome entered into a Retirement Deed with Silver in 1999, which was subsequently varied in 2000. As varied, the Deed relevantly provided that upon Silver's retirement, Dome would pay his nominee company a sum equal to the director's and consulting fees paid directly or indirectly in connection with Silver's management of Dome in the 3 years preceding his retirement. This amount expressly included all payments made to Silver's nominee companies. Durban Roodepoort Deep Ltd, Dome's parent, guaranteed this payment.   Upon retiring as a non-executive director, Silver claimed a payment of approximately $474,000 pursuant to the Deed.  Dome and its parent denied that they were liable to pay this amount.  At trial, Hamilton J, rejected their arguments and ordered them to pay the full amount claimed with interest: *Silver v Dome Resources NL* [2007] NSWSC 455; *Silver v Dome Resources NL* [2007] NSWSC 699.   **(c) Decision**    Dome appealed to the NSW Court of Appeal. It argued that the Retirement Deed was unenforceable. First, because its directors did not have authority under its Constitution to enter into the Deed, and secondly, because the Deed provided a retirement benefit that contravened the Corporations Law provisions relating to termination payments (now found in Part 2D.2 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)). Basten and Bell JJA (with whom Beazley JA agreed) rejected these arguments.   **(i) Directors' power to enter into the Deed: Constitution must be construed broadly**   In rejecting Dome's first argument, the court held that constitutional provisions which give directors power should be construed as broadly as is reasonably possible. Similarly, courts should be slow to find that a constitution imposes procedural constraints on the exercise of a board's powers unless some "contextual indication or purpose" requires it.   In this case, clause 11.5 of Dome's Constitution granted the board specific powers to provide retirement benefits for directors: "The Directors may at any time adopt any scheme or plan . which is designed to provide retiring or superannuation benefits for both present and future non-executive Directors, and they may from time to time vary any such scheme or plan .".   Dome argued that this clause mandates a two-step process.  First, the board must formulate a general policy or common rule relating to retirement benefits, which was capable of being varied from time to time. Only then could it validly enter into specific agreements with individual directors. In Silver's case, there had been no general policy, only an individual agreement. Therefore conferral of the benefit under the Retirement Deed was not pursuant to a "scheme or plan", as required by clause 11.5, and the Deed was made without authority.   The court rejected this rigid reading of clause 11.5 in favour of a more flexible approach. Proceeding from the well-established basis that company constitutions should be interpreted in a way similar to commercial contracts, Basten and Bell JJA noted that it was appropriate to give Dome's constitution a "businesslike interpretation". The court echoed the High Court's finding that attention should be paid "to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure": see *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at [22] (Gleeson CJ); *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [15] (Gleeson CJ, McHugh, Gummow and Kirby JJ, Callinan J agreeing at [53]). Finally, the court noted that even if a corporate constitution adopts the specific language of the Corporations Act, the "importance" of construing that language in its new contractual context obliges a court to consider a broader range of considerations than just the language's statutory meaning.   In light of these interpretative obligations, the Court of Appeal found that:  "a provision conferring power on the directors should be given as broad an operation as is reasonably available on the language and without imposing procedural constraints on the board, absent some contextual indication or purpose requiring the language to be so construed".   Applied to this case, the court held that while the rigid construction that Dome argued for in respect of clause 11.5 was open on the face of the provision, it was not the only possible interpretation, and given its interpretative imperatives, the court should find that the necessary "scheme or plan" could be constituted by an individual agreement, without the need for a separate enabling step.  The court also considered that its finding was supported by the implications of other provisions, which were expressed as requiring a prior resolution of the directors before action could occur.   **(ii) Director's remuneration includes payments made to third parties**   In rejecting Dome's second argument, that the Deed was unenforceable as it provided for a retirement benefit which contravened the Corporations Law provisions relating to termination payments (now found in Part 2D.2 of the Corporations Act), the court held that where a director makes his or her services available through a third party, and requests payments to be made to that third party, a court should generally accept these payments were made available, indirectly, to the director.   Section 200G(1)(c) of the Corporations Law prevented a board from providing a retirement benefit to a director or officer that exceeds their total remuneration from the company during the 3 years preceding their retirement, unless general meeting approval is obtained. There had been no approval in this case.   Dome argued that the payments which it had made to Silver's nominee companies under the consultancy agreement, as opposed to certain fees which had been paid directly to Silver himself, must be excluded from his "remuneration" for the purposes of determining the upper limit that the board could approve without a general meeting. This would have substantially limited Silver's payout under the Retirement Deed. For the purposes of section 200G(1)(c), "Remuneration" was defined by reference to what the relevant accounting standard (then AASB 1017) obliged the company to disclose as Silver's remuneration in its financial reports.   The court rejected Dome's argument by finding that where a director makes his or her services available through a third party, and requests payments to be made to that third party, a court should generally accept these payments were made available, indirectly, to the director, without the need for specific evidence that the payment ultimately made its way to the director. Therefore these payments will be caught for the purposes of the accounting standard.  Accordingly, the payments that Dome had made to Silver's nominee companies, in return for the provision of Silver's services, properly constituted part of his total remuneration, and should be counted as raising the limit set on the directors ability to approve retirement benefits. The Retirement Deed was therefore not unenforceable for this reason.   **(iii) Other matters**   In disposing of the appeal, the court also rejected Dome's alternative argument that Silver lacked standing to seek relief (as he had provided no consideration for the Deed and hence was precluded from seeking the equitable remedy of specific performance), and held that the trial judge had not erred in imposing interest on the amount that Dome owed Silver.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h5)  **5.2 Director's liability to indemnify the Commissioner of Taxation under Corporations Act section 588FGA(2)**    (By Laura Keily and Brenton Pollard, Corrs Chambers Westgarth)   Commissioner of Taxation v Sims [2008] NSWCA 298, New South Wales Court of Appeal, Beazley JA, Ipp JA and Macfarlan JA, 26 November 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/november/2008nswca298.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/november/2008nswca298.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   This case was an appeal from the Supreme Court of New South Wales decision by Justice Hammerschlag.  The original proceedings were initiated by the liquidators of Newsnet.com Pty Ltd (Newsnet) against the Commissioner of Taxation (the Commissioner) under section 588FF of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) to recover payments made in respect of tax while the company was insolvent.    Hammerschlag J found that the Commissioner was liable to pay to the liquidators an amount equal to tax payments made by Newsnet to the Commissioner pursuant to Schedule 1 to the [Taxation Administration Act 1953](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6441" \t "Default), plus interest. The Commissioner sought orders under section 588FGA(2) of the Corporations Act requiring the directors of the company to indemnify the Commissioner for loss or damage resulting from the order to pay the liquidators under section 588FF, including the Commissioner's legal costs and the liquidators costs that the Commissioner had been ordered to pay, both on a party and party basis.   Hammerschlag J found that one of the directors was liable to the Commissioner for the full amount of the order under section 588FF plus the Commissioner's legal costs on a party and party basis. The other director was liable for a lesser amount (as she was successful in proving some statutory defences to the claims against her). However, Hammerschlag J found that the directors were not responsible under section 588FGA(2) for the costs of the liquidators. On appeal, the court held that it was empowered to make an order under section 588FGA(2) which extended to requiring the directors to indemnify the Commissioner for the legal costs of the liquidators, so long as those costs were reasonably incurred.   The decision emphasises the extent of potential personal liability under section 588FGA(2) of the directors of a company which makes tax payments while the company is insolvent.  The directors can each be required to indemnify the Commissioner not only for the sum of money paid plus interest, but for all loss and damage to the Commissioner flowing from an action of recovery, including the reasonably incurred costs of the liquidators.    **(b) Facts**    The Respondents were directors of Newsnet which, at the time of the proceedings, was in liquidation. The liquidators sued the Commissioner under section 588FF of the Corporations Act to set aside tax payments made whilst the company was insolvent. The Commissioner successfully sought the joinder of the two directors of Newsnet, Mr and Mrs Maine, as Respondents to the proceedings and sought indemnity from the directors under section 588FGA(2) for the Commissioner's loss or damage resulting from the litigation.    **(c) Decision**    **(i) Decision at first instance**   At first instance, in Justice Hammerschlag's view, the indemnity given to the Commissioner did not extend to the liquidator's legal costs because the loss must result from an order under section 588FF(1) and that section says nothing about orders as to costs. His Honour reasoned that the 'order' referred to in section 588FGA(2) is an order of the kind in section 588FGA(1) which in turn was an order made under section 588FF(1). Therefore, as the loss must result from that order, it cannot extend to costs which the Commissioner must pay due to a further order to pay the plaintiff's costs.   **(ii) The Court of Appeal's approach to interpreting section 588FGA(2)**   The leading judgment was delivered by Justice Ipp who reviewed the authorities that had considered the interpretation of section 588FGA(2). Ipp J concluded, after reviewing the authorities, that the section was ambiguous with regard to whether it empowers the making of orders of indemnity that extend to costs and interest that the Commissioner might be ordered to pay as contemplated by section 588FGA(1).    Accordingly, in order to resolve the ambiguity, his Honour considered the Explanatory Memorandum to the Insolvency (Tax Priorities) Legislation Amendment Bill 1993 which led to the insertion of section 588FGA. The Explanatory Memorandum stated that the position of the Commissioner by virtue of the indemnity in section 588FGA(2) is equivalent to that of a guaranteed creditor.   His Honour also referred to section 588FGA(5) which provides for a deemed guarantee by the directors (jointly and severally). Under section 588FGA(5), his Honour explained that the company is put in the position of a deemed principal debtor and the section provides for a deemed guarantee by the directors of the debts of the company to the Commissioner.     His Honour then explained that under the general law of guarantees it is well settled that: (1) an implied contract arises between the guarantor and the principal debtor whereby the debtor indemnifies the guarantor in respect of monies the guarantor might pay towards the principal debt; and (2) that a guarantor may recover (as damages for breach of the implied contract) damages for its costs incurred in reasonably defending actions brought against it.  While the situation was not directly analogous (as in this case the company is in the position of a debtor and the directors in the position of a guarantor, and the Commissioner is not a deemed guarantor of the directors), Ipp J held that this illustrates that the incurring of legal costs in defending a claim for which another party is liable, in some circumstances, may be properly regarded as "damages" incurred by the defending party.    His Honour then considered what possible loss or damage might fall within the ambit of section 588FGA(2) because it resulted from an order of the kind referred to in section 588FGA(1).  His Honour considered how to best characterise the loss that could "result" from a payment by the Commissioner in accordance with section 588FF(1) (which he considered could only arise from a payment under section 588FF(1)(a)).    His Honour considered that the only possibly conceivable loss or damage that might result from an order under section 588FF(1)(a) to repay money was the costs associated with the reasonable but unsuccessful defence of a claim or interest on moneys ordered to pay.  If this were not the case then in his view section 588FGA(2) would be redundant. This inference is reinforced by the definition in section 9 of the Corporations Act where "result" includes "result indirectly."    Ipp J considered that the costs the Commissioner was ordered to pay the liquidators resulted indirectly from the order made by Hammerschlag J, requiring the Commissioner to pay the liquidator's amount of tax plus interest. Had the latter order not been made, his Honour probably would not have made the costs order.    His Honour held that an indemnity can only extend to costs which the Commissioner is ordered to pay which were reasonably incurred. His Honour then considered whether the costs of the liquidator were reasonably incurred and in this case (after detailed examination) he found that they were.   In the alternative, the Commissioner sought orders against the directors of Newsnet in the nature of Sanderson and Bullock orders in respect of the liquidator's costs. A Sanderson order is an order of a court that the costs of a successful party should be paid directly by an unsuccessful party. A Bullock order relates to a court order against an unsuccessful defendant to pay the costs of the successful defendant where the plaintiff has joined two defendants because of doubt as to which was liable. However, Ipp J in this case held that once the indemnity claim was granted, there was no reason to make any other order.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h5)  **5.3 Majority shareholder entitled to use company money to fund oppression defence**  (By Charles Slattery, DLA Phillips Fox)  Sellar v Lasotav Pty Ltd, In the Matter of Lasotav Pty Ltd [2008] FCA 1766, Federal Court of Australia, Foster J, 25 November 2008  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/november/2008fca1766.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/november/2008fca1766.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  This case concerned an unsuccessful application by the minority shareholders of two related companies for an interlocutory injunction restraining the companies from paying any of the legal expenses incurred by the majority shareholders in connection with oppression proceedings.  **(b) Facts**   Ian and Louise Sellar (plaintiffs) are shareholders in each of Lasotav Pty Ltd (first defendant) and Como Marina Pty Ltd (second defendant). Together they hold 6.275% of the issued capital of each of those companies. Jocelyn Buskens (fourth defendant) and Roger Buskens (fifth defendant) hold approximately 70% of the issued capital of each of those companies.    The plaintiffs brought proceedings against the defendants in April 2006 claiming that the conduct of the affairs of both the first and second defendants has been, and continues to be, 'contrary to the interests of the members of (each of the first and second defendants) as a whole, oppressive, unfairly prejudicial to and unfairly discriminatory against the plaintiffs, within the meaning of section 232 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).' The plaintiffs' claims have been fixed for final hearing in April 2009.   At the date of the proceedings the second defendant had paid the total amount of the legal and disbursement fees incurred to date by each of the defendants in respect of these proceedings.   The plaintiffs alleged that, unless restrained from doing so, the second defendant would continue to pay the legal expenses of the defendants at a total cost of between $300,000 and $315,000. The plaintiffs, therefore, applied to the court for an interlocutory injunction to restrain the first and second defendants from paying any of the legal expenses incurred by the fourth and fifth defendants in connection with these proceedings. The plaintiffs also sought an order that the fourth and fifth defendants repay to the first and second defendants all legal and other expenses paid by the first and second defendants in connection with the proceedings.    The plaintiffs argued that it is well established that the use of company funds to defend oppression proceedings may, in certain circumstances, constitute oppression.   Where the issue has been raised with the court prior to the final determination and there is a significant risk of the company's resources being expended in the defence in the interests of the majority, the court may step in at the interlocutory stage and make appropriate orders.     The plaintiffs further alleged that the balance of convenience favoured the grant of an injunction because there was a 'decidedly uneven playing field' in the sense that the plaintiffs were compelled to fund the litigation in circumstances where they had no assets of any significance, whereas the fourth and fifth defendants have access to company funds.   In their defence, the first, second, fourth and fifth defendants confirmed that they were prepared to submit to a court-ordered purchase of the plaintiffs' shares to resolve the dispute provided that the purchase price reflected the current market value of the plaintiffs' shares (i.e. on the basis that the shares were valued without reference to the alleged oppressive conduct).   **(c) Decision**   Foster J applied the test set out by Mason A-CJ in *Castlemaine Tooheys Limited v South Australia* (1986) 161 CLR 148 at 153 when determining whether to intervene at the interlocutory stage. In that case, Mason A CJ said:  "In order to secure such an injunction the plaintiff must show (i) that there is a serious question to be tried or that the plaintiff made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief; (ii) that he will suffer irreparable injury for which damages will not be an adequate compensation unless an injunction is granted; and (iii) that the balance of convenience favours the granting of the injunction."   **(i) Serious question to be tried?**   His Honour held that the plaintiffs had satisfied this element. The question to be tried was, whether in the circumstances of this case, the conduct of the fourth and fifth defendants in causing the second defendant to pay all of the legal expenses of the first, second, fourth and fifth defendants amounted to oppression. His Honour was of the view that the plaintiffs had a strong chance of success in making good this ground of complaint at the final hearing.  However, his Honour held that the plaintiffs had not satisfied either of the remaining requirements for the granting of an interlocutory injunction.   **(ii) Will the plaintiff suffer irreparable injury for which damages will not be an adequate remedy?**  Foster J stated that the court is generally reluctant to interfere at the interlocutory stage with the payment of legal fees and expenses unless there is a good reason to do so. His Honour was not convinced that, in the event that the plaintiffs were successful at the final hearing, any or all of the first, second, third, fourth or fifth defendants would be unable to pay any amount likely to be ordered by the court. His Honour was of the opinion that it was highly likely that an appropriate financial adjustment could be made if the final relief the plaintiffs sought in respect of the oppression proceedings was made good and, therefore, there was no need for the court to intervene at this stage of the proceedings.   **(iii) Balance of convenience**  His Honour noted that the plaintiffs did not seek the injunction to preserve property which was the subject of the claim, but rather on the basis that it was 'not fair' for the majority shareholders to cause the companies to pay their legal fees and expenses when the plaintiffs could not access the same source of funds.    His Honour considered this argument to be a sound submission for the final hearing, but it did not bear upon the balance of convenience as far as the application for an interlocutory injunction was concerned. In fact, the present state of affairs had been in place for some time, as the second defendant had been paying the legal fees and expenses of the fourth and fifth defendants for the duration of the proceedings, some two and half years.    Accordingly, Foster J dismissed the plaintiffs' application with costs.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h5)  **5.4 Ability of former owner of company to continue to direct litigation proceedings; security for costs in relation to such proceedings**  (By Laura Coleman, Freehills)  Ipex ITG Pty Ltd v Melbourne Water Corporation (No 4) [2008] VSC 497, Supreme Court of Victoria (Commercial and Equity Division), Byrne J, 21 November 2008  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/november/2008vsc497.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/november/2008vsc497.htm" \t "_new) or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**  Ipex ITG Pty Ltd, the plaintiff, claimed damages for misleading and deceptive pre-contractual statements made by Melbourne Water Corporation, the defendant. Melbourne Water brought two applications before the court, seeking firstly that the proceeding be stayed, summarily dismissed or struck out on the basis that the persons instructing the lawyers for Ipex were not authorised to do so, and secondly that Ipex provide a further $3 million security for Melbourne Water's costs in relation to the proceeding.  It was found that the company instructing the lawyers for Ipex was authorised to do so, and Ipex was ordered to provide security for Melbourne Water's costs, although of a lesser amount than what was sought by Melbourne Water.  **(b) Facts**  **(i) Authority to instruct counsel**  Ipex first commenced litigation against Melbourne Water on 17 February 2003. At that time, all the shares in Ipex were held by Takapana Investments Pty Ltd as trustee for the Schwalb Family Trust No 1. Takapana sold its shares in Ipex to Volante Group Ltd under a share sale agreement dated 22 December 2003.    However, Takapana's interest in the existing litigation was preserved by clause 11.2 of the share sale agreement, which provided, among other things, that Volante permit Takapane to take reasonable action to defend, continue, pursue or otherwise settle existing litigation, including the claim by Ipex against Melbourne Water.   Takapana has continued to instruct the lawyers for Ipex in the litigation and to pay their fees and orders for costs which have been made. In 2004, Volante provided security to Melbourne Water for its costs of the proceeding.   Ipex's lawyers in this litigation made it clear early on that the proceeding was directed by and conducted for the benefit of the Schwalb family, who control Takapana.   On 7 August 2008, Volante's parent company, Commander Communications, went into administration and it appointed voluntary administrators for its subsidiaries, including Volante and Ipex.   **(ii) Further security for Melbourne Water's costs**   On 3 March 2004, Melbourne Water wrote to Volante seeking security for its costs. At that time, there was no apprehension that Ipex would be unable to satisfy a costs order. On 12 May 2004, Volante executed a continuing guarantee of the obligation of Ipex to meet the costs of Melbourne Water, which became worthless after Volante went into voluntary administration.   On 9 August 2008, Melbourne Water's sought security for its costs, pursuant to either regulation 62.02, section 1335 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) or the inherent jurisdiction of the court. Ipex opposed the application on the basis that the application was brought late and should be refused for that reason.   **(c) Decision**  **(i) Authority to instruct counsel**  Byrne J held that the lawyers acting for Ipex were authorised to do so and declined to stay or strike out Ipex's claim. They key points considered are set out below:   * Share sale agreement: Byrne J held that clause 11.2 of the share sale agreement did not authorise Takapana to continue to conduct the litigation in Ipex's name or in the name of any person other than Volante. In reaching this conclusion, Byrne J found that the parties to the share sale agreement were aware of the intention and effect of clause 11.2. It was also relevant that Ipex was not made a party to the share sale agreement. * Equitable estoppel: Byrne J noted that the doctrine of equitable estoppel was applicable and found that because Volante and Ipex were aware that Takapana was directing the liquidation, instructing the lawyers and paying the expenses, they should not be permitted to resile from that position. In addition, the receivers and administrators were not averse to the litigation continuing under the direction of Takapana. However, Byrne J did not make a final determination on this point. * Receivership and administration: It was held also that neither the receivership not the administration defeated Takapana's right to continue to direct the proceeding and meet Ipex's expenses. In the case of receivers, the receivership does not defeat Takapana's right to continue to direct the litigation and meet Ipex's expenses, because the property of the companies does not pass to the receivers upon their appointment. By contrast, administrators are passed the control of the company's business, property and affairs under section 437A(1) of the Corporations Act.   However, the property of Ipex came into the control of the administrators subject to pre-existing rights affecting it, including Takapana's power under a pre-existing agreement or estoppel that binds Ipex.   **(ii) Security for Melbourne Water's costs**  It was not in dispute whether security should be given. The issues were whether security should be given for past costs and, if so, the amount of that security.  Byrne J held:   * it was not appropriate to treat Melbourne Water's application for costs (of 29 August 2008) as a late application, in light of the fact that having obtained a guarantee from Volante of Ipex's obligation to meet Melbourne Water's costs, it would have been pointless for Melbourne Water to apply for further security and any application would probably have been rejected anyway because the Volante guarantee was already in place; * because the loss of value of the security was not due to any fault of Melbourne Water, Ipex must make up the loss and provide security for costs; and * as to the appropriate quantum of costs, the costs should be assessed from the date of the commencement of the litigation in February 2003. Byrne J ordered security for costs in the sum of $660,000, which includes a discount of 10 per cent, on the basis that there was a risk that the parties would compromise their differences before the trial and thereby avoid some costs.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h5)  **5.5 Successful application for relief under section 1325D and section 1322(4) of the Corporations Act in relation to an off-market takeover bid**  (By Gabrielle Hirsch, DLA Phillips Fox)   Emerald Capital Ltd, in the matter of Emerald Capital Ltd [2008] FCA 1739, Federal Court of Australia, McKerracher J, 18 November 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/november/2008fca1739.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/november/2008fca1739.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   This decision concerned a successful application by Emerald Capital Limited for relief under section 1325D and section 1322(4) of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) in relation to an off-market takeover bid for Goldlink IncomePlus Limited which lapsed on 8 November 2008 following defects in the preparation and despatch by Emerald of a notice extending the offer. Following an application to the Federal Court by Emerald, the court ordered that the proportional takeover offer be extended until at least 2 December 2008. Emerald was also ordered to pay $12,500 to Goldlink in respect of its costs.  **(b) Facts**  On 22 July 2008, Emerald Capital Limited (Emerald) made an off-market takeover bid to acquire 45% of the fully paid ordinary shares in Goldlink IncomePlus Limited (GLI). Under the replacement Bidder's Statement, the offer was subject to various defeating conditions which could be waived by Emerald. Although originally due to close on 8 September 2008, the takeover bid was extended on two occasions until 5:00pm on 8 November 2008.   Emerald sought to extend the offer period until 25 November 2008 and extend the date for giving notice regarding the defeating conditions to 18 November 2008. Accordingly, it prepared an extension notice in accordance with section 630(2) and section 650D(1) of the Corporations Act.    On 31 October 2008, a copy of the extension notice was lodged with ASIC in accordance with section 650D(1)(b) and was served on GLI's solicitors. There were several errors contained in this notice, including an error as to the date for giving notice regarding the status of the conditions of the offer and the number of days by which the offer was extended ('the first irregularity'). A different version of the Notice was then given to the Australian Securities Exchange (ASX) ('the second irregularity').   A share registry company ('the company') was engaged by Emerald to process acceptances and print and coordinate mailouts of relevant documents. The company was instructed to print and mail out a copy of the Notice to shareholders. In fact, the company printed and mailed a previous notice of extension which had been prepared by Emerald in relation to an earlier extension of the offer.   On 12 November 2008, GLI's solicitors informed Emerald of the irregularities of which they were aware, claiming that unless Emerald sought remedial orders from the court, GLI would contend that the offer had closed on 8 November 2008. On 13 November 2008, Emerald brought an application to the Federal Court seeking remedial orders to correct the irregularities in the Notice to ensure that the takeover bid remained on foot.   In response to notice by Emerald that it intended to apply for remedial orders, ASIC supplied a letter to the court. Although ASIC did not express a view on whether the court should grant remedial orders, it requested that Goldlink shareholders be notified of the effect of any such orders if they were indeed granted. McKerracher J took this into account in framing his orders.   **(c) Decision**     McKerracher J discussed the application and effect of sections 1322(4) and 1325D of the Corporations Act which empower the court to make several orders to correct any invalidity caused by an irregularity or contravention arising from inadvertence. His Honour also considered the effect of sections 650B, 650C and 650D of the Act, which are generally regarded as providing the sole method by which offers under off-market bids may be varied, including extensions of the offer period.   His Honour noted that a failure to effectively vary the notice period in accordance with the statutory provisions would mean that, subject to any remedial court order, the Emerald takeover bid would have lapsed. However, McKerracher J accepted the submission that section 1322(4) was a 'remedial provision to be applied with liberality'.    Ultimately, McKerracher J held that this was an appropriate case where the failure to comply with the Corporations Act was an inadvertent contravention.  In his Honour's view, the whole tenor of the affidavit was consistent with honest inadvertence. This was indicated by the fact that Emerald had amended the extension notice and the solicitor handling the matter failed to notice the amendment. While his Honour noted that there was a faint suggestion that there was not complete 'frankness' in the course of the errors, he was satisfied that in the circumstances, particularly given the openness of the affidavit admitting the errors, Emerald together with its solicitors had acted honestly in relation to the contravention.    Further, his Honour noted that the application before the Federal Court was brought promptly after GLI alerted Emerald to the errors and that it was highly improbable that prejudice would be occasioned by any GLI shareholder as a result of any remedial order.    **(i) Impact of the length of delay on the granting of relief**   GLI asserted that Emerald had not provided a notice of extension of the offer to GLI shareholders 17 days after such notice was required to be provided to shareholders by section 650D(1)(c)(ii). Accordingly, GLI suggested that the court was precluded from granting relief to Emerald as the delay was in excess of 10 days from the date the bidder was required to provide notice to the shareholders. However, McKerracher J did not accept the authority provided by GLI as support for this proposition. Instead, subject to there being honesty and inadvertence, his Honour held that the length of delay was merely a factor to be considered and needed to be weighed against any indications of actual or likely prejudice.    **(ii) Ability to fund the takeover bid and reliance on defeating conditions**   GLI also asserted that the court ought not grant the orders sought until Emerald had demonstrated that it was able to fund the takeover bid. Further GLI argued that it was inconsistent for Emerald to seek orders reinstating the takeover bid while reserving its own right to abandon the takeover on account of a defeating condition which had already occurred. Accordingly, it sought an undertaking by Emerald that it would not rely on the defeating conditions. These propositions were rejected by McKerracher J who viewed the extension of the offer as a way of preserving the status quo.   His Honour therefore made orders pursuant to sections 1322(4) and 1325D that the period for Emerald to give notice to vary the offer be extended to midnight on Monday 17 November 2008 and that Emerald further vary the offers by extending the date of close of offers to 2 December 2008. This order was made subject to a number of conditions in addition to those alluded to by ASIC.   As a condition of granting relief and so as to avoid any prejudice, McKerracher J required an undertaking on the part of Emerald to compensate vendors of shares in GLI for the difference between their sale price and the bid price. Notwithstanding that relief was granted in favour of Emerald, McKerracher J ordered that Emerald make a contribution of $12,500 towards GLI's costs.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h5)  **5.6 Co-operative to company: Australian Co-operative Foods Ltd**   (By Jennifer Arnold, Clayton Utz)   Australian Co-operative Foods Ltd [2008] NSWSC 1221, Supreme Court of NSW, Barrett J, 18 November 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/november/2008nswsc1221.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/november/2008nswsc1221.htm" \t "_new)   or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   This was a successful application under section 344 of the [Co-operatives Act 1992 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3882" \t "Default), for an order approving an arrangement between Australian Co-operative Foods Ltd (ACF) and its members that would result in every member's shares in ACF being transferred to National Foods Limited (National Foods) and each member receiving cash consideration.    Barrett J commented in particular on four components of this application:   * the "inactive members" of ACF; * ACF becoming a Corporations Act company before the whole of the shares in ACF were transferred to National Foods, raising an issue concerning section 606 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default); * the requirements of section 353 of the Co-operatives Act; and * a request for a minor variation to the arrangement.   **(b) Facts**    ACF applied to the court under section 344 of the Co-operatives Act for an order approving an arrangement between ACF and its members. Under the arrangement, shares in ACF would be transferred to National Foods Limited and each member would receive cash consideration. The cash consideration would be provided by National Foods in the form of a special dividend payable by ACF but funded by National Foods.    The arrangement was submitted to ACF members for approval by way of a special postal ballot. Eighty-eight percent of the members entitled to vote exercised their voting rights upon the ballot, and of those who voted, 96.3 percent cast positive votes.  This was sufficient approval to satisfy the requirements of the Co-operatives Act.   **(c) Decision**    Barrett J granted the order, and approved the arrangement. Four issues were raised during the granting of this approval.   **(i) Inactive members**   The first issue involved the rights of "inactive members". Inactive members were those who held shares in ACF, but who had no voting rights and whose shares were subject to forfeiture upon the expiration of a particular period. Even though the inactive members would participate in the arrangement and their shares would be dealt with in the same manner as the active members, they did not participate (and were not entitled to participate) in the ballot to approve the arrangement. Therefore, the issue was whether the arrangement could be binding on the active and inactive members, although only the former had voted.   Barrett J was satisfied that the arrangement could be binding. Following the reasoning of Santow J in Re Australian Co-operative Foods Ltd [2001] NSWSC 382; (2001) 38 ACSR 71, Barrett J stated that the concept of classes of members that plays a part in the similar provisions of section 411 of the Corporations Act finds no place in the Co-operatives Act. Although Santow J had raised the question whether a "plebiscite" of inactive members should be held, Barrett J did not think that this possibility should be pursued. Voting members had the power to bring about various outcomes binding on the members as a whole, and so the purpose a plebiscite might have served was unclear.   **(ii) Becoming a Corporations Act company**   The second matter was that under the arrangement ACF was to become a company registered under the Corporations Act. This was to occur before all of the shares in ACF had actually been transferred to National Foods, raising the question whether the subsequent transfer of the shares would be a breach of section 606 of the Corporations Act. Section 606 prohibits the acquisition of a relevant interest in voting shares in an unlisted company with more than 50 members if, as a result of the acquisition, the voting power increases from below 20 percent to greater than 20 percent, or from a point above 20 percent but below 90 percent. "Voting power" is the percentage of votes attached to all the voting shares.   This issue initially arose because the transfer of shares to National Foods would have been a breach of section 289 of the Co-operatives Act, which prohibits a person from holding a "relevant interest" in more than 20% of the shares in a co-operative. However, the Registrar granted an exemption from this prohibition, on the condition that the members and court approve the scheme and that ACF register as a company under the Corporations Act within three months of the court's approval.    To satisfy the second of these conditions, ACF was required to follow the complementary provisions in the Co-operatives Act and the Corporations Act allowing for the registration of a co-operative as a company.   The issue of the prohibition in section 606 arose as ACF would be registered as a company before the transfer of its shares to National Foods. As the transfer of shares would occur after the registration of ACF as a company, the question was raised whether this was the acquisition of a relevant interest in voting shares in an unlisted company with more than 50 members, which would increase the voting power of the acquirer from below 20 percent to greater than 20 percent, or from a point above 20 percent but below 90 percent.   Barrett J found that there would be no contravention of section 606. Firstly, the parallel operation of the two Acts meant that a body corporate existing by virtue of registration under the Co-operatives Act would become a body corporate existing by virtue of registration under the Corporations Act, but no new legal entity would be created and the body corporate would remain the same entity. The persons who held shares in the body at the time of registration as a company would continue to hold those shares after the transition. Secondly, the definition of "voting share" in the Corporations Act referred to shares in a body corporate (not just a company), and therefore extended to shares in a co-operative. However, the prohibition in section 606 only applied to "voting shares" in a "company" - and so did not apply until after the transition of ACF into a company.    Under the arrangement in this case, National Foods would have obtained a "relevant interest" in each and every share in ACF prior to the transition of ACF into a company. Using the reasoning that the persons who held shares in the body at the time of registration as a company would continue to hold those shares after the transition, the interest of National Foods in the ACF shares would continue during and after registration. The only new factor would be that the shares, which were already "voting shares", would become "voting shares in a company". Therefore, when National Foods actually took the transfer of all the shares at some time after the transition of ACF into a company, it would not "acquire" a relevant interest in those shares because it already held the relevant interest. Consequently, the prohibition in section 606 was not breached.    **(iii) Avoidance**   The third matter was section 353 of the Co-operatives Act. Section 353 stated that the court "need not approve" (rather than "must not approve", as stated in section 411(17) of the Corporations Act) a compromise or arrangement, unless it was satisfied that the arrangement had not been proposed for the purpose of enabling any person to avoid restrictions on share offers and that the Registrar had no objection to the arrangement. In these circumstances it was quite clear why the arrangement had been structured in the manner it had, and this was not for the purpose of avoiding any restrictions on share offers, and evidence was adduced of the approval of the arrangement by the Registrar.    However, Barrett J held that even though both of these conditions were satisfied, there was no positive obligation upon the court to approve the arrangement. The satisfaction of both of the conditions merely removed the "need not" directive - it did not convert it into "need" or in any way impose a duty or requirement on the court. Similarly, should one of the conditions not be satisfied, the court nevertheless had the discretion to approve the arrangement - although Barrett J commented that a consideration of the ramifications of this should be a predominant factor. In short, section 353 required the court to make a finding about the purpose for which the arrangement was proposed, and to do this with reference to the possibility that the purpose was to enable someone to avoid the operation of a restrictive provision regarding share offers.    **(iv) Minor variation**   Lastly, the court was asked to approve the arrangement subject to a minor variation, a difference that had not been put to the members for approval. This variation was that the date of the payment to members of the special dividend as consideration be moved forward one day in line with a recent taxation ruling. As there was no prejudice or disadvantage to anyone concerned, and the possibility that the change by one day might affect any person adversely was non-existent, Barrett J approved the variation.    In doing so, he referred to section 344 of the Co-operatives Act, which grants the court jurisdiction to approve an arrangement subject to an alteration, and adopted the ruling of Lindgren J in *Re Independent Practitioner Network Ltd (No 2)* [2008] FCA 1593, which stated that such power was broad.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h5)  **5.7 Court's discretion on winding up application where debt paid**  (By Jehan Mata, Clayton Utz)   Deputy Commissioner of Taxation v BK Ganter Holdings Pty Ltd [2008] FCA 1730, Federal Court of Australia, Logan J, 18 November 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/november/2008fca1730.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/november/2008fca1730.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   The Applicant, the Deputy Commissioner of Taxation (the Deputy Commissioner), applied for the winding up of the Respondent, BK Ganter Holdings Pty Ltd (Ganter) flowing from failure to comply with a statutory demand. Ganter repaid the debt by a bank cheque. The court held that repayment of a debt does not impose an obligation on the court to dismiss a winding up application but is a factor that the court considers when exercising its discretion in the disposal of an application.    **(b) Facts**   The Deputy Commissioner served a statutory demand upon Ganter. Ganter failed to comply with that demand and the Deputy Commissioner commenced winding up proceedings on 20 August 2008.  Ganter then paid part of the debt.   On 5 November 2008, the Deputy Commissioner advised Ganter that if it paid the outstanding debt prior to the hearing of the winding up application on 13 November 2008, the Deputy Commissioner would seek the adjournment of the proceedings "until all funds have been cleared and then dismiss the wind up application at the next return date".     Ganter procured a bank cheque in favour of the Australian Taxation Office (ATO). Ganter proposed that the Deputy Commissioner adjourn the application listed for 13 November 2008 and allow for a week for the cheque to clear, and that the matter be dismissed at the next return date upon clearance of the bank cheque.     On 11 November 2008, the Deputy Commissioner agreed to Ganter's proposed course. However, on the same day Ganter proposed an alternative. It suggested that the winding up application ought to be dismissed on 13 November 2008, but the Deputy Commissioner rejected this. On 13 November 2008, at the hearing of the application for winding up, Ganter sought the dismissal of the application.  The Deputy Commissioner opposed this and sought adjournment of the application for a further week.  The matter was then referred to a Judge.     **(c) Decision**   **(i) Dismissal of the proceedings**   The court rejected Ganter's submissions that the winding up application should be dismissed.   Ganter's arguments included:   * the payment of the debt obliged the court to dismiss a winding up application; and * the Deputy Commissioner was obliged, as a "model litigant", to agree to the dismissal of the winding up application.   The court regarded these arguments as misapprehensions by Ganter.     Logan J observed that the payment of a company's debt would be a matter relevant to the court's discretion on a winding up application, rather than a matter obliging the court to dismiss the application.     The court also said that the Deputy Commissioner had not acted unreasonably by resisting the dismissal of the application, because one of the obligations on Crown representatives in civil litigation is protection of the revenue.   Accordingly, the court held that it was not obliged to dismiss the application on 13 November 2008.  The court held Ganter to the terms agreed by the parties on 11 November 2008.  The matter was adjourned to 19 November 2008.   **(ii) Standing**   By section 459A(1)(b) of the Corporations Act 2001 a creditor is one of the persons who may apply for the winding up of a company. The court held the date for the determination of the standing of an applicant creditor to apply for the winding up of a company is the date when the application is made.     The Deputy Commissioner applied for the winding up of Ganter on 20 August 2008. At that time, the Deputy Commissioner was a creditor. There is no requirement flowing from the Corporations Act that the applicant must continue to be a creditor at the time when the winding up application is heard.    **(iii) Payment by bank cheque**   Logan J stated that a cheque, even a bank cheque, is not a form of legal tender.  However, the court referred to the decision of Mason J in *George v Cluning* (1979) 53 ALJR 767 that, in general trade and commerce, a payment by cheque is sufficient. In this case there was no objection to Ganter's payment of the debt by cheque.   The court stated that this was not to suggest that the Deputy Commissioner was under any obligation to accept Ganter's cheque. The Deputy Commissioner would have been entitled to refuse the cheque on the grounds of Ganter's endeavours to pay the debt after the filing of the winding up application and that Ganter was, by operation of section 459C(2)(a) of the Corporations Act 2001, presumed to be insolvent. A refusal to accept the cheque would not have eliminated the debt in question.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h5)  **5.8 Foreign company registered in Australia wound up under the Corporations Act where it has ceased to exist in the jurisdiction in which it was incorporated**   (By Paul Schaefer, Blake Dawson)  Titchfield Management Ltd v Vaccinoma Inc, [2008] NSWSC 1196, New South Wales Supreme Court, Barrett J, 14 November 2008  The full text of this judgement is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/november/2008nswsc1196.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/november/2008nswsc1196.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The plaintiff, Titchfield Management Ltd (Titchfield), sought:   * an order that Vaccinoma Inc (Vaccinoma), the defendant, be wound up under section 583 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act); and * an order that a liquidator be appointed to Vaccinoma.   Both orders were granted by Justice Barrett.   **(b) Facts**   Vaccinoma was incorporated in the State of Delaware, in the United States of America, on 6 April 2006.  Vaccinoma was subsequently registered in Australia under Division 2 of Part 5B.2 of the Act on 13 April 2006.   Shortly after its incorporation in Delaware, and registration in Australia, Vaccinoma lodged a prospectus with the Australian Securities and Investments Commission (ASIC). The prospectus was dated 26 April 2006.  Vaccinoma's prospectus invited subscription for 17 million shares in Vaccinoma at an issue price of A$1.00 each.  It was intended that Vaccinoma be admitted to the official list of the Australian Securities Exchange and that the newly issued shares be listed for quotation.   According to the prospectus, Vaccinoma's principal asset was an exclusive license from Maanex LLC (Maanex) that entitled Vaccinoma to make, use, exercise and vend vaccines for the treatment and prevention of breast cancer and melanoma.   On or about 6 October 2006, Vaccinoma entered into an agreement with Titchfield, under which Vaccinoma appointed Titchfield as corporate adviser and transaction co-ordinator in relation to the proposed share issue.   Titchfield subsequently arranged a meeting between Vaccinoma's chief executive officer and representatives of CK Life Sciences International Holdings Inc (CK Life) on 29 November 2006.   On 2 January 2007, CK Life made a proposal to Vaccinoma to acquire Vaccinoma's business and assets. As part of the proposal:   * a new company would be formed to acquire Vaccinoma's intellectual property; * Vaccinoma's existing shareholders would become shareholders in the new company; * CK Life would invest US$40 million in the new company in return for a 66.7% interest in it; and * US$2 million of the US$40 million to be invested by CK Life could be used to reimburse Vaccinoma for any out of pocket expenses incurred in connection with the prospectus.   On 3 January 2007, Titchfield invoiced Vaccinoma for A$3,262,986. Titchfield alleged that this money was due for work completed pursuant to the agreement that Titchfield and Vaccinoma entered into on or about 6 October 2006.  On or about 6 January 2007, CK Life issued draft heads of agreement to give effect to the proposal it made to Vaccinoma on 2 January 2007. The heads of agreement made provision for the payment of US$2 million by CK Life to Vaccinoma to enable Vaccinoma to pay debts incurred in relation to the prospectus transaction.   Titchfield contented that at some time after 6 January 2007, CK Life and Vaccinoma completed a transaction on substantially the same terms as those in the heads of agreement, causing the licence held by Vaccinoma from Maanex to be assigned or novated to Polynoma LLC (Polynoma). US$2 million appeared to be the only funds received by Vaccinoma as part of the transaction.   According to Titchfield, the directors of Vaccinoma were aware, or should have been taken to have been aware, that the transfer of assets by Vaccinoma was made without consideration or at a substantial undervalue. Titchfield contended that the directors of Vaccinoma may have, in connection with the transaction, failed to discharge their duties as directors.   On 18 June 2007, Vaccinoma notified ASIC by way of a Form 407 that it had ceased to carry on business in "this jurisdiction". ASIC initiated action to strike Vaccinoma off the register, but that action was not completed. Vaccinoma was dissolved in Delaware on 1 August 2008.   **(c) Decision**   **(i) Was Vaccinoma a "Part 5.7 body" for the purposes of section 583 of the Act?**   The winding up application made by Titchfield was advanced under section 583 of the Act.   Justice Barrett noted that section 583 only applies to Part 5.7 bodies. Therefore, in order for the section to apply to Vaccinoma, a threshold question that needed to be considered was whether Vaccinoma was a "Part 5.7 body", as defined by section 9 of the Act.   His Honour noted that the definition of "Part 5.7 body" includes "a registrable body that is a foreign company and . is registered under Division 2 of Part 5B.2".     "Registrable body" includes ".a foreign company" and "Foreign company" includes "a body corporate that is incorporated in an external Territory, or outside Australia and the external Territories, and is not a corporation sole or an exempt public authority".   Given that Vaccinoma had been incorporated in Delaware, it came within the definition of "foreign company". As a result of being a "foreign company", it was also a "registrable body". The fact that Vaccinoma's registration under Division 2 of Part 5B.2 was continuing meant that it fell within the definition of "Part 5.7 body". Section 583 of the Act could therefore apply.   **(ii) Did section 583 of the Act apply to Vaccinoma in the circumstances?**   Justice Barrett held that Vaccinoma came within the scope of section 583(c)(1) of the Act, as the lodgement of the Form 407 with ASIC on 18 June 2007 established that it "had ceased to carry on business in this jurisdiction", as required by the section.   His Honour went on to note that section 582(3) specifically permitted the court to exercise its jurisdiction even if the relevant body had been dissolved under the laws of the place of its incorporation. Therefore, the fact that Vaccinoma had been dissolved in Delaware was immaterial.   **(iii) How should the court's jurisdiction under section 583 be exercised?**   Justice Barrett noted that the jurisdiction created by section 583 of the Act is discretionary. His Honour felt that it is necessary to consider the avenues that would be available to a liquidator appointed in a winding up, as it is only if a liquidator has reasonable prospects of producing tangible results that a winding up order would be an appropriate exercise of the court's discretion.   Justice Barrett held that if a company is wound up pursuant to section 583, the whole of Chapter 5 of the Act applies, with adaptations to the application of the chapter made where necessary.   As a result, the liquidator of a Part 5.7 body under a section 583 winding up may make an application under section 588F(1) for an order in favour of the Part 5.7 body. The court may make such an order if satisfied that a transaction of the body is a voidable transaction under section 588FE.   This means that the same recovery possibilities exist in relation to a winding up under Division 2 of Part 5.7B as those for a company formed and registered under the Act.   Recovery possibilities for insolvent trading under section 588M(2) are also available if an order for the winding up of a Part 5.7 body is made.   Justice Barrett noted that the applicability of certain provisions in the Act commonly resorted to by a liquidator is indicated by the fact that those provisions refer to a "corporation". One such provision is section 598, which may apply to breaches of statutory duties created by Division 1 of Part 2D.1, such as those in sections 180 to 184. Vaccinoma was a "corporation" for the purposes of such sections, due to its classification as a Part 5.7 body (and therefore "company" as required by section 57A).  Justice Barrett noted that any attempt by a liquidator to rely on a perceived breach of a duty arising under Division 1 of Part 2D.1 would have to potentially overcome obstacles created by the general law principle that the extent of duties owed by a director of a foreign company is a matter governed by the law of the place of incorporation. Against this, however, stands the fact that Division 1 of Part 2D.1 makes specific reference to the case of a foreign company. His Honour felt that the general law principle would need to be viewed in light of the clear provision of legislation.  According to Justice Barrett, one significant point to note was that the mechanisms for examining officers and others made available to liquidators by Part 5.9 of the Act apply in relation to "corporations". The examination process is one that would be available to a liquidator of Vaccinoma. Investigation of the availability of causes of action for the benefit of creditors would be a legitimate use of that process.   Justice Barrett held that Titchfield had shown itself to be an unsatisfied creditor of Vaccinoma. In addition, Titchfield had shown that causes of action were potentially available to Vaccinoma or a liquidator of Vaccinoma against the directors of Vaccinoma. As a result, Titchfield established that there is a reasonable possibility of benefit accruing to creditors from making the winding up order.  Justice Barrett noted that it had been submitted on behalf of Titchfield that a liquidator in a winding up of Vaccinoma may be able to obtain access to courts in the United States of America, with a view to examining the director of Vaccinoma resident there. His Honour expressed doubts about this proposition, but nonetheless felt satisfied that Titchfield had made out a case for the exercise of the discretionary winding up jurisdiction available under section 583.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h5)  **5.9 Failure by judge to disclose financial interest in a respondent in a shareholder class action and subsequent motions brought for judge's recusal on the basis of pecuniary interest in the litigation due to membership in the plaintiff class**   (By Jane King, Blake Dawson)   Kirby v Centro Properties Ltd (No 2) [2008] FCA 1657, Federal Court of Australia, Finkelstein J, 14 November 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/november/2008fca1657.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/november/2008fca1657.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   Three motions were considered together because they related to a common shareholder class action which was being brought against the Centro group of companies (Centro). The respondents to the class action claimed that the judge, Finkelstein J, should recuse himself from hearing the cases on the basis of his Honour holding an undisclosed financial interest in Centro. The concern was that his Honour might not bring an impartial mind to the proceedings on account of the loss of approximately $19,000 to his personal superannuation fund.   After considering the authorities in the United Kingdom, the United States and Australia, Finkelstein J arranged to sell his interest in the Centro shares and waived all claims arising out of the pleadings. However, the respondents were not satisfied that this cured the reasonable apprehension of bias. The judge then expressed some doubt as to the appropriate course of action, and in the interest of avoiding further appeals, delays and related costs, elected to make directions that each proceeding be reassigned to another judge of the Federal Court.   **(b) Facts**    The respondents in three shareholder class actions against Centro brought motions for the recusal of Finkelstein J on the basis of Motown Investments Pty Ltd (Motown) owning shares in one of the respondents. Motown is the trustee of a self-managed superannuation fund of which Finkelstein J is a member, and his Honour is also a director of Motown. The central allegations in the class actions were that the respondents made false statements to the market and failed to comply with continuous disclosure obligations with the result that their securities traded at an inflated price.    His Honour's financial interest in Centro was not disclosed in the first instance due to an administrative oversight which was later corrected. Once disclosure occurred, the respondents claimed that there could still be a reasonable apprehension by fair minded lay observers, including other Centro security holders, that his Honour might not bring an impartial mind to the proceedings on account of the loss of approximately $19,000 to his personal superannuation fund. The concern was that the loss might create a disposition against the respondents, who were alleged to have caused the loss, or an inclination toward other security holders who may have suffered similar loss.   **(c) Decision**    The issue before the court was whether Finkelstein J should recuse himself from hearing each case on the basis of his pecuniary interest in the litigation as a member of the plaintiff class.    Initially, his Honour considered that due to the relatively small nature of the interest in Centro, a disclosure of the interest and an appropriate amendment to the statement of claim to exclude Motown as a group member would be sufficient to address any appearance of bias. This view was supported by the High Court in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 which held that a judge's holding of a relatively small stake in a corporate party to litigation does not give rise to an appearance of impropriety such as to found a reasonable apprehension of bias requiring the judge's recusal. Although disclosure of even a small financial interest is no doubt the better practice, Ebner also indicates that belated disclosure of an interest that was the result of inadvertence (as in this case) would suffice.   His Honour then canvassed further authorities for guidance which revealed that in the United States, many jurisdictions have statutory, rule-based and case law authority for the proposition that, subject to certain exceptions including the common law rule of necessity, any financial interest of the judge in the litigation requires recusal. The exception to this recusal rule in statute, case law and US Supreme Court practice, is where a justice has divested himself of the stock prior to oral argument in the case, and returned to participate in the hearing and decision of the case. This practice is authorised by statute which provides that where substantial judicial time has been expended on the matter, a judge need not recuse based on the discovery of financial interest if he or she divests himself or herself of the interest.   Based on the majority view in the US that divestiture cures any appearance of impropriety, Finkelstein J arranged for Motown to sell its interest in Centro shares and waived all claims arising out of or related to the facts alleged in the pleadings, and assumed this would be sufficient to cure any appearance of bias. However, the respondents were not satisfied with this approach and argued that even though his Honour had divested himself of the pecuniary interest, the reasonable apprehension of bias was real and could not be cured due to the 'grudge' he might be perceived to bear due to the unrecoverable $19,000 loss to his personal superannuation fund.   In the face of these considerations, Finkelstein J confessed to having doubts about the matter and decided in the end to recuse himself on the basis that the better view would be to be cautious. His Honour also expressed concern that the respondents would have appealed a refusal to recuse which would cause delays and additional costs to the parties in an already expensive piece of litigation.   The judge also dealt with the procedural matter of whether there was a need for any orders to be made and after expressing doubt about some of the authorities on this point, decided that it was only necessary to make directions that the cases be allocated to another judge.   Accordingly, in each case, Finkelstein J made a direction that the proceeding be reassigned to another judge of the Victoria District Registry of the Federal Court.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h5)  **5.10 Appropriateness of order under section 477A of the Corporations Act for termination of administration**  (By Sabrina Ng and Katrina Sleiman, Corrs Chambers Westgarth)  Flynn v Theobald [2008] WASC 263, Supreme Court of Western Australia, Beech J, 14 November 2008  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/november/2008wasc263.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/november/2008wasc263.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)            **(a) Summary**  The defendants were appointed administrators of Kitchens Ucan Fit Pty Ltd (the Company). The plaintiff, the sole director of the Company, applied for an order under section 447A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) that the administration be terminated on the grounds that the Company is solvent, the administrators are in a position of conflict of interest and the provisions of Part 5.3A of the Corporations Act are being abused.    **(b) Facts**  From May 2008 the Company began to experience liquidity problems which led to the Company's bank issuing a number of demands in August 2008. On 13 August 2008 the bank appointed the first named defendant to prepare a report on the financial position of the Company. The report concluded that there were reasonable grounds to suspect insolvency on the part of the Company.  On 6 October 2008 the bank appointed the defendants as administrators of the Company.   On 20 October 2008 the plaintiff commenced proceedings for an order under section 447A of the Corporations Act that the administration be terminated on the grounds that the Company is solvent, the administrators are in a position of conflict of interest and the provisions of Part 5.3A of the Corporations Act are being abused. Alternatively, the plaintiff sought an order that the defendants be removed as administrators.   **(c) Decision**   On the issue of the solvency of the Company, the court stated that insolvency is a question of fact to be ascertained from a consideration of the company's financial position taken as a whole, and that section 447A invites attention to whether the company is insolvent as at the date of the hearing, not some earlier point in time, such as when the company went into administration.  Insofar as the plaintiff invoked section 447A(2)(a), the onus was on the plaintiff to establish that the Company is solvent.   The court stated that in an application for an order under section 447A, in a case where the administrators were appointed under section 436C, the ability of the Company to pay the secured debt which has triggered the right of appointment will be of central significance to an assessment of the Company's solvency.  In this respect, the court gave significant weight to the undisputed fact that for some months, the Company's debts to the bank in the sum of not less than $580,000 had been due and payable but had not been paid by the Company. The evidence demonstrated that the failure to pay the bank was on account of the Company's inability to do so.     In relation to the independence of the defendants, the court considered the following legal principles in relation to the removal of a liquidator on the ground of actual or perceived conflict of interest, which have been equally applied in relation to administrators:   * there must be a real and not merely theoretical possibility of conflict; * those who assert that a liquidator should be removed are under a duty to establish at least a prima facie case that removal is for the general advantage of the persons interested in the winding up, and the onus of proof will not be easy to discharge if the liquidator has become well acquainted with the business and affairs of the company; and * a liquidator may act as a liquidator of a company even if there is a prior involvement with the company in liquidation, provided that that involvement is not likely to impede or inhibit the liquidator from acting impartially in the interests of all creditors or give rise to a reasonable apprehension that the liquidator might be so impeded.   The plaintiff pointed to the fact that the administrators appointed the solicitors who act for the bank in relation to this matter as their solicitors as a ground for suggesting lack of independence.  The court stated that in some cases, the appointment by an administrator of solicitors who act for and have acted for the appointor may be an indication of a lack of independence. However, the appointment by an administrator of solicitors who act for the appointing holder of a charge does not, of itself, in all circumstances, give rise to a ground for removal of the administrator on the ground of a lack of independence. In the circumstances, the court held that it was appropriate for the administrators to instruct new solicitors as it appeared to be undesirable and inappropriate for the same solicitors to act both for the administrators and for the appointing charge‑holder. However, the court was not satisfied that the use by the administrators of the same solicitors was a sufficient indication of a lack of independence to justify a conclusion that the appointment of the administrators should be terminated. Further, the court held that the fact that the first named defendant acted as proxy for the bank (as well as for certain other unsecured creditors) does not provide any basis to conclude that he does not act independently of the bank.   The plaintiff contended that the fact that in August 2008 the first named defendant prepared the report on the financial position of the Company impeded him from acting impartially in the interests of all creditors or gave rise to a reasonable apprehension that he would be so impeded. However, the court did not accept this submission as there was not a sufficient basis to conclude that he would fail to take all information now available into account, or to conclude that he would resist altering any conclusions that he had reached in his August report.   In relation to the plaintiff's contention that the administrators should be replaced on the ground that they have failed to properly carry out their duties, the Court held that the plaintiff's evidence fell well short of establishing that the first named defendant had approached his task from the beginning with the object of leading the Company into liquidation.   Accordingly, the court dismissed the application.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h5)  **5.11 Share devolution, family dissolution, but no triumphs of form over substance**  (By Andrew Coffey, Mallesons Stephen Jaques)  Wood v Inglis [2008] NSWSC 1147, New South Wales Supreme Court, Barrett J, 6 November 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/november/2008nswsc1147.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/november/2008nswsc1147.htm" \t "_new)   or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**  The substance of this case concerns:   * the devolution of shares in a private company; * the purported use of corporate power in light of this specific legacy; and * the application of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) and company's constitution to regulate both of the foregoing.   William Inglis (the Testator) died on 11 October 2007. He was survived by his second wife Helen Inglis (the Widow), their son William Inglis and four children from his first marriage, Kathryn Clark, Michael Inglis, Pamela Wood and Fiona Inglis.    Relevantly, part of the Testator's accumulated wealth was reposed in a family trust, of which Inglis Research Pty Limited (IRPL) was and is the trustee. The dispute before the court largely revolved around the devolution of the Testator's shares in IRPL and the corporate power purported to have been exercised by the  IRPL board (the Board) to:   * appoint Pamela Wood as a director; * remove the Widow as a director; and * retain lawyers (ClarkeKann).   To resolve this dispute, the court was required to consider the statutory process of share devolution, whether this process was modified by the constitution of IRPL, and the conduct of the executrices in light of both of the foregoing.   **(b) Facts**   At the time of his death, the Testator held 8 of the 10 shares comprising the issued share capital of IRPL, with the balance of 2 shares being held by the Widow (1 share) and Michael Inglis (1 share). These three were also the directors immediately prior to the Testator's death. It was clear from his will that the Testator wanted his shareholding in IRPL to devolve equally to Kathryn Clark and Pamela Wood, meaning the Board would be constituted by:   * the Widow (with 10% of the issued share capital); and * Pamela Wood and Kathryn Clarke (holding 40% of the issued share capital each).   Michael Inglis (with a 10% shareholding) was not a director at the time of the Testator's death. The will was granted probate on 27 November 2007 to executrices Pamela Wood and the Widow. On 31 December 2007, prior to the complete administration of the estate by the executrices, a purported general meeting of IRPL was held. The persons assembled together on that occasion were Kathryn Clark, Pamela Wood and Michael Inglis. The Widow was not present, despite apparently having received notice that it was to be held. The meeting purported to resolve:   * that Pamela Wood be appointed director; and * that the Widow be removed as director.   The ultimate question to be considered by the court was whether these resolutions were valid. If these resolutions were not valid, the directors after 31 December 2007 remained the Widow and Kathryn Clark, they being the survivors of the three-person Board as it stood immediately prior to the Testator's death. If the resolutions were valid, the directors after 31 December 2007 were Kathryn Clark and Pamela Wood, to the exclusion of the Widow.   Kathryn Clark and Pamela Wood conducted themselves as if they were the only directors of IRPL pursuant to the purported Board meeting of 31 December 2007, subsequently deciding on 8 May 2008 that IRPL should retain ClarkeKann as solicitors to defend proceedings instituted by the Widow.   Ultimately, the question before the court was whether ClarkeKann was in fact retained by IRPL. That is, could Kathryn Clark and Pamela Wood legally bind IRPL to a retainer with ClarkeKann when the very institution of Pamela Wood to the office of directorship may not have been legally resolved by IRPL. The question of the legality of the retainer in turn would determine the more material question of whether the resolutions purportedly passed by the Board on 31 December 2007 were in fact legally corporate actions by the Board.   **(i) Relevant legislation, common law and company constitution considerations**   In seeking to resolve this issue Barrett J, among other things, examined in detail the process for the devolution of a share in a company. Importantly, his Honour noted that the "property is vested in the executor as from the time of death" who, after applying the estate to any outstanding debts of the deceased, must then make available to the specific legatee the balance of the estate bequeathed by the testator according to the terms of his/her will. To put a specific legatee into the possession of the bequest, his Honour noted, "some act of assent is necessary".   When the specific legacy is a share, the executor has a statutory right under the Act to be registered as the shareholder (before giving assent to the specific legatee). However, if the executor purports to give assent in the absence of registration, nothing in the Act will preclude that transfer from taking effect. The constitution of the company may nevertheless impose an alternate regime.    Relevantly, the IRPL constitution contained the following clauses:   * The directors in their absolute discretion may decline to register any transfer of shares in the Company to any person of whom they do not approve and shall not be called upon to assign any reason for such refusal. * The legal personal representatives of a deceased sole holder of a share shall be the only persons recognised by the Company as having any title to the share. In the case of a share registered in the name of two or more holders, the survivors or survivor or the legal personal representatives of the deceased survivor shall be the only persons recognised by the Company as having any title to the share.   Importantly, Barrett J found that "the constitution of IRPL makes clear . that the legal personal representatives of a deceased sole holder of a share are the only persons recognised by the Company as having any title to the share".  **(c) Decision**    On the basis of relevant legislation and the IRPL constitution, Barrett J found that:  "a share in IRPL that is the subject of a specific bequest can . become registered in the name of the legatee only through action of the legal personal representative. That action can only be by way of transfer - either transfer without the representative's first having become the registered holder or transfer after the representative has become the registered holder.  It is for the legal personal representative to choose between these alternatives."   In this case, however, Barrett J found that the executrices (or joint "legal-representatives" within the contemplation of the IRPL constitution) never made a choice between those alternatives. Instead his Honour found that Pamela Wood acted unilaterally in making the entry on the company register on 31 December 2007; something which could not be regarded by the court as "assent" by the executrices. His Honour noted that the jurisdiction of the court to rectify the register could have been invoked in such circumstances, but was not sought in this case.   The composition of the Board consequently did not change on 31 December 2007 and Pamela Wood, not being a director of IRPL, was incapable of resolving (in concert with Kathryn Clark) to retain ClarkeKann. The IRPL constitution provided that the power to manage the business of the company is to be exercised in general meeting. This, of course, did not occur because Kathryn Clark and Pamela Wood required the assent of the executrices to be put into possession of their specific legacy - the shareholding which would confer upon them requisite corporate power to make board resolutions - and this never occurred.   Having found that the purported resolutions of 31 December 2007 created no legal rights, Barrett J went on to decide that the motion of the Widow should nevertheless be adjourned. His Honour asserted that the purported resolutions can (and likely will) be ratified by the newly constituted Board once the executrices carry out their duties in administering the Testator's will. That is, the children from the former marriage will, after the executrices assent to the devolution of the shares pursuant to the terms of the Testator's will, be in a position to exercise the corporate power of IRPL to remove Helen Inglis as a director and ratify the originally improper decision to retain ClarkeKann. His Honour thus chose to adjourn the matter such that this could be done, rather than grant "an undesirable triumph of form over substance".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h5)  **5.12 Whether a single originating process can be used to seek orders to set aside multiple statutory demands under section 459G**  (By Kathryn Finlayson, Minter Ellison)   Remo Constructions Pty Ltd v Dualcorp Pty Ltd [2008] NSWSC 1172, New South Wales Supreme Court, Barrett J, 6 November 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/november/2008nswsc1172.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/november/2008nswsc1172.htm" \t "_new)   or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   A single originating process which contains two distinct claims, each in respect of a different statutory demand served by a single defendant, can be a valid and regular application under section 459G of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).   **(b) Facts**   On each of 18 April 2008 and 22 April 2008, the plaintiff was served with a statutory demand in relation to two separate judgment debts arising from the filing in the District Court of adjudication certificates pursuant to section 25 of the [Building and Construction Industry Security of Payment Act 1999](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=17378" \t "Default).   On 9 May 2008, the plaintiff filed an originating process in the Supreme Court seeking the following orders:   * an order that the statutory demand dated 18 April 2008 served by the defendant on the plaintiff be set aside; * an order that the statutory demand dated 22 April 2008 served by the defendant on the plaintiff be set aside; and * an order that the defendant pay the plaintiff's costs including on an indemnity basis.   The defendant submitted that the plaintiff had not complied with section 459G of Corporations Act 2001 (Cth) in respect of either statutory demand.     Section 459G provides:  (1)   A company may apply to the court for an order setting aside a statutory demand served on the company. (2)    An application may only be made within 21 days after the demand is so served. (3)    An application is made in accordance with this section only if, within those 21 days:          (a) an affidavit supporting the application is filed with the court; and           (b) a copy of the application, and a copy of the supporting affidavit,   are served on the person who served the demand on the company.   The defendant contended that section 459G required a single originating process to be filed in respect of a single statutory demand.  It submitted that the plaintiff's originating process which incorporated a claim for two orders seeking to set aside two statutory demands was invalid.   The plaintiff submitted that the two claims were properly included in the one originating process.   **(c) Decision**   Justice Barrett held that a single originating process which contains two distinct claims, each in respect of a different statutory demand served by a single defendant, can be a valid and regular application under section 459G.   His Honour did not accept that the Corporations Act 2001 (Cth) required the court to proceed according to an 'abstract rule of general application that there can only be one summons dealing with one demand' for two reasons:   * It was not discernable from the language of section 459G.  In his Honour's view, the time limit in section 459G(2) 'after the demand is so served' could be applied separately to each claim in an originating process of the kind filed by the plaintiff to determine whether the application represented by that claim was within time; and * The rules of procedure of the Supreme Court applied to proceedings commenced under the Corporations Act 2001 (Cth) in that court. Under rule 6.18(1)(a) of the [Uniform Civil Procedure Rules 2005](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "Default), a plaintiff may, in any originating process, claim relief against the defendant in respect of one or more causes of action if the plaintiff sues in the same capacity and claims the defendant to be liable in the same capacity in respect of each cause of action.  His Honour considered that the conditions for the operation of that rule would be satisfied in this case.   Justice Barrett noted that in some cases an attempt to challenge multiple statutory demands under section 459G by means of a single originating process may fail, for example because of a failure to comply with section 459G(3). However, having regard to the nature of the grounds advanced in the supporting affidavit and to the separate claims in the originating process, his Honour held that the plaintiff's application was a valid and regular application under section 459G.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h5)  **5.13 When is a refusal to consent to the transfer of a franchise reasonable?**  (By Alex Zolotarsky, Freehills)   Lockhart v GM Holden Ltd [2008] QSC 257, Supreme Court of Queensland, Douglas J, 24 October 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2008/october/2008qsc257.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2008/october/2008qsc257.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   This case dealt with a car manufacturer withholding consent to allow a franchisee to transfer its car dealership to another party. The franchisee alleged that the withholding of consent was unreasonable - losing the opportunity to sell the dealership for a more favourable amount - in breach of the Franchising Code of Conduct.   The franchisee was unsuccessful. The withholding of the consent was reasonable because the reasons given for the decision truly reflected the franchisor's decision making process and were genuine or made in good faith.   **(b) Facts**    GM Holden (Holden) refused to agree to the transfer of a Holden car dealership franchise held by Peter Lockhart Motors (Lockhart) to Zupps South East Pty Ltd (Zupps).   Lockhart's performance as a dealer was unsatisfactory and Holden had the intention to terminate its franchise. However, Holden did not terminate the franchise as Lockhart entered into discussions with Holden to transfer the car dealership to Zupps. Holden told Lockhart that Zupps were probably unsuitable for this transfer. However, Lockhart entered into an agreement with Zupps transferring the dealership without Holden's knowledge. Once Holden was informed, it refused to approve the application of transfer.   Holden gave the following reasons:   * The transfer would increase Zupps' market footprint to an unacceptable level, with possible adverse effects on other dealers in the area. * If the transfer was to occur, the future of Zupps was not certain as there was no appropriate succession plan in the event of Mr Zupps' death or retirement. * No proper business plan was provided for the dealership by Zupps.   The court held that the reasons provided by Holden were not unreasonable.   **(c) Decision**   His Honour, Douglas J, considered what were reasonable considerations for the decision to refuse by Holden.   **(i) Transfer would result in unacceptable market concentration by Zupps**  Holden's policy set out acceptable levels of market concentration. If Zupps was to acquire Lockhart's dealership, it would exceed the acceptable market concentration for that area.  This policy had been developed after Holden had experienced the collapse of a very large dealership group, after its patriarchal figure's death. The collapse had significantly affected Holden's market share.    Holden had a legitimate risk management interest behind this policy: to be able to contain any risk to Holden of an adverse event affected a large dealer group.   The court also held that it was sufficient that Zupps knew that it was not allowed to acquire more market share, without knowing the specific limit imposed.   **(ii) Indeterminacy of Zupps relinquishing one of its other dealerships**  If Zupps did offer to give up one of its other dealerships to acquire Lockhart, Holden's decision not to approve the transfer would still not have been unreasonable because of the indeterminacy of any proposal by Zupps to sell its other franchise.   **(iii) Transfer would result in an adverse effect on other Holden franchisees**  The court accepted that Holden had a genuine interest to protect and maximise its market share and profits against other motor vehicle manufacturers.   Allowing the transfer would create a real risk - even though it may be a hypothetical one - of a larger dealership cannibalising another Holden dealership through the sheer power of its size and stronger economic position.   **(iv) Uncertainty of Zupps' succession plans**  Mr Zupp had hands on control of the business. Factual evidence supported Holden's concern that the managers of Zupps' dealerships had no equity in the business and little incentive to stay. With no trained successors, if Mr Zupp was to unexpectedly exit the business, there was a real fear of the dealership failing.    This highlighted the previous experience of Holden that formed the basis for the market concentration rule.   **(v) No proper business plan for the dealership**  Factual evidence showed no proper business plan was discussed or submitted to Holden by Zupps. It was reasonable for Holden to refuse the transfer because a lack of a proper business plan emphasised the issue of the uncertainty of succession of the Zupps dealerships.   **(vi) Other considerations**  The court noted that it is also legitimate to give consideration to the following when deciding if it is reasonable to withhold consent:   * whether the franchisor was acting in the legitimate, long term interest of the franchise; * whether the proposed assignee fitted into the franchisor's overall network; and * whether the transfer would have an adverse effect on the franchise network, such as profitability of other retailers / franchisees.   The court also went on to consider the quantum of damages if Lockhart did succeed in this action. This was obiter and the court had major difficulties arriving at a figure due to "major evidentiary problems". An additional factor was the failure of Lockhart to call witnesses from Zupps to ascertain if they would have paid more for the dealership, to establish whether Lockhart did suffer any loss.   This case suggests that the withholding of consent to the transfer of a franchise is likely to be reasonable if it is based on reasons reflecting the decision making process. It is not a high threshold and as long as the reasons are genuine or made in good faith, they are likely to be found reasonable.    These reasons are in addition to the reasonable circumstances set out in section 20(3) of the Franchising Code of Conduct.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h5)  **5.14 Duty to provide 'reasonable assistance'**  (By Catherine Arscott, Freehills)   Nauru Phosphate Royalties Trust (receivers and managers appointed) v Business Australia Capital Mortgage Pty Ltd (in liquidation) [2008] NSWSC 916, Supreme Court of New South Wales, Einstein J, 5 September 2008   The full text of this judgment is available at:   [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/september/2008nswsc916.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/september/2008nswsc916.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**  This case examines the scope of an express obligation on a party under a deed to provide 'reasonable assistance' to a liquidator in dealing with the creditors. It also considers the scope of an implied duty of good faith and 'fair dealing'. While his Honour accepted the observation of the NSW Court of Appeal in Burger King that the Australian common law does not distinguish between an implied duty of reasonableness and an implied duty of good faith in commercial contracts, Einstein J showed considerable deference to Barrett J's 'careful search for . the more substantial and separate content of the duty of good faith' in Overlook v Foxtel. This deference may prompt appellate courts in the future to reconsider Burger King.   **(b) Facts**   A number of complex disputes between entities collectively called the 'Nauruan Entities' on the one hand and various other companies (including 3 collectively known as 'BA Companies') on the other hand, were resolved by the parties entering into a Heads of Agreement in 2004. A liquidator (Mr Wily) was appointed to each of the BA Companies in 2005. The Nauruan Entities, BA Companies, Mr Wily and others executed a Deed in October 2006 to resolve various ongoing disputes, including outstanding claims against the Nauruan Entities by 11 'Priority Creditors'.   **(i) Deed**  Under the Deed, the Nauruan Entities agreed to pay $2 million (Reserve Sum) into a trust account held by 2 trustees, namely Mr Nikolaidais (solicitor for Mr Wily and the BA Companies) and Mr Atkins (Nauruan Entities' solicitor). These funds were to be made available to enable Mr Wily to settle the outstanding claims of the Priority Creditors. If Mr Wily obtained releases from all Priority Creditors before 30 June 2007 for less than $2 million, he was entitled to the balance of the Reserve Sum. Otherwise, the balance reverted to the Nauruan Entities.   The liquidator 'had to take all reasonable steps and use his best endeavours to procure the Priority Creditor Releases' (clause 4.1). The Nauruan Entities' solicitors and Mr Nikolaidis had to 'take all reasonable steps to give effect to the agreement as set out in this clause 4 including but not limited to signing all necessary documents to give effect to the Priority Creditor Releases.' (clause 4.3). The Nauruan Entities had to 'provide reasonable assistance to the Liquidator in dealing with the Priority Creditors .' (clause 4.5).   **(ii) Liquidator failed to obtain all releases**  Mr Wily failed to obtain all releases in time. In particular, he did not obtain a release from Ernst & Young in respect of a claim for fees because Mr Wily was not satisfied on the material provided to him that Ernst & Young was entitled to the amount claimed. Prior to June 2007, Mr Wily became concerned that there might be documents in existence, not in his possession, which altered the terms of the Ernst & Young mandate. If such documents existed, Mr Wily considered that they might entitle Ernst & Young to a substantial settlement.    The Nauruan Entities claimed the balance of the $2 million because Mr Wily failed to procure all 11 releases. The BA Companies contended that Mr Wily was unable to procure the requisite releases because the Nauruan Entities had breached their express obligations to him under clause 4, with the result that Mr Wily was entitled to the balance.    **(c) Issues**  The following issues arose in the case:   * Did clause 4 require the Nauruan Entities to provide 'reasonable assistance' to Mr Wily to actually settle the claims and obtain the releases or merely to assist him in dealing with the Priority Creditors? * What was the scope of the Nauruan Entities' obligation to provide 'reasonable assistance'? In particular, did the Nauruan Entities have to assist Mr Wily in obtaining general access to the files of the Nauruan Entities in relation to the Ernst & Young claim? If so, did the Nauruan Entities provide such assistance? * Did the Nauruan Entities breach any implied duties of good faith and reasonableness that required the Nauruan Entities to cooperate with Mr Wily?   **(d) Decision**  **(i) Construction of clause 4**  The Nauruan Entities contended that their solicitors' obligation to take 'all reasonable steps' to give effect to the Deed and their own obligation to provide 'reasonable assistance' were never intended to require them to assist Mr Wily to actually settle the claims and obtain the releases but rather to assist Mr Wily in dealing with the Priority Creditors.   Tobias JA considered whether there were significant differences between the phrases 'reasonable assistance', 'best endeavours' and 'all reasonable steps'. Without expressing a firm conclusion, Tobias JA, with whom the rest of the Court of Appeal agreed, concluded that the phrases fell within the ambit of the obligation described by Gibbs CJ in Hospital Products Ltd v United States Surgical Corporation, (1984) 156 CLR 41, namely:    ' .an obligation to use 'best endeavours' does not require the person who undertakes the obligation to go beyond the bounds of reason; he is required to do all he reasonable can in the circumstances to achieve the contractual object, but no more.'  Relying on this decision, Einstein J accepted the submission of the Nauruan Entities.    **(ii) Duty to provide 'reasonable assistance'**  Einstein J observed that the scope of the obligation to provide 'reasonable assistance' depended on particular circumstances of each case.    The BA Company and Mr Wily contended that the Nauruan Entities were required to make arrangements with their former solicitors (Levitt Robinson) to grant the Mr Wily access to their files pertaining to the Ernst & Young claim to enable Mr Wily to properly evaluate the Ernst & Young claim.    The scope of this obligation to facilitate access was very wide. It included 'all papers, writing, documents, file notes, files and to provide any information or assistance requested of them in relation to all or any of the Deed Creditors..' Since Levitt Robinson had acted as the solicitors for the Nauruan Entities up until July 2005, including in various Federal Court proceedings, Einstein J accepted that the Levitt Robinson files would have to be reviewed for privileged and confidential documents before Mr Wily could access the files. His Honour held that that the obligation to provide 'reasonable assistance' did not require the Nauruan Entities to provide an authority for such general access to the Levitt Robinson files.    Einstein J set out in detail extensive correspondence between Mr Wily, HNP (current solicitors for Nauruan Entities) and Levitt Robinson. While it was unclear why Levitt Robinson had adopted an obstructionist attitude, Einstein J observed that HNP had expended 'considerable efforts in endeavouring to locate documents sought by Mr Wily, their attempts in this regard being stymied by what would appear to be a strange melange of interlocking agendas of others.'     Einstein J also held that Mr Wily had acted under the mistaken assumption that the Deed only authorised him to settle on terms that were reasonable so far as the creditors were concerned. His Honour held that this mistaken assumption had no basis in the Deed and could not be attributed to any conduct of the Nauruan Entities.   **(iii) Implied duties of good faith and reasonableness**  The BA Companies submitted that the Nauruan Entities breached their implied duties of good faith and fair dealing that required the Nauruan Entities to cooperate to enable Mr Wily to fulfil his obligations under clause 4 to secure the releases. The Nauruan Entities were not entitled to take advantage of this breach by claiming the balance.   Einstein J held that the trite principle that a person cannot enforce a contractual provision in their own favour if he or she breaches an interdependent obligation, Mackay v Dick (1881) 6 App Cas 251, did not preclude the Nauruan Entities from recovering the balance. This was because Mr Wily's ability to obtain the releases was not conditional upon the Nauruan Entities providing reasonable assistance. Einstein J held that Mr Wily was entitled to settle the claims on whatever basis he wished. His Honour held that Mr Wily's view that he could not settle unless he was satisfied the amount was a 'proper one' was not supported by the Deed.    In *Burger King Corporation v Hungry Jack's Pty Ltd*, [2001] NSWCA 187, the NSW Court of Appeal noted that the Australian common law does not distinguish between an implied duty of reasonableness and an implied duty of good faith. In *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15, Giles JA noted that Burger King and Alcatel Australia Ltd v Scarcella (1988) 44 NSWLR 349, support the proposition that 'an implied obligation of good faith and reasonableness in the performance of a contractual obligation or the exercise of a contractual power may be implied as a matter of law as a legal incident of a commercial contract.'   Einstein J showed considerable deference to the reasoning of Barrett J in Overlook v Foxtel [2002] NSWLR 17. His Honour observed that Barrett J's judgment revealed a 'careful search for the more substantial and separate content of the duty of good faith itself', namely an adherence to standards of conduct which are honest, as well as being reasonable having regard to the party's interests. Einstein J carefully outlined the steps in Barrett J's reasoning and his conclusion that the implied obligation of good faith is 'not a duty to prefer the interests of the other contracting party', but rather an 'obligation to eschew bad faith.'    In this instance, Einstein J shied away from any further analysis of the scope of the duty of good faith not only because Burger King had 'effectively collapsed the distinction' between implied obligations of reasonableness and good faith but also because counsel did not contend that the implied duty of good faith imposed obligations on the Nauruan Entities above and beyond those expressly required by clause 4 in the Deed. However, Einstein J's deference to Barrett J's 'careful search for . the more substantial and separate content of the duty of good faith' in Overlook v Foxtel is significant. His deference may prompt an appellate court in an appropriate case in the future to reconsider the position in Burger King.  Einstein J held that the Nauruan Entities did not breach their express obligation to provide 'reasonable assistance' nor any pleaded implied obligation to similar effect. His Honour found that there was no evidence to substantiate the contention that the Nauruan Entities had encouraged Ernst & Young not to enter into the release. Einstein J also held that even if the Nauruan Entities had breached their obligations to provide 'reasonable assistance', there was insufficient evidence to demonstrate that that any such breach caused Mr Wily to fail to obtain the release from Ernst & Young.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20136%20December%202008%20(1).htm%23h5) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. 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