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| **Bulletin No. 148**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1. [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/148%20December%202009.htm#h1)
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I would like to take this opportunity to thank the supporters of the Bulletin - ASIC, ASX and, in particular, our sponsoring law firms listed above. I wish all of our readers an enjoyable Christmas and a happy and prosperous New Year.Professor Ian RamsayEditor  |

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

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| **1.1 APRA consults on enhancements to Basel II Framework** On 21 December 2009, the Australian Prudential Regulation Authority (APRA) released for consultation a discussion paper, accompanied by proposed amendments to relevant prudential standards and prudential practice guides (PPGs), on proposals to enhance the Basel II Framework in Australia. The Basel II Framework is a global capital regime that was introduced for authorised deposit‑taking institutions (ADIs) in Australia on 1 January 2008. The consultation package is a response to measures released in July 2009 by the Basel Committee on Banking Supervision to enhance the Basel II Framework by ensuring that the risks inherent in banks' portfolios relating to trading activities, securitisations and exposures to off-balance sheet vehicles are better reflected in minimum capital requirements, risk management practices and accompanying public disclosures. The proposed changes to prudential standards outlined in APRA's discussion paper include:* higher capital requirements to capture the credit risk of complex trading activities and the introduction of a stressed value-at-risk (VaR) requirement;
* higher risk-weights for so-called 'resecuritisation' exposures to better reflect the risk inherent in these products, and increased credit conversion factors for short-term liquidity facilities provided to off-balance sheet conduits;
* guidance in relation to valuation practices and capture of off-balance sheet and securitisation activities; and
* increased disclosure requirements for securitisations and off-balance sheet exposures.

APRA is also taking the opportunity to propose other amendments to its capital adequacy requirements for ADIs to clarify existing provisions. Subject to industry feedback and international supervisory developments, APRA will release draft reporting standards and forms in the first quarter of 2010 for consultation. APRA intends to issue final prudential standards, PPGs and reporting requirements giving effect to these enhancements in mid 2010. The discussion paper is available on the [APRA](http://www.apra.gov.au/Policy/Proposed-Basel-II-Enhancements-2009.cfm%22%20%5Ct%20%22_new) website.etailed Contents**1.2 SEC approves enhanced disclosure about risk, compensation and corporate governance** On 16 December 2009, the US Securities and Exchange Commission (SEC) approved rules to enhance the information provided to shareholders so they are better able to evaluate the leadership of public companies.Beginning in the upcoming annual reporting and proxy season, the new rules will improve corporate disclosure regarding risk, compensation and corporate governance matters when voting decisions are made.In particular, the new rules require disclosures in proxy and information statements about:* The relationship of a company's compensation policies and practices to risk management.
* The background and qualifications of directors and nominees.
* Legal actions involving a company's executive officers, directors and nominees.
* The consideration of diversity in the process by which candidates for director are considered for nomination.
* Board leadership structure and the board's role in risk oversight.
* Stock and option awards to company executives and directors.
* Potential conflicts of interests of compensation consultants.

The new rules, which will be effective 28 February 2010, also require quicker reporting of shareholder voting results.Specifically, the Commission's approved rules will:**Require disclosure of a company's compensation policies and practices as they relate to the company's risk management:** The SEC approved a rule that would help investors determine whether a company has incentivized excessive or inappropriate risk-taking by employees. Among other things, it would require a narrative disclosure about the company's compensation policies and practices for all employees, not just executive officers, if the compensation policies and practices create risks that are reasonably likely to have a material adverse effect on the company. Smaller reporting companies will not be required to provide the new disclosure.**Enhance information about directors and nominees:** The SEC approved new rules to improve information about directors and nominees for director. The new requirements include for each director and director nominee, disclosure of:* The particular experience, qualifications, attributes or skills that led the company's board to conclude that the person should serve as a director of the company.
* Any directorships at public companies and registered investment companies that each director and director nominee held at any time during the past five years.
* Legal proceedings, such as SEC securities fraud enforcement actions against the director or nominee, going back 10 years, instead of the current 5 years, as well as an expanded list of legal proceedings covered by the rule.

**Disclose how diversity is considered in the director nomination process:** The SEC approved a rule that would require disclosure of whether, and if so how, a nominating committee considers diversity in identifying nominees for director. If the nominating committee or the board has a policy with regard to the consideration of diversity in identifying director nominees, the final rules require disclosure of how this policy is implemented and how the nominating committee or the board assesses the effectiveness of its policy.**Provide information about board leadership structure and the board's role in risk oversight:** The SEC approved rules relating to board leadership structure and the board's role in risk oversight. The rules require disclosure about:* A company's board leadership structure, including whether the company has combined or separated the chief executive officer and chairman position, and why the company believes its structure is the most appropriate for the company at the time of the filing.
* In certain circumstances, whether and why a company has a lead independent director and the specific role of such director.
* The extent of the board's role in the risk oversight of the company.

**Require quicker reporting of voting results:** The SEC approved amendments to Form 8-K that would require companies to disclose the results of a shareholder vote within four business days after the end of the meeting at which the vote was held. This replaces the requirement to disclose voting results in Forms 10-K and 10-Q, which often are filed months after the relevant meeting.**Revise the summary compensation table:** The SEC approved revisions to the reporting of stock and option awards in the Summary Compensation Table and the Director Compensation Table to better reflect the compensation committees' decisions with regard to these awards.* The amended rule requires companies to report the value of options when they are awarded to executives (the aggregate grant date fair value), instead of the current requirement to report the annual accounting charge.
* A special instruction addresses performance based awards to address concerns that the new rule might discourage use of these awards.

**Enhance disclosure about compensation consultants:** The SEC approved rules requiring disclosure about the fees paid to compensation consultants and their affiliates in certain circumstances. This is intended to provide investors with information to help them better assess the potential conflicts of interest a compensation consultant may have in recommending executive compensation. The final rules are consistent with the rule proposal, but include exceptions for circumstances that should not raise the potential conflicts of interest.Further information is available on the [SEC](http://www.sec.gov/rules/final/2009/33-9089.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.3 Superannuation review proposals** On 14 December 2009, the Australian Superannuation System Review released its preliminary report titled 'Clearer Super Choices: Matching Governance Solutions' following phase one (Governance) of its review of Australia's superannuation system. The preliminary report:* outlines key themes emerging in the Panel's work to date;
* proposes a new member-oriented model for super;
* gives a preliminary response to selected governance topics; and
* identifies governance issues that it has decided not to pursue, including: government-directed investing; UN Principles for Responsible Investment and stock lending.

The Panel also released its Phase Three: Structure (including SMSFs) - Issues Paper. The closing date for submissions for this third phase is 19 February 2010.  The Review is being conducted in three phases: Governance, Operation and Efficiency and Structure. The final report (encompassing all three phases) will be delivered to the Government by 30 June 2010.  The report and the issues paper are available on the [Super System Review](http://www.supersystemreview.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents**1.4 Product rationalisation of managed investment schemes and life insurance products - Proposals paper**On 14 December 2009, the Australian Treasury published a paper titled 'Product Rationalisation of Managed Investment Schemes and Life Insurance Products'. The purpose of the paper is to serve as the basis for publicly consulting stakeholders about a proposed product rationalisation framework for managed investment schemes and life insurance products. Product rationalisation is a process of converting or consolidating products of a similar nature into a single product with equivalent features and benefits. Its main purpose in this context is to remove outdated, so-called 'legacy' products by transferring investors into newer, more efficient products.The proposed product rationalisation framework includes specific mechanisms for rationalising legacy products in managed investments and life insurance, and seeks relevant comments from the public on the framework and the proposed mechanisms. Interested parties are invited to make written submissions that address, but need not be limited by, the issues and questions raised in this paper. The proposals paper is available on the [Treasury](http://www.treasury.gov.au/documents/1694/PDF/Product_Rationalisation_Proposals_Paper.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.5 CEBS draft guidelines on concentration risk**On 11 December 2009, the Committee of European Banking Supervisors (CEBS) published its draft revised guidelines on aspects of the management of concentration risk under the supervisory review process. The consultation is open to all interested parties, including supervised institutions and other market participants.The draft revised guidelines update the Guidelines on technical aspects of the management of concentration risk under the supervisory review process published on 14 December 2006 and complement the principles set out in the 'CEBS's Guidelines on the Application of the Supervisory Review Process' (GL03).Building upon the lessons drawn from the financial crisis, CEBS's draft revised guidelines follow a holistic approach which aims at ensuring sound overall concentration risk management, meaning that institutions are expected to identify and assess all aspects of concentration risk, moving further away from the traditional analysis related only to credit risk.  In the draft revised guidelines CEBS is taking a broader approach to concentration risk management and suggests that it is not sufficient to analyse concentration risk only within a risk type (intra-risk analysis), but that analysis of concentration risk across risk types (inter-risk analysis) is also necessary, including credit, market, operational and liquidity risks.The guidelines set out in the paper build upon CEBS's Guidelines on the Application of the Supervisory Review Process under Pillar 2 and should be read together with CEBS's Guidelines on the Revised Large Exposures Regime', and CEBS's High level principles for risk management. The draft guidelines are available on the [CEBS](http://www.c-ebs.org/documents/Publications/Consultation-papers/2009/CP31/CP31.aspx%22%20%5Ct%20%22_new) website.etailed Contents**1.6 Best practice guide to the use of fit and proper standards in financial institutions** On 11 December 2009, the Emerging Markets Committee (EMC) of the International Organization of Securities Commissions (IOSCO) published a report titled "Fit and Proper Assessment - Best Practice Final Report". The publication of the report follows a decision to prepare a guide to best practices with the objective of reducing the risk that responsible persons of regulated institutions are not fit and proper for their roles. The EMC believes that the maintenance of fit and proper standards is essential to ensuring that business activities in the financial sector are conducted with high standards of market practice and integrity.  The best practices are intended to support the members of IOSCO in ensuring that financial institutions are subject to adequate regulations and supervision and that competent authorities take necessary legal or regulatory measures. The fit and proper assessment is both an initial test undertaken during consideration of an application for licensing or authorization, and also a continuing and cumulative test which takes into account the ongoing conduct of business and the history of compliance with all applicable laws, regulation and codes.  The best practices are a framework of minimum voluntary standards for sound supervisory practices and are considered universally applicable. National authorities are free to adopt supplementary measures that they deem necessary to achieve effective supervision in their jurisdiction. The best practices may be read in conjunction with relevant international agreements and national regulations. The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD312.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.7 US House of Representatives passes financial reform legislation**On 11 December 2009, the US House of Representatives approved new legislation to modernize America's financial rules in response to the economic crisis. The Wall Street Reform and Consumer Protection Act (HR 4173) was passed by a vote of 223-202. The legislation still requires the approval of the US Senate.  The Wall Street Reform and Consumer Protection Act: * Creates the Consumer Financial Protection Agency (CFPA), a new, independent federal agency devoted to protecting Americans from unfair and abusive financial products and services.
* Creates a council of regulators that will identify financial firms that are so large, interconnected, or risky that their collapse would put the entire financial system at risk. These systemically risky firms will be subject to increased oversight, standards, and regulation.
* Establishes an orderly process for shutting down large, failing financial institutions like AIG or Lehman Brothers in a way that protects taxpayers and prevents contagion to the rest of the financial system.
* Gives shareholders a "say on pay" - an advisory vote on pay practices including executive compensation and golden parachutes. It also enables regulators to ban inappropriate or imprudently risky compensation practices, and it requires financial firms to disclose incentive-based compensation structures.
* Strengthens the SEC's powers so that it can better protect investors and regulate the US securities markets.
* Regulates, for the first time, the US $600 trillion over-the-counter (OTC) derivatives marketplace. Under the bill, all standardized swap transactions between dealers and "major swap participants" would have to be cleared and traded on an exchange or electronic platform. The bill defines a major swap participant as anyone that maintains a substantial net position in swaps, exclusive of hedging for commercial risk, or whose positions create such significant exposure to others that it requires monitoring.
* Incorporates the mortgage reform and anti-predatory lending bill the House passed earlier this year. The legislation outlaws many of the industry practices that marked the subprime lending boom.  It establishes a standard for all home loans: institutions must ensure that borrowers can repay the loans they are sold.
* Requires the registration of hedge funds and their advisors. This bill requires almost all advisers to private pools of capital to register with the SEC, and they will be subject to systemic risk regulation by the Financial Stability regulator.

Further information is available on the [House Committee of Financial Services](http://financialservices.house.gov/Key_Issues/Financial_Regulatory_Reform/Financial_Regulatory_Reform.html%22%20%5Ct%20%22_new) website.      etailed Contents**1.8 Report on financial sector failures** On 10 December 2009, the UK Treasury published a discussion document on possible international options to reduce the cost to taxpayers of financial sector failures. "Risk, reward and responsibility: the financial sector and society" is a contribution to the international debate on the future of the global financial sector.  The document highlights the importance of the financial sector to the UK economy alongside the risks it poses to society. Whilst some risk-taking is inherent in financial sector operations, the recent financial crisis has shown the high cost to taxpayers when risk-taking becomes excessive. The document considers ways in which the financial sector might contribute to the potential costs of any residual risks it poses to taxpayers and to broader social objectives.  The report is available on the [UK Treasury](http://www.hm-treasury.gov.uk/d/fin_finsectorandsociety.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.9 ASX Corporate Governance Council recent work program communiqué**On 7 December 2009, the ASX Corporate Governance Council (Council) published a communiqué on its recent work program. **(a) Recent developments in corporate governance** The Council has sought to provide guidance on extending the 'Corporate Governance Principles and Recommendations' to address issues raised through the public consultation processes of the Corporations and Markets Advisory Committee (CAMAC) and the Productivity Commission.The following published reports and discussion drafts have been reviewed by the Council. The Council has also reviewed correspondence from Government representatives and stakeholder groups, which has contributed significantly to the views and discussion considered by the Council.1. CAMAC's 'Diversity on Boards of Directors' (March 2009). The report addressed the issue of women on boards in the context of diversity, outlining the role and structure of boards, the current state of diversity, ways to promote an environment conducive to diversity, and ways to assist in developing a broader pool of skilled and experienced candidates.2. CAMAC's 'Aspects of Market Integrity' (June 2009). The report addressed topical market issues including directors entering into margin loans and reporting on any such arrangements, trading by company directors in 'blackout' periods, spreading false or misleading information, and corporate briefings to analysts.3. The Productivity Commission's 'Executive Remuneration in Australia' (discussion draft, September 2009). The report addressed areas of concern in executive remuneration, including avoiding conflicts of interests, providing enhanced disclosure, and improving board accountability and shareholder engagement.Each of these reports outlined a role for the Council.Following consideration of the above matters the Council proposes to make the following changes to its principles and recommendations with an expected implementation date from 1 July 2010: **(b) Diversity*** The Corporate Governance Principles and Recommendations will be expanded to include a new recommendation requiring each listed entity (on an "if not, why not?" basis) to establish a diversity policy that includes measurable objectives relating to gender as set by the board of the entity. The policy must be disclosed to the market in full or in summary.
* Another new recommendation will require each listed entity to disclose in its annual report (on an "if not, why not?" basis) its achievement against the gender objectives set by the board of the entity.
* A further new recommendation will require each listed entity to disclose in its annual report (on an "if not, why not?" basis) the proportion of women employees in the whole organisation, in senior management and on the board.
* Changes will be made to the existing commentary for Recommendation 2.4 to encourage the nomination committees of listed entities to include in their charters a requirement to continuously review the proportion of women at all levels in the company. New commentary will highlight that it is the responsibility of the nomination committee to address strategies on board gender diversity and diversity in general.
* Commentary for existing Recommendation 2.5 will be amended to require that the performance review of the board include consideration of diversity criteria in addition to skills. And boards will be required to disclose what skills and diversity criteria they look for in any new board appointment.

**(c) Trading by company directors in 'blackout' periods*** Council will assess the implications for the Corporate Governance Principles and Recommendations after ASX's proposed listing rule changes requiring entities to adopt and disclose a trading policy, including trading restrictions and clearance procedures, on trading in the entity's securities by directors and other key management personnel (announced on 4 December 2009) are finalised.

**(d) Corporate briefings to analysts*** Principle 6 of the Corporate Governance Principles and Recommendations concerns the rights of shareholders. It will be amended to include in Box 6.1 ('using electronic communications effectively') guidance that companies should keep a summary of topics discussed at group briefings with investors and analysts, including a list of those present, and the time and the place of the meeting.
* In addition, where possible, particularly in the case of results announcements, entities will be encouraged to arrange for advance notification of group briefings and make them widely accessible, including by the use of internet web casting and conference calls.

**(e) Executive remuneration*** Council proposes that the existing suggested composition of the remuneration committee in the commentary to Recommendation 8.1 - namely that the remuneration committee be comprised of a majority of independent directors, be chaired by an independent director and have at least three members - be elevated to an "if not, why not?" recommendation.
* ASX has advised publicly that it intends to amend its listing rules for entities in the ASX 300 consistent with the approach that the Council plans to adopt for all listed entities (above). Larger listed entities (in the top-300) will be required by an ASX listing rule to adopt the same remuneration committee composition as that recommended by the Council for all, including smaller, listed entities.
* The ultimate changes to the Council's principles and recommendations on remuneration will depend on the final recommendations of the Productivity Commission and the extent to which they are adopted by the Government.

**(f) Proposed timetable for implementation of amendments**Council expects to provide an exposure draft of the proposed changes to the Corporate Governance Principles and Recommendations for public consultation in early 2010. The anticipated implementation date is the financial year commencing 1 July 2010. It is expected that a period for transitioning to the new arrangements will also be provided.etailed Contents**1.10 OECD sets out framework for overhaul of financial regulation** On 4 December 2009, the Organization for Economic Co-Operation and Development (OECD) established a set of key principles to guide financial policy makers as they look to fundamental reform that will achieve strong, resilient financial systems that play their part in driving economic growth. Among the issues they address are the need for increased transparency, more effective surveillance and greater accountability to the public. According to the OECO, increasing transparency is key. The complexity and opaqueness of products made risk assessment difficult for firms and investors and hindered market transparency, a major cause of the crisis. The principles call for domestic and international efforts to ensure that comprehensive, relevant, up-to-date and internationally comparable statistics and indicators are available. Governmental authorities should have the legal powers to compel the collection and dissemination of data. Surveillance and analysis of the financial system should be strengthened, involving close cooperation among governments. Market failure analysis should be carried out to assess the efficiency of the system and understand evolving problems. The principles also underline the need for greater accountability of governments. Governmental authorities, including regulators, should publish annual reports that give an overview of developments in the financial system, identify key risks and explain how they are addressing them. The principles are available on the [OECD](http://www.oecd.org/dataoecd/18/53/44187223.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.11 Improving Australia's corporate reporting framework** On 4 December 2009, the Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, released draft reforms aimed at improving Australia's corporate reporting framework. The key measures include: * reducing the regulatory burden on companies limited by guarantee (which typically have a not-for-profit purpose), by introducing a three tiered differential reporting framework;
* streamlining parent-entity reporting;
* providing greater flexibility for companies to pay dividends, by replacing the profits test with a solvency-type test; and
* allowing companies to more easily change their year-end date to minimise the burden on companies and their auditors during peak reporting periods.

The reforms will also implement refinements to the regulatory framework, including: * improving disclosure of non-financial information in the directors' report;
* protecting solicitors' representation letters from disclosure to enable auditors to properly verify a company's contingent liabilities;
* refining the statement of compliance with International Financial Reporting Standards contained in the directors' declaration; and
* clarifying the circumstances in which a company can cancel its share capital.

The reforms are being implemented through the Corporations Amendment (Corporate Reporting Reform) Bill 2010, and the accompanying Regulations. The closing date for submissions is 3 February 2010.Further information is available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1677" \t "_new) website.etailed Contents**1.12 Consultation on market supervision reforms** On 2 December 2009, the Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP, released a consultation paper and draft legislation facilitating reforms to the supervision of Australia's financial markets.  This follows on from the announcement on 24 August 2009 by the Treasurer and Minister Bowen that the Australian Securities and Investments Commission (ASIC) would take over the supervision of real-time trading on all of Australia's domestic licensed markets. The preparation of legislation is the first step towards implementing that change.  The Government is consulting on a new system for rule making and enforcement of those rules by ASIC in relation to domestic licensed financial markets in Australia.  Key elements of the exposure draft of the Bill are: * The removal of the obligation on domestic financial market operators to supervise their financial markets. Instead, market operators will be responsible for the operation of their markets and the supervision and enforcement of their operating rules, which relate to operational issues.
* The provision of a new type of rule called a 'market integrity rule' which will be made and enforced by ASIC.
* The establishment of an infringement notice regime in relation to a contravention of the market integrity rules.

The consultation paper seeks comments on:  * the proposed means of ASIC recovering the cost of supervision;
* ASIC establishing a disciplinary panel made up of financial industry experts;
* providing ASIC wider powers to give directions; and
* proposed transitional arrangements.

The exposure draft of the Bill and the consultation paper are available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1673" \t "_new) website.etailed Contents**1.13 Proposed reforms to the UK Corporate Governance Code**  On 1 December 2009, the UK Financial Reporting Council (FRC) launched a consultation on its proposals to reform the UK's Corporate Governance Code (formerly the Combined Code). The proposals take into account those lessons of the recent financial crisis that are relevant to all companies. The main proposals are as follows:* To enhance accountability to shareholders, the FRC proposes either the annual re-election of the chairman or of the whole board.
* To ensure the board is well balanced and challenging, new principles are put forward on the leadership of the chairman, the roles, skills and independence of the non-executive directors and their level of time commitment.
* To enhance the board's performance and awareness of its strengths and weaknesses, board evaluation reviews should be externally facilitated at least every three years and the chairman should hold regular development reviews with each director.
* To improve risk management, new principles are proposed on the board's responsibility for the handling of risk.
* Proposals are also made to emphasise that performance-related pay should be aligned to the long-term interests of the company and its policy on risk.

The Code, which was formerly known as the Combined Code, will be renamed 'The UK Corporate Governance Code' to avoid confusion among overseas investors. Consultation on the draft revised Code ends on 5 March 2010. Subject to the outcome of consultation, and the necessary changes to the Listing Rules, the FRC intends that the revised Code should apply to all listed companies with a Premium Listing for financial years beginning on or after 29 June 2010. In response to the Government's request that the FRC take responsibility for a stewardship code for institutional investors as recommended by Sir David Walker, the FRC will carry out a separate consultation designed to ensure it can be operated effectively. The '2009 Review of the Combined Code' final report is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/2009%20Review%20of%20the%20Combined%20Code%20Final%20Report.pdf%22%20%5Ct%20%22_new) website. The consultation paper is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/Consultation%20on%20the%20Revised%20Corporate%20Governance%20Code.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.14 APRA finalises position on remuneration requirements**  On 30 November 2009, the Australian Prudential Regulation Authority (APRA) released its prudential requirements on remuneration for authorised deposit‑taking institutions (ADIs) and general and life insurance companies.  APRA participated in the Financial Stability Board's initiative on executive remuneration, which culminated in G20 endorsement in April this year of its Principles for Sound Compensation Practices. APRA's approach follows these principles. The relevant industry governance standards (APS 510, GPS 510 and LPS 510) and an associated prudential practice guide (PPG 511) have now been published, along with a response paper to the second round of consultation that explains further modifications made in response to submissions and other feedback. APRA‑regulated institutions will be expected to conform to the intent and the substance of the remuneration requirements. Where APRA judges that the remuneration arrangements of a regulated institution are likely to encourage excessive risk‑taking, APRA has several supervisory options, including the power to impose additional capital requirements on that institution. The revised governance standards will come into effect on 1 April 2010. By this date, APRA requires that the Board Remuneration Committee, with appropriate composition and charter, will be established and a suitable Remuneration Policy will be in place. APRA expects regulated institutions to use the period before 1 April 2010 to begin the transition for existing remuneration arrangements that would not meet the revised standards. The response paper, the prudential standards and the prudential practice guide can be found on the [APRA](http://www.apra.gov.au/Policy/remuneration-governance-extensions-November-2009.cfm%22%20%5Ct%20%22_new) website.etailed Contents**1.15 Walker review of corporate governance in financial institutions** On 26 November 2009, The Walker Report titled "A review of corporate governance in UK banks and other financial industry entities: Final recommendations" was published.  In February 2009, Sir David Walker was asked by the UK Prime Minister to review corporate governance in UK banks in the light of the experience of critical loss and failure throughout the banking system. The terms of reference were as follows: "To examine corporate governance in the UK banking industry and make recommendations, including in the following areas: the effectiveness of risk management at board level, including the incentives in remuneration policy to manage risk effectively; the balance of skills, experience and independence required on the boards of UK banking institutions; the effectiveness of board practices and the performance of audit, risk, remuneration and nomination committees; the role of institutional shareholders in engaging effectively with companies and monitoring of boards; and whether the UK approach is consistent with international practice and how national and international best practice can be promulgated." The terms of reference were subsequently extended so that the Review should also identify where its recommendations are applicable to other financial institutions. The recommendations in the report are listed below. On 26 November 2009, the Chancellor of the Exchequer, Alistair Darling, stated that the Government accepts all of the recommendations and will take steps to implement them as soon as possible. **(a) Board size, composition and qualification** **Recommendation 1**To ensure that NEDs have the knowledge and understanding of the business to enable them to contribute effectively, a bank or other financial institution (BOFI) board should provide thematic business awareness sessions on a regular basis and each NED should be provided with a substantive personalised approach to induction, training and development to be reviewed annually with the chairman. Appropriate provision should be made similarly for executive board members in business areas other than those for which they have direct responsibility. **Recommendation 2** A BOFI board should provide for dedicated support for NEDs on any matter relevant to the business on which they require advice separately from or additional to that available in the normal board process. **Recommendation 3** The overall time commitment of NEDs as a group on a FTSE 100-listed bank or life assurance company board should be greater than has been normal in the past. How this is achieved in particular board situations will depend on the composition of the NED group on the board. For several NEDs, a minimum expected time commitment of 30 to 36 days in a major bank board should be clearly indicated in letters of appointment and will in some cases limit the capacity of an individual NED to retain or assume board responsibilities elsewhere. For any prospective director where so substantial a time commitment is not envisaged or practicable, the letter of appointment should specify the time commitment agreed between the individual and the board. The terms of letters of appointment should be available to shareholders on request.**Recommendation 4**The FSA's ongoing supervisory process should give closer attention to the overall balance of the board in relation to the risk strategy of the business, taking into account the experience, behavioural and other qualities of individual directors and their access to fully adequate induction and development programmes. Such programmes should be designed to assure a sufficient continuing level of financial industry awareness so that NEDs are equipped to engage proactively in BOFI board deliberation, above all on risk strategy. **Recommendation 5** The FSA's interview process for NEDs proposed for FTSE 100-listed bank and life assurance company boards should involve questioning and assessment by one or more (retired or otherwise non-conflicted) senior advisers with relevant industry experience at or close to board level of a similarly large and complex entity who might be engaged by the FSA for the purpose, possibly on a part-time panel basis.**(b) Functioning of the board and evaluation of performance** **Recommendation 6** As part of their role as members of the unitary board of a BOFI, NEDs should be ready, able and encouraged to challenge and test proposals on strategy put forward by the executive. They should satisfy themselves that board discussion and decision-taking on risk matters is based on accurate and appropriately comprehensive information and draws, as far as they believe it to be relevant or necessary, on external analysis and input.**Recommendation 7** The chairman of a major bank should be expected to commit a substantial proportion of his or her time, probably around two-thirds, to the business of the entity, with clear understanding from the outset that, in the event of need, the bank chairmanship role would have priority over any other business time commitment. Depending on the balance and nature of their business, the required time commitment should be proportionately less for the chairman of a less complex or smaller bank, insurance or fund management entity. **Recommendation 8** The chairman of a BOFI board should bring a combination of relevant financial industry experience and a track record of successful leadership capability in a significant board position. Where this desirable combination is only incompletely achievable at the selection phase, and provided that there is an adequate balance of relevant financial industry experience among other board members, the board should give particular weight to convincing leadership experience since financial industry experience without established leadership skills in a chairman is unlikely to suffice.An appropriately intensive induction and continuing business awareness programme should be provided for the chairman to ensure that he or she is kept well informed and abreast of significant new developments in the business. **Recommendation 9** The chairman is responsible for leadership of the board, ensuring its effectiveness in all aspects of its role and setting its agenda so that fully adequate time is available for substantive discussion on strategic issues. The chairman should facilitate, encourage and expect the informed and critical contribution of the directors in particular in discussion and decision-taking on matters of risk and strategy and should promote effective communication between executive and non-executive directors. The chairman is responsible for ensuring that the directors receive all information that is relevant to discharge of their obligations in accurate, timely and clear form. **Recommendation 10** The chairman of a BOFI board should be proposed for election on an annual basis. The board should keep under review the possibility of transitioning to annual election of all board members.  **Recommendation 11** The role of the senior independent director (SID) should be to provide a sounding board for the chairman, for the evaluation of the chairman and to serve as a trusted intermediary for the NEDs, when necessary. The SID should be accessible to shareholders in the event that communication with the chairman becomes difficult or inappropriate. **Recommendation 12** The board should undertake a formal and rigorous evaluation of its performance, and that of committees of the board, with external facilitation of the process every second or third year. The evaluation statement should either be included as a dedicated section of the chairman's statement or as a separate section of the annual report, signed by the chairman. Where an external facilitator is used, this should be indicated in the statement, together with their name and a clear indication of any other business relationships with the company and that the board is satisfied that any potential conflict given such other business relationship has been appropriately managed. **Recommendation 13** The evaluation statement on board performance and governance should confirm that a rigorous evaluation process has been undertaken and describe the process for identifying the skills and experience required to address and challenge adequately key risks and decisions that confront, or may confront, the board. The statement should provide such meaningful, high-level information as the board considers necessary to assist shareholders' understanding of the main features of the process. It should also provide an indication of the nature and extent of communication with major shareholders and confirmation that the board were fully apprised of views indicated by shareholders in the course of such dialogue.**(c) The role of institutional shareholders: communication and engagement** **Recommendation 14**Boards should ensure that they are made aware of any material cumulative changes in the share register as soon as possible, understand as far as possible the reasons for such changes and satisfy themselves that they have taken steps, if any are required, to respond. Where material cumulative changes take place over a short period, the FSA should be promptly informed. **Recommendation 15** Deleted by the Review. **Recommendation 16** The remit of the FRC should be explicitly extended to cover the development and encouragement of adherence to principles of best practice in stewardship by institutional investors and fund managers. This new role should be clarified by separating the content of the present Combined Code, which might be described as the Corporate Governance Code, from what might most appropriately be described as the Stewardship Code. **Recommendation 17** The Code on the Responsibilities of Institutional Investors, prepared by the Institutional Shareholders' Committee, should be ratified by the FRC and become the Stewardship Code. By virtue of the independence and authority of the FRC, this transition to sponsorship by the FRC should give materially greater weight to the Stewardship Code. Its status should be akin to that of the Combined Code as a statement of best practice, with observance on a similar "comply or explain" basis. **Recommendation 18** The FRC should oversee a review of the Stewardship Code on a regular basis, in close consultation with institutional shareholders, fund managers and other interested parties, to ensure its continuing fitness for purpose in the light of experience and make proposals for any appropriate adaptation. **Recommendation 18B** All fund managers that indicate commitment to engagement should participate in a survey to monitor adherence to the Stewardship Code. Arrangements should be put in place under the guidance of the FRC for appropriately independent oversight of this monitoring process which should publish an engagement survey on an annual basis. **Recommendation 19** Fund managers and other institutions authorised by the FSA to undertake investment business should signify on their websites or in another accessible form whether they commit to the Stewardship Code. Disclosure of such commitment should be accompanied by an indication whether their mandates from life assurance, pension fund and other major clients normally include provisions in support of engagement activity and of their engagement policies on discharge of the responsibilities set out in the Stewardship Code. Where a fund manager or institutional investor is not ready to commit and to report in this sense, it should provide, similarly on the website, a clear explanation of its alternative business model and the reasons for the position it is taking. **Recommendation 20** The FSA should require institutions that are authorised to manage assets for others to disclose clearly on their websites or in other accessible form the nature of their commitment to the Stewardship Code or their alternative business model. **Recommendation 20B** In view of the importance of facilitating enhanced engagement between shareholders and investee companies, the FSA, in consultation with the FRC and Takeover Panel, should keep under review the adequacy of what is in effect "safe harbour" interpretation and guidance that has been provided as a means of minimising regulatory impediments to such engagement.**Recommendation 21** Institutional investors and fund managers should actively seek opportunities for collective engagement where this has the potential to enhance their ownership influence in promoting sustainable improvement in the performance of their investee companies. Initiative should be taken by the FRC and major UK fund managers and institutional investors to invite potentially interested major foreign institutional investors, such as sovereign wealth funds, public sector pension funds and endowments, to commit to the Stewardship Code and its provisions on collective engagement. **Recommendation 22** Voting powers should be exercised, fund managers and other institutional investors should disclose their voting record, and their policies in respect of voting should be described in statements on their websites or in another publicly accessible form. **(d) Governance of risk****Recommendation 23**The board of a FTSE 100-listed bank or life insurance company should establish a board risk committee separately from the audit committee. The board risk committee should have responsibility for oversight and advice to the board on the current risk exposures of the entity and future risk strategy, including strategy for capital and liquidity management, and the embedding and maintenance throughout the entity of a supportive culture in relation to the management of risk alongside established prescriptive rules and procedures.In preparing advice to the board on its overall risk appetite, tolerance and strategy, the board risk committee should ensure that account has been taken of the current and prospective macroeconomic and financial environment drawing on financial stability assessments such as those published by the Bank of England, the FSA and other authoritative sources that may be relevant for the risk policies of the firm. **Recommendation 24**In support of board-level risk governance, a BOFI board should be served by a CRO who should participate in the risk management and oversight process at the highest level on an enterprise-wide basis and have a status of total independence from individual business units.Alongside an internal reporting line to the CEO or CFO, the CRO should report to the board risk committee, with direct access to the chairman of the committee in the event of need. The tenure and independence of the CRO should be underpinned by a provision that removal from office would require the prior agreement of the board. The remuneration of the CRO should be subject to approval by the chairman or chairman of the board remuneration committee. **Recommendation 25** The board risk committee should be attentive to the potential added value from seeking external input to its work as a means of taking full account of relevant experience elsewhere and in challenging its analysis and assessment. **Recommendation 26** In respect of a proposed strategic transaction involving acquisition or disposal, it should as a matter of good practice be for the board risk committee in advising the board to ensure that a due diligence appraisal of the proposition is undertaken, focussing in particular on risk aspects and implications for the risk appetite and tolerance of the entity, drawing on independent external advice where appropriate and available, before the board takes a decision whether to proceed. **Recommendation 27** The board risk committee (or board) risk report should be included as a separate report within the annual report and accounts. The report should describe thematically the strategy of the entity in a risk management context, including information on the key risk exposures inherent in the strategy, the associated risk appetite and tolerance and how the actual risk appetite is assessed over time covering both banking and trading book exposures and the effectiveness of the risk management process over such exposures. The report should also provide at least high-level information on the scope and outcome of the stress-testing programme. An indication should be given of the membership of the committee, of the frequency of its meetings, whether external advice was taken and, if so, its source.**(e) Remuneration****Recommendation 28**The remuneration committee should have a sufficient understanding of the company's approach to pay and employment conditions to ensure that it is adopting a coherent approach to remuneration in respect of all employees. The terms of reference of the remuneration committee should accordingly include responsibility for setting the over-arching principles and parameters of remuneration policy on a firm-wide basis.**Recommendation 29**The terms of reference of the remuneration committee should be extended to oversight of remuneration policy and outcomes in respect of all "high end" employees. **Recommendation 30** In relation to "high end" employees, the remuneration committee report should confirm that the committee is satisfied with the way in which performance objectives and risk adjustments are reflected in the compensation structures for this group and explain the principles underlying the performance objectives, risk adjustments and the related compensation structure if these differ from those for executive board members. **Recommendation 31** For FTSE 100-listed banks and comparable unlisted entities such as the largest building societies, the remuneration committee report for the 2010 year of account and thereafter should disclose in bands the number of "high end" employees, including executive board members, whose total expected remuneration in respect of the reported year is in a range of £1 million to £2.5 million, in a range of £2.5 million to £5 million and in £5 million bands thereafter and, within each band, the main elements of salary, cash bonus, deferred shares, performance-related long-term awards and pension contribution. Such disclosures should be accompanied by an indication to the extent possible of the areas of business activity to which these higher bands of remuneration relate. **Recommendation 32** FSA-authorised banks that are UK-domiciled subsidiaries of non-resident entities should disclose for the 2010 year of account and thereafter details of total remuneration bands (including remuneration received outside the UK) and the principal elements within such remuneration for their "high end" employees on a comparable basis and timescale to that required for UK-listed banks. **Recommendation 33** Deferral of incentive payments should provide the primary risk adjustment mechanism to align rewards with sustainable performance for executive board members and "high end" employees in a BOFI included within the scope of the FSA Remuneration Code. Incentives should be balanced so that at least one-half of variable remuneration offered in respect of a financial year is in the form of a long-term incentive scheme with vesting subject to a performance condition with half of the award vesting after not less than three years and of the remainder after five years. Short-term bonus awards should be paid over a three-year period with not more than one-third in the first year. Clawback should be used as the means to reclaim amounts in circumstances of misstatement and misconduct.  This recommended structure should be incorporated in the FSA Remuneration Code review process next year and the remuneration committee report for 2010 and thereafter should indicate on a "comply or explain" basis the conformity of an entity's "high end" remuneration arrangements with this recommended structure.**Recommendation 34**Executive board members and "high end" employees should be expected to maintain a shareholding or retain a portion of vested awards in an amount in line with their total compensation on a historic or expected basis, to be built up over a period at the discretion of the remuneration committee. Vesting of stock for this group should not normally be accelerated on cessation of employment other than on compassionate grounds. **Recommendation 35** The remuneration committee should seek advice from the board risk committee on specific risk adjustments to be applied to performance objectives set in the context of incentive packages; in the event of any difference of view, appropriate risk adjustments should be decided by the chairman and NEDs on the board. **Recommendation 36** If the non-binding resolution on a remuneration committee report attracts less than 75 per cent of the total votes cast, the chairman of the committee should stand for re-election in the following year irrespective of his or her normal appointment term.**Recommendation 37**The remuneration committee report should state whether any executive board member or "high end" employee has the right or opportunity to receive enhanced benefits, whether while in continued employment or on termination, resignation, retirement or in the wake of any other event such as a change of control, beyond those already disclosed in the directors' remuneration report and whether the committee has exercised its discretion during the year to enhance such benefits either generally or for any member of this group. **Recommendation 38/39** Remuneration consultants should put in place a formal constitution for the professional group that has now been formed, with provision: for independent oversight and review of the remuneration consultants code; that this code and an indication of those committed to it should be lodged on the FRC website; and that all remuneration committees should use the code as the basis for determining the contractual terms of engagement of their advisers; and that the remuneration committee report should indicate the source of consultancy advice and whether the consultant has any other advisory engagement with the company.The report is available on the [UK Treasury](http://www.hm-treasury.gov.uk/walker_review_information.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.16 AICD announcement on board diversity**On 24 November 2009, the Australian Institute of Company Directors (AICD) stated that boards of directors need to be more proactive in taking advantage of the value of diversity. In particular, AICD believes that the current proportion of women on major company boards in Australia - 8.3 per cent of ASX 200 company directors according to the latest EOWA data - is not good enough and needs to be increased.  AICD also believes it should take a leadership role in addressing this issue and announced a range of new measures to help focus on the value of a diverse board and, in particular, to increase the pool of women available for board positions. The aim of the initiative is to achieve a greater representation of women on boards and in senior executive positions. These measures include:* New recommendations for boards to adopt, and report on, diversity policies and goals for the board and senior management;
* Recommendations for greater transparency in board selection processes and reporting;
* A new AICD mentoring program bringing together senior listed company chairmen and emerging women directors;
* A new AICD scholarship program and other educational initiatives;
* Enhanced AICD database and information services for current and aspiring women directors;
* Additional briefings, seminars and other events tailored to the needs of aspiring women directors; and
* A new AICD publication providing guidance for boards and search professionals on board appointments that highlights the advantages of diversity and widening the candidate pool.

Further information is available on the [AICD](http://www.companydirectors.com.au/NR/rdonlyres/0898C42C-267F-4D05-A924-4FBE455158E4/0/AICDTakesActiononBoardDiversity_24November2009.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.17 CEO turnover study**On 26 November 2009, Booz & Company published its annual CEO turnover study. The study - measuring the rates of CEO turnover globally and among the 224 companies comprising the ASX 200 at some stage in 2008 - found 22% of Australian CEOs departed their roles, more than in any other region and the most in the nine-year history of the study.Of the 50 CEO transition events in Australia during 2008, 40% were performance-related - or forced - also a peak for the study and above the level recorded in 2001 at the height of the dot-com crash. Forty-four percent of departures in 2008 were planned (compared to 12% in 2007) and 16% were merger-related (29% in 2007). Financial services and listed property trusts bore the brunt of volatile conditions in Australia, accounting for half of all forced departures during 2008, and 34% of all CEO transitions. Australian findings were in stark contrast to those in North America and Europe, the regions hit first and hardest by the credit crunch. CEO departures in these regions fell by 0.5% and 1.9% respectively. Globally, CEOs in the financial services and energy sectors were in the firing line, with forced departures from these sectors at record highs. The Booz study confirmed the Australian trend emerging in recent years to appoint new CEOs from within, with insiders accounting for 74% of new appointments in Australia in 2008, up from 59% in 2007. For the first time in the history of the study, departing CEOs who had been internal appointments delivered superior shareholder returns over the course of their tenure than external hires - a 1.7% return versus a 14.9% decline respectively. Between 2000 and 2007, departing "outsider" appointments had delivered a cumulative annual shareholder return of 15.3% compared to 10.3% for their "insider" counterparts. Higher CEO turnover coincided with a sharp drop in average shareholder returns delivered by all departing CEOs, down to -2.3% from the record high of 22% in 2007. Perhaps surprisingly, shareholder returns of CEOs who exited following a planned departure in 2008 slumped from 26% in 2007 to -11% in 2008.    Booz found the average tenure of Australian CEOs forced to depart in 2008 increased from 6.0 years to 6.7 years. Among other findings of the global study:* Average global CEO succession at the world's top 2500 listed companies of 14.4% was up slightly from 2007 but below the peak rates of 2005. Planned (7.2%) and forced (5.1%) departures were up, while merger-related turnover (2.2%) was down. Turnover was 14.8% in North America, 15.1% in Europe, 16.9% in Japan and 13.2% elsewhere in Asia.
* Globally, rates of forced departures at financial services and energy companies were up 159% and 107% on their historical averages respectively. Corporate leadership in sectors considered a safe haven in recession - utilities, consumer staples and industrials - proved more stable, with lower turnover rates than the historical average.
* Companies in North America are steering away from the combined Chairman/CEO title, with only 18% of incoming CEOs sharing the Chairman title.
* Compared to the historical rate over the last 11 years, incoming CEOs in 2008 were almost twice as likely to have had previous CEO experience, suggesting Boards continued to value experience in difficult times.

The study is available on the [Booz and Company](http://www.booz.com/media/file/BoozCo_CEO_Succession_Study_2008.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.18 Report of inquiry into financial products and services in Australia** On 23 November 2009, the Parliamentary Joint Committee on Corporations and Financial Services published its report following its inquiry into financial products and services in Australia. The inquiry considered the collapse of Storm Financial and Opes Prime.The committee has made 11 recommendations. These are: **Recommendation 1:** The [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) be amended to explicitly include a fiduciary duty for financial advisers operating under an AFSL, requiring them to place their clients' interests ahead of their own. **Recommendation 2:** The government ensure ASIC is appropriately resourced to perform effective risk-based surveillance of the advice provided by licensees and their authorised representatives. ASIC should also conduct financial advice shadow shopping exercises annually. **Recommendation 3:** The Corporations Act be amended to require advisers to disclose more prominently in marketing material restrictions on the advice they are able to provide consumers and any potential conflicts of interest.  **Recommendation 4:** The government consult with and support industry in developing the most appropriate mechanism by which to cease payments from product manufacturers to financial advisers. **Recommendation 5:** The government consider the implications of making the cost of financial advice tax deductible for consumers as part of its response to the Treasury review into the tax system. **Recommendation 6:** Section 920A of the Corporations Act be amended to provide extended powers for ASIC to ban individuals from the financial services industry. **Recommendation 7:** As part of their licence conditions, ASIC require agribusiness MIS licensees to demonstrate they have sufficient working capital to meet current obligations. **Recommendation 8:** Sections 913B and 915C of the Corporations Act be amended to allow ASIC to deny an application, or suspend or cancel a licence, where there is a reasonable belief that the licensee 'may not comply' with their obligations under the licence. **Recommendation 9:** ASIC immediately begin consultation with the financial services industry on the establishment of an independent, industry-based professional standards board to oversee nomenclature, and competency and conduct standards for financial advisers. **Recommendation 10:** The government investigate the costs and benefits of different models of a statutory last resort compensation fund for investors. **Recommendation 11:** ASIC develop and deliver more effective education activities targeted to groups in the community who are likely to be seeking financial advice for the first time. The committee's report is available on the [APH](http://www.aph.gov.au/Senate/committee/corporations_ctte/fps/report/index.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.19 ICGN publishes revised corporate principles**On 19 November 2009, the International Corporate Governance Network launched its revised Global Corporate Governance Principles. These build on the lessons learned by the ICGN's members through the years since the last version of the Principles were published in 2005, and particularly the lessons learned in the financial crisis.The revised Principles include a number of significant changes:* The central development is a shift from a focus principally on structures to a focus more on culture and behaviours. This is seen most clearly in the board segment: before any discussion about structures and independence, the Principles highlight the need for appropriate board behaviours, and outline what this means in practice.
* The revised Principles include two entirely new sections, responding to the financial crisis. One is on risk management and how ICGN members expect companies to address risk and report publicly on it. The other is on corporate culture, which is a crucial way for companies to create and preserve value and to which the ICGN expects boards to pay close attention. As part of this focus on culture and behaviours, the Principles call on boards and remuneration committees to have some oversight of pay throughout the organisation.
* There is a greater emphasis on the responsibilities of shareholders. Reflecting the ICGN's own response to the crisis, which acknowledged investors' failings as a contributory factor, the revised Principles have a much more developed segment on shareholder responsibilities.

The revised Principles are the ICGN's overarching set of Principles. Under them sit a variety of other best practice guidelines.The Principles are intended to be of general application around the world, irrespective of legislative background or listing rules. As global guidelines, they need to be read with an understanding that local rules and structures may lead to different approaches to these concepts. The ICGN will also seek change to legislation, regulation or guidance in particular markets where it believes that this will be helpful to generating corporate governance improvements and particularly where such change will facilitate dialogue and accountability.Further information is available the [ICGN](http://www.icgn.org/%22%20%5Ct%20%22_new) website.etailed Contents**1.20 IOSCO consults on point of sale disclosure for collective investment schemes**  On 16 November 2009, the International Organization of Securities Commissions (IOSCO) Technical Committee published a consultation report on Principles on Point of Sale Disclosure. The Report proposes a set of principles, for the disclosure of key information relating to collective investment schemes, designed to assist markets and market authorities when considering point of sale disclosure requirements in their respective jurisdictions.  The Report analyzes issues relevant to requiring key information disclosures to retail investors relating to collective investment schemes (CIS) and their distribution prior to the point of sale (POS). It also sets out principles to guide possible regulatory responses. The report does not examine issues relating to the suitability of CIS or similar products and does not purport to describe or address all disclosure obligations of the intermediary (e.g., relating to general information on the intermediary's range of services, the safeguarding of client assets, client categorization or information that needs to be disclosed in the client agreement). Transparency in the market place, particularly disclosure of information to investors, has always been a high priority for regulators in seeking to ensure that markets run efficiently and with integrity. Enhancing POS disclosure, by helping to ensure that investors are able to consider key information about CIS products before they invest, can contribute to this goal. The recent crisis in the financial markets has highlighted the critical role that accurate, understandable and meaningful disclosure can play. This, and other IOSCO projects, can assist regulators in developing a path towards renewed investor trust in both the producers of financial products and the intermediaries that sell them. The Report analyzes in detail the key issues raised by POS disclosure, including: * whether regulatory disclosures are in fact effective in addressing information asymmetries that exist between investors, producers and sellers;
* what constitutes key information;
* how information should be delivered and whether a layered approach should be used;
* what exactly should be understood as delivery;
* at what point in time the information should be delivered;
* use of plain language rather than technical jargon; and
* the format of disclosures.

The proposed principles for disclosure of key information in regard to CIS prior to the point of sale are as follows: **Principle 1** Key information should include disclosures that inform the investor of the fundamental benefits, risks, terms and costs of the product and the remuneration and conflicts associated with the intermediary through which the product is sold.  **Principle 2** Key information should be delivered, or made available, for free, to an investor before the point of sale, so that the investor has the opportunity to consider the information and make an informed decision about whether to invest. **Principle 3** Key information should be delivered or made available in a manner that is appropriate for the target investor. **Principle 4** Disclosure of key information should be in plain language and in a simple, accessible and comparable format to facilitate a meaningful comparison of information disclosed for competing products. **Principle 5** Key information disclosures should be clear, accurate and not misleading to the target investor. Disclosures should be updated on a regular basis.  **Principle 6**  In deciding what key information disclosure to impose on intermediaries and product producers, regulators should consider who has control over the information that is to be disclosed. In addition, the Report's examination of possible disclosure of key information has highlighted the following important points: * No matter what disclosures are mandated, they will not have the intended effect if the investor either does not read and/or understand the information provided. Regulators should therefore consider measures to help improve retail investor education in order to enhance their financial literacy and ability to read investment documentation and make informed investment decisions;
* In general, new POS disclosure requirements should not be imposed without the benefit of consumer testing or assessment to help determine the likely effectiveness of new disclosure requirements; and
* The principles set forth in this report may also be applicable to non-retail investors.

The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD310.pdf%22%20%5Ct%20%22_new) website.           etailed Contents**1.21 ISC code on the responsibilities of institutional investors**On 16 November 2009, the Institutional Shareholders' Committee (ISC) published a new code of responsibility for investors.  The Code sets out best practice with regard to monitoring companies, dialogue with company boards and voting at general meetings. The ISC, which comprises the four leading investor bodies in the UK, believes this is the first formal code for investors to be drawn up at national level. It also sets new standards in terms of disclosure and verification.  The Code is aimed at those institutions that choose to engage with companies as part of their investment strategy. It is voluntary and will operate on a comply-or-explain basis. The Code calls on institutions to state publicly how they apply its principles and disclose what steps they have taken, or intend to take, to verify their compliance.  Firms which comply-or-explain against the Code and provide a link to their policy statement will be listed on the ISC website. The ISC envisages that this list will become an important source in helping inform pension fund trustees and other beneficiaries on managers' approach to engagement. Further information is available on the [ISC](http://www.institutionalshareholderscommittee.org.uk/%22%20%5Ct%20%22_new) website.   etailed Contents**1.22 Credit derivatives paper**The IMF has published a paper titled 'Credit Derivatives: Systemic Risks and Policy Options'. Credit derivative markets are largely unregulated, but calls are increasingly being made for changes to this "hands off" stance, amidst concerns that they helped to fuel the financial crisis, or that they could be a cause of the next one.  The purpose of the paper is to address two basic questions: (i) do credit derivative markets increase systemic risk; and (ii) should they be regulated more closely, and if so, how and to what extent? The paper begins with a basic description of credit derivative markets and recent events, followed by an assessment of their recent association with systemic risk. It then reviews and evaluates some of the authorities' proposed initiatives, and discusses some alternative directions that could be taken. The working paper is available on the [IMF](http://www.imf.org/external/pubs/ft/wp/2009/wp09254.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.23 Regulators and government agencies annual reports** Several regulators and other government agencies with responsibility for corporate law and corporate governance have recently released their annual reports for 2008-2009. They include:* [Australian Accounting Standards Board Annual Report 2008-09](http://www.aasb.com.au/About-the-AASB/AASB-annual-reports.aspx%22%20%5Ct%20%22_new);
* [Australian Auditing and Assurance Standards Board Annual Report 2008-09](http://www.auasb.gov.au/About-the-AUASB/Annual-reports.aspx%22%20%5Ct%20%22_new);
* [Australian Office of Financial Management Annual Report 2008-09](http://www.aofm.gov.au/content/publications/reports/AnnualReports/2008-2009/index.asp%22%20%5Ct%20%22_new);
* [Australian Prudential Regulation Authority Annual Report 2008-09](http://www.apra.gov.au/AboutAPRA/Annual-Report-2009.cfm%22%20%5Ct%20%22_new);
* [Australian Securities and Investments Commission Annual Report 2008-09](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Annual%20reports%22%20%5Ct%20%22_new);
* [Australian Securities Exchange Annual Report 2008-09;](http://www.asx.com.au/about/shareholder/publications.htm%22%20%5Ct%20%22_new)
* [Commonwealth Treasury Annual Report 2008-09](http://www.treasury.gov.au/contentitem.asp?NavId=036&ContentID=1649" \t "_new);
* [Companies Auditors and Liquidators Disciplinary Board Annual Report 2008-09;](http://www.caldb.gov.au/CALDB/CALDBWeb.nsf/byheadline/Annual%2BReports?opendocument" \t "_new)
* [Corporations and Markets Advisory Committee Annual Report 2008-09](http://www.camac.gov.au/CAMAC/camac.nsf/0/4873391D9063AD4ECA256B6C007FFD41?opendocument" \t "_new);
* [Financial Reporting Council Annual Report 2008-09](http://www.frc.gov.au/reports%22%20%5Ct%20%22_new);
* [Insolvency and Trustee Service Australia Annual Report 2008-09](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/about%2Bus-%3Epublications-%3Eannual%2Breports?opendocument" \t "_new);
* [Takeovers Panel Annual Report 2008-09](http://www.takeovers.gov.au/content/reports/annual_reports.aspx%22%20%5Ct%20%22_new).

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

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| **2.1 ASIC seeks feedback on disclosure requirements for non-standard margin lending facilities**On 21 December 2009, the Australian Securities and Investments Commission (ASIC) released a Consultation Paper designed to help retail investors better understand the risks involved with non-standard margin lending facilities.A non-standard margin lending facility differs from a standard margin lending facility in that ownership of securities passes out of the investor's hands. Ownership is transferred to the lender who then transfers consideration for the securities back to the investor, representing the 'loan' component of the facility. Products like this were offered by lenders such as Opes Prime Stockbroking Ltd and Tricom Equities Ltd up until 2008.ASIC wants to ensure that retail investors better understand the risks of such products, in particular, that they may not receive the securities bought with the loan product back from the lender.Consultation Paper 129 'Non-standard margin lending facilities - improving disclosure for retail clients' (CP 129) sets out the key features and risks which ASIC proposes should be disclosed in a Product Disclosure Statement (PDS).The release of Consultation Paper 129, which outlines where the regulation of a non-standard margin lending facility applies, is accompanied by a draft Regulatory Guide containing ASIC's expectations for improved disclosure to help retail clients understand and assess these facilities.This consultation process seeks the views of stakeholders, including providers of margin lending facilities, investors and consumer groups, legal advisors and industry associations. Under recent changes to the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), margin lending will be regulated as a financial product and supervised by ASIC. ASIC's proposed requirements for non-standard margin lending facilities supplement the Financial Services Working Group's proposed requirements for shorter, simpler disclosure for standard margin loans. **Background**As a result of the [Corporations Legislation Amendment (Financial Services Modernisation) Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=110243" \t "Default), a margin lending facility will be regulated as a financial product under Chapter 7 of the Corporations Act 2001. This means that a licensee offering a margin lending facility must provide a Product Disclosure Statement to a retail client. The Financial Services Working Group, established by the Commonwealth Government in February 2008, is developing a simplified disclosure regime for standard margin lending facilities. Draft regulations and an example Product Disclosure Statement were released for public comment on 24 September 2009. ASIC's proposals for non-standard margin lending facilities build on the proposal released by the Financial Services Working Group, and also include reference to key issues relating to the features and risks of non-standard margin lending facilities. The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp129.pdf/%24file/cp129.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.2 ASIC releases new best practice proposals for the handling of confidential information and conduct of market soundings**On 21 December 2009, the Australian Securities and Investments Commission (ASIC) published proposed best practice guidelines to help improve market practices relating to the handling of confidential information by listed entities. The guidelines are an important part of ASIC's work to promote confidence in Australia's capital markets.Consultation Paper 'Handling confidential information' (CP 128) and the attached draft regulatory guide, set out a range of best practice guidelines that will enable companies and their advisers who are in receipt of confidential, price-sensitive information to benchmark themselves, with a view to strengthening their procedures as appropriate to the scale and context of their business. ASIC's goal in developing these best practice guidelines is to help parties ensure that confidential, price-sensitive information is provided to all the market in a timely manner, through the ASX announcements platform, rather than provided selectively to some participants at an incomplete stage. There are often large numbers of parties involved in corporate transactions. ASIC believes companies should be more demanding about ensuring confidentiality. The statement of best practice may facilitate companies insisting on reciprocal standards from others in the market.The proposals on which ASIC seeks comment include best practices for confidentiality agreements and adviser retainer agreements, insider lists and personal account dealing.The draft regulatory guide also sets out ASIC's recommendations for the conduct of market soundings by investment banks before major corporate transactions, such as capital raisings and merger deals. ASIC believes that more formal procedures are required than apply currently, to provide accountability for the flow of information. Soundings should occur when the market is closed.The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp128.pdf/%24file/cp128.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.3 ASIC releases guidance for credit licensees**On 11 December 2009, the Australian Securities and Investments Commission (ASIC) released further regulatory guidance on the implementation of the [National Consumer Credit Protection Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "Default) (National Credit Act). This release is the second package of regulatory guidance on the implementation of the National Consumer Credit regime. The guidance sets out how ASIC will approach the administration of the National Consumer Credit regime. It has been developed to help industry prepare their credit licence applications and also understand ASIC's expectations in relation to their obligations as credit licensees. Separate guidance has been developed to specifically assist small business operators make a credit licence application. ASIC has also updated regulatory guides on applications for relief and when it will issue no-action letters under the National Credit Act. The release of this package is part of ASIC's effort to provide as much upfront guidance as is possible before the commencement of the National Consumer Credit regime in July 2010. It follows the release of guidance on the registration process which begins on 1 April 2010. ASIC has released the following new publications: * Regulatory Guide 204 Credit licensing: Applying for and varying a credit licence (RG 204);
* Regulatory Guide 205 Credit licensing: General conduct obligations (RG 205);
* Regulatory Guide 206 Credit licensing: Competence and training (RG 206);
* Regulatory Guide 207 Credit licensing: Financial requirements (RG 207);
* Regulatory Guide 208 How ASIC charges fees for credit relief applications (RG 208); and
* INFO 97 Guidance for small credit businesses (INFO 97).

ASIC has also updated two existing regulatory guides to accommodate the National Consumer Credit regime: * Regulatory Guide 51 Applications for relief (RG 51); and
* Regulatory Guide 108 No Action letters (RG 108).

Further information is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/Credit%2Bhomepage?openDocument" \t "_new) website.etailed Contents**2.4 Updated regulatory guide and new consultation paper regarding schemes of arrangement**On 11 December 2009, the Australian Securities and Investments Commission (ASIC) released an updated 'Regulatory Guide 60 Schemes of Arrangement' (RG 60) and 'Consultation paper 127 Schemes of arrangement: Statements under section 411(17) (b) (CP 127)'.**(a) Updated Regulatory Guide 60 schemes of arrangement (RG 60)**RG 60 combines the now superseded Regulatory Guide 60 Schemes of arrangement - section 411(17) and Regulatory Guide 142 Schemes of arrangement and ASIC review. The update is largely minor and technical.RG 60 explains:* ASIC's role under the scheme provisions in Pt 5.1 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act);
* the matters ASIC considers when reviewing scheme documents; and
* how ASIC determines whether to provide a 'no objection' statement under section 411(17)(b) of the Act.

**(b) Consultation paper 127 schemes of arrangement: Statements under section 411(17)(b) (CP 127)**ASIC is seeking feedback on whether, in particular circumstances, it should give a 'no objection' statement under section 411(17)(b) of the Act. **(c) Future guidance on 'reverse takeover' schemes**A scheme results in a reverse takeover if consideration for the members of the company proposing the scheme (the target company) is shares in the offeror company, and the scheme results in a change in control of the offeror company or has a material effect on control of the offeror company. ASIC is considering what future guidance might be provided regarding these types of schemes in light of the decision in Re Gloucester Coal Limited 01R(a) and (b) [2009] ATP 9. In the meantime, ASIC encourages any person proposing a reverse takeover in these circumstances to consult with it very early in the planning stage. The regulatory guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg60v1.pdf/%24file/rg60v1.pdf%22%20%5Ct%20%22_new) website. The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp127.pdf/%24file/cp127.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.5 Investing between the flags**On 8 December 2009, the Australian Securities and Investments Commission (ASIC) launched 'Investing Between the Flags', a free practical guide to investing for retail investors. The Investing Between the Flags guide sets out the basic principles of investing and suggests that people develop and stick to a sound investment plan. The guide sets out six steps to investing between the flags.Investing between the flags also provides case studies to illustrate how people at different life stages have different investment goals and what to consider in working towards those goals. The guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/InvestingBetweenTheFlags.pdf/%24file/InvestingBetweenTheFlags.pdf%22%20%5Ct%20%22_new) website. etailed Contents**2.6 ASIC seeks feedback on proposal to develop listed corporate bond market**On 7 December 2009, the Australian Securities and Investments Commission (ASIC) released a consultation paper to assist with the development of a sustainable listed corporate bond market in Australia.Consultation Paper 126 'Facilitating Debt Raisings' proposes relief from long form prospectus requirements including:* a shorter prospectus for bond offers focused on the terms of the offer and the ability of the bond issuer to meet its interest and repayment obligations; and
* a two-part prospectus designed to provide successive bond offers offering greater flexibility and speed-to-market in making bond offers.

The proposed relief is subject to the following conditions:* the companies are listed and have a good continuous disclosure history - e.g. they have not been suspended for more than five days over a period of 12 months;
* the bonds offered are simple, vanilla bonds offered to retail and wholesale investors at the same price; and
* the size of the bond offer is at least $100 million to maximise the prospects of a liquid secondary market.

Disclosures would need to be made both in the prospectus and on an ongoing basis, to help investors understand any credit, liquidity or other risks that might be involved. Companies would also be required to publish information about the offer on their website and provide email facilities so investors can be easily updated about their investment.The disclosure thresholds take into account that investors and the market already receive a great deal of information about listed companies through annual reports and continuous disclosure. However, this information can be piecemeal and it can be difficult for investors to form a complete view of an entity or offer. Therefore, the consultation paper also seeks views on how well the annual reporting regime is operating.The Consultation Paper also proposes some prospectus relief for offers of certain convertible securities to wholesale investors. This would make it easier to sell listed shares granted on conversion of those products on financial markets such as the Australian Securities Exchange.ASIC has also developed a guide on investing in corporate bonds, which will help retail investors better understand the risks and benefits of investing in corporate bonds. The guide covers what corporate bonds are, how they work, what the risks are and provides a checklist of things to look for when investing. The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp126.pdf/%24file/cp126.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.7 Information for issuers and advisers of margin lending facilities**On 7 December 2009, the Australian Securities and Investments Commission (ASIC) released updated policy and regulatory guidance to assist issuers and advisers of margin lending facilities comply with new licensing, conduct and disclosure requirements, following the passage of the [Corporations Legislation Amendment (Financial Modernisation) Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=110243" \t "Default) (the Act).The Act, amongst other things, makes margin lending facilities a financial product and requires that issuers and advisers of margin lending facilities hold an Australian Financial Services Licence (AFSL). The reforms were introduced by the Federal Government to enhance investor protection. The same licensing, conduct and disclosure requirements that currently apply to financial services will soon apply to providers and financial advisers in relation to margin lending facilities and margin lending facilities will be regulated in the same way as other financial products. In addition, the regime imposes new responsible lending requirements on issuers of margin lending facilities and clarifies responsibility for providing notification of margin calls. Under the Act, issuers and advisers will have a 12-month transition period from commencement of the Act until the new requirements take effect (commencement of the Act is yet to be proclaimed). During the first six months of the transition period, existing margin lenders and advisers of margin loans will be required to apply for an AFSL authorisation. A number of ASIC's existing regulatory guides have been amended to take into account the inclusion of margin lending facilities as a financial product. The updated policy and regulatory guidance comprises: * Updates to Regulatory Guide 2 AFS Licensing Kit: Part 2 - Preparing your AFS licence application (RG 2) and Regulatory Guide 3 AFS Licensing Kit: Part 3 - Preparing your additional proofs (RG 3);
* Update to Regulatory Guide 146 Licensing: Training of financial product advisers (RG 146);
* Update to Regulatory Guide 166 Licensing: Financial requirements (RG 166);
* Update to Pro Forma 209 Australian financial services licence conditions (PF 209); and
* Regulatory impact statement.

ASIC's existing policies and regulatory documents on financial services and products, will apply to margin lending facilities and to licensees that provide financial services in relation to a margin lending facility. The commencement date of the legislation is yet to be proclaimed (ASIC will publish this information and key dates on its website as soon as the commencement date is proclaimed). However, to assist issuers and advisers in preparing for the transition, ASIC can confirm the following timeframes:* ASIC will accept AFSL applications, or variations to existing AFSLs, one month from the commencement of the legislation;
* Applications from existing margin lenders and advisers of margin loans will be accepted for five months in total (that is, until a date six months after the commencement of the legislation and five months from the time ASIC starts accepting applications). Existing margin lenders and advisers on margin loans will need to apply to ASIC for an AFSL authorisation within this timeframe if they intend to continue to provide a margin lending financial service after the application period closes;
* The licensing, conduct and disclosure requirements for issuers and advisers of margin lending facilities, and the new responsible lending and margin call notification requirements, apply from a date 12 months (one year) after the commencement of the legislation; and
* There will be an 18-month transition period from the commencement date of the Act for entities and individuals that provide financial product advice on margin lending facilities to comply with the training standards set out in RG 146.

The existing and updated regulatory guides are available from the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \t "_new) website.etailed Contents**2.8 ASIC guidance on credit reforms**On 1 December 2009, the Australian Securities and Investments Commission (ASIC) released its first package of regulatory guidance to help entities and individuals prepare for the proposed National Consumer Credit regime. ASIC has released:* Information Sheet 96 Getting ready for credit (INFO 96), which explains how the national credit regime applies and what people can do to start getting ready for credit;
* Regulatory Guide 203 Do I need a credit licence? (RG 203), which is designed to help people who engage in credit activities understand whether they need to be licensed; and
* Regulatory Guide 202 Credit registration and transition (RG 202), which outlines the process for registering with ASIC and the transition from registration to licensing.

Registration is the first step in the transition process. Persons who engage in credit activities can apply to ASIC to be registered from 1 April 2010 until 30 June 2010. Registered persons will then have six months to apply for an Australian Credit Licence, between 1 July 2010 and 31 December 2010.The Information Sheet 96 'Getting ready for Credit' (INFO 96) is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/Getting%2Bready%2Bfor%2Bcredit?openDocument" \t "_new) website.  Regulatory Guide 203 'Do I Need a Credit Licence?' (RG 203) is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg203.pdf/%24file/rg203.pdf%22%20%5Ct%20%22_new) website.Regulatory Guide 202 'Credit Registration and Transition' (RG 202) is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg202.pdf/%24file/rg202.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.9 ASIC releases consultation paper outlining proposed guidance to directors on their duty to prevent insolvent trading**On 24 November 2009, the Australian Securities and Investments Commission (ASIC) released a Consultation Paper outlining proposed guidance to directors on their duty to prevent insolvent trading.The [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) imposes a positive duty on directors to prevent insolvent trading.  ASIC wishes to ensure that directors, particularly those in small-to-medium enterprises in financial difficulty, fully understand this duty.The proposed guidance, contained in Consultation Paper 124 titled 'Directors' Duty to Prevent Insolvent Trading: Guide for directors' (CP 124), sets out the relevant legal background to the duty to prevent insolvent trading and the key principles that ASIC considers directors need to take into account in performing their duty to prevent insolvent trading. Those principles are that a director:* must keep him or herself informed about the financial affairs of the company and regularly assess the company's solvency;
* immediately on identifying concerns about the company's viability, should take positive steps to confirm the company's financial position and realistically assess the options available to deal with the company's financial difficulties;
* should obtain appropriate advice from a suitably qualified person; and
* should consider and act appropriately on the advice received in a timely manner.

The guidance includes information about ASIC's approach to insolvent trading and describes some of the factors ASIC will take into account, and the evidentiary material it will look at, in assessing whether there has been a breach of the insolvent trading provisions.By providing guidance, ASIC seeks to assist directors both to understand their duty to prevent insolvent trading and also, what they can do to minimise the risk that they will breach their duty.ASIC is seeking feedback on these proposals by 22 January 2010. The consultation paper and draft regulatory guide are available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP124.pdf/%24file/CP124.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

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

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| **3.1 ASX consultation on trading windows and blackout periods** On 4 December 2009, the Australian Securities Exchange (ASX) released for public consultation proposed listing rules affecting company policies on trading windows and blackout periods. ASX is seeking to require listed entities (companies and trusts) to:* Adopt and disclose a trading policy on trading in entity securities by directors and other key management personnel;
* Include restrictions and clearance procedures in the policy as to when trading can and cannot occur; and
* Publicly disclose whether any trading by directors occurred during an otherwise restricted period.

ASX believes a disclosure-based approach via the listing rules will encourage the adoption of robust trading policies across the entire market, minimise the potential for insider trading, and strengthen investor confidence in the governance arrangements of listed entities. The proposals provide listed entities with the flexibility to formulate trading windows and restrictions that are appropriate for their individual circumstances. The consultation paper is available on the [ASX](http://www.asx.com.au/about/pdf/20091203_asx_consultation_paper_listing_rule_amendments.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.2 Reports** On 3 December 2009, the Australian Securities Exchange (ASX) released:* the [ASX Group Monthly Activity Report](http://www.asx.com.au/about/pdf/ma_031209_monthly_activity_report.pdf%22%20%5Ct%20%22_new); and
* the [SFE Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2009/notice2009_206.pdf%22%20%5Ct%20%22_new) for November 2009.

etailed Contents**3.3 ASX Market Rules amendment - Removal of the ten second rule** On 30 November 2009, the cash equity market was changed to remove the 10 second period to execute on-market crossings. This was announced on 6 October 2009 to allow 8 weeks for any development work that may have been required.etailed Contents**3.4 ASX submission to ASIC on clearing and settlement facilities** On 19 November 2009, ASX provided a submission to ASIC in response to Consultation Paper 120: 'Operators of Clearing and Settlement Facilities'. The ASIC consultation paper sought the views of interested persons, including operators of financial markets and clearing and settlement (CS) facilities such as ASX, on ASIC's proposals concerning CS facility regulation, as set out in its draft regulatory guide "Clearing and settlement facilities: Australian and overseas operators". The submission is available on the [ASX](http://www.asx.com.au/%22%20%5Ct%20%22_new) website.etailed Contents**3.5 Review of disclosure of directors' interest notices** On 17 November ASX released its review of disclosure of directors' Interest Notices lodged by listed entities. The review was conducted by ASX Markets Supervision (ASXMS) on all Directors' Interest Notices lodged between 1 July and 30 September 2009 (Q3 2009). The notices cover a director's appointment, changes to a director's interests and ceasing to be a director.  This is the fourth such review that ASXMS has completed.Further information is available on the [ASX](http://www.asx.com.au/%22%20%5Ct%20%22_new) website. etailed Contents |

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

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| **4.1 Meeting of shareholders ordered to consider a scheme of arrangement which involved a 1.9% break fee**(By Alexia Takis, Clayton Utz) eircom Holdings Limited, in the matter of eircom Holdings Limited [2009] FCA 1418, Federal Court of Australia, Lindgren J, 1 December 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009fca1418.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009fca1418.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** In this case, eircom Holdings Limited (ERC), a target company in a scheme of arrangement proposal, applied under section 411(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) for the Court to order a meeting of its shareholders to consider the scheme of arrangement.  In determining whether to grant the order, the Court considered two issues with regards to the scheme: (1) a break fee payment arrangement that exceeded the Takeovers Panel guideline of 1%; and (2) the failure of the directors of ERC to make a recommendation regarding one of the alternative forms of consideration offered under the scheme, namely scrip consideration in the unlisted acquisition vehicle.  The Court held that a meeting be convened on the basis that the break free payment arrangement should not stand in the way of the making of an order to convene a meeting of ERC shareholders, and that the directors gave sufficient reasons for making no recommendation regarding scrip consideration. **(b) Facts**  ERC, a company listed on the Australian Securities Exchange (ASX), sought orders under section 411(1) of the Act that it convene a meeting of its shareholders to consider a proposed scheme of arrangement and that the scheme booklet be approved as required by section 412(1)(a) of the Act.  The proposed scheme involved the acquisition of shares in ERC by Emerald Communications (Cayman) SPC (ECC), an unlisted company incorporated in the Cayman Islands for the purpose of acquiring the capital of ERC under the proposed scheme. Under the proposed scheme, ERC was to acquire all of the shares that it did not already hold or were not held on ECC's behalf. Participants in the scheme had the option of receiving cash consideration, scrip consideration (being shares in the unlisted acquisition vehicle) or a combination of cash and scrip consideration.  ERC and ECC had entered into a Scheme Implementation Agreement (SIA), which included, amongst other things, the requirement for ERC to pay ECC a break fee of $4 million in certain circumstances. The amount of the break fee represented 1.9% of the equity value of ERC, and 4.4% of the total value of the scheme proposal, in excess of the 1% Takeovers Panel guideline.  **(c) Decision** Lindgren J ordered that a meeting be convened of all shareholders of ERC to consider the proposed scheme of arrangement and that the scheme booklet be approved for the purposes of section 412(1)(a) of the Act.  **(i) The scrip consideration** ERC's directors recommended the scheme. However, with regard to the scrip consideration option, they did not make a recommendation other than to recommend that shareholders considering this option should carefully consider the issues and risk factors associated with the underlying investments and should consult with their financial advisor. Two main reasons were given for why the directors did not express a recommendation:* because ECC was an unlisted entity incorporated in the Cayman Islands, participant shareholders in the scheme who become minority shareholders in ECC might not be afforded equivalent protections to those enjoyed by minority shareholders in Australia; and
* as ECC was not listed, participant shareholders in the scheme might have difficulty in disposing of their shares.

Lindgren J accepted the above reasons for not making a recommendation and "did not consider that the absence of a recommendation from the ERC directors in relation to the Scrip Consideration alternative stood in the way of the making of an order for the convening of the meeting of Scheme Participants" (at para 40). **(ii) Break fee** Lindgren J also considered whether the arrangement to pay to ECC a break fee of $4 million, representing 1.9% of the equity value of ERC, and 4.4% of the total value of the scheme proposal, could prevent the Court making the orders sought on the basis that the break fee exceeded the Takeovers Panel guideline of 1% of the equity value of the target.  The SIA between ERC and ECC provided for the payment of a $4 million break fee to ECC in two circumstances: (1) if a competing transaction, not recommended by ERC's board, emerged by 13 March 2010 and prevailed within 9 months of the date of the SIA in respect of more than 50% of all ERC shares; or (2) if any director failed to recommend the proposed scheme or withdrew his or her favour of it, except in defined circumstances.  Lindgren J held that there were a number of factors which made this case unusual in relation to break fees and which supported the conclusion that the $4 million break fee would not have an anti-competitive or coercive effect, and therefore should not stand in the way of the Court making an order to convene a meeting:* the $4 million break fee only represented 0.06% of the enterprise value of ERC. (In Guidance Note 7, the Takeovers Panel notes that in some limited circumstances the 1% guideline may be applied to a company's enterprise value, as opposed to its equity value, where the target is highly geared.) Lindgren J held that an analysis of ERC's balance sheet indicated that ERC was highly geared and therefore the 1% guideline could be applied to its enterprise value;
* ECC's costs incurred in relation to the scheme proposal were approximately $10 million, well above the $4 million break fee and thus the break fee represented genuine cost recovery;
* ERC had engaged in a public formal review and had invited expressions of interest in regards to the acquisition of ERC, and the ECC proposal remained the only genuine proposal;
* the break fee was only payable "for cause", and not in circumstances where scheme participants voted the proposal down;
* the amount of the break fee was highly negotiated by ERC and ECC;
* there were benefits for ERC entering into the $4 million break fee arrangement, in that there was a $2 million limit on ERC's liability for any breach of the SIA; and
* the consideration offered under the scheme proposal delivered a substantial premium to scheme participants.

etailed Contents**4.2 Reliance on a business advisor in support of an 'honesty' based defence to insolvent trading**(By Cameron Belyea and Vincent Holland, Clayton Utz)McLellan, in the matter of the Stake Man Pty Ltd [2009] FCA 1415, Federal Court of Australia, Goldberg J, 30 November 2009The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/november/2009fca1415.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/november/2009fca1415.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**  Marking what might be seen as a trend away from *Hall v Poolman* (2007) 65 ACSR 123, a director of a company was excused from liability for insolvent trading on the basis that he had acted honestly in trading a distressed business while pursuing a capital management program developed with the help of a business advisor.  The court found that it was fair in the circumstances for him to be so excused under section 1317S of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act"). The case provides apposite analysis on the interaction between a 'reliance' based defence afforded by section 588H(3) and a defence based on honesty pursuant to sections 1317S of the Corporations Act.  It is also timely, coinciding with the release of ASIC's consultation paper titled "Duty to prevent insolvent trading: Guide for directors" in November 2009.  Should this trend continue, it may soon be possible to reconcile the prohibition on trading while insolvent provisions with the protections of the business judgment rule and its exculpatory equivalent in sections 1317S and 1318 of the Corporations Act, at least in situations where decisions are being made as part of a debt or equity rehabilitation process.   **(b) Facts**  **(i) Background** The defendant was a director of The Stake Man Pty Ltd, a company which engaged in processing and wholesaling raw timber which it sold to wholesalers, local councils and contractors.  In late 2003, the Company sought to expand its production. It devised a plan to purchase plant and equipment which would enable it to 'kiln dry' and 'machine' its own timber. By undergoing the 'kiln' drying process, the timber had a wider range of uses.  The expansion did not go according to plan. After the Company obtained funding from a private investor to purchase the necessary equipment (by way of equity and debt financing), there were delays in the installation of the kilns. These delays and a series of cost blow outs began to effect the Company's cash flow. In about March 2005, the Company obtained advice from an external accountant, with experience in the industry. The accountant provided advice on valuations, cash flow and the Company's business model. He advised on several occasions that the Company was not insolvent. The defendant allegedly believed that the Company could overcome its cash flow problems by selling its timber stock at a reduced value. However, during the period 31 December 2005 to 10 May 2010, the Company had insufficient cash to pay its current liabilities, particularly its trade debtors ("Relevant Period"). During the Relevant Period, the Company incurred further debts totalling $426,469.  Towards the end of the Relevant Period, the Australian Taxation Office ("ATO") sought repayment of a tax debt of $110,000. Shortly thereafter, the Company went into voluntary administration and then into liquidation.  **(ii) The claim** The liquidator brought proceedings against the defendant pursuant to sections 588G and 588M(2) of the Corporations Act alleging that the company had traded while it was insolvent. In his defence, the defendant relied on section 1317S and/or section 1318 of the Corporations Act which excuse from liability a person who has acted honestly when it is fair in the circumstances for him to be so excused.  **(c) Decision**  The court found that the company had traded while it was insolvent, but excused the defendant from liability under the 'honesty' defence in section 1317S of the Corporations Act. **(i) Did the defendant engage in insolvent trading under 588G?**  Goldberg J was satisfied on the evidence before him that the defendant was prima facie liable because:* the evidence established that the business had traded while it was insolvent; and
* the defendant had reasonable grounds for expecting that the company was insolvent.

Goldberg J rejected the defendant's submission that the Company could have raised cash by selling down its timber stock below its perceived value, which the defendant argued the Company was able, but unwilling to do. The Court adopted the approach in *Hall v Poolman* (2007) 65 ACSR 123, to find that the defendant had not established that the Company's assets were readily realisable in a short space of time.    On the second finding, the defendant was unable to rely on statements made by his accountant to establish a 'reliance' based defence. Under section 588H(3), a director can defend an insolvent trading claim if he or she relies upon a 'competent and reliable person' who is responsible for providing information about the Company's solvency. However, this defence failed because the accountant had been briefed as a business advisor and it was not part of his role to provide specific information about the Company's solvency.  Goldberg J confirmed the prevailing view that the prime 'thrust' of a section 588H(3) 'reasonable reliance' defence is to protect directors of larger corporations who do not have control over every action, rather than to protect directors of smaller companies with little knowledge of accountancy.  **(ii) Could the defendant rely on an 'honesty' defence under section 1317S and/or section 1318 of the Corporations Act?** Sections 1317S and 1318 excuse a person from liability if:  * they have acted honestly; and
* it is fair in the circumstances for them to be excused.

The court found that the defendant had acted honestly. In reaching this conclusion, Goldberg J placed 'considerable weight' upon the defendant's retainer of the accountant and the advice he gave to the defendant about the Company's financial position.  Although the accountant was not an advisor on whose advice the defendant could rely on for a defence under section 588H(3), Goldberg J found that he could still have regard to the accountant's role for the purposes of exercising jurisdiction under section 1317S.  Goldberg J also pointed to the following factors during the Relevant Period in support of his finding that the defendant had acted honestly: * stock sales were increasing and the defendant was monitoring stock levels and the amount of daily production;
* the defendant actively looked to expand sales and took steps to get the kilns in working order;
* the defendant took active steps to seek out investors who could provide further capital for the Company;
* the defendant called in administrators shortly after the ATO sought repayment of a tax debt; and
* the Defendant did not profit personally from permitting the Company to trade during the Relevant Period, and he did not disregard expert advice to the contrary.

On the basis of these factors Goldberg J found that it was fair in the circumstances for the Defendant to be excused from liability.  **(d) Comment** This decision may mark a fusion between the idea of corporate and directorial obligations, both as a means of preserving and building value to shareholders and in encouraging the implementation of a responsible management plan in distressed conditions.  The fundamental role of directors, and the marriage between stakeholder interests is well analysed in the recent paper by Marshall and Ramsay "Stakeholders and Directors Duties: Law, Theory and Evidence" [2009] UMelbLRS 2 (29/9/09). As explained by these authors:When we further consider the case law we see that the interests of the company as a whole may vary according to the stage in a company's life.  Whilst the duty to consider the interests of shareholders when the company's health is buoyant, it may not be true when the company is in financial difficulty...The decision by Goldberg J explains how a director of a distressed enterprise might properly discharge duties to shareholders, creditors and other stakeholders.  The decision suggests that one means of doing so would be for the director to show that they have acted in accordance with a capital management plan designed to improve the fortunes of the enterprise if it was fair in the circumstances for that plan to have been implemented.   The director should ideally document this plan, preferably after taking proper advice from an advisor. The director should also believe (beyond a mere hope or whim) that the plan will be successfully implemented and should be able to explain the basis for that belief.  In these circumstances, and assuming it is otherwise fair for an exculpatory order to be made, the director should have some basis for gaining the protection of the safe harbour defences within the Corporations Act even if the enterprise later fails.   As with all cases of this type, the individual circumstances of the situation will determine whether or not the defence is properly available to protect a director.  etailed Contents**4.3 Winding up a foreign company in purported external administration**(By Tina Davey, Blake Dawson) Re Reef Cove Resort Limited [2009] QSC 378, Supreme Court of Queensland, White J, 24 November 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/november/2009qsc378.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/november/2009qsc378.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** This case concerned an application to wind up a foreign company in purported external administration under Part 5.3 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act). White J held that a foreign company cannot appoint external administrators under the Corporations Act, however it may be wound up by the Court pursuant to section 583. **(b) Facts**  The respondent was Reef Cove Resort Limited (Reef), a company incorporated in New Zealand and registered as a foreign company in Australia. The applicant, Holding Redlich Lawyers, served a creditor's demand on Reef on 15 April 2009 for $207,858.61. Reef failed to pay within the time allowed and on 4 June 2009 Holding Redlich applied to the court for Reef to be wound up on the ground of insolvency pursuant to section 583 of the Act.   On 30 June 2009, Reef purported to appoint joint administrators on the resolution of its sole director under section 436A of the Act. On 18 August 2009, Reef purported to execute a Deed of Company Arrangement.   Whilst it was not made explicit in White J's judgment, presumably Reef was attempting to secure the protection of section 440A(2) of the Act. That section states that the court must adjourn the hearing of winding up application for a company under administration if it is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up. When Holding Redlich's application for winding up came to be heard before the court, White J was therefore required to consider three questions:* Did the external administration provisions of the Act apply to Reef as a foreign company?
* Could Reef be wound up under the Act?
* Should Reef be wound up?

**(c) Decision**  **(i) Did the external administration provisions of the Act apply to Reef?** White J held that only a "company" can have an external administrator appointed to it under section 436A of the Corporations Act. He went on to note that by section 9, a "company" means "a company registered under this Act". In finding that Reef was not such a company, White J was influenced by the following factors:* to register a company under the Act a person must lodge an application with ASIC in accordance with section 117;
* section 118 provides that if an application is lodged under section 117, ASIC may give the company an ACN number, register the company and issue a company certificate stating that the company is registered under the Act;
* by section 119 a company comes into existence as a body corporate on the day which it is registered; and
* under section 119A, a company is incorporated "in this jurisdiction".

White J also cited *Peninsular Group Ltd v Kintsu Co Ltd* (1998) 44 NSWLR 534 as additional authority for the proposition that a foreign company is not a "company" as it is not a company registered under the Act. Because Reef was not a "company", the external administration provisions of the Act could not apply to it and the purported appointment of the external administrators was of no effect. Since there had been no valid appointment of an administrator, the proposed Deed of Company Arrangement was also ineffectual. It was therefore unnecessary for White J to consider whether it was in the interests of the company's creditors for the company to continue under administration rather than be wound up. **(ii) Could Reef be wound up under the Corporations Act?** White J went on to note that a foreign company may be wound up pursuant to section 583 as a Part 5.7 body. Under section 9, a "Part 5.7 body" includes "a registrable body that is a foreign company".  It was therefore "clear" to White J that Reef was a Part 5.7 body which could be wound up under section 583.  White J then cited section 583(c), under which a Part 5.7 body may be wound up if it is "unable to pay its debts". His Honour also relied on section 585(a), which provides that a Part 5.7 body will be unable to pay its debts if a statutory demand for payment has been served on the body and it has failed to pay the sum due within 3 weeks of service. On the facts, Holding Redlich had served Reef with the demand for payment on 15 April 2009, Reef had failed to pay the sum within the time due and the sum remained unpaid as at the date of the hearing.  For these reasons, White J held that it was unable to pay its debts. **(iii) Should Reef be wound up?** His Honour found that there were no discretionary factors which operated against an order being made for Reef to be wound up. He therefore made the following orders:* that Reef be wound up under the provisions of the Corporations Act;
* that a liquidator be appointed to conduct the winding up; and
* that the costs of Holding Redlich be costs in the winding up.

etailed Contents**4.4 Appointing an auditor under a shareholders agreement: answering questions about timing and independence**(By Meg O'Brien, Mallesons Stephen Jaques) Kenros Nominees Pty Ltd v Tipperary Group Pty Ltd [2009] VSC 524, Supreme Court of Victoria, Hollingworth J, 20 November 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/november/2009vsc524.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/november/2009vsc524.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** In this case it was established that a shareholders agreement which charged "the auditor" of a company with the task of valuing its shares upon the occurrence of certain specified events should be construed in such a way to mean that "the auditor" was the company's pre-existing auditor at the time those specified events occurred.   This case also establishes that the appointment of an auditor is a process that is separate and distinct from any contract that may exist between the company and its auditor.  Provided that an auditor has consented to act as the company's auditor, a proprietary company can appoint that person as its auditor at a general meeting or through a resolution of its directors.   Finally, this case discusses when and how claims of bias can be used to impugn a valuation of shares.  **(b) Facts**  In 2003, Kenros Nominees Pty Ltd ("Kenros") and Raza Holdings Pty Ltd ("Raza") each purchased 10% of the shares in Tipperary Group Pty Ltd ("Tipperary") from Dunkeld Pastoral Co Pty Ltd ("Dunkeld").  Dunkeld retained ownership of the remaining 80% of the shares.  Under a shareholders agreement Kenros and Raza were paid to manage the business of Tipperary and its subsidiaries.  Under clause 1(c) of the shareholders agreement Tipperary was able to terminate this arrangement at any time by providing the relevant period of notice or a payment in lieu of such notice.  If such a termination took place, Kenros and Raza were obliged under clause 1(d) of the shareholders agreement to sell their shares to Dunkeld, which was obliged to purchase them at market value.  The market value of the shares was to be determined by Tipperary's auditor or another person both parties agreed upon.   On 5 December 2007, Tipperary purported to appoint Mr Laurie Cogger ("Cogger") as its auditor through a resolution of its directors.  On 6 December 2007, Tipperary terminated the employment of Kenros and Raza.  On 7 December 2007 Cogger was sent a document entitled "Notice to [sic] Appointment of Expert" that informed him he had been appointed as Tipperary's auditor. In this case the plaintiffs alleged that under a proper construction of the shareholders agreement, "the auditor" means the person who, at the time of the termination, was Tipperary's auditor and "was a person whose appointment is not attended by a credible appearance or soundly-based apprehension of partiality."   On this basis the plaintiffs advanced two arguments.  First, that Cogger was not entitled to conduct the valuation of the shares because he was not Tipperary's auditor until he received the notice on 7 December 2007.  Secondly, that because Tipperary and Dunkeld were companies associated with Allan Myers and his family, and that Cogger had a longstanding professional relationship with the family and associated entities, there was an issue of apprehended bias that made Cogger unsuitable for the purpose of valuing the shares.   **(c) Decision** In the absence of oral evidence relating to the circumstances in which the shareholders agreement was entered into, Hollingworth J proceeded to ascertain the intention of the contracting parties objectively in accordance with the relevant principles.   **(i) The appointment of the auditor**  Hollingworth J found that "the auditor" under the shareholders agreement could not, as a matter of construction, be an auditor appointed after the termination of Kenros and Raza's employment.  Her Honour found that although the shareholders agreement does not explicitly identify when "the auditor" needs to be appointed, the structure and a purposive interpretation of clause 1(d) supported this conclusion.   First, her Honour reasoned that construing clause 1(d) in this manner would foster efficiency. If "the auditor" was Tipperary's pre-existing auditor, the valuation process will be quicker owing to the auditor's knowledge of the company's business and financial situation.  Secondly, her Honour believed this construction helped ensure the auditor's independence. Her Honour reasoned that because auditors were subject to various statutory requirements relating to their independence when undertaking audit activity, allowing the pre-existing auditor to conduct the audit would increase the likelihood that any valuation would be impartial.  Thirdly, her Honour reasoned that any contrary interpretation would render the fact that the relevant clause also permitted another valuer to be appointed "by agreement" redundant because any interpretation that allowed the majority shareholder to unilaterally appoint anyone as the auditor would render this part of the clause completely meaningless.   In conclusion, her Honour stated that constructing the relevant clause in this way would accord with what a reasonable person would have understood the relevant clause to mean. Consequently, in order to validly conduct the valuation, Cogger must have been appointed prior to the termination of Kenros and Raza's employment.  There was no dispute that termination was effective from the time Kenros and Raza received a written notice to this effect on 6 December 2007.   In this case the plaintiffs submitted that Cogger was appointed on 7 December 2007 upon receiving notice of his appointment.  The defendants submitted Cogger was appointed on 5 December 2007 after the directors passed the resolution to this effect. The plaintiffs submitted that because Part 2M.4 of Chapter 2M of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") does not regulate the appointment of auditors then the relevant law is the law of contract and therefore, no valid appointment is made unless and until a contract is concluded between the company and its auditor.  In the alternative, they submitted that an auditor is not validly appointed until he or she receives notice of the appointment.   Her Honour rejected these submissions stating that there was no need to read into the Act requirements regarding the appointment of auditors that were not there. She also stated the appointment of auditors is "separate from the terms and conditions of any contract between the parties." Her Honour stated that so long as the auditor has provided and not withdrawn his or her consent to act as a company's auditor, a proprietary company can appoint that person as its auditor at a general meting or through a resolution of its directors.   In this case Cogger had provided his consent to act as Tipperary's auditor on 5 December 2007 and his consent had not been withdrawn. There was also nothing in the resolution appointing him about needing to take any other steps to give effect to the appointment.  Consequently, Hollingworth J concluded the resolution of the directors on 5 December 2007 had appointed Cogger as Tipperary's auditor. It followed that Cogger was Tipperary's auditor at the time the employment of Kenros and Raza was terminated and was therefore able to validly determine the value of Kenros and Raza's shares under the shareholders agreement.   **(ii) Issue of appearance of partiality** The plaintiffs also contended that "the auditor" in the shareholders agreement is a person "whose appointment is not attended by a credible appearance or soundly-based apprehension of partiality."   The plaintiffs argued that Cogger was affected by apparent bias and should be permanently enjoined from conducting the valuation because of his connection with the Myers family and related entities.  The plaintiffs submitted that this reading of the shareholders agreement arose as a matter of proper construction of clause 1(d). However, Hollingworth J commented that the courts are reluctant to impugn the valuation process, particularly in relation to companies where there is a substantial majority shareholder, on the grounds of apparent bias.  Her Honour added that there were remedies available if the valuation was made dishonestly, partially or otherwise not in accordance with the contract.   The plaintiffs also submitted that this was an implied term necessary to give business efficacy to the agreement. However, Hollingworth J concluded that because the proposed term could have been expressed in so many different ways and subject to any number of variations it could not be "so obvious it goes without saying".  Her Honour continued by stating that the proposed term would not facilitate business efficacy because that would demand the valuation be completed as soon as possible. etailed Contents**4.5 Interpretation of section 672A(1) - disclosure notices** (By Sarah Rogers, Freehills) Re Murchison Holdings Ltd [2009] VSC 528, Supreme Court of Victoria, Robson J, 18 November 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/november/2009vsc528.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/november/2009vsc528.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** For the purposes of section 672A(1)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act), a 'member' means a current registered member. Therefore, a section 672A(1)(a) notice relating to shares that are no longer registered in the name of the recipient of the notice is invalid. Similarly, a notice under section 672A(1)(b) given to a person named in a previous disclosure under section 672B must relate to a current shareholding. Therefore, a section 672A(1)(b) notice relating to a shareholding no longer registered is invalid. Section 672A does not apply to options since options do not confer membership of the company on an option holder. The court was not prepared to make orders under section 1325A where the notice is confusing and misleading. **(b) Facts**  Murchison Holdings Limited (MCH) commenced proceedings against Mr Julian Lee, Ms Chow Lou Low and Ms Kam Yoke Low and Quest Investments Limited (QIL) commenced proceedings against Mr Lee and Ms Lou Low. MCH is the holding company of QIL. The two applications were heard together. The plaintiffs sought to ascertain the nature of the relevant interests in MCH shares held, or formerly held, by the defendants with section 672A notices, requiring disclosure of their interests under the Act. The defendants failed to respond.  The plaintiffs argued that section 672A was available as each of the defendants was or had been a member of the company. The extract of holdings issued by the Company's share registrar indicated that Mr Lee and Ms Lou Low were no longer members of MCH, while Ms Yoke Low still held 5000 MCH shares and 5000 MCH options. Each of the plaintiffs sought orders pursuant to section 1325A, requiring the defendants to comply with directions given by the plaintiffs under section 672A of the Act.  **(c) Decision**  **(i) Interpretation of section 672A(1)(a)** The plantiffs contended that a 'member' referred to in section 672A(1)(a) includes a person who was a member of the company but is no longer a current member. However, the court disagreed and held that a 'member' means a current member "on the record". The court considered the purpose of tracing notices. In particular, the court referred to the Takeovers Panel decision in Re Village Roadshow Limited, which noted that section 602 contains an implied purpose of enabling companies to ascertain relevant interests in their shares and in turn protect against any breach of the substantial holding disclosure requirements. The court held that such a purpose would not be furthered by obtaining information about previous holdings. The court held that section 672A would be virtually unworkable if it applied to shares or interests acquired in the past but which were subsequently disposed. The court stated that it failed to see how information about a past shareholding could inform the market as to the present position of the company. Therefore, the court held that, for the purposes of section 672A(1)(a), a 'member' means a current registered member. Further, the court held that section 672A does not apply to options since options are not shares for the purposes of section 672B and do not confer membership of the company on an option holder. **(ii) Interpretation of section 672A(1)(b)** The court held that section 672A(1)(b) must also relate to a current shareholding for similar reasons to those outlined above in relation to section 672A(1)(a). In addition, the court noted that section 672A(1)(b) refers to a person named in a previous disclosure under section 672B as "having a relevant interest" in the shares. The court considered that the relevant test is a current test of 'having' and not a past test of 'had', which suggests that the section is concerned with the current position and not the past. **(iii) Relief for non-compliance** The Act provides for circumstances where non-compliance with a section 672A notice can be excused, including where inadvertence or a mistake had been made. However, there did not seem to be any evidence of such circumstances in this case. **(iv) Validity of the section 672A notices** The court held that the notices given by MCH to Mr Lee and Ms Lou Low were invalid as they had no current shareholding.  The court held that the notices given to Ms Yoke Low suggested that she was obliged to give information concerning previous shareholdings, which is not the case. For this reason, even if the notices were valid, the court was not prepared to exercise its discretion to make orders under section 1325A as the notices were confusing and misleading. The court held that Mr Lee and Ms Lou Low need not make any disclosures in respect of the notices which appeared to have been given under section 672A(1)(b). In particular, the court was persuaded by the fact that there was no evidence that the recipients were persons named in previous disclosures under section 672B as having a relevant interest in, or having given instructions about, voting shares in the company, nor did the notices allege as such, nor did the notices refer to section 672A(1)(b). In addition, the notices referred to a series of holdings and, for the reasons outlined above, were misleading as to what they required. **(v) Court's powers and remedies** The court held that it has wide discretionary power under section 1325 to make any order with regards to enforcing compliance with section 672B. However, the court was not prepared to make any orders on the notices issued by MCH and QIL in this case. The application was dismissed.etailed Contents**4.6 One.Tel decision gives guidance on directors' business judgments and standard of care** (By Angela Pearsall and Chris Burgess, Blake Dawson) Australian Securities and Investments Commission v Rich [2009] NSWSC 1229, New South Wales Supreme Court, Austin J, 18 November 2009The full text of this judgment is available at:[http://www.lawlink.nsw.gov.au/scjudgments/2009nswsc.nsf/6ccf7431c546464bca2570e6001a45d2/946c84c9b612746fca25766c002688f0?OpenDocument](http://www.lawlink.nsw.gov.au/scjudgments/2009nswsc.nsf/6ccf7431c546464bca2570e6001a45d2/946c84c9b612746fca25766c002688f0?OpenDocument" \t "_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**After a lengthy trial, ASIC did not prove that two One.Tel executive directors breached their duties in relation to the collapse of the One.Tel telecommunications group in 2001.   Although the court's decision turned largely on its factual findings, Justice Austin made some important observations concerning the standard of care of directors in relation to financial information and forecasting and the protection afforded by the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) to directors' and officers' business judgments.These included that:* Directors are expected to possess the degree of financial literacy of the hypothetical reasonable director, regardless of their individual background and experience.
* The "business judgment rule" can protect directors and officers from liability    for a wide range of planning, budgeting and forecasting decisions.

**(b) Facts**In 2001, ASIC brought civil penalty proceedings in the Supreme Court of New South Wales against One.Tel's former chief executives Bradley Keeling and Jodee Rich, non-executive chairman John Greaves and finance director Mark Silbermann.  ASIC claimed the four directors had contravened section 180 of the Corporations Act, which requires company directors and officers to exercise their powers and discharge their duties with reasonable care and diligence.   The case against Mr Keeling and Mr Greaves settled in 2003 after they agreed to periods of disqualification from managing corporations and to pay compensation to One.Tel's liquidators of approximately $112m.  However, no settlement was reached with Mr Rich and Mr Silbermann and the court went on to hear the case against these directors over 232 sitting days. The central plank in ASIC's case was that Mr Rich and Mr Silbermann had breached their duties by failing to inform the One.Tel Board of the group's true financial position in the months leading to the appointment of administrators in May 2001.  Among other claims, ASIC also claimed that Mr Rich and Mr Silbermann had failed properly to assess One.Tel's financial position and neglected to ensure systems were established to facilitate the flow of financial information to the Board.**(c) Decision****(i) What was the financial condition of the One.Tel Group?** The way ASIC framed its case led to a large factual dispute:  What was the financial condition of the One.Tel Group between January and April 2001?  Justice Austin concluded that ASIC had not proved that One.Tel's financial position throughout this period was as poor as ASIC had claimed.  It followed that Mr Rich and Mr Silbermann had not breached their duty of care and diligence.   In large part, ASIC sought to prove One.Tel's financial position by tendering One.Tel financial records, including management accounts for One.Tel's fixed wire/service provider business, "profile summaries" of One.Tel debtors and One.Tel "Australian aged creditors" reports extracted from the creditors' ledger.  A forensic accounting expert was engaged by ASIC to explain these records, but much of his evidence was ruled inadmissible.   Justice Austin's conclusion that ASIC had not proved its case against Mr Rich and Mr Silbermann was underpinned by his Honour's views that:* The origin and reliability of many financial papers in evidence was not clear.  For instance, assumptions underlying financial forecasts were not always explained and the issue of whether particular documents were in draft form only, and what their purpose and function was, was not clear to his Honour; and
* Witnesses were not called by ASIC to prove the origin, purpose and reliability of the financial records.  For this reason, Justice Austin inferred that their evidence would not have assisted ASIC's case.

**(ii) Standard of care and diligence**Justice Austin accepted that every director has a duty to maintain familiarity with the financial status of the company and to have a reasonably informed opinion of its financial capacity.  In this respect, each director is expected to possess and exercise a reasonable degree of financial literacy irrespective of their personal inexperience or lack of skill. However, in determining whether there has been a breach of duty, his Honour also stressed that:* a director's conduct is to be assessed with close regard to the circumstances existing at the relevant time, without the benefit of hindsight; and
* "mere errors of judgment" and like "mistakes" can be distinguished from negligence founding a breach of the director's duty of care and diligence.

These comments appear to have particular application for directors involved in the field of financial forecasting, which Justice Austin acknowledged was a difficult and uncertain process with room for mistakes, errors of judgment and differences of opinion.   **(iii) Scope of the "business judgment" rule**Section 180(2) of the Corporations Act provides for directors and officers to be immune from breach of their duty of care and diligence when making "business judgments", provided certain conditions are fulfilled.  This provision, known as the "business judgment" rule, was enacted to safeguard directors and officers who engage in responsible risk-taking in the course of commercial transactions.  However, the business judgment rule has so far received relatively little judicial attention.   Mr Rich and Mr Silbermann sought to invoke the rule to protect a variety of their day to day "judgments", such as judgments as to what financial information was material to the performance of the One.Tel group, what financial information should be brought to the attention of the Board, and what level of cash reserves was appropriate.  This raised the question of the extent to which the business judgment rule could apply to management, organisational and planning decisions.   Justice Austin agreed that decisions to take, or not to take, action in relation to matters of planning, budgeting and forecasting were "business judgments" which can be protected by the business judgment rule.  His Honour observed that directors and officers will be taken to have acted with care and diligence if they can prove that:* they make a "business judgment" in good faith for a proper purpose. A "business judgment" here means a decision to take, or not to take, action in respect of a matter relevant to the business operations of a corporation and does not include oversight, such as a failure to consider the need to implement monitoring systems;
* they do not have a material personal interest in the subject matter of the judgment;
* they inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate - relevant considerations here include the importance of the judgment, the time and costs of obtaining information and the state of the company's business at the time; and
* they rationally believe the judgment is in the best interests of the company. This does not require the judgment to be "reasonable" in the court's eyes, but instead requires the director's or officer's judgment to be supported by an arguable process of reasoning.

In so far as Mr Rich and Mr Silbermann had adopted or sanctioned a practice of delaying payments to One.Tel creditors to provide capital to grow the business, his Honour held that they had shown each of the above conditions were satisfied and that the business judgment rule should apply. Indeed, in his Honour's view, managing a company's relationship with its suppliers was quintessentially an occasion for the exercise of business judgments, including as to whether the suppliers should be paid on contractual terms or on a delayed basis.   **(iv) Comment**The outcome of this case needs to be viewed in the context of its complexity and scope. On 17 December 2009 ASIC announced that it will appeal the decision. In the meantime, Justice Austin's decision provides helpful guidance on a number of legal issues, including the scope of directors' duties of care and diligence and the business judgment rule.  This guidance should be read as subject to his Honour's qualification that the business judgment rule ultimately requires some further consideration by an appeal court.  etailed Contents**4.7 Conditional or absolute obligation to redeem convertible redeemable preference shares**(By Mark Cessario, Corrs Chambers Westgarth) Kandelka Management Pty Ltd v Pisces Group Ltd (subject to deed of company arrangement) [2009] FCA 1379, Federal Court of Australia, Lindgren J, 18 November 2009  The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/november/2009fca1379.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/november/2009fca1379.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** The plaintiffs were issued convertible redeemable preference shares ("CRP shares") in the defendant, Pisces Group Ltd ("Pisces").  The terms on which those shares were issued provided that:* if the plaintiffs chose not to convert the CRP shares to ordinary shares, the plaintiffs were to be paid $2.5 million; and
* to the extent that $2.5 million was not paid to them, that sum would be advanced as a loan to Pisces.

The plaintiffs elected not to convert the CRP shares to ordinary shares.  Pisces did not redeem the shares because it had insufficient profits to do so, and did not have funds available from a new issue of shares. Pisces went into administration and the plaintiffs sought to prove for $2.5 million.  The administrator did not accept those proofs of debt.  The question considered by the Court was whether the plaintiffs were creditors of Pisces in the principal sum of $2.5 million for the purposes of a creditors meeting held on 10 July 2009. Lindgren J held that:* the agreements by which the $2.5 million was loaned to Pisces were to be read such that they only became operative if the CRP shares had been lawfully redeemed;
* the issue of whether Pisces had an absolute obligation to redeem the CRP shares was to be determined by construing the relevant documents;
* the documents in issue in the proceedings suggested that Pisces only had an obligation to redeem the CRP shares if it had sufficient profits to do so, or had funds available from a new issue of shares; and
* given that such funds were not available, and Pisces therefore did not have an absolute obligation to redeem the CRP shares, the plaintiffs were not creditors in the sum of $2.5 million at the time of the 10 July 2009 creditors' meeting.

**(b) Facts** The plaintiffs owned all the shares in a company known as Mortgage Data Solutions Pty Ltd ("MDS").  In about 2006 and 2007, negotiations took place for the sale of MDS by the plaintiffs to Pisces. The terms of the sale provided, amongst other things:* for the plaintiffs to be issued with 1.5 million CRP shares;
* the CRP shares were to be redeemed at Pisces' option, or converted at the option of the plaintiffs;
* the CRP shares could only be redeemed out of profits or out of the proceeds of a new issue of shares made for the purpose of redemption;
* by 1 January 2009, the plaintiffs needed to elect to either take or not take 1.5 million ordinary shares in Pisces;
* in the event that the plaintiffs elected not to take ordinary shares, the sum of $2.5 million shall be payable to the plaintiffs; and
* to the extent that the sum of $2.5 million was not paid to the plaintiffs, that sum (or part thereof) would be advanced as a loan to Pisces.

The terms of that sale were expressed in a Share Sale Agreement dated 25 January 2007, in loan agreements also dated 25 January 2007 and in a document entitled "Convertible Redeemable Preference Shares".   On 19 December 2008, the plaintiffs gave notice that they elected not to take ordinary shares and they wished to have all of the CRP shares redeemed.  That notice also stated that, to the extent the $2.5 million was not paid to the plaintiffs, the loan would come into effect for the sum outstanding. Pisces did not pay any money to the plaintiffs on or after 1 January 2009 pursuant to the loan agreements, nor did it redeem the CRP shares.   On 29 May 2009, an administrator was appointed to Pisces.  The plaintiffs lodged proofs for the $2.5 million.  At the second meeting of creditors held on 10 July 2009, the administrator did not accept those proofs.   By previous order of the court, the following question was to be decided separately from any other question in the proceedings:  Whether, for the purposes of the meeting of the creditors of Pisces held on 10 July 2009, the plaintiffs were creditors of Pisces in the principal sum of $2.5 million.   **(c) Decision** In order to determine that separate question, Justice Lindgren had to consider whether Pisces had an absolute obligation to redeem the CRP shares on 1 January 2009.  The plaintiffs contended that Pisces assumed an absolute obligation to redeem, whereas Pisces contended that its obligation to redeem was subject to the availability of either of the funds referred to in section 245K. Section 254K of the Corporations Act provides, relevantly, that a company may redeem redeemable preference shares only "out of profits or the proceeds of a new issue of shares made for the purpose of the redemption". Pisces led evidence that there was a lack of profits available to fund a redemption and asserted that market conditions had not made it possible to raise money for the specific purpose of redeeming preference shares.   Justice Lindgren considered the decisions in *Heesh v Baker* (2008) 67 ACSR 192 and in *Federal Commissioner of Taxation v Coppleson (1981)* 39 ALR 30.  His Honour:* agreed with the decision of Barrett J in *Heesh v Baker* that the question of whether a company has undertaken an absolute obligation to redeem or only an obligation to do so once the conditions stipulated in section 254K are satisfied is one of construction; and
* treated *Coppleson* as a warning that a conclusion that a company has undertaken an absolute obligation to redeem should not be lightly reached.

His Honour then turned to consider the Share Sale Agreement and the loan agreements. In doing so, Lindgren J noted that the construction of those documents was difficult because different provisions within those documents led to different conclusions as to whether Pisces had an absolute obligation to redeem the CRP shares.  Of particular importance to his Honour's decision was:* an unequivocal statement in Schedule 7 of the Share Sale Agreement that the loan was to be made from the proceeds of the redemption of the CRP shares. His Honour took that to mean that there was to be a redemption followed by a "loan back" of the proceeds of the redemption and absent a redemption, the loan agreements would not become operative;
* a statement in the "Convertible Redeemable Preference Shares" document that the CRP shares "may only be redeemed out of profits or out of the proceeds of a new issue of shares made for the purpose of redemption".  His Honour considered that statement expressed an agreement that there was to be no redemption if profits, or proceeds from the new issue of shares, were not available to enable a redemption; and
* other statements in the "Convertible Redeemable Preference Shares" document which suggested that the obligation of Pisces to redeem the CRP shares only became absolute if profits were available, or proceeds from a new issue of shares were available.

In light of those matters, Justice Lindgren was of the opinion that the loan agreements were to be read on the assumption that there had been a lawful redemption on or by 1 January 2009 by Pisces. In circumstances where Pisces had neither profits nor proceeds from the new issue of shares available, no lawful redemption of the CRP shares had taken place.  In the result, his Honour held that the plaintiffs were not creditors in the sum of $2.5 million at the time of the meeting of creditors of Pisces held on 10 July 2009. etailed Contents**4.8 Application to inspect company books refused**(By Stephen Zographakis and Garth Riddell, Freehills)Praetorin Pty Ltd V TZ Ltd [2009] NSWSC 1237, New South Wales Supreme Court, Barrett J, 17 November 2009 The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/november/2009nswsc1237.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/november/2009nswsc1237.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** An application for access to the books of a listed company under section 247A of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) was refused. The applicants sought documents relating to transactions entered into by the defendant company in financial stress. The applicants failed to point to an "express and articulated" basis for their application. When the defendant is a listed company, section 247A will rarely be available merely to assist an applicant to value their securities. **(b) Background** The defendant ASX listed company, TZ Ltd ("TZL"), issued $24 million worth of convertible notes to a third party ("QVT") in February 2008 and subsequently defaulted on interest repayments. As a result of the default, the full $24 million principal under the convertible notes and more than $2 million in interest became immediately due and payable to QVT. In the process of negotiating a 'work out' plan with QVT, TZL made a number of borrowings (secured by way of a first charge over TZL's assets) under a convertible note deed entered into with TZ Resurgence Nominees Pty Ltd ("Resurgence") and later Sydcomp Pty Ltd. Resurgence's sole shareholder was a shareholder in TZL. The plaintiffs were also shareholders in TZL.  On the application of a shareholder, section 247A of the Corporations Act 2001 (Cth) ("Act") gives the court a discretion to make an order authorising the shareholder or another person to inspect a company's books where the court is satisfied that the applicant is acting in good faith and the inspection is to be made for a proper purpose.  The plaintiffs sought orders under section 247A for access to the books of TZL, and in particular documents concerning the arrangements with Resurgence and QVT. The plaintiffs based their claim on numerous grounds but their essential argument was that the convertible note deed and the transactions made under it were illegal and uncommercial in nature.   **(c) Decision**  **(i) The "case for investigation" test** The court considered the existing law on section 247A of the Act and quoted the 9 principles summarised in *Acehill Investments Pty Ltd v Incitec Ltd* [2002] SASC 344, including the well known principle that a shareholder should not ordinarily have recourse to the courts to challenge a managerial decision. The court noted that even though it had not been outlined in the Acehill Investments decision, another useful criterion arising from the earlier case of Knightswood Nominees Pty Ltd v Sherwin Pastoral Co Ltd (1989) 15 ACLR 151 is whether an applicant for access to books can show "a case for investigation as regards past or future wrongful or undesirable conduct."  **(ii) Grounds for seeking access** Where an applicant alleges past or future wrongful or undesirable conduct, the court emphasised the need for the applicant to point to an "express and articulated basis" for the apprehension of a legal wrong. In this case, the court found that the plaintiffs' generalised assertions of illegality were "undeveloped and unexplained." In the absence of anything in the evidence to ground an apprehension of legal wrong, access would not be granted to documents simply to "check it out that no-one had done anything wrong".  **(iii) Capital raising during times of financial stress** The court stated that the exercise by the directors of their powers over unissued shares would generally only be impeachable where the purpose was not to raise capital. Where the company is in financial difficulty, as TZL was, the court will allow particular latitude, especially where the powers are exercised to reach an accommodation following a default under the company's financial arrangements. There is no rule - or even expectation - that the directors should resort to members on a pro rata basis when a need for new capital arises. **(iv) Implications for listed companies** His Honour noted that in the past a desire by an applicant to assess the value of his or her shares may have constituted a ground for permitting an inspection of books, however the context inevitably changes when an ASX listed company is involved. Because the ASX Listing Rules require information of the relevant price-sensitive kind to be made generally available to the market, a court would be very slow to accept an application made on the basis that there was internal and unannounced information that might more adequately equip the applicant to make an informed judgement whether to sell their shares. A course that would provide access to all shareholders (rather than a section 247A application) is the "correct course" in those circumstances. etailed Contents**4.9 To review or not to review: The remuneration of administrators**(By Steven Grant, Minter Ellison) Paul's Retail Pty Ltd v Morgan [2009] NSWSC 1222, New South Wales Supreme Court, Barrett J, 13 November 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/november/2009nswsc1222.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/november/2009nswsc1222.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** This case concerns the court's powers under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) to review the remuneration of an auditor where it is already determined. **(b) Facts**  The defendant, Mr Morgan, became the administrator of the first plaintiff, Paul's Retail Pty Ltd (PR) under Part 5.3A of the Corporations Act on 24 January 2008.  A deed of company arrangement (DOCA) was executed on 21 April 2008 and Mr Morgan became the administrator of the DOCA.The following resolutions were passed at the second meeting of creditors in the Part 5.3A administration on 1 April 2008:* 'That the remuneration of the Administrator, his partners and staff be approved for the period 24 January 2008 to 1 April 2008 to [sic] be calculated on a time basis and charged at the hourly rates of PKF Chartered Accountants & Business Advisors and that the Administrator be authorised to make periodical payments on account of such accruing remuneration at his discretion, fixed in the amount of $540,000 exclusive of GST and disbursements.'
* 'That the remuneration of the Administrator, his partners and staff be approved for the period 2 April 2008 to the execution of the Deed of Company Arrangement be calculated on a time basis and charged at the hourly rates of PKF Chartered Accountants & Business Advisors and that the Administrator be authorised to make periodical payments on account of such accruing remuneration at their discretion, up to a cap of $90,000 exclusive of GST and disbursements.'
* 'That the remuneration of the Administrator of the Deed (if appointed), his partners and staff be approved for the period from the execution of the Deed of Company Arrangement to the effectuation of the Deed of Company Arrangement be calculated on a time basis and charged at the hourly rates of PKF Chartered Accountants & Business Advisors and that the Deed Administrator be authorised to make periodical payments on account of such accruing remuneration at their discretion, up to a cap of $120,000 exclusive of GST and disbursements.'

At the same meeting the creditors resolved to execute the DOCA. PR and Mr Dwyer sought orders that:* Mr Morgan's maximum remuneration as administrator and deed administrator be confirmed to be that which was determined by the creditors' resolutions of 1 April 2008; and
* the fees paid to Mr Morgan be reviewed by a registrar of the court having regard to the criteria in section 449E(4) of the Corporations Act to determine the reasonable remuneration of Mr Morgan, that amount being no greater than that determined by creditors on 1 April 2008.

Mr Morgan's claims were such that in effect:* for the period of the administration up to 31 March 2008 (or 1 April), $710,231 was sought as against the fixed sum of $540,000 determined by creditors on 1 April 2008;
* for the balance of the voluntary administration, $150,590 was sought as against a time-based fee capped at $90,000 determined by creditors prospectively on 1 April 2008;
* for the whole of the period as deed administrator, a total of $453,374 was sought as against a time-based fee capped at $120,000 determined prospectively by creditors on 1 April 2009.

Although Mr Morgan's claims were framed as claims to have remuneration fixed by the court, Barrett J noted that they were really claims to have the court review remuneration already determined.  Accordingly, two issues arose from the parties' contentions, namely:* whether Mr Morgan is precluded from access to statutory provisions for the review by the court of remuneration already determined; and
* if not, should Mr Morgan's remuneration be reviewed by the court.

**(c) Decision** **(i)  Is court review of remuneration precluded where remuneration is already determined?** PR and Mr Dwyer claimed that although the court has jurisdiction to review the remuneration determined by a resolution of creditors passed on 1 April 2008 (whether under section 449E(1) or section 449E(1A)) and to confirm, increase or reduce it, Mr Morgan was precluded, as against PR (or perhaps Mr Dwyer), from invoking that jurisdiction.  However, Barrett J noted that implicit in the claims of PR and Mr Dwyer, was the proposition that they were not denied access to the section 449E(2) jurisdiction and may ask the court to reduce remuneration determined by the same resolution.  Relevantly, section 449E(2) provides that the court may, on the application of the administrator or a member of the company, (a) review the remuneration; and (b) confirm, increase or reduce it. PR and Mr Dwyer also claimed that Mr Morgan may not resort to section 449E(2) with a view to the court determining remuneration higher than that set by the 1 April 2008 resolution on the basis that Mr Morgan was subject to a contractual obligation not to seek or receive remuneration beyond, in one case, the fixed sum and, in the others, the 'cap' referred to in the resolution.  PR and Mr Dwyer also further claimed that Mr Morgan was estopped from doing so.  These contract and estoppel claims arose from representations made by Mr Morgan on 1 April 2008 in a conversation with Mr Dwyer immediately before the start of the creditors' meeting, following a conversation with Mr John Vouris, an insolvency practitioner who had been retained by Mr Dwyer as an adviser.      In that conversation, Mr Dwyer claimed that Mr Morgan agreed that his remuneration would be capped and no further payments would be required, and Mr Morgan read out the resolutions which would later be proposed by Mr Dwyer and passed at the creditors' meeting.  However, Mr Morgan had no recollection of that conversation with Mr Dwyer. Barrett J found that on the balance of probabilities, the conversation between Mr Dwyer and Mr Morgan did not occur.  In this respect Barrett concluded that Mr Morgan had not made any promise or representation that, come what may, he would never seek remuneration as administrator beyond the fixed sum stated in the first resolution plus a sum calculated in accordance with (and subject to the 'cap' in) the second resolution or remuneration as deed administrator beyond the 'cap' in the third resolution. On the contrary, an agreement had been reached between Mr Morgan and Mr Vouris as to the content of the resolutions that would be put to creditors at the meeting that was about to take place.  The agreement was reached on the clearly implied footing that a resolution of creditors fixing remuneration represented only part of the overall machinery created by section 449E for fixing remuneration and that other parts of that overall machinery may operate to cause remuneration already fixed to be supplemented by additional remuneration or to be increased or reduced.Accordingly, Barrett J did not order that the maximum remuneration of Mr Morgan as administrator and deed administrator be confirmed to be that which was determined by the creditors' resolution of 1 April 2008 or be fixed at an amount no greater than that determined by creditors on 1 April 2008.  In this respect, the section 449E machinery was fully available for appropriate use in this case. **(ii) Should Mr Morgan's remuneration be reviewed by the court?** Barrett J then considered the competing section 449E(2) applications by PR and Mr Dwyer, and by Mr Morgan.  To the extent that PR purported to apply under that section, the application was a nullity because companies themselves are not given standing to apply.  Accordingly, the matter was approached on the basis the relevant applications were made by Mr Dwyer alone, having standing as (at least) an officer and the sole member of PR.Pursuant to section 449E(4) the court must have regard to whether the remuneration was reasonable.  In this respect, Barrett J observed that the court must consider whether the initial remuneration already fixed was reasonable or unreasonable because it was either too high or too low.  This assessment would be made in light of all relevant circumstances brought to the court's attention, which may include circumstances which were not known or foreseen at the time the remuneration was fixed and whether unnecessary work or work outside the proper performance of the administrator's functions was performed (with the exception of allegations of misfeasance or breach of duty). Barrett J noted that when an application for review is made the court is required to consider whether, in the light of the statutory provisions, it is just that a review be conducted.  This is to be determined by assessing whether the applicant can demonstrate a need to inquire into the appropriateness of the originally determined quantum.  Whilst Barrett J was not satisfied that the remuneration as voluntary administrator for the period 24 January 2008 to 1 April 2008 should be reviewed, being the remuneration determined by the first resolution, Barrett J considered that the elements of remuneration determined prospectively (namely the determinations in respect of the period of the voluntary administration after 1 April 2008 and the whole of the period as deed administrator), should be reviewed.  Whilst the 'cap' was to mark a limit beyond which there could be no remuneration without either a further determination of creditors or an order of the court, the existence of the 'cap' did not imply that remuneration could never exceed the stated amount. Accordingly, Barrett J ordered that the matter be referred to the registrar to conduct and determine a reviews of the second and third resolutions of 1 April 2009 pursuant to section 449E(2).etailed Contents**4.10 Application for order setting aside a statutory demand** (By Igor Golshtein, DLA Phillips Fox)Drillsearch Energy Ltd v Carling Capital Partners Pty Ltd [2009] NSWSC 1192, New South Wales Supreme Court, Barrett J, 9 November 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/november/2009nswsc1192.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/november/2009nswsc1192.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** Drillsearch Energy Ltd ('Drillsearch') procured corporate advisory services from Carling Capital Partners Pty Ltd ('Carling'). Carling issued to Drillsearch three invoices in respect of services performed. Drillsearch had only paid $22,500 of the amounts invoiced. Carling filed a statutory demand in the Supreme Court of Victoria claiming the amounts in the three invoices. Drillsearch applied under section 459G of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Act') to have the statutory demand set aside on the ground that there was a 'genuine dispute' (pursuant to section 459H(1)(a)) as to the existence of the relevant debts. Barrett J held that the amounts in the second and third invoices related to a letter sent by the defendant to the plaintiff which was drafted in a manner suggesting that it was more akin to a 'proposal' than a 'concluded contract'.  Furthermore, there was uncertainty as to whether the person that represented the plaintiff at a meeting where the contents of the letter were negotiated had the requisite authority to finally conclude a contract on the plaintiff's behalf. As such, his Honour held that a genuine dispute existed in relation to the amounts in both invoices. In relation to the first invoice, Barrett J noted that the plaintiff reasonably queried the amount in the invoice. The defendant's failure to respond to the query led his Honour to hold that a genuine dispute existed in relation to that amount. Hence, Barrett J set aside the defendant's statutory demand.**(b) Facts** By originating process filed on 3 August 2009, Drillsearch applied under section 459G of the Act for an order setting aside a statutory demand dated 14 July 2009 served on it by Carling. The demand related to three distinct debts each of which was said to be owing, due and payable by Drillsearch to Carling. They were described in the demand by reference to attached invoices:* The first invoice was for a total of $17,820, and was for professional services in respect of drafting and compiling certain materials.
* The second invoice was for $217,250. The third invoice was for $33,000. Both invoices were described to be 'as per our [Carling] letter dated 27th May 2009'.

Subject to one qualification, Drillsearch maintained that there was a genuine dispute between itself and Carling about the existence of each of the three debts. It thereby relied on section 459H(1)(a) in advancing its section 459G application. The qualification related to an item of $22,500 in the second invoice for which the Drillsearch accepted liability and paid that amount to Carling.  It was common ground between the parties that Carling was retained by the Drillsearch to provide certain corporate advisory services, and that two relevant agreements were entered into between the two companies - one referred to as the 'general mandate' and the other as a 'takeover mandate'. **(c) Decision**  **(i) Second and third invoices**Since the second and third invoices were described to be 'as per' the 27 May 2009 letter, Barrett J first considered the legal effect of that letter and, in particular, whether or not it had contractual force. Barrett J considered that the letter conveyed, in terms, a proposal: 'we are prepared to accept a fail fee .'. It sought a confirmation or response: 'we hope that we can conclude this matter amicably .'. Viewed in isolation from surrounding circumstances, the letter could not be seen to be the course of a contractual promise to pay money. Some limited evidence of the circumstances in which the letter came into being was given on affidavit in the defendant's case by Mr Carling (the principal of the defendant) and Mr Simpson who was at the time the executive chairman of the plaintiff. On both accounts, differences had emerged between the parties regarding rights under the takeover mandate. In light of these differences, Mr Carling and Mr Simpson met on 27 May 2009. At the meeting, Mr Simpson assured Mr Carling that he had been instructed to finalise a deal with him and whatever they agreed to at the meeting would be done. Mr Carling and Mr Simpson then discussed and agreed upon the fees to be paid by Drillsearch for Carling's services. The fees agreed upon were as per the second and third invoices. At the conclusion of the meeting, Mr Simpson asked Mr Carling to draft a letter representing the contents of their discussions and bring it to Drillsearch's office. Mr Carling did this immediately and brought the letter to the Drillsearch office a few hours later. Upon reviewing the letter, Mr Simpson said that 'the letter was fine' and told Mr Carling to remove the word 'draft' from the letter and insert 29 May 2009 as the date for finalizing everything with Carling and to send him the final version, which Mr Carling did later that day. Despite Mr Simpson's apparent conviction that he committed the plaintiff to a contract with Carling on 27 May 2009, and Mr Carling's apparent understanding that a contract came into existence through the words spoken by Mr Simpson on that day, Barrett J held that there was continuing doubt on this matter.  Specifically, his Honour held that the 27 May 2009 letter did not, in terms, record an agreement. It stated what the defendant 'is prepared to accept' and expresses a 'hope' that 'the matter can be concluded amicably'. This was not the language of contract. Nor, in his Honour's view, did Mr Simpson's invitation to take out the word 'draft' and insert the date 29 May 2009 necessarily bespeak the concluding of a contract, as distinct from the conclusion of an agreed proposal for consideration by the plaintiff. The notion that the defendant had merely put a proposal to the plaintiff by means of the 27 May 2009 letter was confirmed by Mr Carling himself in two emails in early June where, over a week after the letter had been signed and delivered, he was pressing to have the 'proposal' accepted by a resolution of the plaintiff's board so that it would be 'finalised'. Furthermore, there was a question on the extent of Mr Simpson's authority at the 27 May 2009 meeting. Although it was clear that Mr Simpson met with Mr Carling as a result of a decision made by the plaintiff's board of directors at a meeting on 13 May 2009, there was doubt about precisely what the board resolved.  As such, Barrett J held that it was plainly arguable that no contract between the plaintiff and defendant came into existence in terms of the 27 May 2009 letter. This finding was sufficient to justify the conclusion that, to the extent that the debts claimed in the second and third invoices (beyond the $22,500 acknowledged by the plaintiff) were said to be owing, due and payable by reason of a contract in terms of the 27 May 2009 letter, there was a genuine dispute as to the existence of those debts. Furthermore, in relation to the second invoice, an issue also arose as to the proper construction of the word 'acquisition' in the takeover mandate which provided for the payment of a fee expressed to be payable on the 'acquisition' of shares in a target company. The dispute was whether the term was to be understood according to principles as to the creation of relevant interests and the acquiring of powers with respect to shares, or conversely, a more direct and permanent concept of attaining ownership of the shares. There was no 'real evidence' of the circumstances of the formation of the takeover mandate. The court, therefore, had no insight into pre-contractual conduct that may cast light on the genesis of the contract, its objective meaning or the ambiguous term.  On the face of the document, Barrett J held that each of the above constructions was fairly arguable. As such, his Honour held that the existence of the dispute about the correct construction of the takeover mandate meant that there was also a dispute about the existence of the debt. Specifically, his Honour held that 'a dispute as to the existence of a debt that is the product of a dispute about construction is not removed from section 459H(1)(a) just because the issue in contention is one of construction.' It followed that the question about the meaning of 'acquisition' arising from the takeover mandate was one that itself gave rise to a 'genuine dispute' within section 459H(1)(a). **(ii) First invoice** Upon receiving the first invoice, the plaintiff's managing director (recently appointed at the time) wrote to the defendant seeking to clarify that the work in respect of which the first invoice was issued had not already been covered by the plaintiff by a general monthly advisory fee that the plaintiff paid the defendant. There was no reply to this and the statutory demand was served about three weeks later. Barrett J held that his was not an unreasonable request given that the services the subject of the invoice had been ordered by a managing director that had since resigned, so that the plaintiff could not discover internally the basis on which the claimed monies were owning, due and payable. Following the decision in Financial Solutions Australasia Pty Ltd v Predella Pty Ltd (2002) 26 WAR 306, Barrett J held that until the issuer of a statutory demand gave access to documents on which its claim depended, there was an adequate and sound reason for the company to dispute the claim. As such, his Honour found there to be a 'genuine dispute' as to the existence of the alleged debt referred to in the first invoice. For the above reasons, Barrett J ordered that the defendant's statutory demand be set aside and requested written submission on the issue of costs.etailed Contents**4.11 Out of the money and in the money options in a scheme of arrangement** (By Alissa Crittenden, Clayton Utz) Sino Gold Mining Limited, in the matter of Sino Gold Mining Limited [2009] FCA 1277, Federal Court of Australia, Lindgren J, 6 November 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/october/2009fca1277.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/october/2009fca1277.htm%22%20%5Ct%20%22_new)  or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** Sino Gold Mining Limited ("Sino") sought orders pursuant to section 411(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act") for the convening of meetings of its members and creditors in relation to two proposed schemes of arrangement, one for its shareholders ("Share Scheme") and the other for its option holders ("Option Scheme").  It was proposed that there be one class of shareholders and two classes of option holders.  For the classes of option holders, it was proposed that different valuation methods be used for each class. Two option holders objected to the proposed valuation method for their proposed class on the basis that their entitlement would be increased markedly if the valuation method to be used for the other proposed class was applied The court held that the proposed classes of option holders were not inappropriate and made orders convening meetings of the various classes accordingly. **(b) Facts**  Sino was an Australian company listed on the Australian Securities Exchange ("ASX").  Its shares were traded on ASX with a secondary listing on the Hong Kong stock exchange.  It had also issued options to acquire shares in its capital. It was proposed that Eldorado Gold Corporation ("Eldorado"), a Canadian publicly-listed company with shares listed on the Toronto and New York Stock Exchanges, acquire all of the Sino shares and options through Eldorado's wholly-owned subsidiary, Eldorado Pacific Pty Ltd ("Eldorado Pacific"). The two classes of option holders were those who were "in-the-money" and those who were "out-of-the-money".  It was proposed that the "intrinsic valuation method" be used to value the in-the-money options whilst the "Black-Scholes methodology" was to be applied for the out-of-the-money options. The only contentious issue was whether the proposed classes of option holders were appropriate.  One objecting option holder, Kingsway International Holdings Limited ("Kingsway"), was granted leave to appear, lead evidence and make submissions. **(c) Decision**  His Honour considered the various characteristics of the proposed Share Scheme and Option Scheme and made the following observations and findings:* the court will not ordinarily order the convening of meetings under section 411(1) of the Act unless the scheme is likely to be approved at a final hearing (at 10);
* under the Scheme Implementation Deed between Eldorado and Sino ("SID"), the exclusivity period of close to five months was not unreasonably long (at 23);
* the appropriateness of the break fee provisions under the SID was supported by evidence that the break fees were the result of "normal commercial negotiation", it was unlikely that Eldorado would have executed the SID if not for the relevant break fee provisions, and they allowed Sino Gold's shareholders to access benefits available to them upon implementation of the Share Scheme; and
* the deemed warranties under each Scheme in favour of Sino, Eldorado and Eldorado Pacific, that the Sino shareholders and option holders held their shares or options fully paid and free from all encumbrances, were not objectionable, subject to the attention of the share and option holders being drawn to those warranties (at 30-31).

In respect of the issue in contention, the court held that:* it is "unprincipled" to determine the appropriateness of classes by reference to the likely effect on voting (at 50);
* following Barrett J's dicta in *Re MIA Group Ltd* (2004) 50 ACSR 29, the proposed valuation methods for each class of option holders displayed "consistent and indiscriminate application of the same pricing or valuation methodology" (at 55);
* the leading English case on the composition of classes is *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573 ("Sovereign Life") in which it was held that:
	+ classes must be defined so as to prevent confiscation and injustice; and
	+ a class must be "confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest" (at 51);
* according to Kingsway, all of the in-the-money option holders would be underpaid if the intrinsic valuation method was used.  It was therefore open to Kingsway to consult with the other holders with a view to persuading them to vote against the Option Scheme on the ground of the valuation method to be adopted.  As such, the proposed classes of option holders did not offend the principles set down in Sovereign Life (at 56); and
* it would remain open to Kingsway and any other objecting option holder to contend at the second court hearing that the Option Scheme should not be approved because it is unfair or oppressive to them (at 58).

etailed Contents**4.12 Who should chair a creditors' meeting when there is both a liquidator and a special purpose liquidator?**(By Carol Taing, Clayton Utz) Walker re One.Tel Ltd [2009] NSWSC 1172, New South Wales Supreme Court, Barrett J, 3 November 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/november/2009nswsc1172.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/november/2009nswsc1172.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** This was an application by the liquidators of One.Tel Limited ("One Tel") under section 511 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") seeking the court's guidance on whether the liquidators would be justified in nominating a person to chair the annual meeting of creditors of One Tel or whether the "special purpose liquidator" should assume that role. The court directed that the liquidators would be justified in nominating Mr McGrath, an insolvency practitioner with no connection to the winding up of One Tel, to chair the annual meeting of creditors.  **(b) Facts**  Mr Walker and Mr Sherman are the joint liquidators in a creditors' winding up of One Tel.  Mr Weston had been appointed as a "special purpose liquidator" of One Tel. One of the purposes of his appointment was to report to creditors on possible proceedings (for their benefit) against certain defendants (referred to as "the SPL Litigation"). Mr Weston was appointed to this role by the court as Mr Sherman was one of the possible defendants to the SPL Litigation. The annual meeting of One Tel creditors would involve the presentation of Mr Weston's report on the SPL Litigation, a potential motion of no confidence against Mr Weston and other motions critical of Mr Weston's role as the special purpose liquidator. Mr Sherman indicated an intention not to chair the forthcoming meeting  and applied to the court for guidance on the appropriate chair for the meeting. Mr Weston, as special purpose liquidator, contended that he was the appropriate chairperson for the meeting for reasons including that a significant part of the meeting would concern matters of his administration.  The members of the committee of inspection supported Mr Sherman's nomination of Mr McGrath to chair the meeting.**(c) Decision**  **(i) The law** The court considered regulation 5.6.17(1) of the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default) as the relevant rule for determining this matter. The regulation states that: "If a meeting is convened by a liquidator...that person, or a person nominated by that person, must chair the meeting." (A meeting under section 508 of the Act is convened by a liquidator (pursuant to section 508(1)(b)(i)).) The court considered that regulation 5.6.17(1) contains no express requirement or expectation that the liquidator should preside over the meeting. Barrett J considered that the legislative provision is satisfied if the liquidator chairs the meeting or if a person nominated by the liquidator chairs the meeting.  **(ii) Chairperson of a meeting must act impartially** Ultimately, the court's decision rested on the conclusion that a chairperson of a meeting of creditors must be independent and impartial. The court concluded that the meeting's purpose would be seen to be more effectively and more efficiently achieved "if a person aloof from the issues at hand" was able to bring "dispassionate judgment and objectivity" in playing the administrative role that falls to a chairperson. Also of relevance is "the reality and the appearance of impartiality". As the meeting could involve contentious debate about Mr Weston's report and motions critical of Mr Weston's performance, the court considered that, to an informed bystander, the appearance of impartiality would be compromised if Mr Weston was the chairperson. The court did not conclude that Mr Weston was incapable of bringing dispassionate judgment and objectivity to the function of a chairperson. Instead, the court considered that the items of business were likely to be highly contentious and that if confronted with criticisms, there was a chance Mr Weston would become a participant in the debate at the meeting.  The court found no legal requirement that Mr Weston be nominated and no compelling case, in any practical sense, for him to chair the meeting. The court considered that Mr Weston did not need to be chairperson to effectively deliver or explain his report or to justify the actions he took in his role as special purpose liquidator. **(iii) Conclusion** The court thus considered that Mr McGrath, being wholly unconnected with the One Tel winding up, would secure both "the reality and perception of impartiality" if he were to be nominated to the role of chairperson. etailed Contents**4.13 Negligent misstatement claim**(By Rebecca Smithwick and Laura Keily, Corrs Chambers Westgarth) Chew v Amanatidis [2009] SASC 334, Supreme Court of South Australia (Full Court), Gray, White and Kelly JJ, 3 November 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2009/november/2009sasc334.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2009/november/2009sasc334.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** This case concerned two matters: (1) the relevant factors required to establish a claim in negligent misstatement; and (2) whether the trial judge's findings of fact regarding credibility of witnesses should be overturned.  The court found that the claim in negligent misstatement was not established because the respondent's business experience and acumen meant that no special relationship could be established to form a duty of care on the appellant's part.  The court also considered that an appellate court could overturn findings of fact by the trial judge regarding credibility of witnesses, but no basis for overturning the judgment was established in this case.   **(b) Facts** On 3 November 1999, Lee Teck Chew (Appellant) entered into a fraudulent investment scheme whereby an investor would make a loan at or above a minimum of US$100,000 and in return, interest would accrue at a minimum rate of 25% per week.  Protection was to be provided through an insurance policy and placement of the investment in an escrow account with a solicitor in the United States. Mario and Angelo D'Aloia (Plaintiffs) were introduced to the appellant by Gregory John Amanatidis (Respondent) and the Plaintiffs provided US$100,000, in addition to the Appellant's investment of US$60,000, to invest in the scheme. The Plaintiffs agreed to pay a commission of 4% but required a contract of indemnity in return.   The scheme in which they invested was fraudulent and, apart from two payments made to the Plaintiffs of US$22,500 and AUD$6,000 respectively, their monies were lost.  The Respondent pursued proceedings against the Appellant, claiming that he had been induced to enter into the contract of indemnity as a result of the Appellant's negligent misstatement. The trial judge found that the Plaintiffs were not entitled to any reimbursement under the insurance policy, but found that the Respondent was liable to the Plaintiffs under the indemnity agreement for the amount the Plaintiffs lost through the investment.  The trial judge also found that the Appellant owed the Respondent a duty of care, and had acted in breach of that duty by encouraging and advising the Respondent to provide the indemnity to the Plaintiffs.  The Appellant was held liable to indemnify the Respondent in respect of the amount of judgment awarded in favour of the Plaintiffs. The Appellant appealed the judgment on the grounds that the trial judge's adverse findings of fact concerning credibility and reliability were incorrect, that the Appellant's relationship with the Respondent was not such as to give rise to a duty of care, and that it was unreasonable for the Respondent to have acted on the alleged misstatement. **(c) Decision** Justice Gray (with Kelly J agreeing) allowed the appeal, overturning the trial judge's finding of liability for negligent misstatement.  Justice White (with Gray J agreeing) held that there was no basis on which to overturn the trial judge's findings of fact. **(i) Relevant law** Justice Gray relied on the three conditions for the existence of a duty of care in relation to the giving of information in this context set out in the judgment of Barwick CJ in *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 (Evatt) and restated by Brennan J in *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340. The following three conditions must be satisfied:* the representor realises or ought to realise that the representee will trust in his especial competence to give that information or advice;
* it would be reasonable for the representee to accept and rely on that information or advice; and
* it is reasonably foreseeable that the representee is likely to suffer loss should the information turn out to be incorrect or the advice turn out to be unsound.

Justice Gray also considered the most recent review of negligent misstatement by the High Court in *Tepko Pty Ltd v Water Board* (2000) 206 CLR 1 in which Gaudron J, in discussing reliance, stated that reliance "as the test for the existence of a relationship that will call a duty of care into existence is not actual reliance, but reasonable reliance."   Gray J also turned his attention to *Evatt* where Barwick CJ and Kitto J discussed reasonable reliance.  Chief Justice Barwick considered the "identity and position of the recipient of the utterance" in assessing whether there was reasonable reliance.  Justice Kitto considered reasonable reliance as being a situation where it was "reasonable for the inquirer to suppose that the other was replying with an intention of accepting the full responsibility that is ordinarily appropriate to a business transaction".  Justice Gray emphasised Kitto J's finding that whether the statement caused the loss depends on its potency as an influence upon a decision and that such an intention can only be inferred when the statement is supplied in the context of matters of business.  Justice White's decision regarding the trial judge's findings of fact was based on the principles set out by Brennan, Gaudron and McHugh JJ in *Devries v Australian National Railways Commission* (1993) 177 CLR 472 (affirmed in *Fox v Percy* (2003) 214 CLR 118): if the trial judge's finding depends to a substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable".  **(ii) Application of principles** Justice Gray found that the Respondent was a "man of considerable business experience" and was "not a naïve investor totally inexperienced in the affairs of business".  Having regard to the Respondent's business experience and acumen, and the investment's "lack of any commerciality", Gray J held that reasonable reliance could not be established.  Consequently, the circumstances did not give rise to a special relationship necessary to support a duty of care on the part of the Appellant.  These matters were not matters of peripheral relevance as the trial judge considered them to be.  Justice White held that the Appellant had not demonstrated that the trial judge had erred in the factual findings of the case as he had not established that the trial judge's findings were "glaringly improbable".  It was not suggested by the Appellant that any of the trial judge's findings were "inconsistent with any facts incontrovertibly established by other evidence". etailed Contents**4.14 Pooling contributions under a managed investment scheme: The intention requirement in the context of a fraud**(By Meg O'Brien, Mallesons Stephen Jaques) National Australia Bank Ltd v Norman [2009] FCAFC 152, Federal Court of Australia, Full Court, Spender, Gilmour and Graham JJ, 30 October 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/october/2009fca152.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/october/2009fca152.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** In this case, the National Australia Bank ("NAB") appealed a decision of Mansfield J at first instance.  His Honour had concluded that a scheme operated by the late Allan McFarlane ("McFarlane") was a managed investment scheme within the meaning of section 9 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act"). As this scheme was not registered under section 601ED(1) of the Act, Mansfield J made a winding up order pursuant to section 601EE of the Act.  NAB was not a party to the first instance hearing but it was granted leave to appeal the decision.   On appeal, NAB alleged that a managed investment scheme had never come into existence and that there had been no "pooling" of contributions in the relevant sense under the Act.   The court concluded that contributors to a managed investment scheme under section 9 of the Act must intend that their contributions are going to be pooled for the purpose of creating financial benefits for members of that scheme.  These contributors should also be aware of the nature of the scheme they are contributing to.  The court also appeared unable to reconcile the fraudulent conduct of McFarlane with the definition of "managed investment scheme" in the Act.  On this basis the court found that there was no evidence that a managed investment scheme had come into existence and found that evidence suggested each investor intended that their funds be dealt with separately and for their own benefit.   **(b) Facts**  McFarlane was the founder and a principal of "McFarlanes", the entity through which he carried on business as an advisor and chartered accountant.  Following his death in June 2008 it became apparent that his estate had unsecured creditors in the order of $21 million.  A trustee was subsequently appointed to his estate under section 244 of the [Bankruptcy Act 1966 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "Default).  The $21 million largely consisted of money given to McFarlane by his clients for him to invest on their behalf. McFarlane held an account known as "McFarlanes Charted Accountants Trust Account" with the applicant, into which funds received from investor clients were placed. In the course of his business, McFarlane had approached a number of his acquaintances and informed them of the availability of investment opportunities.  When he received the funds he was under instructions to deal with them in certain ways.  Most were meant to be placed in term deposit accounts in Australia or overseas.  However, McFarlane consistently ignored these instructions and misappropriated the funds for his own purposes and to pay interest to other investors.   At first instance, Mansfield J was satisfied "as to the existence of a managed investment scheme operated by McFarlane, which involved him inviting the investors to deposit funds into an account operated by him for the purpose of the investors participating in the financial benefits earned from investment of those funds" and that this scheme was required to be, but was not, registered under the Act.  Consequently, Mansfield J issued a winding up order.  No contradictor appeared at the first instance hearing to make submissions that a managed investment scheme was not in existence.  NAB appealed the decision of Mansfield J on the basis that there was no evidence to suggest a managed investment scheme had come into existence.  NAB also submitted that there was no "pooling" of contributions in the sense contemplated within the definition of "managed investment scheme" contained in section 9 of the Act.   **(c) Decision**  Gilmour and Graham JJ delivered separate judgments.  Spender J stated that he was  in "general agreement" with Graham J's reasons about why McFarlane's scheme did not constitute a managed investment scheme under section 9 of the Act and that he agreed with the orders proposed by Gilmour J.   **(i) Was there a "pooling" or "common enterprise" under section 9 of the Act?** According to Gimour J, the scheme devised by McFarlane lacked fundamental features of a managed investment scheme as defined by section 9 of the Act.  First, his Honour emphasised the need to read the definition as a whole.  This included recognising that contributions to a managed investment scheme are made for a particular purpose so that "prior to any contributions being made the program or plan of action must have been articulated including the means by which benefits are to be produced; what those benefits are and what is the consideration to be paid to obtain an interest in those benefits."   His Honour then proceeded to consider what the words "contributions are to be pooled" meant.  He concluded that these words ".require an intention, objectively discerned, forming part of the "scheme" and formed prior to the making of contributions that the contributions are to be pooled.  That intention may be discerned objectively and variously from documents, discussions or conduct.  The subjective evidence of members as to what, and by what means, they understood was the scheme prior to making their contributions would be relevant but not necessarily determinative of this question." In addition, his Honour required "an intention objectively discerned that contributions are to be pooled" in order to produce financial benefits for members of the scheme.  Consequently, contributions cannot be pooled under a managed investment scheme without the purpose of producing financial benefits for members.   In this case, his Honour found that contributions were not made with the intention that they be "pooled" to produce financial benefits for members.  Without evidence of such an intention, his Honour concluded that money pooled in one bank account which was to be used in accordance with the instructions of each client could not be considered a managed investment scheme under section 9 of the Act.  Furthermore, his Honour added that McFarlane's investor clients had no understanding that their money was going to be combined with that of other investors to produce some benefit for all of them.  There was also no program or plan under which investors were meant to reap financial benefits. Graham J also believed those contributing to a scheme must be "seized of the nature of the scheme, the benefits that may be produced by the scheme and the nature of the rights to those benefits which they were acquiring".  Furthermore, contributors needed to know that their contributions were being pooled or used in a common enterprise.  Ignorance of this fact would be inconsistent with the existence of a scheme.  In this case, his Honour concluded that there was no evidence to support a conclusion that the individual contributors contemplated that their contributions were going to be pooled and in fact, the evidence suggested each investor's funds were to be dealt with separately and for their own benefit.   **(ii) Can a fraudulent scheme ever be a managed investment scheme under section 9 of the Act?** Gilmour J found that McFarlane's intention to fraudulently misappropriate his client's money was inconsistent with the existence of a managed investment scheme.  McFarlane never intended that his clients would acquire interests in a scheme and his clients assumed their money was being placed in high interest bearing bank accounts.  Despite submissions from the respondents that the managed investment scheme was the way in which McFarlane carried out this fraud his Honour concluded that "a scheme involving, even in part, misappropriation as one of its features, is not a scheme of a kind which is capable of registration by the Australian Securities and Investments Commission under s 6091EB of the Act."  According to his Honour, it simply was not plausible that someone could contribute "money as consideration to acquire rights to benefits produced by a scheme in which they would be defrauded."  On this basis Gilmour J concluded that the orders of Mansfield J should be dismissed.  Graham J also found the requirement under section 9 that a scheme needs contributions of money or money's worth as consideration for the acquisition of rights or interests in the benefits produced by the scheme and the fraudulent conduct of McFarlane hard to reconcile.  His Honour did not make any definitive statements on this point but appeared to subsume this issue under his findings that a contributor to a managed investment scheme under section 9 of the Act intend that their funds are going to be pooled in order to produce a financial benefit to scheme members.etailed Contents**4.15 Removal and appointment of directors not valid; appointment of administrators not valid - appointment made by person without authority**(By Dylan Burke, DLA Phillips Fox)Londish v Sheahan & Lock in Re Valofo Pty Ltd [2009] NSWSC 1175, New South Wales Supreme Court, Brereton J, 2 October 2009The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/october/2009nswsc1175.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/october/2009nswsc1175.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**Brereton J held that the purported removal of Mr Peter Londish as director and secretary of two entities was not valid, as the purported removal was not done in accordance with section 249B of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Act') and because there was no provision in the Articles of Association of the relevant entities allowing removal in the manner in which he was purported to be removed. Similarly, the purported appointment of Mr Sidney Londish as director of the same two entities was not valid, as the purported appointment was not done in accordance with section 249B of the Act and because there was no provision in the Articles of Association allowing such appointment. The fact that the purported appointment of Mr Sidney Londish was not valid was relevant as Mr Sidney Londish, along with Mr David Bowman as director of Valofo Pty Ltd ('Valofo'), purported to appoint Mr John Shehan and Mr Ian Lock as administrators of Valofo. Given that Mr Sidney Londish was not validly appointed as director of Valofo, the purported appointment of administrators was therefore not valid.  **(b) Facts**The series of events that gave rise to the purported appointment of the two administrators on 16 July 2009 is as follows:Vesudi Investments Pty Limited ('Vesudi') was the sole shareholder of Londish Nominees Queensland Pty Ltd ('LNQ'), which was the sole shareholder of Valofo. As at the date of hearing, the National Database showed that the shareholdings in Vesudi were as follows:* 1,000 shares held by Vesudi Holdings Pty Limited ('Vesudi Holdings');
* 66,863 shares held by Masalo Pty Limited ('Masalo');
* 66,863 shares held by Feenix Investments Pty Limited ('Feenix'); and
* 66,274 shares held by Tiffany Properties Pty Limited ('Tiffany Properties').

Subject to Article 62(3) of the Articles of Association of Vesudi, holders of the majority of issued shares and capital of the company holding the right to vote at all general meetings of the company could at any time remove any director from office and appoint any person to be a director. Article 62(3) also provided that any appointment or removal took effect immediately upon delivery of the instrument of appointment or removal to Vesudi's registered office. On 19 February 2009, Mr Sidney Londish as director and Ms Lynn Londish as secretary of Tiffany Properties, and Mr Bowman as director of Masalo, signed a notice removing Mr Peter Londish as director and secretary of Vesudi and appointing Mr Sidney Londish as director of Vesudi.  On 25 February 2009, Mr Sidney Londish, as director of Vesudi, and Mr Bowman as director and secretary of Vesudi, purported to remove Mr Peter Londish as director and secretary of LNQ, and appointed Mr Sidney Londish as director.On 26 February 2009, Mr Sidney Londish and Mr Bowman in their purported capacities as directors of LNQ purported to remove Mr Peter Londish as director and secretary of Valofo, and appointed Mr Sidney Londish as director of Valofo. Once Mr Sidney Londish had been purportedly appointed as a director of Valofo, he and Mr Bowman, already a director of Valofo, appointed Mr Sheahan and Mr Lock as administrators of Valofo, pursuant to section 436A of the Act.**(c) Decision****(i) Removal of Mr Peter Londish as director and secretary of Vesudi and appointment of Mr Sidney Londish as director of Vesudi**Mr Peter Londish argued that the National Database was incorrect, in that it stated that Feenix held 66,863 shares in Vesudi, when in fact, it held 133,000 shares. This would have meant that the combination of the shareholdings of Masalo and Tiffany Properties would not have amounted to a majority in Vesudi. Furthermore, this would have meant that Mr Sidney Londish as director and Ms Londish as director and secretary of Tiffany Properties, and Mr Bowman as director of Masalo, would not have been entitled to remove Mr Peter Londish as director and secretary and would similarly not have been entitled to appoint Mr Sidney Londish as director of Vesudi.  However, Brereton J held that the National Database did not reflect a belated notification of the transfer of Feenix's shareholding, but that this was explained in the affidavit of Mr Bowman. His Honour accepted that the National Database accurately reflected the shareholdings in Vesudi, and on that basis, accepted that Masalo and Tiffany Properties held a majority of shares in Vesudi. Mr Sidney Londish and Ms Londish, acting through Tiffany Properties, and Mr Bowman, acting through Masalo, were therefore entitled to exercise the power under Article 62(3) of the Articles of Association of Vesudi. The effect of this was that Mr Peter Londish was validly removed as director and secretary of Vesudi and Mr Sidney Londish was validly appointed as director of Vesudi.  **(ii) Removal of Mr Peter Londish as director and secretary of LNQ and appointment of Mr Sidney Londish as director of LNQ** The Articles of Association of LNQ did not contain an Article on similar lines to Article 62(3) of the Articles of Association of Vesudi. Accordingly, the respondents claimed that the appointment and removal were effective under section 249B of the Act, which deals with resolutions of one member companies. Brereton J did not accept this contention, and noted that although LNQ did have only one member, section 249B of the Act contemplates that a resolution is made by the company 'as if' in general meeting. The notice purporting to remove Mr Peter Londish and appointing Mr Sidney Londish was not expressed to be and did not purport to be a resolution of LNQ, but rather purported to be an act of LNQ giving notice of removal of a director. In this sense, Brereton J held that the notice of removal and appointment was a purported exercise of a non-existent power under a non-existent article of the Articles of Association of LNQ. His Honour held that the notice did not represent a formal decision of LNQ, but rather, was a unilateral act of Vesudi as the sole shareholder of LNQ, purporting to remove by notice, but not making a decision in the manner contemplated by section 249B of the Act. As such, the notice was not valid, and therefore Mr Peter Londish remained a director of LNQ, and Mr Sidney Londish was not validly appointed as a director of LNQ. **(iii) Removal of Mr Peter Londish as director and secretary of Valofo and appointment of Mr Sidney Londish as director of Valofo** In the same manner in which the notice was purported to be given in relation to LNQ, the notice given in relation to Valofo was not valid as it was not a resolution made by the company, as contemplated by section 249B of the Act.Furthermore, even if such notice was permitted, Mr Sidney Londish was not a validly appointed director of LNQ (for the reasons outlined above), and therefore could not have authenticated the notice.For these reasons, Brereton J held that Mr Peter Londish was not removed as director and secretary of Valofo and Mr Sidney Londish was not validly appointed as director of Valofo. **(iv) Appointment of Mr Sheahan and Mr Lock as administrators of Valofo** Brereton J held that the administrators were not validly appointed as administrators of Valofo. This is because the appointment, purported to be made under section 436A of the Act, was made by resolution of Mr Sidney Londish and Mr Bowman. As outlined above, Mr Sidney Londish was not validly appointed as director of Valofo, and therefore, the appointment of Mr Sheahan and Mr Lock as administrators was not a valid and effective act of Valofo.  **(v) Application for relief under sections 447A and 1322 of the Act** Brereton J refused the relief sought by Mr Sidney Londish and Mr Bowman for relief under sections 447A and 1322 of the Act to overcome the defect in the purported appointment of Mr Sheahan and Mr Lock as administrators.  As for the relief sought under section 447A, Brereton J held that any relief to be given under this section is limited to orders in relation to how Part 5.3A of the Act is to operate in relation to a particular company. Part 5.3A deals with administration of a company's affairs with a view to executing a Deed of Company Arrangement, and therefore, section 447A cannot be used to rectify a defect in the appointment and removal of a director.  In relation to section 1322, Brereton J declined to provide the relief sought as an order made by a court under section 1322(4)(a) must be in relation to an act, matter or thing done or a proceeding under the Act. The purported removal of Mr Peter Londish as director of LNQ and Valofo and the appointment of Mr Sidney Londish as director of those companies were not valid under the Act, and therefore, the respondents were precluded from relief under section 1322.  Furthermore, section 1322(6) provides that a court must not make an order under section 1322(4)(a) unless it is satisfied that the act, matter or thing or the proceeding is essentially of a procedural nature. Brereton J held that removal and appointment of directors are not matters of a procedural nature, but rather are matters of a substantive nature, and therefore declined to provide the relief sought under section 1322 of the Act. etailed Contents |

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