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|  | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  | | --- | | **Bulletin No. 146**  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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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 Superannuation review - issues paper on operation and efficiency**    On 16 October 2009, the Australian superannuation system review panel called for submissions in response to the release of its Phase Two: Operation and Efficiency - Issues Paper. Key issues being considered in the Operation and Efficiency phase include: fees and charges; comparability of funds; defaults; use of technology; competition; administrators and complexity.   The issues paper is available on the [Super System Review](http://www.supersystemreview.gov.au/content/downloads/operation_effiencency_issues_paper/Phase_Two_Operation_and_Efficiency_Issues_Paper.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.2 FRC publishes revised guidance for directors on going concern assessments and disclosures**  On 15 October 2009, the UK Financial Reporting Council (FRC), published updated guidance for directors of UK companies to assist them when making their assessment of going concern. The guidance is based on three principles covering the process which directors should follow when assessing going concern, the period covered by the assessment and the disclosures on going concern and liquidity risk. The guidance emphasises the importance of balanced, proportionate and clear disclosures about going concern issues and the key assumptions being made in one place in an annual report.   The guidance is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/Going%20concern%20and%20liquidity%20risk%20-%20guidance%20for%20directors%20of%20uk%20companies%20093.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.3 Reforms needed for the not-for-profit sector**   There is a need for wide-ranging reforms and a reduction in compliance costs faced by the not-for-profit sector, according to a draft research report released on 14 October 2009 by the Australian Productivity Commission.   To consolidate regulatory oversight, and enhance public transparency, the Commission proposes a 'one-stop shop' for Commonwealth-based regulation in the form of a Registrar for Community and Charitable Purpose Organisations.   The report makes a number of other draft recommendations aimed at:   * building a better knowledge base through a national measurement framework and a Centre for Community Service Effectiveness for the promotion of best practice evaluation; * smarter regulation including a more coherent endorsement process for tax status to be administered by the proposed Registrar and a new definition of charitable purpose; * promoting giving through broader scope of gift deductibility, the promotion of planned giving and national harmonised fundraising regulation; * facilitating social innovation and sector development through a variety of initiatives; * reforming government purchasing and contracting arrangements; and * building more effective relationships with governments, including through the establishment of an Office for Not-For-Profit Sector Engagement to implement reforms.   The not-for-profit (NFP) sector is large and diverse:   * Of the around 600,000 NFPs, a little less than a quarter have a formal legal structure, and of these only around 59,000 are employers and/or have an 'active tax role'. * The ABS satellite accounts found these 'economically significant' NFPs contributed $43 billion to Australia's GDP and 8% of employment in 2006-2007. * Over the seven years to 2006-2007, the contribution to GDP has more than doubled in current price terms and the NFP contribution to GDP has increased from 3.3 to 4.1% reflecting the strong growth in the NFP sector over this time. * 4.6 million volunteers work with NFPs, with an imputed additional contribution to GDP of $14.6 billion. More Australians are volunteering (35 per cent of adults in 2006 up from 24% in 1995), but for fewer average hours, and the proportion volunteering in community services has fallen.   According to the Productivity Commission, the current regulatory architecture does not serve the sector well:   * Regulatory reporting can be disproportionate, complex and costly. * Some legal forms are unsuited to purpose, especially for national organisations, with no coordinated central regulatory oversight to support transparency. * Fundraising legislation is inconsistent across jurisdictions and has yet to be harmonised. * The 'standard chart of accounts', which would allow for robust comparison, has not been adopted nationally. * There is a perceived conflict for the Australian Taxation Office (ATO) in assessing eligibility for some tax concessions. * There is no central body to drive needed reforms.   The draft report is available on the [Productivity Commission](http://www.pc.gov.au/projects/study/not-for-profit/draft" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.4 The global financial crisis and Australia - report**  On 13 October 2009, the Financial Services Institute of Australasia (Finsia) launched a report which examines Australia's experience of the global financial crisis (GFC).  The report 'Navigating Reform: Australia and the Global Financial Crisis' examines the current framework which underpins banking and financial services regulation in Australia and provides recommendations on the issues that need to be addressed as part of the regulatory reform process.   The report is structured around four key questions that arise from Australia's experience of the GFC. These include:   * Why was Australia's experience of the GFC comparatively benign? * What lessons are there about financial markets and their regulation? * How might regulatory arrangements change in light of the GFC? * Can Australia's experience of the GFC be used to press strengths as a regional financial centre?   The report is available on the [Finsia](http://www.finsia.com/Home/AM/ContentManagerNet/HomePages/favicon.ico" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.5 ACSI releases new ESG guidelines to monitor Australian listed companies**   On 12 October 2009, the Australian Council of Super Investors (ACSI) released its two most recent guidelines, titled 'A guide for superannuation trustees on the consideration of environmental, social and governance risks in listed companies', and 'A guide for fund managers and consultants on the consideration of environmental, social and governance risks in listed companies'.  ACSI believes that good governance requires boards to consider and manage all material risks facing the company, including environmental and social issues, as well as considering relevant corporate governance factors. Superannuation funds can, and should, manage their investments for the long-term through consideration of environmental, social and governance (ESG) risks in their investment decision-making processes.  The revised guidelines provide recommendations which are of direct relevance to superannuation trustees, as well as additional tools and materials to assist trustees to implement the guidelines. Complementary guidelines have been developed to provide suggestions for asset consultants and fund managers.   The guidelines are available on the [ACSI](http://www.acsi.org.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.6 CEBS consults on disclosure guidelines reflecting the lessons learnt from the financial crisis**   On 9 October 2009, the Committee of European Banking Supervisors (CEBS) published for public consultation its draft disclosure guidelines intended to help institutions improve their risk disclosures in the wake of the financial crisis.   The disclosure guidelines are divided into three different parts, discussing respectively:   * general principles to be applied to high quality disclosures; * principles dealing with the content of disclosures on areas or activities under stress, in particular for the following topics: business models, impacts on results and risk exposures, impacts on financial positions, risk management and sensitive accounting issues; and * guidance on presentational aspects of disclosures.   The guidelines are available on the [CEBS](http://www.c-ebs.org/getdoc/bfc84fba-a46d-4f47-943c-b8e88a691e38/CP30-CEBS-Disclosure-guidelines.aspx" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.7 Financial development report shows global financial centres' lead is weakening**    On 8 October 2009, the World Economic Forum published its second annual Financial Development Report. Global financial centres still lead in the report's Index, but the effects of financial instability have pulled down their scores compared to last year. The United Kingdom, buoyed by the relative strength of its banking and non-banking financial activities, claimed the Index's top spot from the United States, which slipped to third position behind Australia largely due to poorer financial stability scores and a weakened banking sector.   The Financial Development Report ranks 55 of the world's leading financial systems and capital markets. It analyses the drivers of financial system development and economic growth in developed and developing countries to serve as a tool for countries to benchmark themselves and establish priorities for reform.  The rankings are based on over 120 variables spanning institutional and business environments, financial stability, and size and depth of capital markets, among other factors.  The financial crisis was acutely felt in most global financial systems and caused most countries' scores to drop significantly compared to 2008.  Germany and France suffered a heavy fall in overall scores that pulled them out of the top 10. They dropped in the rankings but demonstrated financial stability scores that were significantly higher than the United Kingdom and US. Australia showed particular strength this year, a trend that is echoed in many Asia Pacific economies.   The breadth of factors covered in the report means that countries with high financial instability scores like the United Kingdom and US could still achieve a high relative ranking in the Index due to other strengths.  **Top 10 countries in 2009**   **Country                             2009 Ranking** United Kingdom                 1 Australia                              2 United States                      3 Singapore                           4 Hong Kong SAR                5 Canada                               6 Switzerland                         7 Netherlands                        8 Japan                                   9 Denmark                             10   The 2009 rankings are available on the [World Economic Forum](http://www.weforum.org/pdf/FinancialDevelopmentReport/Rankings2009.pdf" \t "_new) website.  The report, rankings and country highlights are available on the [World Economic Forum](http://www.weforum.org/fdr" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.8 Top 100 Australian boards - study**   The boards of Australia's largest 100 companies experienced their lowest level of turnover in years in 2008, with the overall director pool continuing to steadily age, according to research from the Australian Council of Super Investors published on 8 October 2009.  In 2008 there were just 79 new appointments to S&P/ASX 100 company boards, down substantially from the 106 in 2007 and 134 in 2006 and 2005.   Despite the sharp decline in the number of new appointments to S&P/ASX 100 boards the number of new S&P/ASX 100 directors - individuals who were not and had not previously been directors of S&P/ASX 100 - outweighed the number of 'appointments from within' for the first time in several years.  Of the 79 new appointments, 40 were new to S&P/ASX 100 boards. Consistent with the lack of new appointments, the ACSI study also found that the average age of non-executive directors, at 60.4, was at the highest since ACSI began its annual review of S&P/ASX 100 boards in 2001, when the average S&P/ASX 100 non-executive director was 58.6.   The findings also show that the number of women on S&P/ASX 100 boards has declined slightly since 2006. Women held 11.1 percent of S&P/ASX 100 board seats in 2008, down from 12.4% in 2007 and accounted for 10.1% of all Top 100 directors. This was the lowest level since 2005, although it was in part driven by the addition of several new commodities companies to the S&P/ASX 100.  Director pay, in keeping with CEO pay, rose in 2008. The median S&P/ASX 100 non-executive chairperson in 2008 received $396,880, up 10.9% from 2008, while the median non-executive director saw their fees increase 8.6% to $176,528.   Further information is available on the [ACSI](http://www.acsi.org.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.9 IMF paper on banking sector weaknesses**   On 7 October 2009, the International Monetary Fund (IMF) published a paper titled "Policies to address banking sector weakness: evolution of financial markets and institutional indicators". The paper complements the stocktaking paper of the G-20 responses to the global banking crisis. The paper reviews the impact of measures to address the global banking crisis in the United States and Europe through mid-2009. It does so from three different perspectives: financial institutions, markets, and stakeholders. The policies addressed immediate pressures on bank liquidity through mid-2009, but profitability of large complex financial institutions worsened, their tangible common equity remained at a critical level, and asset quality weakened. In addition, market confidence remained weak, with credit markets highly dependent on official support. Since the measures by governments at end-March (including the G-20 meetings), the business environment in which some banks operate has improved, but a deterioration in the economic environment could impair the fragile recovery by banks.   The paper is available on the [IMF](http://www.imf.org/external/pubs/ft/spn/2009/spn0924.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.10 Consultation paper on audit firms providing non-audit services to listed companies they audit**    On 6 October 2009, the UK Auditing Practices Board, part of the UK Financial Reporting Council, published a consultation paper on the appropriateness of the provision of non-audit services by auditors to the entities they audit. The consultation paper does not address issues specific to individual non-audit services.  The consultation paper is available the [APB](http://www.frc.org.uk/apb/publications/pub2123.html" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.11 Overhaul of UK liquidity regulation**   On 5 October 2009, the UK Financial Services Authority (FSA) published its final rules on the liquidity requirements expected of firms.    The far-reaching overhaul, designed to enhance firms' liquidity risk management practices, is based on the lessons learned since the start of the credit crisis in 2007.    The FSA's new requirements are designed to protect customers, counterparties and other participants in financial services markets from the potentially serious consequences of imprudent liquidity risk management practices.    Specifically, the rules include:   * an updated quantitative regime coupled with a narrow definition of liquid assets; * over-arching principles of self-sufficiency and adequacy of liquid resources; * enhanced systems and controls requirements; * granular and more frequent reporting requirements; and * a new regime for foreign branches that operate in the UK.   Further information is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/Policy/2009/09_16.shtml" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.12 Short selling disclosure regulations**   On 2 October 2009, the Australian Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, released draft regulations and commentary material in relation to the disclosure of short selling information under the [Corporations Amendment (Short Selling) Act 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=105282" \t "Default).   The draft regulations require:   * the reporting of covered short selling transactions to market operators. This information will be aggregated and publicly released by market operators on the following business day. This is consistent with the existing Australian Securities and Investments Commission's (ASIC) interim disclosure regime; and * the reporting of short positions by short sellers to ASIC. This information will be aggregated by ASIC and released to the public four business days after the positions are taken. The reporting of short positions will commence on 1 April 2010.   The draft regulations and related commentary material are available on the [Treasury](http://www.treasury.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.13 Major Norwegian pension fund seeks reforms in US governance**   On 2 October 2009, the world's second-biggest pension fund announced that it has started a campaign to drive corporate governance reforms in the US by submitting resolutions to four US companies to appoint new independent chairmen.   Norges Bank Investment Management (NBIM) is calling for a shareholder vote on separating the role of chairman from chief executive at Harris Corporation, Parker Hannifin, Cardinal Health and Clorox.   NBIM manages assets in excess of US$400 billion globally in the Norwegian state pension fund, of which US$66 billion is invested in US equities.   According to information released by NBIM:   * NBIM is a long term shareholder and makes active use of its ownership rights in order to help safeguard financial wealth for future generations by promoting good corporate governance and encouraging high ethical, social and environmental standards at companies it is invested in. * Sound corporate governance is a prerequisite for long term value creation.  In that context, the composition of the board should be such that it represents all stockholders to whom it is accountable. The roles of chairman of the board and CEO are fundamentally different and should not be held by the same person. There should be a clear division of the responsibilities between these positions to ensure a balance of power and authority on the board. * This is a fundamental principle of good corporate governance that NBIM seeks globally for its portfolio companies. * The board should be led by an independent chairman and be in a position to make independent evaluations and decisions, hire management, set a remuneration policy that encourages good performance, provide strategic direction and have the support to take long-term views in the development of business strategies. An independent chairman is better able to oversee and give guidance to executives and help prevent conflict or the perception of conflict. This will in turn effectively strengthen the system of checks-and-balances within the corporate structure and protect stockholder value. * In the current challenging markets, NBIM believes that an independent chairman is essential. An independent chairman will be an asset to the company when the board must make the necessary strategic decisions to sustain a strong share price and to create shareholder value over time.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.14 FSA sets out policy on short selling**   On 1 October 2009, the UK Financial Services Authority (FSA) issued a feedback statement that confirms that it intends to pursue enhanced transparency of short selling through disclosure of significant short positions in all equities.  However, it will work towards agreement on future requirements at an international level rather than introduce a separate domestic regime. In the meantime it has no plans for immediate changes to its current short selling requirements.  Currently, the FSA requires disclosure to the market of net short positions of 0.25% or more of the issued share capital of UK financial sector companies or companies carrying out a rights issue.   The feedback statement details the responses that the FSA received to its proposals in the February 2009 Discussion Paper (DP) on short selling. The DP examined the arguments for and against restrictions on short selling. It proposed a disclosure requirement for the short selling of all stocks, not just those of financial services companies, using an initial disclosure threshold of 0.5% of issued share capital. It also stated that the FSA's preferred route was to achieve international agreement on policy.     Since the DP was published the Committee of European Securities Regulators (CESR) has issued proposals for a short selling disclosure regime. CESR's proposals for public disclosures of significant short positions are very similar to the FSA's but also include the idea for private disclosures to regulators at 0.1%. In its Feedback Statement, the FSA states that it is open to the possibility of requiring private disclosures at the lower threshold.  The FSA will continue to work with CESR to develop an agreed European disclosure policy for short selling.  The feedback statement is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/DP/2009/fs09_04.shtml" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.15 Executive pay - Productivity Commission report**   On 30 September 2009, the Productivity Commission released its Discussion Draft on Executive Remuneration in Australia. The Commission proposes reforms that would improve the accountability of boards, remove conflicts of interest and enhance shareholder engagement on remuneration.   The Commission reports that for Australia's largest 100 companies, executive pay grew by more than 250% in real terms since 1993, before falling in 2007-08. It is too early to determine if that decline has continued in 2008-09.   The Discussion Draft reveals marked differences across public companies. For the top 20 CEOs, pay averages almost $10 million, or 150 times average weekly earnings, whereas CEOs' pay at the smallest 500 companies averages around $180,000.   The Commission does not consider that there is general system failure in pay-setting across Australia's 2000 listed companies. However, some pay outcomes, especially the more egregious cases of 'reward for failure', appear inconsistent with an efficient executive labour market and could reflect weak or complicit boards. Such outcomes can weaken community confidence in corporate Australia and could have adverse effects on equity markets.   The Commission is proposing a package of changes to the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and ASX listing rules, including:   * barring executives from sitting on remuneration committees; * requiring that remuneration consultants report to boards independently of management; and * prohibiting directors and executives voting their shares and any undirected proxies on remuneration issues.   Importantly, the Commission also proposes strengthening shareholders' 'say on pay' by requiring boards to face re-election if shareholders' concerns on consecutive remuneration reports are ignored - a 'two strikes' rule.   The following key points are part of the discussion draft.   * Strong growth in executive remuneration and instances of large payments, despite poor company performance, have fuelled and continue to fuel community concerns that executive remuneration is out of control. * Executive pay for larger companies appears to have grown most strongly from the mid-90s to 2000, and increased by over another 50% in real terms to 2007. Remuneration fell in 2007-08, but it is unclear whether this decline has continued. Virtually all recent growth has come from performance pay. * In practice, executive pay varies greatly across Australia's 2000 public companies.  - For the top 20 CEOs, it averages almost $10 million (150 times AWE) compared to less than $200,000 for CEOs of the smallest companies (3 times AWE).  - Generally speaking, Australian executives appear to be paid in line with smaller European countries but below the UK and USA (the latter being a global outlier). * Globalisation, increased company size, and the shift to incentive pay structures have been major drivers of executive remuneration increases - companies compete to hire the best person for the job, and try to structure pay to maximise the executive's contribution to company performance. * However, some trend and specific pay outcomes appear inconsistent with an efficient executive labour market.  - Incentive pay 'imported' from the United States and introduced without appropriate hurdles led to substantial pay rises in the 1990s, partly for 'good luck'. Increasing complexity in pay arrangements in subsequent years also may have delivered 'upside' unanticipated by boards.  - Large termination payments could indicate compliant boards. * Instances of excessive payments and perceived inappropriate behaviour can reduce public confidence in the corporate sector and impact on equity markets. But the way forward is not to by-pass the central role of boards by capping pay, which would have adverse impacts on the economy. * The corporate governance framework should be strengthened, including by:  - removing conflicts of interest through more independent remuneration committees, and improved processes for use of remuneration consultants; and - promoting accountability and engagement through enhanced disclosure and strengthening the consequences for boards of shareholders' 'say on pay'.   The discussion draft is available on the [Productivity Commission](http://www.pc.gov.au/projects/inquiry/executive-remuneration/draft" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.16 British banks and G-20 remuneration reforms**  The UK's top five banks have committed to implementing reforms to bank remuneration agreed by the G-20 in Pittsburgh, Chancellor of the Exchequer Alistair Darling announced on 30 September 2009.    The five banks, including those which did not have recourse to government recapitalisation - Barclays, HSBC, Lloyds, RBS, and Standard Chartered have confirmed their commitment to comply with the FSA Rule on remuneration, which comes into force on 1 January 2010 and which is in line with the G-20 agreement, setting global standards for the implementation of the FSB's remuneration principles. They are committed to implementing important enhancements in disclosure, deferral, and clawback with effect from 1 January 2010 for performance year 2009.    The banks will continue to work with the FSA and adopt the G-20 principles.  The FSA Rule on remuneration is already broadly in line with the G-20 Implementation Standards and will be updated in 2010 to reflect the remaining differences, developments within the EU, and experience in implementing this Rule. The FSA will apply the same standards to all entities covered by the Rule on remuneration in the UK (and as it does already, including foreign owned subsidiaries), and will work with overseas banking regulators to ensure a consistent and timely global application of these reforms.    The measures will cover all senior executive officers and employees whose actions have a material impact on the risk exposure of the firm, including, but not limited to all PDMRs (Persons Discharging Managerial Responsibility).     Key elements of the reforms include:   * Significant financial institutions should have an independent board remuneration committee which is constituted in a way that enables it to exercise competent judgment on compensation policies and the incentives for managing risk, capital and liquidity. It should ensure that the bank's policy complies with FSB principles and standards and with the FSA's code, and undertake an annual compensation review which should be submitted to the FSA for them to assess compliance. * Remuneration for employees in the risk function should be determined independently of other business areas. * Firms must ensure that total variable pay is consistent with ensuring that they have the ability to maintain a sound capital base over the long term, while managing the risks that arise if an organisation cannot pay competitively to retain the right people. * Failure by firms to implement sound policies in line with the FSB implementation standards will result in appropriate corrective measures by the FSA to offset the extra risk of this, including requiring additional capital to be held. * Bonus pools must take into account the full range of current and potential risks, including capital, liquidity and timing of potential future revenues. * For senior executives, as well as other employees whose actions have a material impact on the risk exposure of the firm, 40-60% of variable compensation will be deferred over three years, with at least 50% in shares/share-linked instruments. * Multi-year guaranteed bonuses should not be part of future arrangements - any minimum bonus agreements should be limited to one year. * Poor performance will lead to a considerable contraction of bonus payments, including through malus or clawback arrangements. * Firms will be required to publish an annual report on compensation, providing information to help shareholders hold boards accountable, such as the remuneration committee mandate, performance criteria and information on the linkage between pay and performance. * This will include disclosure of aggregate information on the pay of senior executives and all employees whose actions have a material impact on the risk exposure of the bank.   Further information is available on [HM Treasury](http://www.hm-treasury.gov.uk/home.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.17 CESR launches a consultation on trade repositories in the European Union**      The financial crisis, especially the default of Lehman Brothers, underlined the importance of a robust and adequately functioning post-trading infrastructure, highlighted the need for more transparency on exposures generated by the over-the counter (OTC) market, in particular for derivatives, notably credit default swaps (CDS), and demonstrated the need to safeguard the OTC market from abusive behaviour. On 29 September 2009, the Committee of European Securities Regulators (CESR) published a consultation paper on trade repositories. The CESR/ESCB Recommendations for Securities Settlement Systems and Central Counterparties in the European Union, upon request of the ECOFIN, have been reviewed in order to encompass the OTC derivatives dimension.  Further information is available on [CESR](http://www.cesr.eu/data/document/09_837.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.18 Special purpose entities: Joint Forum releases final report**   On 29 September 2009, the Joint Forum released the final version of its paper entitled 'Report on Special Purpose Entities. This paper serves two broad objectives. First, it provides background on the variety of special purpose entities (SPEs) found across the financial sectors, the motivations of market participants to make use of these structures, and risk management issues that arise from their use. Second, it suggests policy implications and issues for consideration by market participants and the supervisory community.    The report is available on the [BIS](http://www.bis.org/publ/joint23.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.19 Liability burden on company directors - study**  On 29 September 2009, the Australian Institute of Company Directors (AICD) published its Boardroom Burden Report Card, developed by the AICD, which measures on a state by state basis the 'business-friendliness' of legal regimes, in terms of the content of laws imposing liability on directors, the number of those laws in operation in each state and territory and the procedural fairness with which they are administered.  There are 663 state and territory laws which impose personal liability on individual directors for corporate misconduct. That is, directors are liable because they are a director, even where they may not have had any personal involvement in a breach.  In some states and under some legislation the onus of proof is reversed, removing the presumption of innocence, and there are very narrow legal defences and limited rights of appeal.  The executive summary, methodology and results are available on the [AICD](http://www.companydirectors.com.au/NR/rdonlyres/DADD9808-448C-487C-8198-890CB1289CB8/0/AICDBoardroomBurdenReportCardrelease_Sept0.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.20 Australian CEO salaries - study**   As the global financial crisis began in 2008 the average Top 100 Company CEO in Australia saw their base pay increase 6.2% to $1.95 million, according to research from the Australian Council of Superannuation Investors (ACSI) published on 28 September 2009.  The average cash pay of a CEO of a S&P/ASX 100 company in 2008 held steady, dropping only marginally from $3.78 million to $3.75 million. The average annual cash bonus (for those CEOs who received a bonus) fell slightly from its record high of $2.18 million in 2007 to $1.95 million in 2008.  The average bonus in 2008 was the second highest ever recorded. Despite the decline in average bonus levels, more S&P/ASX 100 company CEOs received a bonus in 2008 compared to 2007, with the proportion receiving a bonus increasing from 88% to 93%.  Of the five CEOs who received no bonus, two were at companies that did not operate bonus programs at all for the 2008 year and three left their companies shortly after the end of the 2008 year. In their 2008 financial years, 13 Top 100 companies changed CEOs.   Average total pay, including the disclosed value of share based payments, fell in the 2008 year, from $5.53 million to $5.15 million (in 2006 it was $4.56 million). Most of the decline in the average was driven by highly paid CEOs in the 2007 survey having left their underperforming companies.  Three of the Top 10 highest paid CEOs in the 2007 ACSI study departed their roles in 2008 and were replaced in the Top 10 by lower paid individuals. The three departing CEOs were Phil Green of Babcock & Brown, Paul Anthony of AGL Energy and Telstra's former CEO, Sol Trujillo. The exclusion of Phil Green from the 2008 sample accounted for two-thirds of the decline in the average, given his disclosed pay for 2007 of $22.1 million.  Further information is available on the [ACSI](http://www.acsi.org.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.21 Leaders' statement: The G-20 summit**   On 24-25 September 2009, the leaders of the G-20 countries met in Pittsburgh. The following is an extract from the leaders' statement published on 25 September 2009.   **Strengthening the international financial regulatory system**   "Major failures of regulation and supervision, plus reckless and irresponsible risk taking by banks and other financial institutions, created dangerous financial fragilities that contributed significantly to the current crisis. A return to the excessive risk taking prevalent in some countries before the crisis is not an option.   "Since the onset of the global crisis, we have developed and begun implementing sweeping reforms to tackle the root causes of the crisis and transform the system for global financial regulation. Substantial progress has been made in strengthening prudential oversight, improving risk management, strengthening transparency, promoting market integrity, establishing supervisory colleges, and reinforcing international cooperation. We have enhanced and expanded the scope of regulation and oversight, with tougher regulation of over-the-counter (OTC) derivatives, securitization markets, credit rating agencies, and hedge funds. We endorse the institutional strengthening of the FSB through its Charter, following its establishment in London, and welcome its reports to Leaders and Ministers. The FSB's ongoing efforts to monitor progress will be essential to the full and consistent implementation of needed reforms. We call on the FSB to report on progress to the G-20 Finance Ministers and Central Bank Governors in advance of the next Leaders summit.   "Yet our work is not done. Far more needs to be done to protect consumers, depositors, and investors against abusive market practices, promote high quality standards, and help ensure the world does not face a crisis of the scope we have seen. We are committed to take action at the national and international level to raise standards together so that our national authorities implement global standards consistently in a way that ensures a level playing field and avoids fragmentation of markets, protectionism, and regulatory arbitrage. Our efforts to deal with impaired assets and to encourage the raising of additional capital must continue, where needed. We commit to conduct robust, transparent stress tests as needed. We call on banks to retain a greater proportion of current profits to build capital, where needed, to support lending. Securitization sponsors or originators should retain a part of the risk of the underlying assets, thus encouraging them to act prudently. It is important to ensure an adequate balance between macroprudential and microprudential regulation to control risks, and to develop the tools necessary to monitor and assess the buildup of macroprudential risks in the financial system. In addition, we have agreed to improve the regulation, functioning, and transparency of financial and commodity markets to address excessive commodity price volatility.  "As we encourage the resumption of lending to households and businesses, we must take care not to spur a return of the practices that led to the crisis. The steps we are taking here, when fully implemented, will result in a fundamentally stronger financial system than existed prior to the crisis. If we all act together, financial institutions will have stricter rules for risk-taking, governance that aligns compensation with long-term performance, and greater transparency in their operations. All firms whose failure could pose a risk to financial stability must be subject to consistent, consolidated supervision and regulation with high standards. Our reform is multi-faceted but at its core must be stronger capital standards, complemented by clear incentives to mitigate excessive risk-taking practices. Capital allows banks to withstand those losses that inevitably will come. It, together with more powerful tools for governments to wind down firms that fail, helps us hold firms accountable for the risks that they take. Building on their Declaration on Further Steps to Strengthen the International Financial System, we call on our Finance Ministers and Central Bank Governors to reach agreement on an international framework of reform in the following critical areas:   * Building high quality capital and mitigating pro-cyclicality: We commit to developing by end-2010 internationally agreed rules to improve both the quantity and quality of bank capital and to discourage excessive leverage. These rules will be phased in as financial conditions improve and economic recovery is assured, with the aim of implementation by end-2012. The national implementation of higher level and better quality capital requirements, counter-cyclical capital buffers, higher capital requirements for risky products and off-balance sheet activities, as elements of the Basel II Capital Framework, together with strengthened liquidity risk requirements and forward-looking provisioning, will reduce incentives for banks to take excessive risks and create a financial system better prepared to withstand adverse shocks. We welcome the key measures recently agreed by the oversight body of the Basel Committee to strengthen the supervision and regulation of the banking sector. We support the introduction of a leverage ratio as a supplementary measure to the Basel II risk-based framework with a view to migrating to a Pillar 1 treatment based on appropriate review and calibration. To ensure comparability, the details of the leverage ratio will be harmonized internationally, fully adjusting for differences in accounting. All major G-20 financial centers commit to have adopted the Basel II Capital Framework by 2011. * Reforming compensation practices to support financial stability: Excessive compensation in the financial sector has both reflected and encouraged excessive risk taking. Reforming compensation policies and practices is an essential part of our effort to increase financial stability. We fully endorse the implementation standards of the FSB aimed at aligning compensation with long-term value creation, not excessive risk-taking, including by: (i) avoiding multi-year guaranteed bonuses; (ii) requiring a significant portion of variable compensation to be deferred, tied to performance and subject to appropriate clawback and to be vested in the form of stock or stock-like instruments, as long as these create incentives aligned with long-term value creation and the time horizon of risk; (iii) ensuring that compensation for senior executives and other employees having a material impact on the firm's risk exposure align with performance and risk; (iv) making firms' compensation policies and structures transparent through disclosure requirements; (v) limiting variable compensation as a percentage of total net revenues when it is inconsistent with the maintenance of a sound capital base; and (vi) ensuring that compensation committees overseeing compensation policies are able to act independently. Supervisors should have the responsibility to review firms' compensation policies and structures with institutional and systemic risk in mind and, if necessary to offset additional risks, apply corrective measures, such as higher capital requirements, to those firms that fail to implement sound compensation policies and practices. Supervisors should have the ability to modify compensation structures in the case of firms that fail or require extraordinary public intervention. We call on firms to implement these sound compensation practices immediately. We task the FSB to monitor the implementation of FSB standards and propose additional measures as required by March 2010. * Improving over-the-counter derivatives markets: All standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements. We ask the FSB and its relevant members to assess regularly implementation and whether it is sufficient to improve transparency in the derivatives markets, mitigate systemic risk, and protect against market abuse. * Addressing cross-border resolutions and systemically important financial institutions by end-2010: Systemically important financial firms should develop internationally-consistent firm-specific contingency and resolution plans. Our authorities should establish crisis management groups for the major cross-border firms and a legal framework for crisis intervention as well as improve information sharing in times of stress. We should develop resolution tools and frameworks for the effective resolution of financial groups to help mitigate the disruption of financial institution failures and reduce moral hazard in the future. Our prudential standards for systemically important institutions should be commensurate with the costs of their failure. The FSB should propose by the end of October 2010 possible measures including more intensive supervision and specific additional capital, liquidity, and other prudential requirements. * We call on our international accounting bodies to redouble their efforts to achieve a single set of high quality, global accounting standards within the context of their independent standard setting process, and complete their convergence project by June 2011. The International Accounting Standards Board's (IASB) institutional framework should further enhance the involvement of various stakeholders.   Our commitment to fight non-cooperative jurisdictions (NCJs) has produced impressive results. We are committed to maintain the momentum in dealing with tax havens, money laundering, proceeds of corruption, terrorist financing, and prudential standards. We welcome the expansion of the Global Forum on Transparency and Exchange of Information, including the participation of developing countries, and welcome the agreement to deliver an effective program of peer review. The main focus of the Forum's work will be to improve tax transparency and exchange of information so that countries can fully enforce their tax laws to protect their tax base. We stand ready to use countermeasures against tax havens from March 2010. We welcome the progress made by the Financial Action Task Force (FATF) in the fight against money laundering and terrorist financing and call upon the FATF to issue a public list of high risk jurisdictions by February 2010. We call on the FSB to report progress to address NCJs with regards to international cooperation and information exchange in November 2009 and to initiate a peer review process by February 2010".   The full G-20 leaders statement is available on the [Pittsburgh Summit](http://www.pittsburghsummit.gov/mediacenter/129639.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.22 Reform of securities prospectuses in the EU**   On 24 September 2009, the European Commission put forward a proposal for the review of the Prospectus Directive.  The Prospectus Directive lays down the rules governing the prospectus that has to be made available to the public in case a public offer or admission to trading of transferable securities in a regulated market takes place in the EU. One of its major achievements is the introduction of a "passport mechanism": the prospectus approved by the competent authority in one Member State is valid for public offers and admission to trading of securities in the entire EU.  The new rules will make securities issues more efficient by making the rules easier to understand (greater legal clarity); reducing administrative burdens for issuers and intermediaries; giving issuers' employees access to a full range of investment opportunities; and helping retail investors more effectively analyse the prospects and risks posed by a security before investing.   The main changes proposed are as follows:   * some types of securities issue will be subject to less comprehensive disclosure requirements (small companies, small lenders, rights issues and government guarantee schemes); * the format and content of the prospectus summary have been improved; * there are clearer exemptions from the obligation to publish a prospectus when companies sell through intermediaries ("retail cascades") and for employee share schemes; * disclosure requirements that currently overlap with the Transparency Directive will be repealed; * issuers of all non-equity securities will be able to determine their home Member State; and * the definition of 'qualified investors' in the Prospectus Directive will be aligned with the one of 'professional clients' as defined in the Directive on markets in financial instruments.   The proposal is available on the [Europa](http://ec.europa.eu/internal_market/securities/prospectus/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.23 Legislative proposals to strengthen financial supervision in the EU**   On 23 September 2009, the European Commission adopted a package of draft legislation to significantly strengthen the supervision of the financial sector in Europe. The aim of these enhanced cooperative arrangements is to reinforce financial stability throughout the EU; to ensure that the same basic technical rules are applied and enforced consistently; to identify risks in the system at an early stage; and to be able to act together far more effectively in emergency situations and in resolving disagreements among supervisors. The legislation will create a new European Systemic Risk Board (ESRB) to detect risks to the financial system as a whole with a critical function to issue early risk warnings to be rapidly acted on. It will also set up a European System of Financial Supervisors (ESFS), composed of national supervisors and three new European Supervisory Authorities for the banking, securities and insurance and occupational pensions sectors.   The current financial crisis has highlighted weaknesses in the EU's supervisory framework, which remains fragmented along national lines despite the creation of a European single market more than a decade ago and the importance of pan-European institutions.   Legislative proposals address those weaknesses both at the macro- and micro-prudential supervision levels by creating:   * **European Systemic Risk Board (ESRB)** to monitor and assess risks to the stability of the financial system as a whole ("macro-prudential supervision"). The ESRB will provide early warning of systemic risks that may be building up and, where necessary, recommendations for action to deal with these risks. * **European System of Financial Supervisors (ESFS)** for the supervision of individual financial institutions ("micro-prudential supervision"), consisting of a network of national financial supervisors working in tandem with new European Supervisory Authorities, created by the transformation of existing Committees for the banking securities and insurance and occupational pensions sectors. There will be a European Banking Authority (EBA), a European Insurance and Occupational Pensions Authority (EIOPA), and a European Securities and Markets Authority (ESMA).   The ESRB will have the power to issue recommendations and warnings to Member States (including the national supervisors) and to the European Supervisory Authorities, which will have to comply or else explain why they have not done so. The heads of the ECB, national central banks, the European Supervisory Authorities, and national supervisors, will participate in the ESRB . The creation of the ESRB is in line with several initiatives at multilateral level or outside the EU, including the creation of a Financial Stability Board by the G-20.  Regarding micro-prudential supervision, currently there are three financial services committees for micro-financial supervision (supervision of individual financial institutions) at EU level, with advisory powers only: the Committee of European Banking Supervisors (CEBS), Committee of European Insurance and Occupational Pensions Committee (CEIOPS) and the Committee of European Securities Regulators (CESR).   The new Authorities will take over all of the functions of those committees, and in addition have certain extra competences, including the following:   * Developing proposals for technical standards, respecting better regulation principles; * Resolving cases of disagreement between national supervisors, where legislation requires them to co-operate or to agree; * Contributing to ensuring consistent application of technical Community rules (including through peer reviews); and * The European Securities and Markets Authority will exercise direct supervisory powers over Credit Rating Agencies.   Further information is available [here](http://ec.europa.eu/internal_market/finances/committees/index_en.htm" \t "_new) and [here](http://ec.europa.eu/economy_finance/thematic_articles/article15861_en.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.24 FSA outlines approach to consumer responsibilities**  On 23 September 2009, the UK Financial Services Authority (FSA) issued a feedback statement reaffirming its regulatory approach to balancing the responsibilities of consumers and firms, which it first set out in discussion paper 08/05.     The 2008 discussion paper articulated how the FSA considers consumer responsibility in its decision and policymaking. For example, the intensity of regulation increases in line with the risks posed to customers by different products. Central to this is the obligation on firms to treat customers fairly.  The feedback statement on consumer responsibility is available is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/DP/2009/fs09_02.shtml" \t "_new) website.  The discussion paper on consumer responsibility is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/DP/2008/08_05.shtml" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.25 Financial Stability Board reports on improving financial regulation**   On 25 September 2009, the Financial Stability Board (FSB) published two reports submitted to G20 leaders which cover:   * policy measures for improving financial regulation; and * progress in implementing the London Summit recommendations for strengthening financial stability.   The reforms set out in the report 'Improving Financial Regulation' cover the following key areas:   * Strengthening the global capital framework for banks. New rules will be set out by end-2009, calibrated in 2010 and phased in as financial conditions improve and recovery is assured. * Making global liquidity more robust. A new minimum global liquidity standard for banks will be issued by end-2009, and measures that could mitigate cross-border liquidity problems at the national level reviewed. * Reducing the moral hazard posed by systemically important institutions. Measures will be developed over the next 12 months that can be taken to reduce the systemic risks that these institutions pose. * Strengthening accounting standards. Further work is encouraged to improve standards on valuation and provisioning and achieve a single set of high-quality global accounting standards. * Improving compensation practices. The FSB is setting out in a separate report implementation standards for the FSB compensation principles. * Expanding oversight of the financial system. Work is progressing to ensure that all systemically important activity is subjected to appropriate oversight and regulation, including relating to hedge funds and credit rating agencies. * Strengthening the robustness of the OTC derivatives market. Standards will be strengthened and consistently applied to address systemic risks, including covering capital requirements to reflect the risks of OTC derivatives and further incentivise the move to central counterparties and, where appropriate, organised exchanges. * Re-launching securitisation on a sound basis. There must be a framework that ensures discipline in the securitisation market as it revives. * Promoting adherence to international standards. The FSB is developing a system of peer reviews of regulatory and prudential standards and of policies agreed in the FSB.   The report titled 'Improving Financial Regulation' is available on the [FSB](http://www.financialstabilityboard.org/publications/r_090925b.pdf" \t "_new) website.   The report titled: 'Overview of Progress in Implementing the London Summit Recommendations for Strengthening Financial Stability' is available on the [FSB](http://www.financialstabilityboard.org/publications/r_090925a.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.26 Microsoft Board authorises "say-on-pay" advisory vote on executive compensation**    On 18 September 2009, Microsoft Corporation announced that its board of directors has approved a shareholder advisory vote on executive compensation at this year's shareholder meeting on 19 November as part of a "say-on-pay" plan to allow shareholders to provide input on the company's compensation of senior executive officers.    Under the plan, Microsoft shareholders will be able to cast a nonbinding advisory vote on the company's executive compensation plan every three years.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.27 Research paper - the positive corporate governance of institutional investors**   A new research paper has demonstrated the positive corporate governance influence of institutional investors. The paper is titled "Does Governance Travel around the World? Evidence from Institutional Investors" and the authors are Reena Aggarwal, Isil Erel, Miguel A Ferreira and Pedro P Matos.   The authors examine whether institutional investors affect corporate governance by analyzing institutional holdings in companies from 23 countries (including Australia) during the period 2003-2008. The authors find that company-level governance is positively associated with international institutional investment. Changes in institutional ownership over time positively affect subsequent changes in company-level governance, but the opposite is not true. Foreign institutions and independent institutions drive governance improvements outside of the US. The origin of the institution matters, as institutions in countries with strong shareholder protection are more effective in promoting good governance than are institutions from countries with weak shareholder protection. The shareholder protection of the country where the company is located also matters, with foreign institutions playing a crucial role in countries with weak shareholder protection. Institutional investors affect not only which corporate governance mechanisms are in place, but also outcomes. Companies with higher institutional ownership are more likely to terminate poorly performing CEOs and exhibit improvements in valuation over time. According to the authors, their results suggest that institutional investors promote good corporate governance practices around the world.   The paper is available on the [SSRN](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1361143" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.28 Supreme Court of Victoria Inaugural Commercial Law Conference - Current Issues in Commercial Law**  **Date:**               Thursday, 12 November 2009 **Venue:**             Banco Court, Supreme Court of Victoria                          210 Williams St, Melbourne 3000 **Time:**             2.00pm - 5.45pm **Cost:**                $200 + $20 GST = $220   **Topics and speakers:**  **2:00pm-2:10pm**   Welcome - The Hon Justice Marilyn Warren, Chief Justice of Victoria   **2:10pm-2:50pm**   Current Issues in Shareholder Remedies under the Corporations Act -Professor Ian Ramsay, University of Melbourne  **2:50pm-3.30pm**    Insolvent Managed Investment Schemes - Issues Arising out of Timbercorp and Great Southern - Jon Webster, Allens Arthur Robinson  **3:30pm-4:00pm**    Afternoon tea  **4:30pm-5:10pm**    Company Director's and Officer's Conflicts of Interest - Allan J Myers AO QC   **5:10pm-5.45pm**   The Role of the Modern Commercial Court - The Hon Justice Tony Pagone and Mark Moshinsky SC  **5:45pm**                 Drinks   The flyer and registration form are available on the [CCLSR](http://cclsr.law.unimelb.edu.au/go/news/index.cfm" \t "_new) website.   The conference is co-sponsored by the Supreme Court of Victoria and the Centre for Corporate Law and Securities Regulation, Melbourne Law School, in association with the Victorian Bar Association and the Law Institute of Victoria.   For further information please contact:  Ms Josephine Peters Centre for Corporate Law and Securities Regulation The University of Melbourne Law School Victoria 3010   Email:  [j.peters@unimelb.edu.au](mailto:j.peters@unimelb.edu.au) Tel:     03 8344 5281 Fax:    03 8344 5285  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1)  **1.29 Melbourne Law School's Graduate Program in Commercial Law 2010**   Melbourne Law School offers an extensive program in commercial and corporate law. The program combines the latest legal expertise with academic excellence and covers emerging and ongoing legal issues to provide a real professional edge to participants.   With specialisations including corporate and securities law, banking and finance law, construction, competition law and environmental law, participants can tailor their course to suit their professional goals and aspirations.    Ninety percent of subjects are offered on an intensive (five day) basis, providing maximum flexibility for busy professionals and allowing interstate visitors to participate. The program also offers high calibre teaching by international experts, local practitioners and respected scholars and is at the forefront of legal knowledge and expertise in Australia.   Programs in commercial law include the Master of Laws (LLM), the Master of Commercial Law and the Graduate Diploma in Corporate and Securities Law. All subjects may also be undertaken individually, either with or without assessment.   Subjects may meet Continuing Professional Development (CPD) requirements.     In 2010 the Melbourne Law Masters will offer a large range of subjects in the commercial law arena, including:  **Corporate and General Commercial Law**   * Accounting for Commercial Lawyers * Commercial Law in Asia * Company Takeovers * Comparative Companies Law in Asia * Comparative Corporate Governance * Corporate Governance and Directors' Duties * Corporate Insolvency and Reconstruction * Governance Issues and the Credit Crisis * International Corporate Insolvency * Not-for-Profit Organisations: Current Regulatory and Governance Issues * Planning Law * Regulation of Securities Markets * Shareholders' Rights and Remedies   **Banking and Finance Law**   * Banking and Finance in Asia * Banking and Finance Law: Principles and Transactions * Derivatives Law and Practice * Financial Services Law * International Financial System: Law and Practice * International Financial Transactions: Law and Practice * International Lending Transactions: Negotiation and Documentation * Project Finance * Superannuation Law   **Commercial Obligations and Remedies**   * Commercial Contracts * Commercial Law: Principles and Policies * Current Application of Legal Remedies * Equity and Commerce * Restitution Law in Commercial Practice   **Communications and Media Law**   * Defamation Law * Film and Television Law: Production, Financing and Distribution * Information Security Law * Privacy Law   **Competition Law**   * Competition Law and Intellectual Property * Economics for Competition Lawyers * Enforcing Competition and Consumer Law * Market Power and Competition Law * Merger Regulation under Competition Law   **Construction Law**   * Advanced Construction Law * Avoiding and Managing Construction Disputes * Construction Contracts * Construction Dispute Resolution * Construction: Principles into Practice * Construction Risk: Allocation and Insurance * Infrastructure Delivery A: Principles and Practice * Infrastructure Delivery B: Public Private Partnerships * International Construction Law * Payment Matters in Construction Projects * Principles of Construction Law * Residential Construction Law   **Dispute Resolution**   * Advanced Civil Litigation * Alternative Dispute Resolution * Class Actions * Expert Evidence * International Arbitration Workshop * International Commercial Arbitration * Proof in Litigation   **Environment, Energy and Resources Law**   * Climate Change Law * Energy Regulation and the Law * Environmental Law * Indigenous Peoples, Land and Resources Law * International Environmental Law * International Petroleum Transactions * Mineral Law * Resources Joint Ventures * Sustainability Law and Governance   **Intellectual Property Law**   * Copyright Law * Designs Law and Practice * Intellectual Property Litigation Practice * International and Comparative Copyright Law * International Issues in Intellectual Property * Interpretation and Validity of Patent Specifications * Licensing Law and Technology Transfer * Patent Law * Patent Practice * Trade Mark Practice * Trade Marks and Unfair Competition   **International Economic and Trade Law**   * Global Financial Order: IMF and World Bank * International Economic Law * International Investment Law and Arbitration * International Trade Law * Trade, Human Rights and Development * WTO Law and Dispute Settlement   **Labour Relations Law**   * Bargaining at Work and Industrial Action * Employment Law * Equality and Discrimination at Work * International Employment Law * Labour Standards under the Fair Work Act * Workplace Health and Safety   **Management in a Legal Context**   * Professional Services Management   **Sports Law**   * Event Management Law * International Sports Employment Law * Sports Law: Entities and Governance * US Sports Law   **Tax**   * Australian Income Tax System * Capital Gains Tax: Problems in Practice * Comparative Business Tax * Corporate Tax A (Shareholders, Debt and Equity) * Current Issues in Tax Avoidance * European Tax Law * Goods and Services Tax Principles * International Tax: Principles and Structure * Taxation of Business and Investment Income * Taxation of Financial Instruments * Taxation of Intellectual Property * Taxation of Mergers and Acquisitions * Taxation of Remuneration * Taxation of Small and Medium Enterprises * Taxation of Sport * Taxation of Trusts * Tax Litigation * Tax Treaties   For further information on the Melbourne Law Masters, including course and subject details and application information, please contact the Melbourne Law Masters Office:   Tel: (03) 8344 6190 Email: [law-masters@unimelb.edu.au](mailto:law-masters@unimelb.edu.au) Website: [http://www.masters.law.unimelb.edu.au](http://www.masters.law.unimelb.edu.au/" \t "_new)  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  |  | | |  | | |  | | --- | | **2.1 ASIC consults further on facilitating online financial services disclosures**  On 13 October 2009, the Australian Securities and Investments Commission (ASIC) issued a consultation paper seeking further feedback on how to better facilitate the delivery of financial services information online.  In April 2008, ASIC released Consultation Paper 93 'Facilitating Online Financial Services Disclosures' (CP 93).The majority of submissions were supportive of ASIC's proposal to facilitate access to financial information online. Most submissions saw the potential for online disclosure to make disclosures more interactive, innovative and user-friendly for retail clients and to deliver cost savings for business in meeting legal requirements.  However, some respondents thought that ASIC should go further in facilitating online disclosure of financial services information.   Consequently, ASIC has revised its proposals taking into account the submissions it received in response to CP 93. Consultation paper 121 'Facilitating Online Financial Services Disclosures (CP 121):   * sets out ASIC's proposed relief to give providers certainty about giving product disclosure statements, financial services guides and statements of advice to retail clients via hyperlinks and references to website addresses; and * sets out ASIC's proposed good practice guidance on online disclosure.   The consultation paper also discusses whether paper disclosure or online disclosure should be the default method of delivering financial services disclosures.  Generally, under the current law, a provider needs to obtain a retail client's express agreement before delivering financial services disclosures online (i.e. paper disclosure is the default method of delivering disclosures). However, ASIC recognises that this requirement may create practical difficulties that are posing a barrier to some providers delivering disclosures online.  ASIC invites comments on the revised proposals in the consultation paper. In particular, ASIC seeks feedback on what should be the default rule for delivering financial services disclosures.  The consultation paper is available on the [ASIC](http://www.asic.gov.au/ASIC/asic.nsf/byHeadline/09-198AD%20ASIC%20consults%20further%20on%20facilitating%20online%20financial%20services%20disclosures?opendocument" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h2)  **2.2 ASIC releases proposed guidance on regulation of clearing and settlement facilities**  On 1 October 2009, the Australian Securities and Investments Commission (ASIC) released proposed guidance on the regulation of clearing and settlement (CS) facilities.  The [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) requires that operators of a CS facility in Australia have a CS facility licence or have been granted an exemption from the licence requirement by the Minister.  The proposed guidance released for consultation, 'Clearing and Settlement Facilities: Australian and Overseas Operators', outlines when an Australian CS facility license is required and how Australian and overseas operators can apply for a licence. The guidance also details ASIC's approach to advising the Minister about applications for exemption from the requirement to hold a licence.  The proposed guidance is designed in part to complement international regulatory developments promoting the use of central counterparty clearing and settlement of over-the-counter (OTC) derivative transactions. A central counterparty interposes itself between counterparties in financial transactions, becoming the buyer to the seller and the seller to the buyer. A well designed central counterparty, with appropriate risk management arrangements, reduces the risk of settlement failure faced by participants and contributes to the goal of financial stability.   ASIC is seeking to develop guidance that assists entities who wish to operate such CS facilities in Australia with the licensing process. To date, it has not issued any specific regulatory guidance about CS licensing.  Other key areas covered by the proposed guidance include:   * outlining what is a sufficient equivalent overseas regulatory regime for non-Australian CS facility operators to be granted authorisation to operate in Australia; * what types of activities will require a CS facility license; and * ongoing obligations of CS facility licensees.   ASIC is seeking the views on these proposals from existing and potential operators of financial markets and CS facilities, the users and potential users of these facilities and investors.   The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp120.pdf/$file/cp120.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h2)  **2.3 ASIC extends transitional period for compliance with group purchasing bodies class order**  On 30 September 2009, the Australian Securities and Investments Commission (ASIC) issued CO 09/728 Variation of CO 08/1 Group purchasing bodies.   This class order extends the transitional period for compliance with Class Order 08/1 Group purchasing bodies (CO 08/1) until 31 January 2010. The transitional period for compliance with this class order was otherwise due to expire on 30 September. CO 08/1 gives conditional relief from the Australian Financial Services licensing regime and Chapter 5C of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for some group purchasing bodies who arrange or hold risk management products for the benefit of third parties.  Stakeholders have raised questions about how the eligibility tests in CO 08/1 operate. The extended transitional period will allow ASIC to clarify the eligibility requirements under CO 08/1 and Regulatory Guide 195 Group purchasing bodies for insurance and other risk management products (RG 195). RG 195 explains ASIC's policy underlying the conditional relief granted in CO 08/1.  **Background**  Group purchasing bodies arrange or hold cover under risk management products for others but do not issue risk management products or provide any financial product advice other than as a result of providing certain general information.  Group purchasing bodies include sporting and other not-for-profit organisations which arrange insurance for third parties (e.g. players or volunteers).   CO 08/1 provides conditional relief only to a limited class of group purchasing bodies who organise insurance on a non-commercial basis. The transitional period for compliance was scheduled to end on 30 September 2009.   ASIC Class Order 09/728 Variation of CO 08/1 is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co09-728.pdf/$file/co09-728.pdf" \t "_new) website.   ASIC Class Order 08/1 Group purchasing bodies is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co08-1.pdf/$file/co08-1.pdf" \t "_new) website.   Regulatory Guide 195 Group purchasing bodies for insurance and other risk management products is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg195.pdf/$file/rg195.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h2)  **2.4 ASIC releases Australian Securities Exchange market assessment report**  On 28 September 2009, the Australian Securities and Investments Commission (ASIC) released its annual market assessment of Australian Securities Exchange Group (ASX).  The report covers the period 1 January 2008 to 31 December 2008.  ASIC has concluded that the ASX group licensees had adequate arrangements in place to supervise its markets (including to manage its conflicts of interest) and its clearing and settlement facilities under sections 792A(c) and 821A(c) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  While ASIC's view is that the ASX group licensees complied with their obligations under the Corporations Act and that the ASX group does continuously monitor and improve the performance of its supervisory activities, there are areas for improvement or attention (covered by agreed actions and recommendations) that the ASX group licensees have agreed to, or should, address. These are covered in the Assessment Report.  The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep168.pdf/$file/rep168.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h2)  **2.5 ASIC provides hedging relief to market makers**  On 24 September 2009, the Australian Securities and Investments Commission (ASIC) issued Class Order [CO 09/774] that allows short selling to hedge risk from market making activities.  Previous exemptions that allowed market makers to 'naked' short sell to hedge their long exposures were repealed on 8 January 2009 by the [Corporations Amendment (Short Selling) Act 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=105282" \t "Default).   The class order provides market makers with relief in limited circumstances from section 1020B(2) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) in relation to the sale of a security or managed investment product to hedge risk from market making activities.   The relief contains a number of conditions, including requirements that market makers have reasonable grounds to believe securities lending arrangements can be put in place to allow delivery and market makers acquire or borrow sufficient products by the end of each day to ensure that they can deliver all products sold during the day at the time delivery is due.  The class order was the subject of public consultation in Consultation Paper 106 Short selling to hedge risk from market making activities (CP 106), released for comment on 30 April 2009.   The ASIC class order also reflects international regulatory developments, including the 'Regulation on Short Selling' report by the International Organization of Securities Commissions (IOSCO) released in June 2009. The paper recommended that short selling regulation should allow for efficient market functioning and development, including an exemption permitting market makers to naked short sell to hedge risk arising from their market making activities.  **Background**  A market maker regularly states prices at which it proposes to buy or sell financial products on its own behalf.  If a market maker enters a transaction with a counterparty that creates a 'long' exposure to an underlying product, the market maker may want to hedge the risk of this long exposure by short selling the underlying product.  Section 1020B regulates the short selling of certain financial products. 'Naked' short selling is prohibited in Australia - that is, a person selling section 1020B products must, at the time of sale, have 'a presently exercisable and unconditional right to vest' the products in the buyer.  A market maker is generally permitted to engage in 'covered' short selling of section 1020B products to hedge risk. A covered short sale is a sale where the person selling products has, at the time of sale, a presently exercisable and unconditional right to vest the products in the buyer because of a securities lending arrangement entered into before that time.  Under the current law, market makers are effectively required to maintain an inventory of long or borrowed products. There are practical difficulties for a market maker to borrow an inventory of section 1020B products needed to cover its market making activities at the start of each trading day because:   * the market maker is unable to anticipate the volume of products it will require to cover possible future positions; and * the market maker will incur borrowing and administrative costs, regardless of whether the borrowed products are actually used and this would restrict the amount of product available for borrowing by others which will increase borrowing costs generally.   The Class Order [CO 09/774] is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co09-774.pdf/$file/co09-774.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  |  | | |  | | |  | | --- | | **3.1 ASX to list new environmental futures and options contracts**   On 7 October 2009, ASX amended the Sydney Futures Exchange Operating Rules to prepare for trading in futures and options contracts on Renewable Energy Certificates (RECs). These contracts will be listed on Tuesday 24 November 2009.   The introduction of ASX REC futures and options will support the Australian Government's Renewable Energy Target (RET) scheme, which is designed to ensure that 20% of Australia's electricity comes from renewable sources by 2020.   ASX has also received regulatory clearance for Certified Emission Reduction (CER) futures and options contracts and these contracts will be listed in the first quarter of 2010. ASX's CER futures and options contracts have been designed to service the specific requirements of prospective compliance entities in Australia and New Zealand, as well as investors and developers involved in Clean Development Mechanism projects.   Subject to the passage of the proposed Carbon Pollution Reduction legislation in Australia, ASX also intends (after regulatory clearance) to list futures and options on Australian Emission Units (AEU).   The Notice regarding these amendments (and miscellaneous amendments to Pre-Negotiated Business Orders and Block Trading determinations) is available on the [SFE](http://www.sfe.com.au/content/notices/2009/notice2009_176.pdf" \t "_new) website.   The media release is available on the [ASX](http://www.asx.com.au/about/pdf/mr_071009_environmental_futures_oct09.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h3)  **3.2 Market and Clearing Rule amendments - Reconciliation of client money requirements**   On 6 October 2009, the ASX Market Rules and ACH Clearing Rules were amended to include the requirement for Market and Clearing Participants to perform a reconciliation of the aggregate balance held in client segregated accounts and trust accounts in the time, form and manner set out in the Procedures.   These amendments were announced in ACH Notice 043/09 ASX Circular 317/09.   Further information is available on the [ASX](http://www.asx.com.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h3)  **3.3 Changes to ACH contributions and additional cover framework**   On 30 September 2009, changes to the ACH Contributions and Additional Cover (CAC) Framework were implemented. The existing ACH Capital Stress Testing model was replaced with Stress Test Exposure Limits (STELs). Each Participant's STEL is calculated individually, based on ACH's internal credit rating for that Participant and ACH's financial resources. Provisions have been made for discounting CAC calls under normal market conditions for highly rated Participants and limitations have been placed on the application of bank guarantees used to collateralise CAC calls.   Clearing Participants were advised of their STEL and the new arrangements by letter in early August. Details of the changes were released in ACH Notice 034/09 and the change itself was announced in ACH Notice 040/09. Both of these Notices are available on ASX Online.  Further information is available on the [ASX](http://www.asx.com.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h3)  **3.4 Activity reports**   On 28 September ASX released the ASX group activities report for financial year 2009.   On 6 October 2009 ASX released:   * the 'ASX Group Monthly Activity Report' for September 2009; * the 'SFE Monthly Volume and Open Interest Report' for September 2009; and * the 'ASX Markets Supervision Quarterly Activity Report' for the first quarter of financial year 2009/10.   These reports are available on the [ASX](http://www.asx.com.au/about/pdf/mr_280909_asx_response_asic_group_activities_report09.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h3)  **3.5 RBA assessment of ASX's clearing and settlement facilities**   On 22 September the Reserve Bank of Australia released its annual assessment of compliance by ASX's licenced clearing and settlement (CS) facilities, which found that all four CS facilities operated by ASX complied with the relevant Financial Stability Standards and did all other things necessary to reduce systemic risk over the year to end-June 2009.    The assessment is available on the [ASX](http://www.asx.com.au/about/pdf/mr_220909_asx_response_rba_assessment_cs_09.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h3)  **3.6 Online course on exchange traded options**   ASX has developed a range of new online courses that cover the essentials of investing in options. These courses went live on the ASX website in September. As with all ASX online courses, they are free to use and can be accessed without registration. Ten modules have been developed with interactive exercises and quizzes included to reinforce learning concepts.   The new options courses and other online courses are available on the [ASX](http://www.asx.com.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  |  | | |  | | |  | | --- | | **4.1 Revised Procedural Rules - Panel releases consultation draft**   On 1 October 2009, the Panel conducted a review of its Rules for Proceedings and posted a draft set of revised rules on its website for public consultation.   The original Rules for Proceedings were adopted in November 2001 and were revised in 2004. The Panel decided that it was appropriate to review them in light of experience and as part of its simplification process. The proposed Procedural Rules are a complete rewrite and incorporate existing Guidance Note 8 on Matter Procedures. If the rules are adopted, GN 8 will be withdrawn. The proposed rules also incorporate related legislative references.   The Panel seeks input from interested practitioners and market participants on the revised Rules.  The consultation paper is available on the [Panel](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=consultation/031.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h4)  **4.2 Bowen Energy Limited 02R - Declaration of unacceptable circumstances and orders**   On 30 September 2009, the Takeovers Panel (Panel) made a declaration of unacceptable circumstances and final orders in response to a review application by Macrae Holdings (WA) Pty Ltd in relation to the affairs of Bowen Energy Limited (see MR TP09/61).   On 10 July 2009, Bhushan Steel (Australia) Pty Ltd announced an on-market takeover bid for Bowen at 14 cents per share. That bid closed on 26 August 2009. Bhushan had voting power in 58.81% of Bowen at the end of the bid.    On 24 July 2009, Bowen issued a target's statement attaching an independent expert's report by Horwath. The report included a "Revised Independent Valuation of the Coal Tenements held by Bowen" dated 23 July 2009 from Minnelex Pty Ltd. The report valued Bowen's shares at 3.53 to 5.51 cents per share.   The Panel considered that the circumstances were unacceptable because, among other things, there were material deficiencies in the Minnelex's 23 July 2009 report, regarding some of the values found, some of the logic involved and compliance with ASIC Regulatory Guide 111 and the VALMIN Code.    As a result of the deficiencies in Minnelex's 23 July 2009 report (and hence the expert's report) and information deficiencies, the acquisition of control over Bowen shares has not taken place in an efficient, competitive and informed market and shareholders in Bowen were not given enough information to enable them to assess the merits of the Bhushan bid.    The Panel made a declaration of unacceptable circumstances.   The Panel is still making inquiries in relation to association between Savni Holding Limited and Bhushan. The review Panel agreed with the initial Panel in respect of the issue of the independent directors of Bowen (see MR TP09/60).    The Panel has made orders to the effect that the independent directors of Bowen procure a report by a new independent expert (satisfactory to ASIC) to provide a valuation of Bowen as at 23 July 2009. Further, the Panel has ordered that Bhushan must divest the shares it received under its takeover offer to accepting offerees who want them back. However, the Panel will not require divestment if the new independent expert concludes that the Bhushan takeover offer is fair and reasonable.    Further information is available on the [Panel](http://www.takeovers.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h4)  **4.3 Multiplex Prime Property Fund 01 & 02 - Declaration of unacceptable circumstances and orders**   On 24 September 2009, the Takeovers Panel (Panel) made a declaration of unacceptable circumstances and final orders in relation to applications dated 6 and 10 September 2009 by Brookfield Multiplex Capital Management Limited (in its capacity as responsible entity for Multiplex Prime Property Fund) and Multiplex Colt Investments Pty Limited (as trustee of the Multiplex Colt Investments Trust) in relation to the affairs of Multiplex Prime Property Fund (see TP09/63 and TP09/66).   The applications concerned the on-market takeover bid by Australian Style Investments Pty Ltd for the Fund announced on 3 September 2009. Brookfield Multiplex Capital Management Limited submitted that the Australian Style bidder's statement contained inadequate disclosure, while Multiplex Colt submitted that the Australian Style bid was coercive. ASIC supported these submissions.   The Panel considered that the circumstances were unacceptable because:   * the acquisition of control over units in the Fund will not take place in an efficient, competitive and informed market * unitholders do not have a reasonable time to consider the proposal or a reasonable and equal opportunity to participate in any benefits of the proposal and * unitholders, and the directors of the responsible entity for the Fund, are not given enough information to enable them to assess the merits of the proposal.   The combination of the Fund's circumstances and the bid created uncertainty for unit holders and did not satisfy the principles in section 602, among other things, because Australian Style may be able to withdraw its bid if its proposed resolution to wind up the Fund succeeds and Australian Style did not have sufficient funds to meet the second instalment or pay for all units that may be issued as a result of the Fund's announced Entitlement Offer.    The Panel has made orders that Australian Style withdraw its bid and inform the market accordingly.    Further information is available on the [Panel](http://www.takeovers.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  |  | | |  | | |  | | --- | | **5.1 Board spill stalled - Postponement by directors of general meeting convened by members**  (By Jane Bowd (nee Warrington), Senior Associate, Clayton Utz Lawyers)   Colbern Nominees Pty Ltd v Prime Minerals Ltd [2009] WASC 289, Supreme Court of Western Australia, Le Miere J, 25 September 2009   The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2009/september/2009wasc0289.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2009/september/2009wasc0289.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 involves the convening of a general meeting by a substantial holder under section 249F of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act) and the purported postponement of that meeting by the directors of the company pursuant to specific powers in the company's constitution. The business proposed by the substantial holder was a spill of the incumbent board and election of its nominee directors.   This decision affirms the existing case law on the postponement of section 249 meetings - namely, directors who are specifically empowered by a company's constitution to adjourn a general meeting may do so, regardless of whether that meeting was initiated by the directors or independently by members under section 249F, as long as certain safeguards are met.  Those safeguards are minimal - namely: the meeting must be held for a proper purpose (section 249Q) and the postponed time must be reasonable (section 249R).   Unfortunately the plaintiff in this case, Colbern Nominees Pty Ltd (Colbern), did not run the argument that such an action by directors is an unlawful interference in a member's statutory rights under section 249F (thus, is an abuse of process etc). Le Miere J took care to note this omission in Colbern's case; however, as it was not an issue before him he gave no indication as to whether such a submission would have found favour or not.   **(b) Facts**   Colbern held in excess of 5% of the voting shares of the Australian listed company Prime Minerals Ltd (Prime).  As a substantial holder, Colbern was entitled to call a general meeting of Prime under section 249F of the Act.     On 5 August 2009, Colbern notified the Prime board of its intention to call and arrange a section 249F general meeting.  The next day, Prime commenced unrelated litigation against Colbern and others (including one of the candidates proposed by Colbern for election as a "new" director) in respect of alleged breaches of a corporate advisory agreement that had been entered into 2.5 years earlier (the Litigation).     Undeterred, Colbern gave notice to Prime members on 12 August pursuant to section 249F of a general meeting to be held on 7 October.  The business proposed was a spill motion, i.e. replacing the existing directors with nominees of Colbern (Colbern Called Meeting).   Relevantly, section 249F of the Act provides that: "(1) Members with at least 5% of the votes that may be cast at a general meeting of the company may call, and arrange to hold, a general meeting. The members calling the meeting must pay the expenses of calling and holding the meeting.   (2) The meeting must be called in the same way - so far as is possible - in which general meetings of the company may be called...".   Unlike section 249D of the Act - which compels directors to call and arrange a general meeting when requisitioned by members - a meeting convened under section 249F requires no action to be taken by directors. A downside is that the member must pay the expenses and handle the logistics, however, the upside is that the meeting can be held 28 days after the notice is given: section 249HA (or 21 days for unlisted companies: section 249H).   This "upside" was thwarted for Colbern when the Prime board announced one week after the notice, on 19 August, that it had resolved to postpone the Colbern Called Meeting from 7 October to 16 November (Board Resolution).  Directors do not have power to postpone a properly convened general meeting unless the constitution expressly confers this power upon them: *McPherson v Mansell* (1994) 16 ACSR 261.  In this case, that express authority exists in article 12.2(c)(i) of Prime's constitution - it empowers the directors to postpone a general meeting "for a period not exceeding 40 days".     The Prime board's rationale for the Board Resolution was that the extra time may allow for the Litigation to be resolved, and it would give members an opportunity to consider Prime's annual report, before members were called upon to determine the board's composition.   Colbern commenced proceedings seeking, inter alia, a declaration from the court that the Board Resolution was invalid and an order that the meeting proceed on 7 October as originally convened. The arguments put forward in support of such relief were quite limited namely, Colbern argued that the:   * proposed postponement exceeded the 40 day limit allowed under Prime's constitution; and * postponed meeting was not at a "reasonable time", thus, contravened section 249R of the Act.   **(c) Decision**   Colbern was unsuccessful on both grounds. Therefore, the Prime board's postponement of the section 249F general meeting was held to be effective. Ultimately, this decision turns on its facts as the arguments raised by Colbern were limited to an interpretation as to how to calculate a time period stipulated in Prime's constitution (i.e. what is meant by "not exceeding 40 days"), and a determination as to whether the postponed time was reasonable (i.e. has section 249R been breached?).     Colbern agreed that the Prime directors were empowered to postpone a section 249F general meeting. It did not attempt to run the argument that, as a matter of law or proper construction of section 249F, such a postponement by directors under a constitution of a section 249F meeting is not permitted.  The court disposed of Colbern's two arguments as follows:     **(i) What is meant by "not exceeding 40 days"?**  Colbern contended that the directors' purported postponement of the meeting from 11am on 7 October to 4pm on 16 November was a postponement for a period exceeding 40 days and hence breached the constitution which confers a power to postpone for a period not exceeding 40 days.  In considering what was meant by "not exceeding 40 days", the court observed the following about the reckoning of time:   * Generally, the law takes no account of fractions of a day, each separate period of time is calculated by excluding the day on which the act or event takes place and including the first or final day of the period depending on whether the period is expressed to be 'before' or 'after' the act or event; * Interpretation Act provisions in all Australian jurisdictions provide that where a period is to be calculated from a particular day or event, the time is to be reckoned exclusive of that day or the day of that event: section 36 of the [Acts Interpretation Act 1901 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "Default) and equivalent state and territory provisions; and * Section 105 of the Act provides that in calculating how many days a particular day/act/event is before or after another day/act/event, the first‑mentioned day or the day of the first‑mentioned act or event is to be counted, but not the other day or the day of the other act or event.   None of these reckoning principles technically apply to the interpretation of a company's constitution. That said, the court identified them as being "relevant" to determining the usual and ordinary means of calculating time periods.     The court held that as the constitution refers to a time period which is referable to a period calculated by days, the day of beginning is not included in the calculation.  Rather the calculation begins on the following day and ends at the end of the last day.     Therefore, as the Prime directors were empowered to postpone the meeting "for a period not exceeding 40 days", a meeting called for 11 am on 7 October could validly be postponed to any time before the last moment on 16 November.   **(ii) Was the postponed time unreasonable, thus, a breach of section 249R?**   Colbern contended that 16 November was not a reasonable time to hold the general meeting for the following five reasons:   * the AGM is the next day; * it is inconvenient for members to have to consider the composition of the board at two separate meetings - i.e. the section 249F meeting and then again at the AGM; * it is inappropriate to have two meetings so close together; * depending on the success of the proposed spill motion, the AGM may fall into disarray; and * Colbern had already received proxies which suggested that the spill motion would be successful if the section 249 meeting proceeded on 7 October (i.e. the original date).   Each of these five arguments failed. However, that does not mean that such arguments would fail in other cases - the issue of what time is reasonable is a question of fact which requires the court to consider all of the circumstances.  The court cautioned that, although it had rejected Colbern's arguments, "there may be circumstances when holding a meeting on the day before the AGM, either alone or in combination with other factors, renders the time of the meeting not reasonable". Therefore, there is no general rule or blanket principle in determining what time is "reasonable" under section 249R of the Act.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h5)  **5.2 Release of third party claims not permitted under a Part 5.3A deed of company arrangement**   (By Jonathon Redwood, Victorian Bar (List A Barristers))   City of Swan v Lehman Brothers Australia Ltd [2009] FCAFC 130, Full Federal Court of Australia, Stone, Rares and Perram JJ, 25 September 2009   The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/september/2009fcafc130.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/september/2009fcafc130.htm" \t "_new)  **(a) Summary**  The Full Federal Court held that, as a matter of statutory construction, a deed of company arrangement (DOCA) under Part 5.3A of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) could not validly effect a release between creditors of an insolvent company and certain third parties.    The DOCA arose out the collapse of Lehman Brothers and actual or anticipated claims of a number of creditors for damages against Lehman Australia, arising from Lehman Australia's marketing and issue of collateralised debt obligations (CDOs). The DOCA purported to limit significantly the rights of those creditors against certain third parties, who were related entities of Lehman Australia.    The Full Federal Court concluded that the purpose of a DOCA is to regulate the legal rights and obligations between a company and its creditors, not any third parties. Absent a clear statutory indication to the contrary, the court could find no basis for extending the scope of DOCAs under Part 5.3A to enable a majority of creditors to extinguish the rights of minority creditors to pursue claims against third parties.     The decision raises important points of principle of significant practical relevance to insolvency law and administrations. An appeal to the High Court is expected.    **(b) Facts**   Following the collapse of Lehman Brothers in September 2008, a number of claims have been brought, or are anticipated to be brought, in the United States and Australia and other jurisdictions against Lehman Brothers for misleading disclosure in connection with the issuance or underwriting by Lehman Brothers of complex structured finance products, especially the Lehman Brothers version of the CDO. Structured finance was a core component of the Lehman Brothers business franchise worldwide.    In Australia, a number of municipal councils that invested in CDOs sold to them by Lehman Australia have commenced, or are contemplating commencing proceedings against Lehman Australia for, amongst other things, misleading and deceptive conduct under section 52 of the [Trade Practices Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) and similar provisions in the Corporations Act in offering for sale those CDOs. These actual or contingent claim creditors were referred to in the DOCA as "Litigation Creditors".    In May 2009, a majority of the creditors of Lehman Australia executed a DOCA that if valid would have bound all the creditors of Lehman Australia, including the Litigation Creditors. In broad terms, the DOCA:   * prevented the Litigation Creditors from instituting court proceedings against other Lehman entities (such as the US parent corporation, Lehman Brothers Inc); * gave the administrators of Lehman Australia the sole conduct and control over any claims by the Litigation Creditors under various insurance policies; and * released and discharged all claims which the Litigation Creditors might have against other Lehman entities, upon their receipt of a final divided.   A "Lehman entity" was defined in the DOCA to have the same meaning as a related body corporate of Lehman Australia under the Corporations Act. The parties to the DOCA were Lehman Australia, Lehman Asia and the administrators. The DOCA established a fund comprising the property of Lehman Australia to distribute to the creditors of Lehman Australia in accordance with a 'waterfall' or order of priority clause. The plaintiffs voted against the DOCA because, amongst other things, it in effect made as a condition of receipt of funds pursuant this clause an agreement to release other Lehman entities (and any of their insurers) from any liability they may have to the plaintiffs in connection with the sale of the CDOs.    The issue on appeal was therefore whether the DOCA was validly in accordance with Part 5.3 of the Corporations Act in purporting to extinguish the rights of the dissenting creditors to sue other members of the Lehman Group.    **(c) Decision**   The court, unanimously but in separate reasons, held that, properly construed, the DOCA in purporting to extinguish the plaintiff's rights to sue other Lehman entities within the Lehman Group impermissibly went beyond the power of a DOCA authorised by Part 5.3A of the Corporations Act.    It held that the statutory scheme of Part 5.3A is concerned only with adjusting the rights of creditors against a company with the purpose of enabling the company to have the best chance to operate, or to result in a better return for creditors than in a winding up. It is not a mechanism to readjust the rights of creditors, who have not agreed to such a result, against third parties. In reaching this conclusion, the court relied on the following considerations:   * there is no express provision in Part 5.3A that either permits or forbids a DOCA to interfere with creditors' rights against an entity other than the company. * there are express provisions permitting a DOCA to interfere with creditors' rights against the company. * the language of section 444D of the Act referred to a DOCA binding all creditors of the company. * the provisions concerning a DOCA in Part 5.3A need to be interpreted against the basic canon of construction that a statute should not be interpreted as taking away an existing right unless it does so by clear words that are not reasonably capable of another construction. * the structure, scope and purpose of Part 5.3A pointed against a wide interpretation of section 444D(1) authorising a DOCA to regulate the rights of creditors of a company against third parties. * if the claims encompassed by section 444D(1) included any claim whatsoever against a third party by a creditor then there would not need to be any nexus between the claim made and the affairs of the company to which the object of Part 5.3A is concerned. * although the non-voluntary adjustment of vested property rights is a general feature of insolvency legislation, that adjustment usually takes places in the debtor-creditor relationship to which the detailed provisions of Part 5.3A are evidently directed. It is silent on the position of third parties.   The court further held that this impermissible element of the DOCA was so inextricably linked with the DOCA as a whole that the entire DOCA could not be saved and was accordingly invalid.  **(d) Comparison with scheme of arrangement**   Lehman Brothers placed some reliance on a contended analogy with schemes of arrangement under Part 5.1 of the Act; in particular the recent decision of the Full Federal Court in *Fowler v Lindholm* [2009] FCAFC (discussed in Item 5.13 in this Bulletin) where it was held that provided there was an element of 'give or take', such that the creditors of a company were to receive something in return, there was no reason in principle why a scheme of arrangement could not provide for the creditors to release claims against third parties, even if particular creditors did not accede to the agreement. The Court was influenced in this respect by the fact that the provisions concerning schemes of arrangement are designed to provide a flexible mechanism to facilitate compromises and arrangements between insolvent companies and their creditors as an alternative to liquidation.    Rares J, with whom Stone J agreed, expressed the view that Part 5.1 and Part 5.3 of the Corporations Act are distinct statutory schemes and there is no analogy between the two. There is no statutory purpose in Part 5.3A that would support extending the operation of a DOCA beyond arrangements concerned with governing the rights and obligations between a company and its creditors alone.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h5)  **5.3 Involvement of solicitor in breaches of the Corporations Act for assistance with Phoenix activity**  (By Dylan Burke, DLA Phillips Fox)   ASIC v Somerville [2009] NSWSC 934, New South Wales Supreme Court, Windeyer AJ, 8 September 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/september/2009nswsc934.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/september/2009nswsc934.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 the conduct of eight directors of unrelated companies and their solicitor, Mr Timothy Somerville, in undertaking 'Phoenix' activity. Mr Somerville advised the directors to engage in a process whereby the directors would procure the transfer of assets from one company under their stewardship that was in financial difficulty to a new company with the same directorship. The effect of the process was that the old company would enter into administration or liquidation with insufficient assets to pay its creditors whilst the new company would continue trading, with the benefit of the assets of the old company.   The conduct complained of by ASIC in respect of Mr Somerville was his recommendation of such advice, the preparation by him of all documents necessary to carry out the transaction, and his arranging for execution of the documents with knowledge of the relevant facts.   ASIC was successful in its claim for a declaration that each of the respective directors other than Mr Somerville had contravened sections 181(1), 182(1) and 183(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act).    Section 181(1) of the Corporations Act requires a director to exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose. Section 182(1) of the Corporations Act provides that a director must not improperly use their position to gain an advantage for themselves or someone else or to cause detriment to the corporation. Finally, section 183(1) of the Corporations Act provides that a director who obtains information as a result of their directorship must not improperly use that information to gain an advantage for themselves or someone else or to cause detriment to the corporation.   ASIC was also successful in its claim for a declaration that Mr Somerville was involved in the contraventions of sections 181(1), 182(1) and 183(1) of the Corporations Act by the directors.   Subsection 2 of each of sections 181, 182 and 183 of the Corporations Act provides that a person who is involved in a contravention of subsection 1 of the relevant section is also taken to have contravened the subsection. The term 'involved' is defined in section 79 of the Corporations Act.   **(b) Facts**   The third to tenth defendants were each directors of companies that were suffering from, or were about to suffer, financial problems. As a result of the financial circumstances in which the companies found themselves, each respective director sought advice from Mr Somerville, a solicitor employed by, and director of, the second defendant, which is an incorporated legal practice pursuant to Part 2.6 of the [Legal Profession Act 2004 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=82258" \t "Default).   After obtaining instructions from the respective directors, Mr Somerville wrote a letter of advice that for each of the companies was in very similar, although not identical, terms. The main variation in the respective letters of advice related to the figure for the consideration for the transfer of the assets.   Based on the advice from Mr Somerville, each of the companies entered into a transaction by which the old company ceased to trade, a new company was formed with a substantially similar name, and an agreement was entered into between the old company and the new company. The agreement provided for the assets of the old company to be transferred to the new company. Although there were differences between each of the respective agreements, each contained clauses under which:   * the old company transferred its business, or the assets of its business, to the new company; * the consideration for the transfer was the issue of 100 'V' class shares in the new company. These shares carried the right to receive all dividends declared by the purchaser company until the purchase price under the agreement was paid; * the old company was to receive payments invoiced prior to settlement and apply the monies received to the debts of the old company; * the trade creditor debts would remain with the old company; * employment agreements would be terminated and the new company would offer employees re-employment on the same terms; and * plant and equipment on lease or hire would be transferred to the new company and leases of the premises would be assigned to the new company.   In each instance except for one, Mr Somerville prepared the relevant agreement. The agreement that was not prepared by Mr Somerville was prepared by another solicitor due to Mr Somerville not having time to do so. However, the agreement was on the same terms as those prepared by Mr Somerville. Windeyer AJ concluded that it would not have been prepared if not for the involvement of Mr Somerville. In each case, the transaction was implemented by the office of Mr Somerville.    No dividend was paid on the 'V' class shares. This gave the transaction the practical effect of the new company acquiring the assets of the old company, including the employees, premises and equipment of the old company for no, or no real, consideration. The liabilities of the old company however, remained with the old company, except for those liabilities under lease or hire purchase agreements and those liabilities owed to parties that the business required for its continuation, which were transferred to the new company.   **(c) Decision**   **(i) Claim under section 181**   Windeyer AJ considered that the test under section 181 of the Corporations Act of whether a director has acted in good faith in the best interests of the corporation and for a proper purpose was an objective one.    ASIC submitted that the issue of 'V' class shares did not constitute real consideration, or that if it was consideration, it was illusory because in none of the cases was a dividend declared on the 'V' class shares. Any of the old company's creditors who were paid were employees who continued on with the new company or suppliers who were necessary to the continuance of the business. Generally, non-trade creditors, such as the Taxation Authorities, were not paid. Accordingly, Windeyer AJ held that there was no proper basis for the transactions other than to keep the benefit of the assets in the new company without the burden of the liabilities. As a result, each of the directors was held to be in breach of section 181 of the Corporations Act.  **(i) Claim under section 182**  Based on the decision in *ASIC v Adler* (2002) 42 ACSR 80, Windeyer AJ held that the test of whether a director, officer or employee improperly uses his or her position under section 182 of the Corporations Act is an objective test.    On the facts, Windeyer AJ held that each of the directors used their position to gain an advantage for themselves as they continued to direct a company that had the use of the old company's assets. Furthermore, in procuring the transfer of the assets into the new company, the directors had gained an advantage for someone else, namely the new company. In doing so, the directors had caused detriment to the old company by removing assets from it. Accordingly, Windeyer AJ found that the directors had breached section 182 of the Corporations Act.   **(ii) Claim under section 183**  Based on the decision of the Full Court of the Supreme Court of South Australia in *MacNamara v Flavell* (1988) 13 ACLR 619, Windeyer AJ held that the word 'information' has the meaning 'to have knowledge of facts'.   In this case, the relevant information was the knowledge that the old company was insolvent or reaching insolvency and was unable, or likely to become unable, to satisfy its creditors. Windeyer AJ held that the directors, with this knowledge, effected the transfer to the new company, causing detriment to the old company, and in doing so, contravened section 183 of the Corporations Act.   **(iii) Claim regarding Mr Somerville's involvement**  Windeyer AJ held that 'aiding or abetting' a plan for the purposes of section 79 means helping or assisting in its implementation, 'counselling' means advising conduct, and 'procuring' means taking action to bring about a result.  Windeyer AJ held that Mr Somerville aided, abetted and counselled the transactions by providing and recommending his advice. Furthermore, Mr Somerville's conduct in preparing or obtaining all documents necessary to carry out the transaction, and arranging for execution of the documents with knowledge of the relevant facts was also considered by Windeyer AJ to be within the definition of involvement pursuant to section 79 of the Corporations Act. Windeyer AJ further held that Mr Somerville procured the transaction by doing all that was necessary to facilitate the transfer of the assets.   Windeyer AJ emphasised that the act of giving advice may constitute involvement in a breach of the Corporations Act. Whether the person giving the advice is taken to have been involved in the breach is dependent upon the precise circumstances of the case. However, Windeyer AJ noted that where a solicitor gives advice that leads to a breach of the Corporations Act by the recipient of that advice in circumstances in which the solicitor does all the work involved in the implementation of that advice, it is likely that the solicitor will be taken to have been involved in a contravention with the associated liability under section 79.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h5)  **5.4 Directors and solicitor disqualified from acting as directors for conduct in contravention of the Corporations Act**  (By Dylan Burke, DLA Phillips Fox)   ASIC v Somerville (No 2) [2009] NSWSC 998, New South Wales Supreme Court, Windeyer AJ, 24 September 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/september/2009nswsc998.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/september/2009nswsc998.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 the claims by some of the defendants in *ASIC v Somerville (No 1)* [2009] NSWSC 934 (Somerville No 1) for exoneration under sections 1317S and 1318 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), and where exoneration was not granted, the claim by ASIC seeking orders that the defendants be disqualified from acting as directors for a certain period to be determined by the court.   Taking into consideration the relevant facts with regard to the circumstances and conduct of each of the directors other than Mr Somerville, and submissions made on their behalves, Windeyer AJ imposed a period of disqualification of two years on each of those directors.   Windeyer AJ considered that the conduct of Mr Somerville was far more serious than that of the other directors, and therefore warranted a longer period of disqualification. Although ASIC requested a period of disqualification of twelve years with respect to Mr Somerville, Windeyer AJ held that this was excessive and unnecessarily punitive, and imposed a period of disqualification of six years.   **(b) Facts**  The background facts are as described in Somerville No 1 (see Item 5.3 in this issue of the Bulletin). In addition, Windeyer AJ considered further evidence with respect to the particular circumstances of each of the defendants. By way of example of the varying circumstances of some of the directors, the evidence of some of the directors is set out below:   **(i) Adam Leslie Troost**   Mr Troost said that he was under the impression that no dividend would be declared and that he understood that the transfer of assets would mean that some creditors' claims would be defeated. He was taken to have understood that his actions were in breach of the Corporations Act. Balanced against these considerations was the fact that disqualification would have been more serious for Mr Troost than for some of the other defendants.   **(ii) Calvin Bert Rowley**   Windeyer AJ took into consideration the fact that Mr Rowley never intended that the dividends would be declared by the new company. Furthermore, he took into consideration the fact that Mr Rowley had failed to meet tax obligations for superannuation, GST and PAYG deductions and had structured the accounts of the old company in such a way as to avoid group tax and superannuation consequences. These factors were considered against Mr Rowley's personal mitigating circumstances of having a daughter and partner to support.    **(iii) Christopher Paul Mark Jones**   Mr Jones was taken to have been largely unaware of the implications of his actions and was taken to have relied heavily on the advice of Mr Somerville. However, these considerations were balanced against the proposition that a director of a company should have an understanding of the arrangements being made with respect to that company.   **(iv) Timothy Donald Somerville**   It was noted that on his own evidence, Mr Somerville had given similar legal advice to companies in financial difficulty for approximately ten years. Furthermore, he continued to give such advice even after he knew that ASIC was conducting investigations. He was also aware that one of the accountants involved in liquidating some of the companies was of the opinion that the transactions were uncommercial.  **(c) Decision**   **(i) Exoneration under the Corporations Act**   Windeyer AJ held that in order for a person to be exonerated under sections 1317S or 1318 of the Corporations Act, the court must be satisfied that:   * The person committing the breach has acted honestly; and * Having regard to all the circumstances of the case, the person ought fairly to be excused for the breach.   If the above conditions are met, the court may relieve the person from liability either wholly or partly on such terms as the court thinks fit.   Windeyer AJ held that none of the defendants had acted honestly, and therefore were not entitled to exoneration under the Corporations Act. On that basis, Windeyer AJ proceeded to consider the claim of ASIC that each of the defendants be disqualified from acting as a director of a company for a period to be determined by the court.    **(ii) Disqualification from acting as a director**   Section 206C of the Corporations Act provides that in determining whether disqualification is justified, the court may have regard to:   * The person's conduct in relation to the management, business or property of any  corporation; and * Any other matters that the court considers appropriate.   With respect to the directors other than Mr Somerville, Windeyer AJ based his decisions on a balance of considerations as applicable to directors who may be faced with disqualification from directorship, namely those outlined in *ASIC v Adler* (2002) 42 ACSR 80 and *Commissioner of Corporate Affairs (WA) v Ekamper* (1987) 12 ACLR 519, which are:   * Character of the person; * Nature of the breaches; * Structure of the companies and the nature of their business; * Interests of shareholders, creditors and employees; * Risks to others if the person continues as a director; * Honesty and competence of the person; * Hardship imposed on the person arising from disqualification and the   person's personal and commercial interests; and * Appreciation that future breaches could result in further proceedings.   In the circumstances of this case, Windeyer AJ also considered that the likelihood of similar offences being committed by the defendants in the future was low. Therefore, he considered there to be no need for protection of the public against further wrongdoing.    **(iii) The directors other than Mr Somerville**  According to Windeyer AJ, this case concerned small companies and small creditors, who may be heavily affected by a small loss. Furthermore, some of the arrangements were put in place to avoid taxation obligations, which meant that these were matters that in some way affected most Australians.  Accordingly, Windeyer AJ held that a period of disqualification should be imposed. The precise period of disqualification was dependent upon the degree of seriousness of the conduct of the director and the degree of harm that a period of disqualification would impose on each director. Taking into consideration the relevant circumstances of each director, Windeyer AJ held that a period of disqualification of two years for each director was appropriate.  **(iv) Mr Somerville**  Windeyer AJ held that the conduct of Mr Somerville was far more serious than that of the other directors, which warranted a longer period of disqualification. Windeyer AJ considered it important to send a message to the public and to those closely engaged in corporate activity that conduct such as that engaged in by Mr Somerville will not be tolerated. Furthermore, such conduct is made worse by 'dressing it in misleading garments'.  Of particular importance in this case was that Mr Somerville was taken to have known that the creditors were unlikely to be paid and that the payment of any dividends was subject to the discretion of each of the directors. Furthermore, Mr Somerville was taken to have known that the consideration for the sale of assets was not full consideration and that the transactions were uncommercial. As a result, Windeyer AJ held that Mr Somerville ought not be a director for a period of six years.   Windeyer AJ recognised that disqualification for six years may have implications on Mr Somerville's ability to practice law as he had done so prior to the proceedings. Mr Somerville was a director of Somerville & Co Pty Limited, an incorporated legal practice pursuant to Part 2.6 of the [Legal Profession Act 2004 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=82258" \t "Default). However, this was outweighed by the need to send a message to the public that conduct such as that undertaken by Mr Somerville in the circumstances should not be permitted.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h5)  **5.5 The powers and duties of a responsible entity - commencing proceedings against a former responsible entity**   (By Meg O'Brien, Mallesons Stephen Jaques)   Huntley Management Ltd v Australian Olive Groves Ltd [2009] FCA 1081, Federal Court of Australia, Gordon J, 24 September 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/september/2009fca1081.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/september/2009fca1081.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 matter involved a motion filed by the respondents, Australian Olive Groves Ltd ("AOL") to dismiss the proceedings brought by the first applicant, Huntley Management Ltd ("HML") on the basis that:   * there was no reasonable prospect HML could successfully prosecute the proceedings; * the proceedings were an abuse of process; * HML was improperly or unnecessarily joined as a party to the proceedings; and * the court has a general power to dismiss proceedings.   HML was the responsible entity of a managed investment scheme and AOL was the former responsible entity of that same scheme. HML was alleging that AOL:   * made misleading or deceptive representations (or omissions); * breached its duties under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"); and * breached its contractual obligations.   Justice Gordon dismissed the application on the basis that section 601FB of the Act provides that the powers and duties of a responsible entity are to be determined by reading the Act in conjunction with the managed investment scheme's constitution.  Her Honour found that HML clearly had the power to bring the proceedings against AOL in relation to each claim it had identified in its statement of claim.  However, her Honour did not explicitly identify which instrument gave HML power to bring proceedings against AOL.     **(b) Facts**    HML was (and remains) the responsible entity of a managed investment scheme involving olive plantations entitled "Australian Olives Project No. 5" ("Project"). AOL promoted the Project and was the responsible entity of the Project until it was replaced by HML following a vote of the Project's investors.     After it was appointed responsible entity of the Project, HML investigated AOL's conduct in the period in which it was the responsible entity. As a result of this investigation, HML concluded that AOL had breached its disclosure obligations in relation to the Project's prospectus and its obligations to investors in respect of the management of the Project. HML and a number of the Project's investors subsequently brought proceedings against AOL and its directors for misleading and deceptive representations, breach of contract and breach of its duties under the Act. HML alleged that because of this mismanagement, it incurred "substantial costs" in managing the project.     AOL sought an order striking out HML's claim and removing it as an applicant.  In seeking this order, AOL relied on section 31A of the [Federal Court Act 1976 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "Default) and O 20 r 5 and O 6 r 9 of the [Federal Court Rules 1979 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8830" \t "Default) ("Federal Court Rules"). AOL also sought an order that the proceedings be dismissed or stayed on the basis that the investor applicants had not authorised HML and its solicitors to bring proceedings on their behalf.  In seeking this order, AOL relied on O 20 r 5 of the Federal Court Rules.     In support of its application, AOL contended that HML should be removed as a party because the investor applicants were bringing the same claims as HML and that its particulars of loss and damage showed that the loss it allegedly suffered was the loss of the investors themselves and not the losses of the Project.     HML argued that it was entitled to bring an action under clauses 20.2 and 20.4 of the Constitution of Project 5 dated 28 February 2003 between, and binding on, the investors and the responsible entity ("Constitution") or in its capacity as a trustee of the Project's property. Clause 20.2 of the Constitution permitted HML "to do any act or thing" which, in HML's opinion, "is necessary for the proper and efficient management and development of the Project." Clause 20.4 of the Constitution provided that "[t]he Responsible Entity may on its own behalf or on behalf of any applicant or member commence and prosecute legal proceedings of any kind in any court in respect of the Project or any Member's Interest."  The terms "Project" and "Interest" were defined broadly.     **(c) Decision**    Justice Gordon dismissed the motion.  Her Honour concluded that the claims made by HML were not "unarguably bad", HML was not improperly or unnecessarily joined as a party to these proceedings and HML had not brought the proceedings on behalf of the investor applicants without authority.    **(i) Powers and duties of HML**   Justice Gordon stated that under section 601FB of the Act, the powers and duties of HML as responsible entity of the Project were to be determined by reading the Act and the Constitution together.  This provision formed the basis of her Honour's analysis in relation to the other issues raised in AOL's motion.     **(ii) Removal of HML as a party**   In addressing whether HML should be removed as a party to the proceedings, Justice Gordon dealt with the two categories of claims separately. In relation to the breach of contract and duty claims, Justice Gordon concluded that she did not need to decide whether HML was empowered to bring the action under the Act or the Constitution because it was clear that HML had the power to commence these proceedings. In this respect, her Honour emphasised the importance of clauses 20.2 and 20.4 of the Constitution.     In relation to the claim based on AOL's alleged misleading and deceptive representations, Justice Gordon concluded that under clause 20.2 of the Constitution, it was in HML's power to conclude that the proceedings might provide a source of income to the Project that would enable members to obtain a commercial return. Her Honour also found that clause 20.4 gave HML the power to commence these proceedings on behalf of investors. Justice Gordon also made a broader conclusion about the powers and duties of a responsible entity.  Her Honour concluded that because HML was the responsible entity of a managed investment scheme in which the members of the scheme had raised "serious allegations about what was contained in, and omitted from, the Project's Prospectus", HML was, "on any view", a "person with sufficient connection to the controversy."     Justice Gordon also dealt with AOL's argument that the loss that was the subject of the claim were the losses of individual investors and not the loss of the Project as a whole. Justice Gordon stated that the existence of a statutory cause of action for members of a managed investment scheme under section 601MA of the Act did not preclude actions brought on behalf of members of such a scheme because the Act had to be read as a whole and in conjunction with the Constitution.     **(iii) Were HML's solicitors authorised to bring proceedings?**   Justice Gordon did not believe it was necessary to determine this part of the motion. However, she provided the following brief reasons for her conclusion that AOL should fail:   * clause 20.4 of the Constitution bound all investors under section 601GB of the Act; * when they applied for an interest in the Project the investors acknowledged they were willing to be bound by the Constitution; * there was no suggestion HML had exercised its powers other than in good faith; and * HML asked investors whether they supported HML commencing proceedings and took steps to remove or exclude those who did not from the proceedings.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h5)  **5.6 Variation of registered charges - bringing additional obligations within the scope of existing charges**   (By Meg O'Brien, Mallesons Stephen Jaques)   Re Octaviar Ltd (No 7) [2009] QCA 282, Supreme Court of Queensland - Court of Appeal, Holmes and Muir JJA and White J, 18 September 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/september/2009qca282.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/september/2009qca282.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 matter involved an appeal from a decision of the Supreme Court of Queensland regarding the construction of section 268(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act") which requires a company to notify the Australian Securities and Investments Commission ("ASIC") when there has been a variation in the terms of a charge over its property.     At first instance, it was held that a charge that secures an obligation through a designation mechanism will be varied when that designation mechanism is used to change the obligations secured by the charge. The Court of Appeal unanimously overturned the decision at first instance and concluded that when parties bring additional obligations within the scope of an existing charge, there is no variation to that charge. The Court of Appeal concluded that in these cases, the charge is simply operating in accordance with its terms.     **(b) Facts**    **(i) Background**   Under a loan agreement dated 31 May 2007, Fortress Credit Corporation (Australia) II Pty Ltd ("Fortress") agreed to lend money to Young Village Estates Pty Ltd ("YVE").  Octaviar Limited ("Octaviar") initially provided Fortress with an unsecured guarantee of YVE's obligations under this agreement ("YVE Guarantee").     Under an unconnected facility agreement dated 1 June, Fortress agreed to lend up to $250 million ("Facility Agreement") to a subsidiary of Octaviar, Octaviar Castle Pty Ltd ("Octaviar Castle").  Octaviar was the guarantor of Octaviar Castle's obligations under the facility agreement and this guarantee was secured by way of a fixed and floating charge.  ASIC was subsequently notified of the existence of this charge.     The terms of the charge instrument established a designation mechanism by which the obligations secured by the charge were to be ascertained by reference to "Transaction Documents".  The definition of "Transaction Document" was contained in the Facility Agreement and included "each other document which the Lender and the Borrower or a Security Provider agree in writing is a Transaction Document for the purposes of this Agreement."     On 22 January 2008, Fortress, Octaviar and Octaviar Castle executed a deed by which the parties acknowledged that the YVE Guarantee was a "Transaction Document" under the Facility Agreement.  No notice of any variation to the existing charge was lodged with ASIC.     By the time administrators were appointed to Octaviar in late 2008, the amount borrowed by Octaviar Castle under the Facility Agreement had been repaid in full.  However, Fortress was relying on the charge to secure the YVE Guarantee.  During the course of the administration, deeds of company arrangement were executed reflecting Fortress' rights to the property secured by the charge.     **(ii) Challenge to the validity of the charge**    The Public Trustee of Queensland as trustee for particular noteholders of Octaviar challenged the validity of these deeds of company arrangement on the basis that the deed executed on 22 January 2008 varied the terms of the charge and that this had the effect of increasing the liabilities it secured.  The Public Trustee argued that under section 268(2) of the Act, Octaviar was obliged to lodge a notice of variation with ASIC within 45 days of the variation.  Octaviar's failure to do this meant that under section 266(3) of the Act the charge was void as security to the extent it secured the YVE Guarantee.  Fortress argued that there was no variation to the terms of the charge because there had been no change made to the actual charge instrument or to the Facility Agreement.     **(iii) The decision at first instance**   At first instance, Justice McMurdo found in favour of the Public Trustee and declared the charge void to the extent that it secured the liabilities of Octaviar under the YVE Guarantee.  Justice McMurdo held that section 268(2) should be construed as requiring a company to notify ASIC when there is a change in the underlying obligations secured by a charge even when the terms of the charge document remain the same. Justice McMurdo expressed concerns about the effect any other interpretation would have on keeping the public informed about the obligations secured under a charge.     **(c) Decision**   Holmes JA (White J agreeing) delivered the majority judgment.  Muir JA agreed with the conclusions of the majority for reasons that were slightly different.     **(i) Was there a variation to the terms of the charge?**    Both judgments concluded that the deed dated 22 January 2008, by which a pre-existing but entirely separate obligation was brought within the scope of an existing charge by designating the document creating that obligation a "Transaction Document", was not a variation of that charge.  The court reasoned that when the parties used the designation mechanism they were using a contractual mechanism that already existed under the terms of the charge. Provided that any designation is done in a manner anticipated by the instrument creating the charge, there is no relevant variation for the purposes of section 268(2).     **(ii) What are the "terms of the charge"?**   Both judgments held that the phrase "terms of the charge" in section 268(2) was considerably narrower than was held at first instance.  Muir JA took a strict approach to construing this phrase and concluded that the terms of the charge are those actually contained (or implied) in the instrument creating the charge.  Holmes JA did not make a conclusive statement in relation to this issue.  Her Honour concluded that "the terms of the charge . were to be found in the deed by which it was created, and, arguably, in the . facility agreement."     **(iii) The effect of other provisions in the Act on the interpretation of section 268(2)**   Both judgments concluded that section 268(3) of the Act, which states that there is no requirement to notify ASIC when a payment or advance is made by the chargee to the chargor in accordance with the terms of the charge instrument where that instrument secures an unspecified amount and future advances, had no bearing on the interpretation of section 268(2).  The Court of Appeal concluded that this exception was not the only situation where ASIC did not have to be notified of an increase in the liabilities secured by a charge.     **(iv) Purpose of the registration regime**   Both judgments concluded that the purpose of the registration regime was to alert those searching the ASIC registry about whether a company had encumbrances on its property and indicate to them whether there was a need to make further enquiries.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h5)  **5.7 The court's approach to granting leave to proceed against a corporation in liquidation under section 500(2) of the Corporations Act**   (By Sarah Bitcon and Laura Keily, Corrs Chambers Westgarth)   Atlas Copco Australia Pty Ltd v Max Smith Enterprises Pty Ltd [2009] FCA 1054, Federal Court of Australia, Foster J, 17 September 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/september/2009fca1054.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/september/2009fca1054.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 judicial consideration of the principles that apply where an applicant seeks leave to commence civil proceedings against a company in liquidation.  In summary, an applicant for leave must satisfy the court that there is a serious or substantial question to be tried, and that granting leave would be in the interests of justice.  The court may impose conditions on the granting of leave, as was the case in this matter, directed at minimising interference with the orderly winding up of the company in liquidation.      **(b) Facts**   The principal proceeding to which the leave application in this case related concerned Atlas Copco Australia Pty Ltd (Applicant), a manufacturer of construction and mining equipment, who alleged that Max Smith Enterprises Pty Ltd and Max Smith (together, Respondents) were guilty of misleading and deceptive conduct in respect of the sale of mining compressors.     In defence, the Respondents claimed that they were not responsible for the quality of the mining compressors, as the machinery had been obtained from Bedrock Drilling (Aust) Pty Ltd (In Liq) (Bedrock), who represented that the mining compressors were compliant with Australian Standard 1210 ("Unfired Pressure Vessel Code") and certified by State WorkCover authorities.   Consequently, the Respondents wanted to bring a cross-claim against Bedrock, arguing that Bedrock was the real perpetrator of the misleading and deceptive conduct.   Bedrock was placed into liquidation on 4 June 2009 by way of creditors' voluntary winding up, with Mr Blair Alexander Pleash (Liquidator) being appointed liquidator of the company.  Bedrock had liabilities of up to $430,000 and no assets, and it was clear that the Respondents had no prospect of recovering any money from Bedrock.   Consequently, the Respondents sought an order pursuant to section 500(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act) that they be granted leave to commence proceedings against Bedrock.  Section 500(2) of the Act requires the leave of the Court to be obtained before an action may be commenced against a company in liquidation.    **(c) Decision**   Justice Foster granted the Respondents leave to commence proceedings against Bedrock, under section 500(2) of the Act, on the condition that the Respondents would not seek to enforce any judgment which they may obtain against Bedrock without the prior leave of the court.   **(i) Relevant principles**   In Foster J's decision, his Honour was influenced by the reasoning of Lee J in *Executive Director of the Department of Conservation and Land Management v Ringfab Environmental Structures Pty Ltd* [1997] FCA 1484.  In that case, Lee J stated that the purpose of section 500(2) of the Act was to prevent a company in liquidation being subject to actions that are expensive and, therefore, carried on at the expense of the creditors of the company.   In determining whether leave should be granted under section 500(2) of the Act, Lee J considered whether:   * the balance of convenience lay in allowing the applicant to proceed by way of action to judgment, or by lodging a proof of debt with the liquidator (with the applicant bearing the onus of proof); * there was a serious or substantial question to be tried; and * there was a real dispute between the parties.   Justice Lee stated that where a liquidator has no funds to conduct a defence and there is little prospect of funds becoming available, there are strong reasons for refusing leave under section 500(2) of the Act. However, his Honour also stated that a grant of leave can be made subject to conditions directed at minimising interference with the orderly winding up of a company in liquidation.   **(ii) Application of principles**   Justice Foster had some reservations about granting leave under section 500(2) of the Act, as Bedrock did not have any assets and the Court ultimately could not order any monetary judgment in favour of the Respondents against Bedrock.  However, the fact that a monetary judgment was unlikely to be ordered was not a determinative point, and Foster J found that the prospect of making declarations was enough to justify the grant of leave, particularly given the serious subject matter of this case, being workers safety.   In reaching an outcome, Justice Foster considered whether:   * the Respondents should be left to pursue the claim by lodging a proof of debt; * there was a public interest in ensuring that Bedrock was identified and dealt with by the court; and * the subject matter of the contraventions, being workers safety, was sufficiently serious.   In this case, Foster J noted that there would almost certainly be difficulties in the Respondents successfully lodging a proof of debt in the liquidation of Bedrock. However, this was not a significant matter, as there was no prospect that any funds would be available to meet a proof in any event.   In reaching the decision to grant leave, Foster J highlighted the public interest in identifying errant entities where the contraventions involved serious issues, such as the safety of workers on mine sites, as was the case in this matter.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h5)  **5.8 Are the proceeds of the settlement of an action taken by a trustee trust assets?**  (By Mark Cessario and Georgina Gill, Corrs Chambers Westgarth)  Conlan v The Executor or Other Personal Representative as Executor of the Estate of Anthony John Croci [2009] WASC 266, Supreme Court of Western Australia, Simmonds J, 15 September 2009  The full text of this judgement is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2009/september/2009wasc266.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2009/september/2009wasc266.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**  Mark Anthony Conlan ("Conlan") was the liquidator of Rowena Nominees Pty Ltd (receiver & liquidator appointed) (in liquidation) ("Rowena"). Rowena had previously reached a settlement of a claim brought against the auditors of its trust account.  Conlon sought declarations and directions concerning the status of the money received as part of that settlement. The main question considered by the court was whether or not Rowena's right of recovery against the auditors of its trust account constituted an asset of Rowena in its own right or a trust asset.  **(b) Facts**  Rowena was a finance broker licensed under the [Finance Brokers Control Act 1975 (WA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=15173" \t "Default) ("FBC Act").  Under the FBC Act, Rowena was required to maintain a trust account in respect of loans it negotiated or arranged and ensure audits of the trust account were conducted.    Rowena also acted as trustee of a fund ("Rowena Fund") which was made up of monies held in connection with a finance broking business that Rowena carried on.    In 2000, Rowena commenced action against the auditors of a Rowena trust account (the "Rowena Trust") for breach of duty of care in relation to their audits of the Rowena Trust in 1995 and 1996.  A settlement of Rowena's action against the auditors was reached, and the settlement money paid to Rowena ("Settlement Proceeds") became the subject of the current action.    Conlan sought a declaration that Rowena was entitled to an equitable lien over the Settlement Proceeds to secure the payment to it of:   * the remuneration paid by Rowena to Conlan as "administrative costs" in relation to Conlan's role as liquidator of Rowena during the action against the auditors of the Rowena Trust; and * the reasonable costs and expenses of a solicitor engaged for the purpose of the action and the reasonable costs of Conlan in respect of distributing the Settlement Proceeds to secured creditors of Rowena.   The Applicants also sought a declaration that, subject to the rights of Rowena's secured creditors, the Settlement Proceeds were assets of Rowena rather than assets of the Rowena Fund.    Milton Lyle Fredrick Hunt, who was joined to the proceedings as a representative of the creditors of the Rowena Fund contended that the rights to recover against the auditors were trust assets, the proceeds of which were money forming part of the Rowena Fund.    **(c) Decision**   Simmonds J considered that the declarations sought by the Applicants ought to be made if, and only if, his Honour found that the Settlement Proceeds were assets of Rowena in its own right.   In determining whether Rowena's entitlement to the Settlement Proceeds was an asset of Rowena or formed part of the Rowena Fund, Simmonds J considered Young v Murphy [1996] 1 VR 279.  In that case, Brooking J and JD Phillips J considered the issue of whether a cause of action commenced by trustees against the auditors of trust accounts in tort and for breach of contract constituted trust property.   Both JD Phillips J and Brooking J agreed that if a contract is entered into for the purposes of the administration of the trust, the benefit of the contract is trust property "with the result that any right of action arising thereunder [is] trust property too".   Applying the decision in Young v Murphy, Simmonds J concluded that Rowena's appointment of an auditor was not in the ordinary course of the administration of the trust as:   * the obligation of Rowena to appoint an auditor under section 53(2) of the FBC Act arose from Rowena's classification as a finance broker under the FBC Act, not under a trust instrument entered into between the trustee and a third party, as was the case in Young v Murphy; * the obligation to appoint an auditor arose when Rowena applied for a license as a finance broker, not at the point that it first held trust money; and * the obligation under the FBC Act that the finance broker pay the fees of the audit indicated that the appointment of the auditor and the performance of the audit were "the ordinary incidents of the business of a licensed finance broker".  In those circumstances, his Honour considered that the appointment of the auditor and the performance of the audit were for Rowena's private purposes as a licensed finance broker, and not in the management of the trusts of which it was the trustee.   Simmonds J concluded that the rights of action against the auditors were assets of Rowena in its own right.   Simmonds J therefore made the declaration that the Settlement Proceeds were the assets of Rowena in its own right.  His Honour also made the first declaration sought by the Applicants, that Rowena was entitled to an equitable lien over the Settlement Proceeds.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h5)  **5.9 Discharge of examination summonses**  (By Benjamin Copeland, Blake Dawson)   Wily re LED (South Coast) Pty Ltd [2009] NSWSC 946, New South Wales Supreme Court, Barrett J, 11 September 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/september/2009nswsc946.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/september/2009nswsc946.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 applications for the discharge of examination summonses issued under section 596B of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The case discussed the nature of an order for discharge of such examination summonses and whether the applicants in this instance had established a basis for such an order.   **(b) Facts**   The respondents were the liquidators of four companies which were some of the nine plaintiffs in Commercial List proceedings against some 78 defendants consisting of the partners of the accounting firm RSM Bird Cameron.   The respondents had made applications ex parte in accordance with section 596C of the Corporations Act 2001 (Cth) for examination summonses under section 596B regarding the examinable affairs of the four companies to be issued against the three applicants. The examination summonses were subsequently issued by the registrar.   The applicants sought discharge of the summonses on various grounds including that the purposes of the application for the summonses were invalid. The applicants also argued that federal jurisdiction and procedure applied to the hearing and the onus was on the respondents to establish that the examination summonses should continue.   **(c) Decision**   **(i) Nature of an order for discharge of examination summonses**   Counsel for the applicants made various preliminary arguments in relation to the nature of an order for discharge of examination summonses and the way in which the court would deal with the 'review' of the registrar's decision in relation to the summonses.  These arguments included that:   * in undertaking a review of the registrar's decision, the court was exercising federal jurisdiction; * this attracted a statement made by Basten JA in *Tomko v Palasty (No 2)* [2007] NSWCA 369 that 'in federal jurisdiction, a review is taken to mean a re-examination of the matter afresh, not limited to reconsideration of the material before the decision maker'; * the court must embark on a hearing de novo; and * the burden for making a case for the continuation of the examination summonses rests with the respondents.   Barrett J discussed the nature of the application, stating that the Corporations Act was silent on this matter.  Barrett J referred to rule 11.5 of the [Supreme Court (Corporations) Rules 1999](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=19658" \t "Default) which states that a person served with an examination summons may apply for an order discharging the summons by filing an interlocutory process and affidavit of facts.   Barrett J stated that the procedure under which the application was made ex parte was well settled and that to allow the proposed examinee a right to be heard at the point of application would be to defeat the purpose of the legislature (referring to *Re Radio Publicity Ltd* (1936) 53 WN (NSW) 220 at 221). The appropriate course is an application for the discharge of the summons on the basis of the principles that apply under the general rules of court to challenges to decisions of registrars, as specified in rule 49.19 of the [Uniform Civil Procedure Rules 2005 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "Default).   Barrett J discussed various cases regarding the nature of the application and stated at paragraph 21 that 'it must be accepted that this court's established procedures and practices with respect to review of registrar's decisions are applicable . the fact that the decision to be reviewed is a decision made under federal jurisdiction pursuant to a Commonwealth Act does not mean that some unseen federal overlay somehow requires the court to modify its established procedures and practices in order to conform to some norm that applies to delegation of functions to officer of federal courts.'.   Barrett J stated that a review of a decision by a registrar starts with the decision itself and does not proceed as if it had never been made.  Barrett J stated at paragraph 30 that the court is 'fully able to approach the matter afresh and by reference to comprehensive material without any need to be particularly conscious of onus.'   **(ii) Purpose of the application**   The respondents stated that the purposes of their application were:   * '[t]o test their preliminary view that the Commercial List claims have good prospects of success.'; * '.because the demonstration of a sufficiently viable case through material obtained from such examinations is, in essence, a prerequisite to any positive decision by the potential litigation funder to provide financial assistance.'; * '.to investigate recovery possibilities unconnected with the Commercial List proceedings.'   Barrett J found none of the purposes for the application put forward by the respondents to be objectionable. His Honour made particular reference to the judgment of Lander J in *Re New Tel Ltd; Evans v Wainter Pty Ltd* [2005] FCAFC 114(2005) which outlined criteria to be applied upon an application such as that of the respondents.  Creating a forum for obtaining information about the viability of litigation in connection with the examinable affairs of a corporation is within the criteria outlined by Lander J.   After discussing the cases of *Re Clutha Ltd; Cumming v Abbey* [2003] NSWSC 235 and *Fetzer v Irving* [2005] SASC 53, Barrett J made a finding of fact that the respondents purpose was not 'seeking a forensic advantage in the embryonic litigation' but rather the respondents validly sought to be able to:   * make a final decision as to whether to pursue litigation; and * put a potential litigation funder into an informed position to make a decision as to whether to make finance available.   **(iii) Order**   Barrett J concluded that the applicants had not established a basis for an order discharging the examination summonses and ordered that the interlocutory process filed by the applicants be dismissed and the applicants pay the costs of the respondents.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h5)  **5.10 Restraint of trade provisions in business sale agreements**  (By Yasmin Lim, Freehills)   Positive Endeavour Pty Ltd v Madigan [2009] SASC 281, Supreme Court of South Australia, Full Court, Bleby, Gray and Layton JJ, 9 September 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2009/september/2009sasc281.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2009/september/2009sasc281.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 an appeal from a decision of a judge of the District Court of South Australia to dismiss a claim by Positive Endeavour Pty Ltd (Positive Endeavour) for damages for alleged breaches of a restraint of trade provision in a business sale contract.    The Full Court held that while the District Court Judge was correct in concluding the restraint provision was unreasonable, with appropriate severance the provision could be valid and enforceable.    **(b) Facts**   Positive Endeavour, the plaintiff and appellant, purchased a finance broking business from the defendants and respondents, Trevor Madigan and Kylie Lehmann for $120,000. The parties had previous business relationships and the contract included a restraint of trade provision.   The restraint of trade provision included clauses which prevented the vendor and each of its associated persons from soliciting, canvassing or securing the custom of a person who was at completion, or was within 12 months of completion, a customer of the vendors or a body corporate. The restraint of trade provision applied to both personal and home loans whether the customer was applying for a new loan or re-financing an existing loan.    Positive Endeavour subsequently issued proceedings against the defendants, and a related entity, First Pacific Mortgages Pty Ltd (First Pacific Mortgages), for alleged breaches of the restraint of trade provision.    **(c) Decision**   In determining whether the restraint of trade provision was valid, the court considered:   * the intended purpose of the restraint provision; and * whether the restraint provision was necessary to achieve the intended purpose.   **(i) Intended purpose**   The court found that it was the intention of the parties to create a binding agreement whereby the vendors would not solicit, canvass or secure the custom of a person who was a customer at completion, or was a customer 12 months prior to completion, in respect of new loans or the refinancing of existing loans, for an indefinite period of time.    The parties had agreed that the restraints were reasonable and the sale agreement contained a clause to that effect.     The court found that the parties had agreed the restraints were necessary in order to protect Positive Endeavour's asset purchase, the goodwill in the business and the commission trail book. This is because in the finance broking industry, mortgage brokers make their commissions from previous and existing customers who seek to refinance their current loans or seek a new loan. Many customers return to their previous mortgage broker when seeking additional finance and therefore it was necessary for the vendors to be prevented from soliciting, canvassing or securing previous customers of the business.    **(ii) Were the provisions necessary to achieve the intended purpose?**   In measuring the validity of the provisions, the court considered what was required to be protected compared to what the provisions actually provided for. Gray J held the provisions were necessary to achieve the intended purpose of the provisions, whereas Bleby J, with Layton J concurring, held the restraint provisions were invalid because:   * First, they went beyond what was reasonable to protect the asset. It was unreasonable to prevent all people who were customers within the last 12 months, or customers at completion, from engaging with the vendors in relation to any type of loan, for an indefinite period of time. * Second, the provisions were against public policy. Provisions which prevent a customer from ever again engaging with a vendor unreasonably restricts their freedom.   **(iii) Severance**    Having concluded the provisions were invalid, Bleby J had to decide whether the provision could be made reasonable by either reading down or severing parts of particular clauses. Bleby J found that in this circumstance it was appropriate to sever parts of clauses to make the restraint of trade provision reasonable.    Bleby J and Gray J, who concurred with this approach, severed certain words which had the effect of the restraint only applying to people who were a customer at completion, and only to those customers who wanted to re-finance existing loans.    By making these amendments the court was able to preserve Positive Endeavour's rights to the trail commissions from existing loans and also allow them the right to re-finance any existing loans.   **(iv) Orders**   The appeal was allowed, the appellant's claim was remitted for further hearing and determination of equitable remedies against First Pacific Mortgages, and the respondents were ordered to pay the appellant's costs of the appeal.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h5)  **5.11 Appointment and removal of liquidators: Conflicts of duty and interest**  (By Steven Grant, Minter Ellison)   Re Octaviar Ltd (No 10) [2009] QSC 283, Supreme Court of Queensland, McMurdo J, 9 September 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/september/2009qsc283.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/september/2009qsc283.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 concerns the circumstances in which liquidators should be removed from office, particularly where there is a conflict of duty and interest, the operation of charges and payments to receivers and creditors.   **(b) Facts**   The case consists of three related proceedings brought in respect of Octaviar Ltd (in provisional liquidation) (Receivers and Managers Appointed) (OL) and Octaviar Administration Pty Ltd (in liquidation) (OA) in which the Public Trustee of Queensland (PTQ) sought the following orders:   * that OL be wound up; * that Mr Greig and Mr Harwood be removed as liquidators of OA; and * that someone other than Mr Greig and Mr Harwood be appointed as liquidators of OL and OA.   Mr Greig and Mr Harwood also sought an order approving the agreement entered into with Fortress Credit Corporation (Australia) II Pty Ltd (Fortress) by Mr Greig and Mr Harwood on behalf of OL and OA for the payment of $19,746,713.63 and $304,331.05 by OA to the receivers appointed by Fortress (Agreement).  The payments were made on 23 December 2008 and 23 February 2009 respectively.   The key facts are as follows:   * Mr Greig and Mr Harwood as administrators of OL and OA, were in receipt of a demand from the Australian Taxation Office (ATO) for compliance with its notice under section 260-5 of the [Taxation Administration Act 1953 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6441" \t "Default) addressed to OA in relation to monies payable by OA to OL.  There was also a demand from the receivers appointed by Fortress for certain funds held by OA on trust for OL in an account with the Commonwealth Bank of Australia (CBA) (Trust Monies). * CBA would not grant access to monies held in OA's bank accounts without the consent of all parties asserting an entitlement to the Trust Monies.  As OL did not have a bank account and without access to OA's funds, the administrators were without funds. * On 8 December 2008, the administrators' solicitors wrote to the solicitors for Fortress, the receivers and the ATO proposing that the Trust Monies be paid by OA to OL, to be held by the receivers until determination of the priority and validity of the competing claims by the receivers and the ATO or earlier agreement by the parties.  It was also proposed that the amount of the ATO's notice be held by OA in a separate account with CBA on a similar basis and that the balance of the funds held by OA with CBA be released to the administrators.  The solicitors for Fortress and the receivers agreed to the proposal. * A letter dated 18 December 2008 signed by the administrators, a solicitor for the ATO and a representative of the receivers directed CBA to close the account in which the Trust Monies were held and to transfer its balance to an account of the receivers with a different bank. * On 24 December 2008, the receivers deposited the Trust Monies into a Fortress account as directed by Fortress. * On 24 March 2009 and again on 20 April 2009, the administrators' solicitors wrote to the solicitors for Fortress, stating that as result of McMurdo J's judgment on 6 March 2009 (*Re Octaviar Ltd (No 7)* [2009] QSC 37),  they considered that the appropriate course was for the Trust Monies to be returned to OA and asking for confirmation that Fortress would do so.  On 28 April, the solicitors for Fortress replied stating that it would be premature to repay the Trust Monies on the basis that it had filed its application for an extension of time for lodgement of a notice of charge with the liquidators under section 266(4) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) to ensure the charge is not declared void, it had appealed against McMurdo J's judgment, there was no suggestion that Fortress would be unable to comply with an order to repay the funds, and that the payment made to Fortress could not be set aside because of sections 451C and 445H of the Corporations Act in the event of a winding up of the company.  Section 451C provides that a payment made in good faith by or with the consent of the administrator is valid under the Corporations Act and not liable to be set aside on the winding up of the company.  Section 445H provides that termination or avoidance of a deed of company arrangement does not affect the previous operation of the deed. * On 31 July, McMurdo J refused an extension of time under section 266(4).  McMurdo J also set aside deeds of company arrangement for OL and OA and ordered that Mr Greig and Mr Harwood be appointed as provisional liquidators of OL and liquidators of OA. * On 7 August, the administrators solicitors wrote to the solicitors for Fortress proposing that the Trust Monies be paid into a trust account to be maintained by Fortress' solicitors and held until the outcome of the appeal from McMurdo J's March judgment.  On 13 August, the solicitors for Fortress rejected that proposal noting that Fortress had until 28 August to file an appeal against McMurdo J's judgment refusing an extension of time under section 266(4).  Fortress filed a notice of appeal and the appeal was heard and the decision reserved at the time of this case. * On 26 August, Mr Greig and Mr Harwood entered into the Agreement on behalf of OL and OA. * Clause 2 of the Agreement provided that it was a condition precedent to the formation of the Agreement that the court give a direction to the effect that Mr Greig and Mr Harwood would be justified in causing OL and OA to enter into and perform the Agreement. * The Agreement in its original terms (prior to the execution of an amended version of the Agreement) provided that the Trust Monies would be paid into an interest-bearing account, maintained jointly by OA and Fortress, to be held in escrow pending the outcome of the entirety of the appeals in relation to the matter.   **(c) Decision**  **(i) Whether Mr Greig and Mr Harwood should continue as liquidators**  Having ordered that OL be wound up, McMurdo J turned to the question of whether Mr Greig and Mr Harwood should continue as liquidators of OL and OA, noting that the Agreement if approved by the court would be relevant.  In this respect, PTQ submitted that if they remained in office, Mr Greig and Mr Hardwood could be placed in a position of conflict between their duties as liquidators and their interest in avoiding proceedings against them personally for paying out the Trust Monies.  On this ground alone, PTQ submitted that cause is shown under section 473(1) for the removal of Mr Greig and Mr Harwood as liquidators of OA and for their removal if section 503 applies. Section 473(1) enables the court to remove a liquidator appointed by the court and section 503 provides that the court may, on cause shown, remove a liquidator and appoint another liquidator.   McMurdo J observed it was unnecessary to prove that Mr Greig and Mr Harwood were unfit for the office for there to be 'cause shown' in terms of section 473.  This is because it is a broad concept concerned not so much with a search for particular instances of wrong or inappropriate conduct, but with a more general enquiry as to the appropriate course for the benefit of the administration and the body of persons interested in it, and the maintenance of confidence in the integrity, objectivity and impartiality of that administration (*Apple Computer Australia Pty Ltd v Wily* (2003) 46 ACSR 729 per Barrett J at 740).  A liquidator ought to be replaced where his or her personal interest conflicts, or may conflict, with the liquidator's duty to act exclusively in the interest of creditors (*City & Suburban Pty Ltd v Smith (as liq of Conpac (Aust) Pty Ltd (in liq))* (1998) 28 ACSR 328 per Merkel J at 336).  McMurdo J further noted that it was common ground that OL and OA should have the same liquidators, and that if it was in the interests of one liquidation that the incumbents should not continue, the same would follow for the other liquidation.  In response, Mr Greig and Mr Harwood submitted that there was no serious case for breach of duty as administrators in paying the Trust Monies to the receivers and that the result of the Agreement would be to remove the prospect of any conflict.  McMurdo J considered these questions in turn.  **(ii) Whether there was a serious case for breach of duty as administrators**  McMurdo J considered that the following circumstances would be relevant when assessing a potential case against Mr Greig and Mr Harwood:   * The ATO and Fortress were demanding funds from OA. * CBA was refusing access to any monies in OA's bank accounts without the consent of all parties then asserting an entitlement to the funds, so that the then administrators were without funds. * The Trust Monies were clearly monies held by OA on trust for OL and the administrators had legal advice to that effect. * The administrators had advice that the better view was that the Fortress charge was not void. * The receivers agreed to the payment and the ATO raised no objection to that payment, resulting in other funds of OA being made available by CBA. * The creditors of OA and OL resolved that the companies should execute deeds of company arrangement. * The making of the payment may or may not have been inconsistent with the proposed deeds of company arrangement for the purposes of section 444C which prohibits actions which are inconsistent with the deeds in certain circumstances. * The administrators believed that the money would be held by the receivers and not passed on to Fortress, however there was no clear agreement that the receivers would not pass the Trust Monies to Fortress without the consent of OL and OA. * Why the administrators did not commence proceedings against Fortress, the ATO and CBA to establish OA's entitlement to the monies in its accounts other than the separate account in which the Trust Monies were held and seek declaratory relief in order to gain access to those accounts. * The basis for the liquidators' opinion in their section 439A report on the company's business, property, affairs and financial circumstances, that upon the basis of their investigations to December 2008, they considered the likely position of OL was that it was solvent on 22 January 2008.   Given these considerations, McMurdo J concluded that there was a real prospect that Mr Greig and Mr Harwood would be in a position of serious conflict between their duties and their personal interests (see section (iii) below) and that prospect made their appointment, or continuing appointment, as liquidators disadvantageous to the winding up of OL and OA.  Counsel for the creditor Wellington Capital Ltd as responsible entity of The Premium Income Fund and counsel for the creditor OPI Pacific Finance Pty Ltd proposed that the conflict could be managed if Mr Greig and Mr Harwood remained as liquidators and other persons were appointed as liquidators to consider the questions for which Mr Greig and Mr Harwood would have a conflict.  However, McMurdo J considered that course to be undesirable for the following reasons:   * It would be difficult to define the ambit of activity of the two teams of liquidators as the question of insolvency is relevant in many ways and not only in relation to the Fortress charge. * It would be undesirable for there to be, in effect, parallel investigations by different liquidators of the solvency of OL due to the unnecessary duplication of resources and the need for others to participate in the investigation process twice. * The prospect of inconsistent outcomes. * The additional cost of two teams of liquidators may outweigh the cost savings derived from keeping the incumbents in office.   The preferable course was to appoint persons who did not have the same potential disability in acting as liquidators.  In making this conclusion McMurdo J considered the view of the majority (in value) of creditors as expressed in response to a circular sent to all unsecured creditors, which supported the appointment of Mr Greig and Mr Harwood to be relevant but not determinative.  Accordingly, after some consideration of the proposed appointees, McMurdo J appointed Mr Fletcher and Ms Barnet as liquidators of OL and OA being appointees with whom no party objected.   **(iii) Whether the Agreement would remove the prospect of any conflict**   McMurdo J noted that in a previous judgment, her Honour held that section 451C would preclude a liquidator of OL from recovering these funds if the charge were void against the liquidator *(Re Octaviar (No 8)* [2009] QSC 202 at [205]).  However, with the benefit of this Agreement, OL would be in a stronger position and McMurdo J did not observe any serious prospect that if the Agreement took effect, the Trust Monies would be returned to Fortress if the ultimate outcome on the section 266 questions was in favour of OL.   On the contrary, if the ultimate outcome on the section 266 questions was in favour of Fortress, the monies which would be held in escrow under the Agreement would have to be paid to Fortress within 14 days.  In that period, OL could apply for an interlocutory injunction to prevent that payment on the basis that it has a serious case to avoid the charge under section 588FE which relates to voidable transactions and under the general law.  At this point, an argument by Fortress relying on section 451C would be more formidable and if an interlocutory injunction were granted, the final outcome could still be in favour of Fortress because of the operation of section 451C.  In this manner, the risk of conflict of duty and interest arises in this circumstance, where the charge is not void but voidable; and where the chargee (namely Fortress), notwithstanding the charge in favour of Fortress being avoided, has a defence to a claim for repayment of the Trust Monies.   Accordingly a loss would result from the payment of the Trust Monies.  This raises the question of whether there would be a case to be investigated in relation to the payment of the Trust Monies.  Such an investigation could not be conducted by Mr Greig and Mr Harwood due to the obvious conflict.  Similarly an investigation into the solvency or otherwise of OL at 22 January 2008 would also create conflict between the liquidators' duties and the interests of Mr Greig and Mr Harwood in the outcome of that investigation which could detract from the prospect of a claim against them.   **(iv) Whether the Agreement should be approved**   McMurdo J noted that in some respects the Agreement was beneficial as discussed above.  However, McMurdo J also noted that the Agreement had been reached in circumstances which detract from the weight of Mr Greig and Mr Harwood's opinion that it was beneficial including:   * it was signed on the day before the circular was sent to creditors and in the week prior to the hearing of this case, when Mr Greig and Mr Harwood were on notice that the principal argument for their removal was the payment of the Trust Monies; * it did not clearly preserve the right for the liquidators to avoid the charge or provide the opportunity for OL to move for an injunction to restrain the payment of the escrow funds to Fortress in the event that the outcome of the appeals was against OL; and * the impact of the Agreement upon the account overall between OL and Fortress, insofar as it relates to the interest accruing on that sum over a period of nearly nine months did not appear to be considered.   McMurdo J further observed that the Agreement contained a condition precedent that the court give a direction that Mr Greig and Mr Harwood would be justified in causing OL and OA to enter into the Agreement and perform it.  However, as Mr Greig and Mr Harwood were to be replaced, McMurdo J concluded that such a direction should not be given on the basis that it be appropriate to direct them to enter into the Agreement on behalf of OL and OA and then be immediately removed as liquidators.   Whilst noting that if the Agreement was not approved, the offer of the Agreement may lapse and may not be renewed, McMurdo J dismissed the application to approve the Agreement.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h5)  **5.12 A voidable transaction under Part 5.7B: Transfer of insolvent company's property to director**  (By Ben Hopper, Blake Dawson)   Merrag Pty Ltd (in liq) v Khoury [2009] NSWSC 915, New South Wales Supreme Court, Palmer J, 8 September 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/september/2009nswsc915.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/september/2009nswsc915.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**   Merrag Pty Ltd ('Merrag') transferred an apartment ('Unit 28') to one of its three directors for $250,000-$275,000 less than market value.  In a judgment replete with the qualifying correlative conjunction, "if not, then .", Palmer J held that this transaction was an insolvent and uncommercial transaction and an unreasonable director-related transaction under Part 5.7B of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act').  This decision arose from the finding that there was neither a written nor an oral contract of sale of Unit 28 and that the only 'transaction' was the transfer simpliciter made when Merrag was insolvent.   Palmer J made an alternative judgment, premised on a contrary factual interpretation that there was an enforceable oral contract, which contained the term that the consideration for the transfer included release of the company from a debt owed to the director.  Palmer J held that such an oral contract constituted an unfair preference, an uncommercial transaction and an unreasonable director-related transaction.   The effect of both decisions was to render the transfer voidable.  His Honour opined that the appropriate relief was to place Merrag and the director in the situation they would have been in had the director wished to purchase Unit 28 after the appointment of a Liquidator, at which point he would have had to pay market value, i.e. $525,000.   **(b) Facts**   In September 2003, Merrag was incorporated as a vehicle to acquire and develop a site as commercial premises and residential apartments.  Three brothers were Merrag's only directors and shareholders.  By Memorandum of Transfer dated 25 October 2007, signed by Michael Khoury as director of Merrag, Merrag transferred to Michael $250,000 for Unit 28, at which time its market value was $525,000.  On 30 October 2007, Merrag was placed in voluntary administration.  On 28 November 2007, the voluntary administrator was appointed Liquidator.   Palmer J considered three factual interpretations, each of which would have a different bearing on the characterisation and consequences of the transfer.   **(i) Scenario one: Valid written contract**   The Plaintiffs contended that there was a valid written contract for sale of Unit 28 to Michael made on 13 September 2004 for a price of $614,800.   **(ii) Scenario two: Enforceable oral contract**   The Defendants contended that there was an oral contract, reached between Michael and director Rodney Khoury, dated March/April 2006 and enforceable by reason of part performance, whose terms were to the effect that:   * Michael would buy Unit 28 for $440,000; * Michael would be entitled to off-set against that figure any debts owed by Merrag to him.   **(iii) Scenario three:  No written contract and no oral contract**   The Plaintiffs further contended that if there was no contract for sale of Unit 28, the transfer itself was an uncommercial transaction.   **(c) Decision**   Palmer J dismissed scenario one and reached two alternative decisions based on factual scenarios two and three   **(i) Scenario one: Decision**   The front page of the alleged written "contract", dated 13 September 2004, was a sham, never intended to have effect and brought into existence for the purpose of persuading Merrag's financier to advance development funds (on the basis that a certain number of apartments had already been sold).  There being no written contract, the Plaintiffs' cause of action - for contract debt and Michael's breach of fiduciary duty as director to procure performance of that contract - failed.   **(ii) Scenario two: Decision in the alternative**   Palmer J found there was no oral contract for various reasons, including the lack of a contemporaneous record and Michael's lack of credibility as a witness.     However, assuming there was an oral contract, his Honour reasoned it was enforceable by reason of part performance because the giving to Michael of the muniments of title and the benefit of rental income prior to completion of the contract were acts unequivocally and in their own nature referable to some contract between Michael and Merrag for the sale of Unit 28 to Michael.   In the most creative part of the judgment, Palmer J held that such an oral contract constituted an unfair preference.  His Honour drew on the analogy of an unsecured creditor of an insolvent trader "purchasing" trading stock from the trader to the value of the debt and then offsetting the trader's debt against the purchase price.  His Honour opined that this was 'no different in principle' from the oral contract entered into when Merrag was insolvent and under which part of the consideration was a set-off of Merrag's debt to Michael against the purchase price.  This transaction was also held to be an uncommercial transaction and an unreasonable director-related transaction.  Accordingly, it was voidable under section 588FE.   **(iii) Scenario three: Primary decision**   Palmer J held that the execution and registration of the Memorandum of Transfer was the only relevant transaction for the purposes of the Act.  His Honour held this transaction was both an uncommercial transaction and an insolvent one within section 588FC(a). Accordingly, it was voidable under sections 588FE(2) and 588FE(6A).   **(iv) Orders**   Section 588FF(1) vests a court with broad powers of redress where it finds that a transaction is voidable because of section 588FE.  Under section 588FF(1)(c), Palmer J ordered that Michael pay to Merrag the sum of $275,000 (representing the balance of the purchase price Michael would have had to pay the Liquidator on a sale after liquidation) together with interest thereon from 10 October 2007, being the date of registration of the Memorandum of Transfer.   **(v) Commentary**   At least two issues arise for comment from this judgment.   First, although apparently not agitated before Palmer J, there is an argument that the identified 'only relevant transaction', viz. the transfer of Unit 28 to Michael, was not voidable, but void ab initio because:   * The Memorandum of Transfer was not properly executed, being signed by Michael alone (and not another director or company secretary); and, * The registration of the Memorandum of Transfer was obtained by a fraud.   Can a transaction, which is void ab initio, be voidable by reason of falling within the rubric of one or more of subsections (2) to (6) of section 588FE?   Second, there is something juristically unsatisfying about a qualified "if not, then" judgment.  Such qualifications obfuscate the distinction between ratio decidendi and obiter dicta:  the inevitable corollary being that the force of the judgment's ratio decided is diluted.  Does this case stand for:   * the proposition that a simple transfer of company property for less than market value is a voidable transaction; or * the proposition that an enforceable oral contract is voidable as constituting an unfair preference where a director "purchases" property of an insolvent company by releasing the company from a debt?   If it stands for both propositions, then one must accept the simultaneous existence of contrary facts an unsteady precipice on which to found precedent.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h5)  **5.13 Confirmation of court's power to approve schemes of arrangement which release third parties**   (By Stefania Gardner, Freehills)   Fowler v Lindholm, in the matter of Opes Prime Stockbroking Ltd [2009] FCAFC 125, Federal Court of Australia, Full Court, Emmett, Gordon and Jagot JJ, 4 September 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/september/[2009]fcafc125.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/september/%5B2009%5Dfcafc125.htm" \t "_new) or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   In August 2009, Finkelstein J approved schemes of arrangement (Schemes) between each Opes Group company and its creditors under section 411(6) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) (see *In the matter of Opes Prime Stockbroking Limited (No 2)* [2009] FCA 864 - summarised in [Corporate Law Bulletin No. 145](http://my.lawlex.com.au/news.asp?id=7233&sp=1" \t "_new)). The approval of the Schemes was subsequently appealed to the Full Court.   The bases of the appeal were that the court did not have power to approve the Schemes as they contained a release of third parties or, alternatively, the Schemes should not have been approved because they contained priority payments to litigation funders and of legal costs incurred by creditors.   The Full Court granted leave to appeal and then ordered the appeal be dismissed as:   * the court did have power to approve a scheme that contained a release of third parties as long as there was a sufficient nexus between the third parties and the scheme; and * the judge did not err in approving the schemes, even though they contained the priority payments, as an intelligent and honest creditor, properly informed, acting alone might have approved the Schemes.   **(b) Facts**   Until March 2008, Opes Prime Stockbroking Limited (OPSL) and Leveraged Capital Pty Ltd (Leveraged Capital) provided stockbroking services to clients. OPSL and Leveraged Capital were also involved in securities lending arrangements, under which they provided finance for their client's share trading activities in exchange for their clients agreeing to transfer title to their securities.    To secure the finance needed, OPSL and Leveraged Capital would on-lend their client's securities to financiers including Australia and New Zealand Banking Group Limited and ANZ Nominees (together ANZ) and Merill Lynch International and Merrill Lynch International (Australia) Limited (together Merrill Lynch). Following the 2007 stock market crash, the Opes Group collapsed and by October 2008 liquidators had been appointed to the Opes Group companies following their creditors resolving that the companies be wound up.   Following the collapse, a number of proceedings were instituted by clients against companies in the Opes Group as well as ANZ and Merrill Lynch. To achieve a 'global settlement' of all the claims, the liquidators promoted the Schemes which had the following relevant characteristics:   * ANZ and Merrill Lynch would contribute $253 million towards a Schemes fund to be distributed between unsecured creditors; * in exchange, the Schemes' creditors would release all claims against the Opes Group companies, ANZ and Merrill Lynch; and * certain priority payments would be made to cover creditor's legal costs and payments due to litigation funders incurred by bringing the proceedings which were already on foot.   The Schemes were approved, without amendment, by Finkelstein J on 4 August 2009. The approval of the Schemes was then appealed by one of the creditors of the Schemes' companies, Mr Fowler (Fowler).   The bases of Fowler's appeal were that the court did not have power to approve the Schemes as they contained a release of third parties or, alternatively, the judge erred in approving the Schemes as they contained priority payments of creditor's legal costs and to litigation funders.   **(c) Decision**   **(i) Power of the court to approve a scheme involving a release of third parties**   Section 411 of the Corporations Acts allows a court to approve an arrangement or compromise between a company and its creditors. Fowler argued that the third party release contained in the Schemes extinguished a right belonging to the creditors in some capacity other than in their capacity as creditors of the Schemes' companies.   The court found that 'doubtless there are limitations on the extent to which a scheme of arrangement . can purport to affect property of the creditor that has no connection with the company' (at [66]) however it is 'permissible to incorporate in a scheme of arrangement an involvement or participation by an outsider' so long as there is an element of 'give and take, such that the creditors receive something in return for the benefit conferred on a third party' (at [69]).   The court found that the creditors would receive significant benefits from the release of the third parties, in the form of their substantial contribution into the Schemes' fund, and that there was an adequate nexus between the release and the relationship between creditor and company for the Schemes to have been validly approved.   **(ii) Priority payments to litigation funders and litigation costs**   The liquidator's reasoning behind making priority payments of creditor's legal costs and to litigation funders was to put those creditors who had commenced proceedings in the same position as all the other creditors. Fowler claimed that this priority distribution was unfair.   The court considered that whether the priority payments were unfair amounted to a 'matter of the exercise of discretion' for the primary judge. Further, there was no rule of law which required funds to be distributed under the Schemes pari passu.   The court found that 'it was open to his Honour to conclude, in the light of the majority of creditors who voted in favour of the Schemes, an intelligent and honest creditor, properly informed, acting along, might approve the Schemes' as the 'reasonableness and fairness of a scheme is best judged by the creditors' (at [79]).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h5)  **5.14 Trust property out of bounds in a distribution under a UK Part 26 Scheme of Arrangement**  (By Ben Petrie, Clayton Utz)  In re Lehman Brothers International (Europe) (in administration); in re the Insolvency Act 1986; in re the Companies Act 2006 (No 2) [2009] EWHC 2141 (Ch), High Court of Justice, Chancery Division, Companies Court, Mr Justice Blackburne, 21 August 2009   The full text of this judgment is available at:  [http://www.bailii.org/ew/cases/EWHC/Ch/2009/2141.rtf](http://www.bailii.org/ew/cases/EWHC/Ch/2009/2141.rtf" \t "_new)   **(a) Summary**   The UK's High Court of Justice considers whether it has jurisdiction to sanction a scheme of arrangement under Part 26 of the Companies Act 2006 that would bind dissentients and enable the company to distribute property held by it on trust.   **(b) Facts**   **(i) The difficulty of dealing with property held on trust**   Before its collapse, Lehman Brothers International (Europe) (LBIE) held significant quantities of assets in trust for its clients.  These assets (i.e. "financial instruments") did not form part of LBIE's general estate. The task of returning those assets to clients was complex for a number of reasons however, including the following:   * the administrators had been to date unable to locate all trust property with certainty; * the administrators were uncertain as to what customers were entitled to the assets; * clients' net positions would be difficult to quantify due to lack of documentation or open contracts, in the context of complex financial transactions; * many beneficiaries were also debtors of LBIE, and it was unclear how set-off would apply or if the company could retain trust property as a lien; and * distributing the property raised the prospect of claims against LBIE for breach of trust where other beneficiaries subsequently lodge a competing claim in respect of the same asset.   **(ii) The proposed solution**   In an attempt to overcome the above difficulties, the administrators proposed a scheme of arrangement said to provide certainty with respect to the pool of persons entitled to the trust property, in addition to ensuring finality in relation to the nature of the entitlement. The scheme would apply only to those who had a pecuniary claim in respect of the trust property ("Scheme Creditors").  Unsecured claimants were therefore not accounted for under the arrangement. In return for releasing LBIE, the scheme supervisors, the administrators and other Scheme Creditors in relation to all claims concerning the trust property, would receive a distribution determined according to a prescribed formula.   Blackburne J noted the question of jurisdiction turned on whether the proposal could be properly regarded as a "compromise or arrangement."  In this regard, the scheme was opposed by the London Investment Banking Association.   **(c) Decision**   Blackburne J sympathised with the administrators and acknowledged the efforts made to resolve the issues. His Honour noted however that, "I must set out the law as I see it, not as I might wish it to be."  The key question was whether the scheme affected the clients intended to be bound by it in their capacity as creditors of LBIE.  Blackburne J held that, insofar as it did not, there was no jurisdiction under Part 26 to force the scheme on those clients who did not assent to it.     The court reasoned that a "compromise or arrangement" could only deal with rights and entitlements of creditors. The position is wholly different in the case of property which is not, and has never formed, part of a company's assets and which is being held on trust for clients as beneficial owners.  As the proposal could not be considered a "compromise or arrangement", Blackburne J held that there was no jurisdiction to sanction the scheme and consequently bind dissentients.  Accordingly, his Honour noted that LBIE is obliged to administer the trust according to its terms, including the return of the property to the clients as beneficiaries, if they so direct.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/146%20October%202009.htm%23h5) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Contributions** |  |  | | |  | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  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