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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007_files/spacer.gif |

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| Corporate Law Bulletin No. 119> |  |

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 | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007_files/spacer.gif |

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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007_files/spacer%281%29.gif |

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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007_files/spacer%281%29.gif |
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| --- | --- | --- |
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| --- | --- |
| **Index** | mail lawlex helpdesk.asiapac@saiglobal.com |

 |
| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007_files/spacer%281%29.gif |

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 | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007_files/spacer%281%29.gif |

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007_files/spacer%281%29.gif |

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| **Bulletin No. 119**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by Lawlex on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson Waldron](http://www.bdw.com.au/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new).1. [Recent Corporate Law and Corporate Governance Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#1)
2. [Recent ASIC Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#2)
3. [Recent ASX Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#3)
4. [Recent Takeovers Panel Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#4)
5. [Recent Corporate Law Decisions](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#5)
6. [Contributions](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#h6)
7. [View previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)
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| **Detailed Contents**  | own |

 |
| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007_files/spacer%281%29.gif |

 |
| [1. Recent Corporate Law and Corporate Governance Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#h1)[1.1 Sydney Seminar - The Takeovers Panel - Consequences of the Alinta Litigation](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#011)[1.2 Private equity consultation document](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#012) [1.3 The treatment of unascertained future personal injury claims](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#013)[1.4 M&A activity: study](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#014)[1.5 Australian capital markets raise record $65b](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#015) [1.6 Additional proposals for auditor independence issued by IFAC's International Ethics Standards Board for Accountants](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#016) [1.7 CESR releases 2nd set of guidance on the operation of the market abuse directive](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#017)[1.8 Plan for simplifying EU rules on company law, accounting and auditing](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#018)[1.9 APRA releases revised Basel II securitisation standard](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#019) [1.10 CGFS report on financial stability and local currency bond markets](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#110)[1.11 Research on ethical standards](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#111) [1.12 Capital adequacy for ADIs and general insurers](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#112) [1.13 Inquiry into shareholder engagement and participation](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#113)[1.14 FSA publishes conclusions of M&A inside information review](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#114)[1.15 New Zealand Securities Commission completes annual oversight review of New Zealand Exchange Limited](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#115)[1.16 Corporate governance practices of Singapore listed companies](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#116)[1.17 POB publishes annual report from its audit inspection unit](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#117) [1.18 FSA publishes first paper from the retail distribution review](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#118)[1.19 Discussion paper on the use of platforms in investments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#119)[1.20 Publication of report on the euro bonds and derivatives markets](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#120)[1.21 Directors' accountability to shareholders as a separate financial reporting objective](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#121)[1.22 BIS releases 77th annual report](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#122) [1.23 Product rationalisation - issues paper](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#123)[1.24 Guidance note on proper purpose when accessing a company's register of members](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#124) [1.25 Leading expert on class actions and mass torts to speak at Melbourne Law School](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#125)[2. Recent ASIC Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#h2)[2.1 ASIC seeks comments on competition for market services](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#021)[2.2 ASIC consults on compensation and insurance requirements for AFS licensees](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#022)[2.3 ASIC'S better regulation: new regulatory documents and road map](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#023)[2.4 Consultation on class order relief for share and unit sale facilities](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#024)[2.5 Financial reporting relief](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#025)[2.6 Updated policy on foreign securities prospectus relief](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#026)[2.7 Relief from consent to quote credit ratings, trading data and geological reports in prospectuses, PDS and takeover documents](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#027)[2.8 Consultation on managed investment schemes: withdrawal rights and scheme liquidity](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#028)[2.9 Audit report requirements for investor directed portfolio and managed discretionary account services](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#029)[2.10 Updated policy on tracing beneficial ownership](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#210)[2.11 Crackdown on disqualified directors](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#211)[2.12 Updated licensing requirements for AFS licensees](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#212)[2.13 Consultation on proposals to review policy on investor directed portfolio services](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#213)[3. Recent ASX Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#h3)[3.1 New Guidance Note 17](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#031)[3.2 Seminars held to introduce ASX CFDs](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#032)[4. Recent Takeovers Panel Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#h4)[4.1 Rinker Group Limited 02 - Panel decision](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#041)[5. Recent Corporate Law Decisions](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#h5) [5.1 Management of conflicts of interest and insider trading](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#051)[5.2 Caution- Ensure you clearly identify the party with whom you contract](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#052)[5.3 Lawyers are not acting for two masters when acting both for and against a party in separate but related matters](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#053)[5.4 The treatment of GEERS payments by a trustee](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#054)[5.5 An examination of the threshold criteria for imposing disqualifications and pecuniary penalties](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#055)[5.6 When privilege attaching to a document is waived during discovery](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#056)[5.7 Validity of the appointment of administrators to Aboriginal Corporations](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#057)[5.8 Time after time: statutory demands and the court's ability to extend time for compliance after the period for compliance has expired](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#058)[5.9 Repayment of money received by mistake](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#059) [5.10 Receivers' duties and their distribution of company assets surplus to their appointers' debts](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#510)[5.11 Relevant considerations in security for costs applications](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#511)[5.12 The effect of general dispute resolution clauses on whether an expert determination is final and binding](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#512)[5.13 Appointment of directors via informal resolution](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007.htm#513)  |

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

 |
| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007_files/spacer%281%29.gif |
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| **1.1 Sydney Seminar - The Takeovers Panel - Consequences of the Alinta Litigation**On 20 April 2007, the Full Federal Court handed down its decision in Australian Pipeline Ltd v Alinta Ltd. In a 2-1 decision, the court struck down one of the grounds upon which the Takeovers Panel makes declarations of unacceptable circumstances (on the basis that the Panel was, in breach of the Constitution, exercising judicial power) and cast doubt on the other ground upon which the Panel makes such declarations. It has been said that the decision has rendered uncertain the future operations of the Panel. The decision has also enlivened strong debate on the effect of the separation of powers doctrine on the powers of administrative bodies.The Attorney General has applied for, and obtained, special leave from the High Court to appeal the Full Federal Court decision. Meanwhile, the Takeovers Panel has continued to receive and consider applications, albeit on a more limited basis than before the court decision.The decision of the Full Federal Court has generated significant controversy and debate. Newspaper headlines following the decision included "Takeovers Panel in doubt as court overrules it twice", "Call to fix takeover turmoil", and "Government action needed to resolve Takeovers Panel problem". In a joint media release published shortly after the court decision, the Commonwealth Treasurer and the Commonwealth Attorney General stated that "The Takeovers Panel plays a vital and integral role in resolving takeovers-related disputes during the bid period. It provides interested parties with an efficient means of resolving disputes without costly and time-consuming litigation . The decision undermines the objective that the Takeovers Panel be the primary forum for the resolution of takeovers disputes."This seminar brings together leading speakers (George Durbridge, Norman O'Bryan SC and Professor Cheryl Saunders AO) to examine the implications of the Full Federal Court decision for the Takeovers Panel from a range of different perspectives.The seminar is being held in Sydney on 21 August 2007 from 5.30pm to 7.15pm. Further details and the registration form are available [here](http://cclsr.law.unimelb.edu.au/download.cfm?DownloadFile=6B5D8889-1422-207C-BAABA45F0E6C35E4" \t "_new).etailed Contents**1.2 Private equity consultation document** In February 2007 the British Venture Capital Association and a group of major private equity firms asked Sir David Walker to undertake a review of the adequacy of disclosure and transparency in private equity. Following on from this on 17 July 2007 the working group led by Sir David published a consultation document "Disclosure and Transparency in Private Equity".The consultation document recommends enhanced communication and more substantive reporting by the private equity industry as a whole. The proposals it makes on how this is to be achieved do not involve any changes to existing legislation and include the following: * The introduction of a voluntary code of conduct and set of guidelines
* Conforming with the guidelines would be on a comply or explain basis
* Enhanced reporting standards for certain portfolio companies
* The publication of an annual review by general partners
* An initiative to promote an increase in the disclosure of authoritative information on an industry wide basis.

The consultation period closes on 9 October 2007. The consultation document is available [here](http://walkerworkinggroup.com/sites/10051/files/walker_consultation_document.pdf%22%20%5Ct%20%22_new). etailed Contents**1.3 The treatment of unascertained future personal injury claims** On 17 July 2007, the Corporations and Markets Advisory Committee (CAMAC) released a discussion paper "Long-tail liabilities: The treatment of unascertained future personal injury claims". The paper responds to a request from the Parliamentary Secretary to the Australian Treasurer, the Hon Chris Pearce, MP, for the Committee to consider the adequacy of arrangements under the law for the protection of individuals who in the future may have personal injury claims against companies. The request refers to the report of the Special Commission of Inquiry into James Hardie in 2004, in which David Jackson QC said that: current laws do not make adequate provision for commercial insolvency where there are substantial long-tail liabilities, that is, liabilities that arise many years after the events or transactions that give rise to them.The difficulty arises with businesses that have been involved in the manufacture and distribution of products that give rise to health problems or diseases after the lapse of a significant period of time. The onset of some diseases, for instance asbestos-related conditions, is difficult to predict, as there is a long gap between exposure to the product and the manifestation of the disease. Any move towards making special provision for future personal injury victims has to take into account: * the difficulty for companies in determining the likely impact of future claims on their operations, as there may be only limited information about the number or possible costs of those claims
* the possibility that constraints on the ongoing management of companies could undermine their ability to pay claims as they arise
* the need to strike a balance between protecting potential personal injury claimants and providing current creditors and others with reasonable business certainty.

Particular problems also arise where corporate insolvency is involved. The challenge is how to protect victims whose claims may not come to light until after the company has been wound up. The request from the Parliamentary Secretary asked CAMAC to review a proposal that seeks to protect persons to whom a company has or may have long-tail liabilities. That proposal involved the extension of existing creditor protections to persons with potential future injury claims, a procedure for dealing with those claims in an insolvency and an anti-avoidance provision. CAMAC invited comments on this proposal and received a number of submissions, which have been taken into account in developing the discussion paper. In the discussion paper, CAMAC raises various issues and puts forward a number of policy options for further consideration with a view to developing workable solutions. Some of the questions raised by the Committee are: * Should any special provision for future personal injury victims apply only where a mass future claim is in prospect?
* Should there be additional protections for future personal injury victims where solvent companies are seeking to return capital to their shareholders?
* Should companies that go into voluntary administration be required to make financial provision for these future victims?
* Should companies be able to enter into schemes of arrangement that regulate payments to these future victims?
* Should liquidators be required to set aside funds in the winding up of a company to accommodate the interests of these future victims?
* Is an anti-avoidance provision needed to discourage agreements or transactions designed to prevent future victims from recovering funds?

The paper also raises questions about the current accounting requirements dealing with the disclosure of contingent corporate liabilities.The discussion paper is available on the [CAMAC](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFDiscussion%2BPapers/%24file/Long_tail_DP_Jun07.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.4 M&A activity: study** KPMG Corporate Finance's Global M&A Predictor, published on 16 July 2007, suggests that global merger and acquisition (M&A) activity is about to peak, and forecasts a fall in overall deal volumes this year. Although liquidity remains high, and deal values continue to rise, KPMG expects global deal volumes in 2007 to be below those achieved in 2006, a year during which both average deal size and the number of deals hit record highs. The forecast, based on a detailed analysis of KPMG Corporate Finance's Global M&A Predictor - a forward looking index of 1,000 leading companies' net debt to EBITDA ratios and price earnings ratios - reveals that pressure has come off, as regards international asset prices, with 12 month forward PE valuations (the valuation ratio of share price to estimated earnings per share) increasing only marginally. KPMG's research also highlights that significant cash and debt capacity remain. However, a modest decline in deal appetite and confidence, rather than capacity or average deal value, is expected to prevail in the coming months. Importantly, due to the relatively sound market fundamentals and generally strong corporate balance sheets, KPMG believes that, in contrast to the steep dot-com collapse of 2000, the slow-down will be gradual. **(a) Forecast M&A activity by world region** KPMG's Global 1,000 analysis shows that, in the first five months of 2007, there was a significant discrepancy between the key trend indicators of deal values and volumes. The last time the market witnessed this kind of 'disconnect' - where the average deal size rose, but the number of deals fell - occurred at the height of the dot com boom in 2000. KPMG's analysis shows that the appetite for M&A transactions appears to be slowing, despite conservative balance sheets. Twelve month forward PE valuations rose marginally to 17.1x compared to 16.8x in both June and December 2006 which implies a restriction on the available "bid" premium in the marketplace. Balance sheet capacity remains conservative but has tightened marginally from 0.85 times to 0.91 times. Of the major global regions, Europe remains the most positive in terms of potential M&A activity, due to rising PE momentum, while Asia Pacific once again looks the weakest. The US remains static in terms of valuation, suggesting the potential for a slow down. In terms of sector regions, the best M&A prospects appear to reside in Utilities Europe, Basic Materials North America, Oil and Gas North America, Industrials Europe and Consumer Services Europe with the weakest prospects being Consumer Services Asia Pacific and Consumer Goods Asia Pacific. **(b) Europe** KPMG's analysis shows that Europe continues to exhibit the strongest M&A picture out of all the major global regions. Twelve month forward PEs for those constituents within KPMG's Global 1,000 stood at 16.2x at the end of the first five months of 2007, some 7.3 percent above the 15.1x at the end of 2006. Net debt to EBITDA ratios for the region weakened slightly, from 0.8 times to 0.88 times. By sector, Utilities are eliciting the most significant "activity" signals, with forward PEs up 12.7 percent to 19.8x. Net debt to EBITDA ratios in European Utilities remain typically among the highest of any sector and have deteriorated slightly from 1.44 x to 1.52 x. Industrials has also shown a strong tendency with PE's up 10.9 percent to 17.7x, with net debt to EBITDA weakening slightly from 1.59 x to 1.65 x. Consumer Services and Telecoms were also strong (PE up 9.6 percent and 8.4 percent respectively). Oil and Gas was the weakest performer though balance sheets remain very strong with net cash, though this position has deteriorated during the past six months. **(c) The Americas** The U.S. traded sideways in terms of valuation with an almost unchanged forward PE of 17.9x, slightly up from 17.7x six months ago. Similar to Europe, balance sheets remain robust though have deteriorated with net debt to EBITDA ratios of 0.82 times to 0.96 times. Within the region, the most positive sector is Oil and Gas with forward PEs rising 13.6 percent from 11.7x to 13.3x. Balance sheets remain strong at 0.41 times indicating that this represents the comparatively hot sector going forward. Telecoms is close behind with forward PEs rising 11.2 percent from 15.7x to 17.5x, though net debt EBITDA ratios have deteriorated to 1.41 times. According to Dealogic data this is the fourth consecutive drop in deal volumes. Most other sectors within the U.S. remain relatively stable, though Healthcare has experienced negative developments in forward PEs from six months ago (down 4.1 percent to 17.7x). **(d) Asia Pacific** Asia Pacific has continued to experience a valuation decline, down a further 4.9 percent to 17.0x, compared to 17.9x as at the end of December 2006 and 18.9x as at the end of June 2006 continuing to suggest an "easing" of potential M&A activity. Contrary to North America and Europe, its balance sheet has strengthened with net debt EBITDA falling from 1.0 times to 0.97 times. Furthermore foreign direct investment in Asia is expected to remain strong, particularly China. The biggest "fallers" contributing to valuation weakness and therefore falling appetite for deals in the region are Consumer Services and Oil and Gas. Consumer Services forward valuation declined 8.7 percent from 22.5x to 20.6x, with Oil and Gas forward PE down by 7.1 percent from 12.4x to 11.5x. Only telecoms remained "warm" with forward PE's up 9.4 percent to 17.5x with net debt EBITDA remaining modest and 0.34 times. etailed Contents**1.5 Australian capital markets raise record $65b** The Australian capital markets reaped a record amount of equity, raising $65 billion in financial year 2006-07, an increase of 50 percent on the previous year, according to KPMG's Capital Markets Survey 2006-2007 released on 16 July 2007. According to KPMG, the year saw record equity and debt raisings; significant M&A and private equity (PE) activity; a booming mining sector; and an expanding superannuation industry, all enhanced by a relatively efficient regulatory framework.Placements became the largest source of new equity during the year, exceeding IPOs for the first time since 2004. They raised a total of $19.5 billion in funds from 1414 separate placements. The survey showed a drop in the average size of floats due to the boom in the resources sector. Smaller companies trying to capitalise on the booming commodities and energy sectors, such as uranium stocks, were a key trend, resulting in a decline in the average IPO value to $47 million. The market witnessed a record breaking 102 floats in the materials sector and 43 floats in the energy sector.**Total equity raised 2005 - 2006 ($ billion)**

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| **Financial year ending** | **2006** | **2007** |
| IPOs | 11.89 | 10.41 |
| Rights Issues | 6.80 | 11.61 |
| Placements | 11.66  | 19.51 |
| Dividend reinvestment plans | 7.33 | 8.70 |
| Calls | 2.06 | 1.77 |
| Exercise of options | 0.45 | 1.12 |
| Others | 3.50 | 3.93 |
| T3 | - | 8.50 |
| Total | 43.69 | 65.55 |

Australia is now the largest centre for hedge funds and absolute return funds in the Asia Pacific region with current assets under management of $62.7 billion. The assets managed by Australian based hedged funds and fund-of-hedge-funds have more than quadrupled in the past three years. The survey is available on the [KPMG](http://www.kpmg.com.au/Default.aspx?TabID=1409" \t "_new) website.etailed Contents**1.6 Additional proposals for auditor independence issued by IFAC's International Ethics Standards Board for Accountants** On 13 July 2007, the International Ethics Standards Board for Accountants (IESBA), an independent standard-setting board within the International Federation of Accountants (IFAC), issued an exposure draft proposing to strengthen three components of the independence requirements contained in the IFAC Code of Ethics for Professional Accountants (the Code).In December 2006, as a result of a comprehensive review, the IESBA issued an exposure draft proposing revisions to the existing independence requirements contained in the Code. In that exposure draft, the IESBA indicated that there were three areas that the IESBA would revise in a future exposure draft: * Provision of internal audit services to an audit client;
* Independence implications related to the relative size of fees received from one assurance client; and
* Contingent fees for services provided to assurance clients.

The IESBA is now seeking comment from interested parties on these three matters.The exposure draft is available on the [IFAC](http://www.ifac.org/Guidance/EXD-Download.php?EDFID=00226" \t "_new) website.etailed Contents**1.7 CESR releases 2nd set of guidance on the operation of the market abuse directive** On 12 July 2007, the Committee of European Securities Regulators (CESR) published its second set of guidance on the implementation of the Market Abuse Directive (Ref CESR/06-562b). In this guidance CESR has developed a common understanding amongst its Members regarding treatment of the following aspects of the Directive and associated issues concerning market abuse.**(a) What constitutes inside information?**The guidance in this context gives: further clarification on 'information of a precise nature' (a term used in the Directive); further guidance on making information public; amplifies what is meant by the concept 'information likely to have a significant price effect'; and provides a non-exhaustive list of indicative types of events or information which may constitute inside information.**(b) When is it legitimate to delay the disclosure of inside information?**The guidance provides illustrative examples of the two circumstances where the Directive generally recognises a potential legitimate delay of disclosure of insider information (for example 'negotiations in course' and 'decisions taken which need the approval of another body'). Depending on the circumstances of the specific case in question, a delay can be legitimate where there are confidentiality constraints relating to competitive situations; or product development or selling of major holdings in another issuer that could be jeopardised by disclosure.**(c) When does information relating to a client's pending orders constitute inside information?**This section of the guidance covers what can be defined as a client's pending order and includes factors to be used in an assessment of when inside information would be involved; in particular it provides further specification of the terms 'price sensitivity' and 'precise nature'.**(d) Insider lists in multiple jurisdictions**To reduce the burdens on issuers that are subject to the jurisdiction of more than one EEA Member State with respect to insider list requirements, CESR is recommending that the relevant competent authorities recognise insider lists prepared according to the requirements of the Member State where the issuer in question has its registered office, thus leading to a mutual recognition system.etailed Contents**1.8 Plan for simplifying EU rules on company law, accounting and auditing** On 12 July 2007, the European Commission put forward measures which would simplify the business environment for EU companies in the areas of company law, accounting and auditing. The proposed measures, which are set out in a Communication, would remove or reduce a range of administrative requirements that are considered outdated or excessive. All interested parties are invited to comment on the proposals by mid-October 2007.**(a) Proposed simplification measures**The Commission would like to know stakeholders' views on a range of possible simplification measures. The key measures under consideration are:* repealing company law Directives that deal mainly with domestic situations (e.g. domestic mergers of companies, domestic divisions, capital of public limited companies and private single-member limited-liability companies) or removing certain information obligations in the company law Directives;
* simplifying disclosure requirements for companies and for branches; and
* further reducing reporting and auditing requirements for small and medium-sized enterprises.

On the basis of discussions with Member States, the European Parliament and stakeholders, the Commission will carry out full and comprehensive impact assessments, which will also take account of administrative costs.Comments can be sent directly to Unit MARKT.F.2. **(b) Background**The European Council of March 2007 underlined the importance of reducing administrative burdens for EU businesses. The Commission has outlined the way for achieving this objective by adopting a simplification program. European company law, accounting and auditing have been identified as priority areas within this initiative. First analyses carried out by a number of Member States have shown that administrative costs caused by EU rules in these areas are particularly high.The Communication should also be seen in the context of the Commission's forthcoming review of the Single Market, which is part of the "Citizens' Agenda". The final report on this initiative will be presented in autumn 2007. The Communication is available on the [Europa](http://ec.europa.eu/internal_market/company/simplification/index_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.9 APRA releases revised Basel II securitisation standard** On 11 July 2007, the Australian Prudential Regulation Authority (APRA) released a paper that sets out its response to submissions on its proposals on securitisation. These proposals updated APRA's existing prudential framework for securitisation to incorporate the new Basel capital adequacy regime, known as the Basel II Framework, as well as market developments.APRA's response paper is accompanied by a final draft Prudential Standard APS 120 Securitisation that incorporates a number of amendments suggested in the consultation process.The final draft prudential standard sets out the general requirements applying to the involvement of an authorised deposit-taking institution (ADI) in securitisation activities, as well as the methodology for the calculation of an ADI's credit risk regulatory capital requirement for securitisation exposures.The proposals form part of the Basel II capital adequacy regime for ADIs that will come into force on 1 January 2008. The full suite of Basel II prudential standards is expected to be finalised in late 2007.Comments on the response paper and the final draft Prudential Standard APS 120 Securitisation can be submitted via email by 10 August 2007. The documents are available on the [APRA](http://www.apra.gov.au/ADI/Basel-II-implementation-in-Australia.cfm%22%20%5Ct%20%22_new) website. etailed Contents**1.10 CGFS report on financial stability and local currency bond markets** On 9 July 2007, the Committee on the Global Financial System (CGFS) released a report entitled "Financial Stability and Local Currency Bond Markets". It was prepared by a working group chaired by David Margolín, General Director of Central Bank Operations Bank of Mexico. In releasing the report, Mr Margolín pointed out that the rapid development of local currency bond markets over the past five years or so had strengthened the financial systems of many emerging market economies (EME). Currency mismatches, the cause of so many earlier crises, have been eliminated or substantially reduced. Foreign financial institutions are channelling increasing volumes of funds into these markets. Many countries have therefore overcome the supposed inability to borrow in local currency. They have done this by adopting better macroeconomic policies, more prudent debt management strategies and significant financial sector reform. Mr Margolín noted that the Working Group nevertheless identified certain features of EME bond markets, which reflect the comparative immaturity of these markets. These characteristics could create significant financial system risks. He drew attention to four key points: 1. Many markets are still comparatively illiquid, and most markets lack an adequate infrastructure for the derivative instruments that are necessary to manage market risk exposures.
2. A comparatively large proportion of bonds outstanding is held by banks. This means that market and credit risks still tend to be concentrated in banks, rather than being dispersed through capital markets.
3. Direct non resident ownership of local bonds appears to be very small. In reality, however, effective non resident exposure is much greater, but is achieved through derivative instruments (often offshore). Foreign investors are becoming increasingly interested in local currency bonds. Trading by foreign investors is rising sharply and having an increasingly important impact on pricing in these markets.
4. The public sector accounts for about 3/4 of bond issuance in developing countries, compared with only 1/3 in developed markets. There is, therefore, considerable room for corporate bond issuance and securitisation to develop further.

The full report is available on the [BIS](http://www.bis.org/publ/cgfs28.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.11 Research on ethical standards** On 9 July 2007, the UK Auditing Practices Board (APB) announced a review of its Ethical Standards for Auditors (ESs). The review is designed to ensure that the ESs are consistent with changes in the law which will arise from the implementation of the Statutory Audit Directive in 2008 and reflect developments and research since they were originally issued in 2004. The APB intends to issue an exposure draft of its proposed revisions to the ESs later in 2007. An accompanying consultation paper will describe the rationale for the proposed revisions. As part of its review the APB has undertaken two research studies and has published a summary of this work. The studies involved: * A survey of company directors, and
* An analysis of information relating to audit fees and fees for non-audit services published in the accounts of listed companies.

The APB research is focussed on the corporate experience; information on the reaction of auditors has been provided by the accountancy bodies and academic research has recently been undertaken that provides a valuable insight into the views of investors.Further information is available on the [FRC](http://www.frc.org.uk/apb/press/pub1361.html%22%20%5Ct%20%22_new) website.etailed Contents**1.12 Capital adequacy for ADIs and general insurers** On 2 July 2007, the Australian Prudential Regulation Authority (APRA) released details of proposed changes to capital requirements for authorised deposit-taking institutions (ADIs) and general insurers (GIs).These proposed changes are outlined in a discussion paper and incorporated in draft Prudential Standards APS 110 Capital Adequacy and APS 111 Capital Adequacy: Measurement of Capital. In addition, to maintain consistency in APRA's approach to capital adequacy between ADIs and GIs, a number of these amendments will be carried over to Prudential Standard GPS 110 Capital Adequacy.The proposed changes arise from the adoption of the Basel II Capital Framework in Australia, finalising APRA's treatment of conglomerate groups containing one or more locally incorporated ADIs and responses to accounting and market developments since the standards were last updated.APRA proposes to finalise and issue the ADI prudential standards in late 2007. They will have effect from 1 January 2008 as part of a substantial set of changes to prudential standards to implement the Basel II Capital Framework. Changes to capital requirements for GIs will be implemented in 2008.The discussion paper and the draft prudential standards for ADIs are available on [APRA](http://www.apra.gov.au/Policy/Capital-adequacy-for-authorised-deposit-taking-institutions-and-general-insurers.cfm%22%20%5Ct%20%22_new) website. etailed Contents**1.13 Inquiry into shareholder engagement and participation** On 2 July 2007 it was announced that the Australian Parliamentary Joint Committee on Corporations and Financial Services is to inquire and report on the engagement and participation of shareholders in the corporate governance of the companies in which they are part-owners, with particular reference to:1. barriers to the effective engagement of all shareholders in the governance of companies;
2. whether institutional shareholders are adequately engaged, or able to participate, in the relevant corporate affairs of the companies they invest in;
3. best practice in corporate governance mechanisms, including:

a. preselection and nomination of director candidates; b. advertising of elections and providing information concerning director candidates, including direct interaction with institutional shareholders; c. presentation of ballot papers; d. voting arrangements (eg. direct, proxy); and e. conduct of Annual General Meetings. 1. the effectiveness of existing mechanisms for communicating and getting feedback from shareholders;
2. the particular needs of shareholders who may have limited knowledge of corporate and financial matters; and
3. the need for any legislative or regulatory change.

Written submissions are invited and should be addressed to:The SecretaryParliamentary Joint Committee on Corporations and Financial ServicesDepartment of the SenateParliament HouseCanberra ACT 2600The closing date for submissions is 14 September 2007.For further information please contact:Committee SecretaryParliamentary Joint Committee on Corporations and Financial Services Department of the SenatePO Box 6100Parliament HouseCanberra ACT 2600Australia Phone: +61 2 6277 3171Fax: +61 2 6277 5719Email: corporations.joint@aph.gov.auetailed Contents**1.14 FSA publishes conclusions of M&A inside information review** On 2 July 2007, the UK Financial Services Authority (FSA) published the results of its review of controls over inside information in relation to public takeovers and sets out its next steps. The review identified a number of areas where both regulated and non-regulated firms could strengthen their controls around inside information. Key areas where improvements could be made were the following:* firms being less complacent about the effectiveness of their own internal procedures to prevent leakages;
* introduction of more formal policies by firms to allow internal reviews to investigate whether inside information had leaked;
* application of more rigorous criteria for selecting insiders on deals; and
* improve access controls around IT systems holding inside information.

The FSA will be doing further work on these and other controls with FSA regulated firms through its ongoing supervisory relationships. In relation to non-regulated firms the FSA is working with other industry bodies to consider ways to share the good practice points it has identified and thus help to raise overall standards. As part of this the Markets Division is progressing work on a Statement of Good Practice, which could be used as a basis to demonstrate high standards and robust controls for handling inside information.The review helped identify the factors that could contribute to the different types of leaks that may occur around public takeovers: accidental leaks, where staff may have inadvertently allowed information to escape into the public domain; intentional leaks to the media for strategic positioning; and intentional leaks for market misconduct purposes.Further information is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Communication/PR/2007/080.shtml%22%20%5Ct%20%22_new) website.etailed Contents**1.15 New Zealand Securities Commission completes annual oversight review of New Zealand Exchange Limited** On 28 June 2007, the New Zealand Securities Commission announced that the New Zealand Exchange Limited (NZX)'s performance as a registered exchange continues to be good, according to the Securities Commission's annual oversight review of the exchange.The Commission's overall conclusion is that NZX is satisfying its obligation to operate its markets in accordance with its conduct rules. The Commission does make some specific recommendations for improvement, and has communicated its concerns and recommendations to NZX, NZX Discipline and the Special Division.The Commission reviewed NZX's performance of its regulatory functions as a registered exchange under the Securities Market Act 1988. This review focussed on NZX's arrangements in the 2006 calendar year for discharging its obligations.The Commission reports on NZX's performance under the following headings:* conflict management;
* the NZAX market;
* NZX's frontline regulation;
* NZX Discipline;
* the Special Division; and
* recommendations arising from the review of the 2005 calendar year.

Among its recommendations, the Commission notes:* NZX should ensure that the practical measures used to ensure the practical separation between its commercial and regulatory functions have reference to the information in relation to for-profit exchanges the Board receives on conflict management. NZX has agreed to provide the Board with relevant and up-to-date information on conflict management and arrangements that other for-profit exchanges have implemented to manage conflicts (to the extent this is publicly available). The Board has determined to discuss this matter each November at its two-day Board strategy review. NZX has also agreed to have regard to this information in its practical measures to ensure separation between its commercial and regulatory functions.
* NZX Discipline should review its resource requirements and structure, and communicate its needs to NZX, so that delays in dealing with non-urgent work are minimised or removed. NZX Discipline has agreed to address this issue.
* NZX should increase the amount of information it provides about the Special Division and make it easier to find. In particular, the contact details for the Special Division should be included on the 'Contacts' and 'Supervision of NZX' pages of the NZX website. NZX has agreed to provide more information about the Special Division on its website, in consultation with the Commission.

The review is available on the [New Zealand Securities Commission](http://www.seccom.govt.nz/publications/documents/nzx-2006/index.shtml%22%20%5Ct%20%22_new) website. etailed Contents**1.16 Corporate governance practices of Singapore listed companies** On 28 June 2007 the Monetary Authority of Singapore (MAS) and Singapore Exchange Limited (SGX) released the findings from a study they had commissioned on the current state of corporate governance of SGX-listed companies in Singapore. This is the first comprehensive review of the state of corporate governance practices of SGX-listed companies based on key areas in the Singapore Code of Corporate Governance since the Code was introduced in 2001.Associate Professor Mak Yuen Teen of the National University of Singapore carried out the study. He reviewed the annual reports of 659 mainboard and SESDAQ-listed companies to assess how well they disclosed and implemented the best practice guidelines as set out in the Code. He also held discussions with a number of independent directors and other market participants. The report sets out eight key recommendations to strengthen corporate governance practices of SGX-listed companies.MAS and SGX will study the report findings to help determine what practical steps they can take with industry stakeholders to enhance corporate governance of SGX-listed companies. MAS and SGX are exploring two immediate initiatives.The first, in conjunction with the Singapore Institute of Directors (SID), is to initiate a review of how they can significantly enhance current efforts in director training and professional development in Singapore.The second is to examine giving practical guidance for audit committees on how they can better perform the critical role they play in the performance and governance of listed companies. MAS and SGX will discuss these and other initiatives with various stakeholders, including the Accounting and Corporate Regulatory Authority (ACRA), and professional associations such as the Institute of Certified Public Accountants of Singapore (ICPAS) and SID.The full report is available on the [MAS](http://www.mas.gov.sg/resource/news_room/press_releases/2007/CG_Study_Complete_Report_260607.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.17 POB publishes annual report from its audit inspection unit** On 27 June 2007, the UK Professional Oversight Board (POB), part of the Financial Reporting Council, published the third annual report from its Audit Inspection Unit (AIU) on findings from its audit quality inspections for 2006/7. Based on its work, the AIU considers the quality of auditing in the UK to be fundamentally sound. Subject to the agreement of satisfactory action plans by firms in response to the AIU's recommendations, it anticipates recommending the continued audit registration of all firms for which it undertakes full scope inspections. The AIU considers this has been a challenging year for the audit firms given the implementation of IFRS and the first full year of application of the ISAs (UK and Ireland) and the APB Ethical Standards and acknowledges the considerable effort made by firms to respond to the challenges arising from these changes. In relation to the implementation of IFRS, the AIU was satisfied with the audit work and accordingly has made no recommendations on this issue. In the AIU's view, this reflects both the significant level of resources allocated and the robustness of the approach taken by firms to the challenges presented by the implementation of IFRS. The implementation and application of the ISAs (UK and Ireland) was a key area of focus of the AIU's inspection visits in 2006/7 and it has made recommendations in relation to both the firms' methodologies and systems as well as the training required for staff particularly in relation to the audit risk and fraud ISAs (UK and Ireland). These particular ISAs (UK and Ireland) contained a significant number of new requirements and the AIU considers further work is required by the firms to embed these requirements within their audits. The AIU notes the significant progress made by all firms in addressing prior year recommendations. The AIU is pleased to note the positive response by all firms to their recommendations, with few instances being identified where no action has been taken to implement the recommendations. However there is one area where the AIU considers there has been no clear progress from the prior year and that relates to the quality of documentation on file to support key audit judgments. The AIU stresses that if key judgments are not properly recorded then there is a substantial risk that the rationale may be incomplete. A focus on key audit judgments is central to the principles-based approach to auditing in the UK. The AIU report contains 21 recommendations to the profession arising from the 2006/7 inspection visits across 18 areas as set out below. Recommendations relate to the principles underlying a particular standard as well as the specific requirements. * Appraisal processes
* Partner rotation monitoring
* Key Audit Partners (KAPs) and Other Partners and Senior Staff (OPSS) on group audits
* Long involvement of partners on group audits
* Partners joining clients
* Non-audit services
* Preparation of accounts for listed companies
* Audit judgments
* Audit documentation
* ISAs (UK and Ireland) implementation
* Audit risk and fraud ISAs (UK and Ireland)
* Analytical review
* Group audits and reliance on other auditors
* Use of external experts
* Use of internal specialists
* Reporting to audit committees
* Dating of audit reports
* Monitoring of audit quality

The report is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/AIU%20Public%20Report%202006-07web1.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.18 FSA publishes first paper from the retail distribution review** On 27 June 2007, the UK Financial Services Authority (FSA) published the first proposals for discussion from the Retail Distribution Review (RDR). The Discussion Paper (DP) represents ideas from the market and consumer representatives involved in the RDR and follows six months work to address the key causes of persistent problems in the retail investment market.The ideas seek to improve the current standards of professionalism; find more cost-effective ways of making advice available to a wider range of consumers; and improve consumer understanding of what they are getting for their money. To achieve this, the key proposal is that the regulated investment advice market could be divided into two parts giving choices to firms and greater clarity to the consumer. These could be summarised as:* **Professional financial planning and advisory services** - which could be offered by highly qualified advisers serving those consumers who need the full range of advice. There could be two types of adviser. The most highly qualified could agree their remuneration directly with the customer and not with the product provider as is often the case with commission now. They could then call themselves 'independent'. Those firms not meeting these conditions might wish to use provider-driven remuneration (i.e. commission), but if they did they would not be able to call themselves independent. The FSA would then seek to address the risks of lower professional standards and potential conflicts of interest through increased regulatory requirements. This would provide regulatory incentives to all firms to operate with higher standards.
* **Primary advice** - providing advice on more straightforward needs using simple products. This advice could be less costly and more easily explained to a consumer than full professional financial planning and advisory services. It could be aimed at a wider consumer audience than the existing Basic Advice regime, with a wider range of products and without charge caps.

During the DP's six month consultation period, which ends on 31 December 2007, the FSA will be actively seeking the views of industry, consumers, professional and trade bodies. As well as undertaking further research on the impact of the ideas in the DP. The FSA aims to publish a feedback statement in Q2 2008.The discussion paper is available on the [FSA](http://www.fsa.gov.uk/pages/library/policy/dp/2007/07_01.shtml%22%20%5Ct%20%22_new) website.etailed Contents**1.19 Discussion paper on the use of platforms in investments**On 27 June 2007, the UK Financial Service Authority (FSA) published a Discussion Paper (DP07/2), on 'Platforms: the role of wraps and fund supermarkets'. Platforms are online services used by intermediaries (and sometimes consumers directly), to view and administer their investment portfolios. Significant growth in the use of platforms over the past year is one of the market developments considered by the FSA. The paper aims to stimulate industry debate about the standards firms should meet in offering and using platforms.The paper is available on the [FSA](http://www.fsa.gov.uk/pages/library/policy/dp/2007/07_02.shtml%22%20%5Ct%20%22_new) website. etailed Contents**1.20 Publication of report on the euro bonds and derivatives markets**On 26 June 2007, the European Central Bank (ECB) published a report entitled "The euro bonds and derivatives markets". The report describes major developments in markets for euro-denominated bonds and related derivatives over the past eight years. Like its predecessor, "The euro bond market study" of December 2004, it focuses on developments that are predominantly structural and, as such, of a longer-term nature.The study shows that markets for euro-denominated bonds, although still young in terms of institutional arrangements, have already achieved a high level of efficiency. Private sector issuers are increasingly entering these markets as liquidity conditions improve. Electronic trading is advancing, and efficient derivatives markets complement bond trading. On a global level, the share of euro-denominated bonds in world bond markets is rising. The report is available on the [ECB's](http://www.ecb.int/press/pr/date/2007/html/pr070626.en.html%22%20%5Ct%20%22_new) website. etailed Contents**1.21 Directors' accountability to shareholders as a separate financial reporting objective**On 25 June 2007, the European Financial Reporting Advisory Group (EFRAG), the Accounting Standards Board (ASB) and a number of other European accounting standard-setters published a paper discussing the rationale for including stewardship, or directors' accountability to shareholders, as a separate objective of financial reporting. The IASB and FASB proposed in their July 2006 Discussion Paper "Preliminary Views on an Improved Conceptual Framework for Financial Reporting" that the converged framework should specify only one objective of financial reporting, that of 'decision-usefulness' for resource allocation. They argued that this objective 'encompasses providing information useful in assessing management's stewardship'. The paper, prepared under EFRAG's Pro-active Accounting Activities in Europe (PAAinE) initiative, seeks to demonstrate that: * there is a broad consensus amongst the majority of the respondents that the stewardship/accountability objective should be a separate objective of financial reporting;
* stewardship/accountability is linked to agency theory and is a broader notion than resource allocation as it focuses on both past performance and how the entity is positioned for the future. It should therefore be retained as a separate objective of financial reporting to ensure that there is appropriate emphasis on company performance as a whole and not just on potential future cash flows; and
* stewardship/accountability has implications for financial reporting which can be demonstrated by way of examples.

Although a majority of the IASB and FASB respondents were in favour of identifying stewardship as a separate objective of financial reporting, members of the two Boards were still left with some doubts about the strength of the case for a separate objective. One was that the comment letters contained a number of different interpretations of the term 'stewardship' which implied that there was no common understanding of the term among the respondent. Another question was that the impact on financial reporting of specifying stewardship as a separate objective had not been demonstrated by the respondents through examples. The paper attempts to respond to these challenges. A core part of the research was to conduct a detailed review of the comment letters received by the IASB and FASB to ascertain whether these questions could be answered by reference to the respondents' views.The discussion paper is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/PAAinE%20Stewardship%20paper.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.22 BIS releases 77th annual report** On 24 June 2007, the Bank for International Settlements (BIS) released its 77th Annual Report. The report notes the performance of the global economy over the last few years has been extraordinary.Real growth has been maintained around levels that are among the highest recorded in the post-war period, and many of the world's poorest countries have shared in this growing prosperity. Underlying inflation levels have generally remained subdued, despite significant upward shocks to most commodity prices. Real interest rates and risk premia have been uncharacteristically low across the board. Record global trade imbalances have been easily financed and exchange rates have been generally stable. According to the BIS Annual Report, "The combination of developments is so extraordinary that it must raise questions about the source and, closely related, the sustainability of all this good fortune." BIS General Manager Malcolm Knight highlighted the uncertainties currently facing markets and policymakers. They include the possible resurgence of global inflation, the evolution of current account imbalances, and potential vulnerabilities in financial markets and financial institutions. He noted that behind each set of concerns lurks the common factor of highly accommodative financial conditions. A further tightening of monetary policy might then be needed, as well as action to reduce still high government deficits and debt in many countries. Countries that, in principle, have floating exchange rate regimes should allow their currencies to adjust more freely. Regarding financial sector developments, there could perhaps be more scepticism about the purported benefits of having new players, new instruments and new business models searching aggressively for increased yield.The annual report is available on the [BIS](http://www.bis.org/publ/arpdf/ar2007e.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.23 Product rationalisation - issues paper**On 22 June 2007, the Parliamentary Secretary to the Australian Treasurer, the Honourable Chris Pearce MP, announced the publication of an issues paper to serve as the basis for consulting stakeholders about a product rationalisation mechanism in the managed funds sector. Product rationalisation refers to a mechanism for removing outdated managed funds products by transferring beneficiaries out of these products into new products with modern features.The Regulation Taskforce (the Banks Committee), in its report of 31 January 2006 entitled "Rethinking Regulation", recommended that the Australian Government, state and territory governments, APRA and ASIC, should, in consultation with industry stakeholders, develop a mechanism for rationalising legacy financial products (Recommendation 5.19). The Australian Government response of 15 August 2006 indicated that it agreed to this recommendation.The paper sets out, among other things, the main issues that are involved in the development of a product rationalisation mechanism. A description of each issue is provided, together with one or more questions to which responses are being sought. It also sets out for discussion purposes a number of possible product rationalisation mechanisms. Stakeholders are invited to submit comments on the options presented, or submit their own preferred options.The discussion paper is available on the [Treasury](http://www.treasury.gov.au/documents/1274/PDF/Product_Rationalisation_Issues_Paper.pdf%22%20%5Ct%20%22_new) website. Submission closing date: 21 September 2007Address written submissions to: Product rationalisation projectCorporations and Financial Services DivisionThe TreasuryLangton CrescentPARKES ACT 2600Phone: 02 6263 3293Fax: 02 6263 2770Email: prodrationalisation@treasury.gov.auetailed Contents**1.24 Guidance note on proper purpose when accessing a company's register of members** On 8 June 2007, the UK Institute of Chartered Secretaries and Administrators (ICSA) published a guidance note on proper purpose when accessing a company's register of members. Sections 116 - 119 of the Companies Act 2006 (UK) make access to a company's register of members subject to a 'proper purpose' test but has not defined what is, or is not, a 'proper purpose'. Whether a purpose is proper or not, is, ultimately, a matter for the courts. The guidance note provides an industry view on what should constitute a proper purpose and provides examples of both proper and improper purposes. This will provide a useful starting point for companies and their registrars in their assessment of any requests they receive in relation to these sections of the Act. The guidance note is one of a series that ICSA is publishing on the Companies Act. The guidance note is available [here](http://www.zoomerang.com/recipient/survey-intro.zgi?p=WEB226KRW2QFWL" \t "_new). etailed Contents**1.25 Leading expert on class actions and mass torts to speak at Melbourne Law School**Deborah Hensler, Judge John W Ford Professor of Dispute Resolution at Stanford Law School, will deliver a Distinguished Visitor Public Lecture at Melbourne Law School on 'Responding to Mass Harms: Private Litigation and Public Action', on 1 August 2007, at 6pm for 6.30pm.Nationalisation of domestic markets and globalisation of the world economy increase the likelihood that harmful products and shady business practices will affect large numbers of people dispersed within and across national boundaries. In some instances, economically productive behaviour may be linked to exploitive practices that rise to the level of human rights abuses. As contemporary abusive practices receive new attention, they stimulate questions about historic unfair or abusive practices and calls for reparations. Professor Hensler's lecture will consider what the US experience teaches us about the costs and benefits of unleashing mass or collective litigation, and whether there are better models for representative litigation that are now in use outside the US. Professor Hensler is a leading expert on class actions and mass torts. Her empirical, interdisciplinary research on public policy issues in the civil justice arena has been recognised within the United States and internationally. She has testified on these issues before state and federal legislatures in the United States and has consulted with judicial and professional committees and task forces in the United States and Asia on alternative dispute resolution, asbestos litigation, mass torts and class actions. She has used a variety of social science research methods to explore civil justice issues and was the founder of the RAND Institute's Survey Research Group. Professor Hensler has been a Visiting Professor at the University of Southern California and the University of Chicago. She is a Fellow of the American Academy of Political and Social Science and has served on the Editorial Boards of Law and Society Review and the Journal of Empirical Legal Studies.This is a free public lecture. For details on how to book and other information, please see the [Melbourne Law School homepage](http://www.law.unimelb.edu.au/%22%20%5Ct%20%22_new).etailed Contents |

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

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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20119%20July%202007_files/spacer%281%29.gif |
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| **2.1 ASIC seeks comments on competition for market services**On 23 July 2007 the Australian Securities and Investments Commission (ASIC) released a consultation package on competition for market services (trading in listed securities and market data).ASIC is considering separate applications from AXE ECN Pty Ltd (AXE) and Liquidnet Australia Pty Ltd (Liquidnet) for Australian market licences.The Minister - the Hon Chris Pearce, MP and Parliamentary Secretary to the Treasurer - is the decision maker in relation to market licence applications. ASIC's role is to provide advice to the Minister. In order to do that, ASIC is consulting publicly on the implications of the operation of these markets as part of the process of developing its advice to the Minister.Both AXE and Liquidnet propose to operate markets for trading in securities listed on Australian Securities Exchange (ASX), operated by ASX Limited. AXE and Liquidnet also propose to sell data relating to trading activity on their respective markets.**Information about the consultation process**Respondents and interested parties should read the documents that make up the consultation package. They are:1. ASIC consultation paper 86; 2. Economic assessment of competition for market services, prepared by CRA International; and 3. Brief overview of the AXE and Liquidnet markets.The draft operating rules of AXE and the draft Australian operating rules of Liquidnet are available on ASIC's website. ASIC is not seeking comments on the draft rules as part of the consultation process, except where explicitly stated in the consultation paper. The global operating rules that apply to Liquidnet markets around the world have not been made available on ASIC's website as they contain commercial-in-confidence information.The ASIC consultation paper 86 is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP_86-Competition_for_market_services%20CP.pdf/%24file/CP_86-Competition_for_market_services%20CP.pdf%22%20%5Ct%20%22_new).The economic assessment of competition for market services, prepared by CRA International is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CRA_paper.pdf/%24file/CRA_paper.pdf%22%20%5Ct%20%22_new).The brief overview of the AXE and Liquidnet markets is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Competition_for_market_services-overview.pdf/%24file/Competition_for_market_services-overview.pdf%22%20%5Ct%20%22_new).The AXE operating rules are available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/AXE_ECN_operating_rules_March%202007.pdf/%24file/AXE_ECN_operating_rules_March%202007.pdf%22%20%5Ct%20%22_new).The Liquidnet operating rules are available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Liquidnet_Australian_rules.pdf/%24file/Liquidnet_Australian_rules.pdf%22%20%5Ct%20%22_new).The consultation period closes on Friday 17th August 2007. Submissions should be sent to:Tracey LyonsDirector, Markets RegulationAustralian Securities and Investments CommissionLevel 18No. 1 Martin PlaceSYDNEY NSW 2000etailed Contents**2.2 ASIC consults on compensation and insurance requirements for AFS licensees** On 23 July 2007, the Australian Securities and Investments Commission (ASIC) released a consultation paper inviting comment on its proposals for administering the new compensation and professional indemnity insurance requirements. These requirements apply to Australian financial services licensees who provide financial services to retail clients.The new requirements were introduced by regulation 7.6.02AAA of the [Corporations Regulations 2001 No. 193 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "_default) on 28 June 2007 and s912B of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). They make professional indemnity insurance the main way licensees are to meet their compensation arrangement obligations. Licensees are responsible for assessing their business and ensuring they have adequate insurance cover.The consultation paper seeks feedback on:* ASIC's proposed policy on what is adequate professional indemnity insurance cover;
* some challenges to the regime and some practical options responding to these challenges;
* ASIC's proposed guidance on how licensees should approach the new requirements; and
* ASIC's policy for approving alternative arrangements to professional indemnity insurance.

ASIC invites comments on the proposals set out in the consultation paper by 14 September 2007. **Background**The obligations under s912B and reg 7.6.02AAA will commence on 1 January 2008 for new licensees and 1 July 2008 for existing licensees. Regulation 7.6.02AAA sets out the compensation arrangements under s912B and was introduced on 28 June 2007 by the [Corporations Amendment Regulation 2007 (No 6) No. 197 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=97320" \t "default). The regulation provides that the primary method of compliance with the obligation is for licensees to obtain professional indemnity insurance. It also provides that some licensees may rely on alternative arrangements or guarantees from a related company who is regulated by the Australian Prudential Regulation Authority (APRA).To assist in developing its policy, ASIC commissioned a report into the market for professional indemnity insurance for AFS licensees: Compensation Arrangements for Financial Services Licensees - Research into the Professional Indemnity Insurance Market. The consultation paper is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP_87_compensation_and_insurance.pdf/%24file/CP_87_compensation_and_insurance.pdf%22%20%5Ct%20%22_new).The report into the PI insurance market: Compensation Arrangements for Financial Services Licensees - Research into the Professional Indemnity Insurance Market dated December 2006 is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/mason-report-compensation.pdf/%24file/mason-report-compensation.pdf%22%20%5Ct%20%22_new). etailed Contents**2.3 ASIC's better regulation: new regulatory documents and road map** On 5 July 2007, the Australian Securities and Investments Commission (ASIC) launched new regulatory documents and a road map as part of its Better Regulation initiatives.The launch of the new regulatory documents is marked by the release of the first documents in ASIC's new, user-friendly regulatory guide format - Regulatory Guide 36 Licensing: Financial Product Advice and Dealing (RG 36) and Regulatory Guide 110 Share buy-backs (RG 110). **(a) New regulatory documents**ASIC has rationalised and redesigned its regulatory documents. There will now only be four types of regulatory documents: consultation papers, regulatory guides, reports and information sheets. ASIC has made information more accessible by developing and user-testing new and simpler document layouts and templates. RG 36 is an updated and re-formatted version of the ASIC Guide Licensing: Financial Product Advice and Dealing (the Advice and Deal Guide) and includes guidance previously in some ASIC frequently asked questions (labelled as 'QFS' on ASIC's website). RG 110 is an updated and re-formatted version of Policy Statement 110 Share buy-backs [PS 110]. ASIC will no longer produce guides or policy statements. Both these categories of documents have been replaced by the new regulatory guide category. The old Advice and Deal Guide and PS 110 have been rewritten in the new regulatory guide format. ASIC guides will now also be numbered. The role of QFS and their connection with other ASIC publications (such as policy statements, guides and information releases) was not always clear. In some cases, this meant ASIC's policy and guidance on a particular topic was spread across several documents making it hard for users to find the information they wanted. Following the introduction of its new regulatory documents, ASIC will progressively remove QFSs from its website. They will be:* incorporated into existing regulatory guides where appropriate;
* re-issued as new regulatory guides or information sheets; or
* withdrawn if they are no longer required or are covered in another regulatory document.

ASIC has commenced this process with the release of RG 36.**(b) Road map** The regulatory road map is a web-based tool that helps people find class orders and regulatory documents on ASIC's website. It is a subject matter index that links to regulatory documents and class orders on both general and specific topics. The road map is available on the [ASIC](http://www.asic.gov.au/roadmap%22%20%5Ct%20%22_new) website. etailed Contents**2.4 Consultation on class order relief for share and unit sale facilities** On 4 July 2007, the Australian Securities and Investments Commission (ASIC) released a consultation paper outlining a proposal for class order relief to facilitate the provision of certain share and unit sale facilities.Share and unit sale facilities are facilities that some companies and managed investment product issuers offer to their members from time to time. These sale facilities are generally an easy and cheap way for their members (especially those with small holdings) to dispose of their holdings at or about their current market value.The consultation paper proposes that ASIC will grant class order relief from a wide range of provisions of the law. This will allow companies and product issuers to offer certain sale facilities and related facilities for the purchase of shares or units, and reduce costs for those companies and product issuers by removing the need for them to apply to ASIC for individual relief before offering such facilities to their members.The proposed relief will apply to facilities that are made available to members who have small holdings (i.e. less than $5,000 worth of shares or units) and where the shares or units are sold in the ordinary course of trading on a licensed market or approved foreign market. The proposed relief is also subject to other limitations and conditions. The details are set out in the consultation paper.The class order relief that ASIC has proposed is consistent with individual relief it has granted regularly upon request over the past few years.ASIC invites comments on the proposals in the consultation paper by 6 August 2007. ASIC plans to publish the final policy by December 2007 following consideration of comments received. The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp85_share_sale_facilities.pdf/%24file/cp85_share_sale_facilities.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.5 Financial reporting relief** On 3 July 2007, the Australian Securities and Investments Commission (ASIC) announced additional relief from the requirement to prepare and lodge financial reports for some companies.ASIC Class Order [CO 07/505] Variation and revocation of financial reporting instruments amends existing ASIC relief to reflect recent changes in the 'large/small test'. The 'large/small test' is the basis for determining which proprietary companies are required to prepare and lodge financial reports under the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act).The changes made by [CO 07/505] affect certain small proprietary companies controlled by foreign companies and registered foreign companies.**(a) Background**A proprietary company that is large for a financial year is generally required to prepare and lodge financial reports under Chapter 2M of the Act. Following amendments made by the [Corporations Legislation Amendment (Simpler Regulatory System) Act 2007 No. 101 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=97385" \t "default) (SRS Act), a company is large if it meets at least two of three criteria:(a) consolidated revenue for the financial year of the company and the entities it controls (if any) is $25 million or more; (b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is $12.5 million or more; (c) the company and the entities it controls (if any) have 50 or more employees at the end of the financial year.A proprietary company that doesn't meet at least two of these criteria is considered small. The company generally isn't required to prepare and lodge financial reports unless it is controlled by a foreign company.The revenue and asset criteria were previously $10 million and $5 million, respectively. The increases in these criteria reduce the number of proprietary companies that are required to prepare and lodge financial reports.**(b) Small proprietary companies controlled by a foreign company**ASIC Class Order [CO 98/0098] "Small proprietary companies which are controlled by a foreign company but which are not part of a large group" relieves small proprietary companies that are controlled by a foreign company from the requirement to prepare and lodge a financial report provided that it is not part of a 'large group'.The 'large group' test applies the amounts from the 'large/small test' to an aggregation of a proprietary company, its siblings in Australia and their controlled entities. Class Order [CO 07/0505] revises the amounts in the 'large group' test, consistent with the changes made to the 'large/small test' by the SRS Act.Relief under [CO 98/0098] is normally only available where the directors have resolved to take advantage of the relief no more than three months before the commencement of the financial year and notice of that resolution has been lodged for the public record before the commencement of the financial year using Form 384. For financial years ending 28 June 2007 to 30 June 2008, Class Order [CO 07/0505] allows Form 384 to be lodged by four months after year end or 31 October 2007, whichever occurs first.**(c) Registered foreign companies**ASIC Declaration [CO 02/1432] "Registered foreign companies - financial reporting requirements" relieves a small registered foreign company that is subject to similar restrictions to an Australian proprietary company from the requirement to lodge financial statements with ASIC provided that:(a) it isn't part of a large group; or (b) it is controlled by a parent which consolidates the registered foreign company for the entire financial year and lodges its financial statements with ASIC.Relief is only available if the registered foreign company is not required to prepare financial statements in its place of origin.The 'large group' test is the same as the test in Class Order [CO 98/0098]. The test has been amended by Class Order [CO 07/0505], consistent with the corresponding changes in amounts under the SRS Act.Declaration [CO 02/1432] contains no conditions concerning directors' resolutions or lodgement of a notice prior to commencement of the financial year. The amended relief will be available where a financial report has not yet been lodged for the 2007 calendar year and all of the conditions of [CO 02/1432] are met.**(d) Other consequential changes**With the change in the large/small test, some consequential amendments have also been to ASIC Class Order [CO 98/0096] "Synchronisation of financial year with foreign parent company".Class Orders [CO 05/0083] "Timing of auditor's independence declaration" and [CO 05/0910] "Auditor's independence declaration - exemption" have been revoked as the relief they provided has been incorporated into the Act by the SRS Act.Further information is available on the [ASIC](http://www.asic.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents**2.6 Updated policy on foreign securities prospectus relief** On 3 July 2007, the Australian Securities and Investments Commission (ASIC) released a technical update to Policy Statement 72: Foreign securities prospectus relief [PS 72]. This policy statement describes how ASIC administers the prospectus provisions of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) for offers of foreign securities and discusses prospectus relief for foreign companies making offers of securities in Australia. The previous version of [PS 72] has been revised to update legislative references, remove references to outdated pro formas and update the list of 'approved foreign markets'.Further information is available on the [ASIC](http://www.asic.gov.au/ps%22%20%5Ct%20%22_new) website or by calling the ASIC Infoline on 1300 300 630.etailed Contents**2.7 Relief from consent to quote credit ratings, trading data and geological reports in prospectuses, PDS and takeover documents** On 3 July 2007, the Australian Securities and Investments Commission (ASIC) released an updated Practice Note 55 Disclosure documents and PDS: consent to quote [PN 55]. The practice note deals with the requirement in the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) for an issuer to obtain the consent of a person to quote them in a prospectus or PDS (s716(2) and 1013K). Similar requirements apply to bidders' and targets' statements in takeovers. ASIC has also given class order relief from the consent requirement: * Class Order [CO 07/428] Consent to quote: Citing credit ratings, trading data and geological reports in disclosure documents and PDS for prospectuses and PDS
* Class Order [CO 07/429] Consent to quote: Citing credit ratings agencies, trading data and geological reports in takeovers for takeover documents

The new class orders give relief to quote:* credit ratings of debt or hybrid securities or equities of authorised deposit-taking institutions;
* trading data from financial markets or market data providers; and
* historical geological reports.

ASIC has finalised the updated PN 55 after public consultation on a draft.ASIC's new class orders are in addition to existing ASIC class order relief to quote, for example, public officials and books and journals. Further information is available on the [ASIC](http://www.asic.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents**2.8 Consultation on managed investment schemes: withdrawal rights and scheme liquidity** On 3 July 2007, the Australian Securities and Investments Commission (ASIC) released a consultation paper on managed investment scheme withdrawal rights and the management of related liquidity risks. The paper outlines ASIC's proposed guidance and seeks feedback from industry about:* what disclosures responsible entities of registered managed investment schemes should make to members about their withdrawal rights; and
* how responsible entities of registered schemes should monitor and manage liquidity risks.

The proposed guidance will be particularly relevant to pooled mortgage schemes. A pooled mortgage scheme is a unit trust that pools investors' money and lends it to various borrowers, with loans secured by mortgages over real property. Investors do not have an interest in a particular loan but have an interest in scheme property as a whole. ASIC has been prompted to release the consultation paper by its concerns about the risk of a mismatch between what investors are led to expect by disclosure documents and what can happen in practice. The proposals identify issues that responsible entities may need to consider to make sure they are carrying out their duties properly. They deal particularly with the risk that a registered managed investment scheme might not have enough cash to meet members' expectations about withdrawal. The consultation paper proposes what ASIC thinks are minimum standards to ensure responsible entities appropriately disclose, monitor and manage this risk. ASIC is seeking comments on the costs and benefits that would apply to ASIC giving guidance on those standards. Part 5C.6 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) contains some restrictions on allowing withdrawal from schemes that are not 'liquid' as defined in the Act. The consultation paper discusses certain legal issues raised by these provisions and seeks submissions on whether relief should be granted so that a scheme constitution may provide for more than one withdrawal period to apply at any one time. ASIC invites comments on the proposals in the consultation paper by 21 August 2007. Publication of the final policy is expected by December 2007.The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp_managed_investments_liquidity.pdf/%24file/cp_managed_investments_liquidity.pdf%22%20%5Ct%20%22_new) website or call the ASIC Infoline on 1300 300 630etailed Contents**2.9 Audit report requirements for investor directed portfolio and managed discretionary account services** On 2 July 2007, the Australian Securities and Investments Commission (ASIC) clarified its auditor report requirements under its relief for investor directed portfolio services (IDPS), IDPS-like registered schemes (IDPS-like services) and managed discretionary accounts (MDAs).The amendments to ASIC's relief clarifies the nature of the auditor report required of electronic transaction facilities made accessible to clients of these services.The amendments to ASIC's policy were foreshadowed in ASIC's Information Release IR 07-27 "ASIC consults on proposals to review its policy on investor directed portfolio services".The amendments mean that where electronic access to account information is given to clients of IDPS, IDPS-like and MDA services, auditors will only need to review the information that is displayed at the end of each quarter. The auditor's review is limited in this way provided that:* the information at the end of each quarter remains accessible to clients through the same electronic facility until the end of the following financial year; and
* the electronic facility through which the information is accessible includes a statement to the effect that only information displayed at the end of the quarter will be audited.

This relief also applies a materiality test to the auditor's opinion required about whether asset information in annual client statements reconciles with corresponding amounts in the service provider's records.The changes to ASIC's relief responds to concerns raised by some auditors that the previous form of auditor's report might involve more work than was intended by ASIC's policy. **Background** As a condition of ASIC's current relief for IDPS, IDPS-like and MDA services, clients of these services must be given quarterly reports containing information about transactions, assets and values, revenues and expenses. Alternatively, if a client agrees, this information can be provided electronically on a substantially continuous basis.Clients must also receive an annual report containing information about transactions, assets and values together with a report of the annual audit of this information. If detailed transactional information is provided via a continuous electronic access facility or in quarterly reports and is subject to an audit report, the information does not have to be repeated in the annual statement.Where an IDPS or MDA operator or responsible entity of an IDPS-like scheme provides electronic access to information that would be contained in the quarterly report, the report by the auditor that accompanies the annual report must include a statement as to whether or not the auditor has any reason to believe the electronically accessible information was materially misstated.Further information is available on the [ASIC](http://www.asic.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents**2.10 Updated policy on tracing beneficial ownership** On 27 June 2007, the Australian Securities and Investments Commission (ASIC) released updated Policy Statement 86: Tracing beneficial ownership [PS 86]. This statement provides guidance on how the agency will exercise its powers under the beneficial ownership tracing provisions (Pt 6C.2) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). The previous version of [PS 86] has been revised to:* incorporate ASIC's policy on when it may provide a beneficial tracing direction following a request by a person who is not a member;
* incorporate the guidance set out in ASIC Information Release [IR 05/50] on when ASIC will provide companies with information received in response to a beneficial tracing direction;
* update legislative references; and
* take account of judicial consideration of the beneficial ownership tracing provisions (e.g. how the provisions apply where the person who must respond to a beneficial tracing direction is overseas).

The amended policy statement is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps86.pdf/%24file/ps86.pdf%22%20%5Ct%20%22_new) website or by calling the ASIC Infoline on 1300 300 630.etailed Contents**2.11 Crackdown on disqualified directors** On 26 June 2007, the Australian Securities and Investments Commission (ASIC) announced the details of a national initiative to ensure that company officers disqualified from managing corporations are not continuing to be involved in the management of companies. The focus of the campaign is on company officers who have been disqualified by ASIC as a result of being involved in two or more failed companies within a seven year period.Over the last six months, ASIC investigators have conducted assessments in Sydney, Melbourne, Brisbane, Adelaide, Canberra and Perth concerning 56 individuals disqualified by ASIC since 2003. Penalties for managing a corporation whilst disqualified can include fines and up to one year's imprisonment.Under the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), ASIC can disqualify a person from managing corporations for up to five years provided they have been the director of two or more failed corporations within seven years. These failed entities must have been wound up with the liquidator lodging a report with ASIC regarding the corporation's inability to pay its debts. Since 1 July 2006, ASIC has banned 75 company officers using this power.etailed Contents**2.12 Updated licensing requirements for AFS licensees**On 25 June 2007, the Australian Securities and Investments Commission (ASIC) ASIC released updated versions of Policy Statement 166 Licensing: Financial requirements [PS 166] and Pro Forma 209 Australian financial services licence conditions [PF 209]. ASIC has also withdrawn three guides for Australian financial services (AFS) licensees given clarifications to its policy and guidance.The updates The updated versions of [PS 166] and [PF 209] include a number of clarifications and additional illustrations consistent with existing policy. There are two minor changes to ASIC's policy on financial requirements as follows:* An amendment to the calculation of 'surplus liquid funds' to allow the addition of a percentage of non-current assets for certain AFS licensees who are eligible providers.
* An amendment to the standard adjustments that need to be made by AFS licenses who underwrite (or sub-underwrite) financial products that are subject to statutory exposure periods.

The changes respond to industry related queries about the application of ASIC's financial requirements policy and some of the existing licence conditions. The amendments will help licensees and practitioners in applying ASIC's policy and complying with their licence conditions and effectively reflect the commercial circumstances of certain businesses.The changes come into effect immediately. An AFS licensee who wishes to take advantage of the changes to PF 209 must apply for a variation to its AFS licence using ASIC form FS03, requesting that the revised versions of all of the conditions and definitions in PF 209 apply under their licence. For more information on how to apply for a licence variation, see Part 1 of the AFS Licensing Kit.Copies of the updated publications are available on the [ASIC](http://www.asic.gov.au/fsrpolicy%22%20%5Ct%20%22_new) website or by calling the ASIC Infoline on 1300 300 630.etailed Contents**2.13 Consultation on proposals to review policy on investor directed portfolio services**On 20 June 2007, the Australian Securities and Investments Commission (ASIC) invited public comment on its proposals about the regulation of investor directed portfolio services (IDPS).The proposals will be relevant to all operators of IDPS and IDPS-like registered schemes and to advisers who recommend IDPS to clients. Also included are a set of proposals relevant to trustees of superannuation funds about the delivery of product disclosure.ASIC's proposals aim to: * reduce complexity, barriers to entry and regulatory burden by removing regulation of IDPS operators beyond that applying to licensees performing dealing or custodial or depository services that do not involve an IDPS, where appropriate;
* adopt a more principles-based approach to the regulation of IDPS and IDPS-like schemes consistent with Chapter 7 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default);
* treat the operation of IDPS and IDPS-like schemes similarly where there is no basis for different treatment; and
* maintain adequate consumer protection by ensuring good advice about using an IDPS, adequate disclosure about the IDPS and securities and financial products accessible via the IDPS, reliable client reporting, effective compliance controls and custodial and transactional integrity.

In April 2006, the Parliamentary Secretary to the Treasurer published a Corporations and Financial Services Regulation Review Consultation Paper. One of the items in the paper sought comment on the need for a review of policy about IDPS. Following public comment suggesting some changes to regulation of IDPS, the Parliamentary Secretary asked ASIC to consider the matter.This is the first time since its issue that ASIC has undertaken a broad policy review of Policy Statement 148: Investor directed portfolio services [PS 148]. This review is being undertaken in light of the reforms in the [Financial Services Reform Act 2001 No. 122 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default), technological developments and expansion in the IDPS industry.The proposals take into account submissions to the PST, ASIC's regulatory experience with IDPS and some preliminary industry consultation. ASIC will also be amending Class Order [CO 02/294] Investor directed portfolio services and Class Order [CO 02/296] Investor directed portfolio-like services provided through a registered managed investment scheme to clarify what the report of an auditor concerning continuous electronic access must contain. Submissions about the proposals should submitted via email. The closing date for submissions is 4 September 2007. **Background**IDPS are administration services that facilitate the acquisition and holding of assets by enabling investors to bundle or 'wrap' a number of services including custody of assets, execution and consolidated reporting. IDPS operate through a technology interface and usually, but not always, through a financial adviser. A key feature of an IDPS is that the client makes all the investment decisions. A wide variety of investments can be accessed via an IDPS. These often include wholesale funds that would not otherwise be available to retail clients.Where these services are provided as a registered scheme, they are classified by [PS 148] as IDPS-like schemes.The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP_IDPS.pdf/%24file/CP_IDPS.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 New Guidance Note 17**The ASX Issuers unit (ASX Issuers) is part of ASX Markets Supervision Pty Limited (ASXMS), a wholly owned subsidiary of ASX Limited (ASX) which was established to provide greater transparency and accountability of ASX's supervisory operations, strengthen market integrity and address the perception of conflict between ASX's regulatory and commercial functions. ASX Issuers has the delegated authority to make supervisory decisions regarding the rules including standard rules waivers and admission decisions.ASXMS continues to be committed to ensuring that applications are dealt with as effectively and efficiently as possible and that the objectives of decision making which are timeliness, transparency and consistency continue to be achieved.However, ASX Issuers' ability to respond in a timely and consistent manner to applications depends upon the quality and completeness of submissions that are lodged by entities and their advisers. Where incomplete submissions are lodged, there may be time delays in relation to the delivery of decisions to applicants. Additionally, listing and waiver applications that involve complex or new policy issues of listing rule interpretation may be required to be referred to a delegate of ASX for consideration and decision. In such circumstances, the applicant will be advised, and this may impact the turnaround time for the decision.An application to ASX Issuers to make a decision under the rules should include information that identifies the rule concerned and the rationale for the waiver. The application should also include supporting arguments to the requests made and where appropriate supporting evidence and reference to precedent decisions of ASX.To assist entities and their advisers in applying for new listings and waiver applications, ASX is issuing a revised Guidance Note 17, which includes a checklist outlining the minimum amount of information that will be required by ASX Issuers in relation to an application. The checklist is not intended to be exhaustive and further additional information could also be required by ASX Issuers in relation to a particular application, depending on the circumstances.ASX is also committed to providing greater transparency when waivers are granted and proposes to publish waiver decisions on the waivers register twice a month (unless a matter is confidential). This means that, generally, a decision is made public within two weeks of the decision being made.etailed Contents**3.2 Seminars held to introduce ASX CFDs**The Australian Securities Exchange (ASX) will launch the world's first exchange-traded Contracts for Difference (CFDs) in September 2007.In preparation for the launch, free public seminars are being held around Australia to introduce traders and investors to the features and benefits of the ASX CFD product range. The seminars will help participants get started in trading and provide the opportunity to meet some of the brokers who will offer ASX CFDs. The seminars begin on 31 July in Adelaide and continue throughout August and September in Perth, Sydney, Brisbane and Melbourne. Online registrations are now being taken. Numbers are limited and attendance is free. In addition to the seminars, ASX is also offering other education programs to help participants understand both the upside benefits and downside risks of trading leveraged investments like ASX CFDs. These include: * Online education courses-the first module is available [here](http://www.asx.com.au/cfd%22%20%5Ct%20%22_new).
* Online trading simulator that explores the fundamentals of trading ASX CFDs without putting any of your own funds at risk - this will be available in August 2007.

ASX CFDs will be listed on the market operated by the Sydney Futures Exchange (SFE). They will initially include the top 50 stocks listed on ASX, key global equity indices, a range of major foreign currency exchange rates, and selected commodities. Further information on the seminars is available on the [ASX](http://www.asx.com.au/investor/cfds/index.htm%22%20%5Ct%20%22_new) website.etailed Contents |

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| **4. Recent Takeovers Panel Developments** |  | ext Section |

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| **4.1 Rinker Group Limited 02 - Panel decision**On 13 July 2007, the Takeovers Panel advised that it has made a declaration of unacceptable circumstances and final orders in relation to an application it received on 13 June 2007 from the Australian Securities and Investments Commission (ASIC), concerning an off-market takeover bid by CEMEX Australia Pty Ltd (CEMEX) for Rinker Group Limited (Rinker) and the affairs of Rinker. The Panel considered that the circumstances of:(a) on 10 April 2007, CEMEX making an announcement (10 April announcement) that the consideration offered under its bid was its "best and final" (in the absence of a superior proposal); and (b) on 7 May CEMEX announcing (7 May announcement) that it would allow Rinker shareholders to retain an AU$0.25 dividend declared by Rinker on 27 April, gave rise to unacceptable circumstances.The Panel considered that CEMEX's 10 April announcement did not qualify the terms of CEMEX's offer in respect of any dividends declared on or after 30 October 2006 (other than an AUD0.16 interim dividend of record date 24 November 2006). The Panel considered that CEMEX resiled from its best and final statement in the 7 May announcement. The Panel considered the departure from the best and final statement was inconsistent with "truth in takeovers", which the Panel considers to be a fundamental principle of an efficient competitive and informed securities market.The Panel has ordered that CEMEX pay shareholders who sold Rinker shares between the two announcements the equivalent of Rinker's dividend (A$0.25) per share for the net disposal by them of Rinker shares in the relevant period.CEMEX has indicated to the Panel that it will seek a review of the Panel's decision. If it does, the Panel has indicated that it will stay its orders pending completion of the review. Further information is available on the [Takeovers Panel](http://www.takeovers.gov.au/display.asp?ContentID=1247" \t "_new) website.etailed Contents |

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| **5. Recent Corporate Law Decisions** |  | ext Section |

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| **5.1 Management of conflicts of interest and insider trading**(By Jade Harkness and Jordana Cohen, Blake Dawson Waldron)Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited [2007] FCA 963, Federal Court of Australia, Jacobson J, 28 June 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fca963.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fca963.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 case arises out of proprietary trading by Citigroup Global Markets Australia Pty Limited (Citigroup) in shares of Patrick Corporation Limited (Patrick) when the private side of Citigroup was providing corporate advisory services to Toll Holdings Limited (Toll) in relation to a proposed takeover of Patrick.ASIC alleged that in the circumstances Citigroup and Toll were in a fiduciary relationship. This relationship was the basis of ASIC's claims that Citigroup had failed to adequately manage its conflicts of interest as required by section 912A(1)(aa) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Act), had engaged in misleading and deceptive conduct and had engaged in unconscionable conduct. ASIC also claimed that Citigroup had committed two breaches of the prohibition on insider trading in section 1043A of the Act.The court found that Citigroup did not owe a fiduciary duty to Toll because the mandate letter between the parties successfully excluded it. Consequently the court found against ASIC on the conflicts of interest, misleading and deceptive conduct and unconscionable conduct claims.The court dismissed ASIC's first insider trading claim on the basis that the actions of the trader could not be attributed to Citigroup. The court found Citigroup had successfully defended the second insider trading claim under section 1043F of the Act by having adequate Chinese Walls in place.**(b) Facts**Citigroup was retained by Toll to provide investment banking and corporate advisory services in relation to Toll's takeover of Patrick. These services were provided by employees on the "private side" of Citigroup (ie. the side likely to come into contact with inside information). The proprietary trading desk is on the public side.On the day before Toll was likely to make a bid for Patrick, one of Citigroup's proprietary traders purchased a significant amount of Patrick shares, which ASIC contended had the effect of increasing Patrick's share price. Citigroup had not specifically disclosed its proprietary trading activities in Patrick shares to Toll.After employees on the private side of Citigroup became aware of Citigroup's proprietary trading in Patrick shares, certain communications occurred between private side employees and the Head of Equities who was on the public side. The Head of Equities then had a conversation with the relevant proprietary trader, instructing him to stop buying further shares from Patrick. The proprietary trader sold the Patrick shares he had purchased.ASIC made the following claims against Citigroup:* by virtue of the fiduciary duty Citigroup owed Toll, Citigroup committed 5 separate breaches of section 912A(1)(aa) of the Act by allowing its self-interest to conflict with the duties it owed to Toll, without Toll's informed consent;
* by virtue of the fiduciary duty Citigroup owed Toll, Citigroup had engaged in misleading and deceptive conduct in breach of section 1041H of the Act and section 12DA of the [Australian Securities and Investments Commission Act 2001 No. 51 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default) (ASIC Act) by failing to inform Toll of Citigroup's proprietary trading;
* by virtue of the fiduciary duty Citigroup owed Toll, Citigroup engaged in unconscionable conduct in breach of common law and section 12CA(1) of the ASIC Act by allowing the conflict of interest and duty to arise; and
* Citigroup committed two breaches of the insider trading prohibition in section 1043A of the Act. The first claim was that Citigroup, through the proprietary trader, sold shares in Patrick while the proprietary trader was in possession of inside information that was communicated to him from the private side through the Head of Equities. ASIC claimed the inside information was a supposition by the proprietary trader that Citigroup was acting for Toll on the Patrick bid.

The second claim was that Citigroup traded shares in Patrick while employees on the private side of Citigroup held inside information that Toll intended to launch a bid for Patrick in the near future. Citigroup defended this claim on the basis that they had adequate Chinese Walls in place.**(c) Decision** The court dismissed all of ASIC's claims and ordered ASIC to pay Citigroup's costs.**(i) Conflict of interest**The court noted that the "pre-contract dealings between Citigroup and Toll pointed strongly toward the existence of a fiduciary relationship". However the court held that the mandate letter, which expressly provided that Citigroup was retained by Toll "as an independent contractor and not in any other capacity including as a fiduciary", was effective to exclude any fiduciary duty Citigroup might have otherwise owed to Toll.The basis for the court's finding is as follows:* An adviser and its client are not a per se category of fiduciary. Therefore the existence of a fiduciary relationship will depend on the factual circumstances and the contractual terms between the parties; and
* Where a fiduciary relationship is founded in contract, it is open for the parties to exclude or modify the operation of fiduciary duties in the contract.

Although the duty to manage conflicts in section 912A(1)(aa) is not based on the existence of a fiduciary relationship, ASIC argued their case in such a way that the finding that no such relationship existed was fatal to ASIC's claims.The court made an obiter dicta comment that informed consent is not required to modify or exclude fiduciary duties where parties are not in a pre-existing fiduciary relationship.The court went on to provide obiter dicta comments that the adequate management of conflicts under the Act requires more than written policies. Financial services licensees must ensure that all employees thoroughly understand the conflict management procedures and are willing to apply them to a variety of possible conflicts.**(ii) Misleading and deceptive conduct and unconscionable conduct**ASIC's claims in respect of misleading and deceptive conduct and unconscionable conduct were based on the existence of a fiduciary relationship. Given the court's finding that there was no fiduciary relationship, these claims failed.**(iii) Insider trading**The first insider trading claim was dismissed on the basis that the proprietary trader was not an "officer" of Citigroup and therefore his knowledge was not attributable to Citigroup under section 1042G of the Act. "Officer" is defined in section 9 of the Act and relevantly provides that a person is an officer of a company if they have the capacity to affect significantly its financial standing. ASIC claimed that the proprietary trader fell within this limb of the definition as he was authorised to trade up to AUD10 million per day. The court rejected this claim and held that an additional involvement in "policy making and decisions that affect the whole or a substantial part of the business of the corporation" is required.The second insider trading claim was successfully defended on the basis that Citigroup had adequate Chinese Walls in place. Section 1043F states that it is a defence to insider trading if a company has arrangements in operation that could reasonably be expected to ensure information is not communicated to a person who makes decisions in relation to trading, and no information or advice is in fact communicated to such a person.The court found Citigroup's arrangements fulfilled the requirements of section 1043F, noting that the section does not require Chinese Walls to be absolutely perfect. In addition the inside information about Toll's impending bid for Patrick was found not to have passed to the trader.etailed Contents**5.2 Caution- Ensure you clearly identify the party with whom you contract** (By Anita Siassios, DLA Phillips Fox)Dennis Pethybridge v Stedikas Holdings Pty Ltd [2007] NSWCA 154, New South Wales Court of Appeal, Beazley JA, Basten JA and Campbell JA, 27 June 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/june/2007nswca154.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/june/2007nswca154.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 whether a building contract was made with a company or with an individual who owned the business name used by that company. Stedikas Holdings Pty Ltd (Respondent) argued that its appointed construction manager, Metro West Pty Ltd (Metro), had contracted with an individual who was the registered proprietor of 'C & D Asphalt Services' (C & D) (registered business name under the provisions of the now-repealed [Business Names Act 1962 No. 11 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3806" \t "default)). The registered proprietor of the business name, Dennis Pethybridge (Appellant), argued that the building contract was made between Metro and Torpoint Investments Pty Ltd (Torpoint) (Torpoint carried on business under the C & D name). The Appellant was also a director of Torpoint. In a judgment given in the District Court of New South Wales (District Court), the trial judge found that Metro had contracted with the Appellant, and not Torpoint. The Appellant appealed this decision in the New South Wales Court of Appeal (NSWCA), where in a unanimous joint judgment the court allowed the appeal and set aside the orders of the District Court. **(b) Facts**The Respondent was the owner of land on which a shopping centre had been constructed. The Respondent had engaged Metro to act as construction manager for various building works at the shopping centre, which included the construction and extension of new and existing car parks. Metro then engaged the Appellant to submit a lump sum fixed price tender to carry out the construction of a new car parking area and the reworking of the existing car park. John Watton, General Manager of Metro, was the key contact person between Metro and the Appellant.Evidence was submitted at the trial that demonstrated the various correspondence that was found to amount to contract formation between Metro and either the Appellant or Torpoint. The correspondence was either between Watton and C & D, or Watton and the Appellant. On one occasion, correspondence from C & D to Watton had printed on it the Australian Company Number (ACN) of Torpoint. On another occasion, an invoice (which was sent after formation of the relevant contract) from C & D to Metro bore the C & D name and Torpoint ACN, however it also bore a stamp to the effect of "Torpoint trading as C & D". The trial judge held that the inclusion of an unidentified ACN at the foot of two pieces of correspondence, together with the Torpoint name on one of those correspondence, was sufficient to displace the prima facie presumption that the Respondent, via Watton and Metro, was contracting with the Appellant, as owner of the registered business name C & D, particularly in view of the fact that the existence of Torpoint was not brought to Watton's attention until after the formation of the contract. **(c) Decision****(i) Identification of the parties**Campbell JA, in the leading joint judgment, concluded for a variety of reasons that it was not the Appellant who entered a contract with the Respondent. First, his Honour stated that identification of the parties to the contract must be made in accordance with the objective theory of contract. Accordingly, he found that Watton's belief of whom he was contracting with was of no significance to this matter, as Watton's belief was subjective. Rather, his Honour found that the correct conclusion to draw from the objective evidence is that a reasonable observer of the communications that led to the entering of the contract, together with the background facts known to the parties, would conclude that the parties intended that the contract would be with whomever it was that was carrying on business under the name C & D (i.e. Torpoint).Secondly, his Honour found that in accordance with the objective theory of contract, save to the extent that the belief had manifested in his words and actions that were known to the other contracting party, any beliefs that were manifested by Watton in his communications could not be entered into any consideration of who the contracting parties were, when those communications with the Respondent were not themselves known to the other contracting party.Thirdly, all written correspondence from 'C & D' all expressly bore an indication that it was a corporation, and bore no indication that it was the Appellant. It was also clear that the inclusion of the ACN on both the correspondence and invoice amounted to objective indications that the contract was one with a corporation. His Honour stated that it was irrelevant whether Watton actually observed the ACNs stated on the correspondence; rather, it was relevant that the ACNs were part of the communications that led to the contract. Accordingly, his Honour found that Watton had sought out and communicated with the entity that carried on business under the name 'C & D', contrary to the trial judge's findings. This conclusion was supported by the principle that once it has been proved who is carrying on business under a particular business name, the evidence leading to that conclusion may overcome the prima facie evidence that arises from section 24, Business Names Act 1962 (NSW). Section 24 stated that if there had been no other evidence tendered, tender of the extract from the Business Names Register would have been sufficient to establish that it was the Appellant who was carrying on business under the name 'C & D'.**(ii) Is it permissible to have regard to subsequent communications for the purpose of deciding with whom the contract was entered?**Campbell JA also considered the issue of whether it is permissible to have regard to subsequent communications for the purpose of deciding with whom the contract was entered. His Honour stated that Australian law was not yet settled in regards to whether, and if so when, it was possible to use post-contractual conduct as an aid to construction of the contract. The more restrictive view, favoured by the NSWCA, is that subsequent communications cannot be looked to as an aid to construction of a contract, but can be looked to as an aid to deciding whether a contract has been entered into at all. On the restrictive view, in this case his Honour decided that it was permissible to look to the subsequent communications, because the question of whether the contract was entered into with the Appellant, or with Torpoint, was in substance no different to a question of whether there was a contract entered into at all. etailed Contents**5.3 Lawyers are not acting for two masters when acting both for and against a party in separate but related matters** (By Rebecca Kovacs, DLA Phillips Fox) EPAS Limited v AMP General Insurance Ltd [2007] QCA 212, Supreme Court of Queensland, Court of Appeal, Jerrard and Keane JJA and White J, 27 June 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2007/june/2007qca212.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2007/june/2007qca212.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 AMP General Insurance Limited (AMP) applied to obtain an order to restrain solicitors and counsel acting for a trustee (EPAS), on the basis that the same solicitors and counsel were acting against the trustee in a closely related matter.Jerrard and Keane JJA and White J upheld the decision of the primary judge finding that:* As it was ASIC who caused each action to be brought, therefore it was ASIC who provided instructions to the lawyers representing EPAS in each matter, not the former directors of the entity; and
* The lawyers who represent EPAS as plaintiff in one matter do not represent EPAS as the defendant in the other, therefore they are not in the position of being obliged to serve two masters at the same time.

**(b) Facts** EPAS Limited (EPAS) is the former trustee of The Employees Productivity Award Superannuation Fund (the Fund). At the time when EPAS was the trustee of the fund, individuals who were involved in the management of EPAS allegedly engaged in actions or omissions which depleted the fund. Utilising its powers under section 50 of the [Australian Securities and Investments Commission Act 2001 No. 51 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default), the Australian Securities and Investments Commission (ASIC) instituted two matters involving EPAS. In the first matter (matter 1), EPAS is seeking orders against the individual officers involved in an attempt to restore the money to the Fund. EPAS also admits that it is liable to make good the losses to the Fund suffered by reason of its own breaches of trust which resulted from the acts and omissions of its officers. However it argues that AMP General Insurance Limited (AMP) issued insurance policies to it and a number of the named defendants which cover them against liability for these losses. In the second matter (matter 2) the plaintiff is Trust Company Superannuation Services Limited (TCSSL) which succeeded EPAS as trustee of the Fund. In this action TCSSL seeks the same relief from the same defendants as is sought by EPAS in matter 1, however EPAS is also named as a defendant. The records reveal that the Statements of Claim in each proceeding were prepared by the same lawyers within ASIC. Therefore technically the same lawyers are acting for EPAS as the plaintiff in matter 1, and against EPAS as a defendant in matter 2. AMP applied to the court for an order restraining the solicitors and counsel who represent EPAS in matter 1 from continuing to act. The main arguments put forward by AMP were that it would be a breach of the lawyer's fiduciary duties to act both for and against EPAS in closely related matters. Further, it was argued that a "fair minded and reasonably informed member of the public" would conclude that it was inconsistent with the proper administration of justice for the lawyers to continue to act for EPAS in matter 1 and against EPAS in matter 2.**(c) Decision** **(i) Separate actions not a mere tactic** Keane JA, in his leading judgment, rejected AMP's argument that EPAS would appear as both plaintiff and defendant in the one proceeding if EPAS and TCSSL had not conspired to bring separate actions. Keane JA highlighted that ASIC caused each of the actions to be brought in the names of EPAS and TCSSL respectively, and AMP had made no suggestion that ASIC was not entitled to do so. Further, the separate actions were required as TCSSL could not sue former officers of EPAS for loss suffered as a result of the breach of their duties owed to EPAS. Finally, separate actions were required as AMP had issued separate insurance policies to EPAS and TCSSL.**(ii) AMP's arguments rejected**Keane JA noted that AMP could have made its application on a number of bases, including that the prosecution of two actions seeking essentially the same relief is vexatious or an abuse of the process of the court. However, AMP chose to base its argument on matters of procedure, rather than focus on the substantive rights of the parties.Although it was argued that the lawyers for EPAS were acting in breach of their fiduciary duties, this argument was rejected as the lawyers who represent EPAS as plaintiff in matter 1 do not represent EPAS in matter 2. Therefore, Keane J held that they are not placed in the position of being obliged to serve two masters at the same time. Keane JA also rejected AMP's argument that EPAS' admission in matter 1 that it was liable to repay money to the Fund demonstrated a willingness by its lawyers to sacrifice EPAS' interests. Keane JA observed that, as stated by the trial judge, there is no inherent vice in a corporate trustee acknowledging its own wrongdoing and then seeking to recover losses from directors and auditors who caused or contributed to the loss. Further, the admission was necessary in order to claim indemnity from AMP. Therefore, it was held that no evidence of misconduct on part of the lawyers for EPAS was proven. Finally, AMP argued that a fair minded and reasonably informed member of the public would consider the continued representation of EPAS by lawyers who were also acting against them, as an affront to the due administration of justice. Keane JA held that a fair-minded and reasonably informed member of the public would appreciate that both matters were being brought in the public interest of recovering money which had been lost as a result of wrongful actions. Such a person would also understand that the lawyers were engaged by ASIC to act on its behalf. The lawyers therefore took instructions solely from ASIC and were not acting on conflicting instructions by two masters. **(iii) Application for joinder**Keane JA also rejected AMP's application join EPAS' solicitors as parties to the appeal. etailed Contents**5.4 The treatment of GEERS payments by a trustee** (By Svetlana Zarucki, Clayton Utz)In the matter of Leonard Thomas Hinde [2007] NSWSC 640, New South Wales Supreme Court, Rein AJ, 22 June 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/june/2007nswsc640.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/june/2007nswsc640.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**On 12 October 2004, the Australian Photonics Staff Entitlements Trust ("APSET") was created by deed of settlement. The settlor of the trust was Australian Photonics Pty Limited ("APPL"). On 15 November 2004, Chris Palmer was appointed administrator of APPL. On 1 March 2005, APPL entered into a deed of company arrangement (DOCA) pursuant to section 444B of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). The trustee of APSET, Leonard Thomas Hinde (Plaintiff), sought to distribute funds held in trust to the eligible employees and all but one of those employees, Dr Angelika Koch, agreed to the proposed distribution and the amount which the trustee proposed to pay to each of them.By way of summons dated 14 November 2006 the trustee sought judicial advice pursuant to section 63 of the [Trustee Act 1925 No. 14 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "default) ("Act") and orders pursuant to section 81 of the Act. A notice of appearance was filed by Dr Koch and the Department of Employment and Workplace Relations ("DEWR"), which administered the General Employee Entitlement Redundancy Scheme ("GEERS"). An appearance was made on behalf of the administrator but no formal notice of appearance was filed.Rein AJ, having regard to the terms of the trust deed, made the directions / orders sought by the trustee.**(b) Facts**The trustee sought judicial advice / orders as follows:* a direction that the Plaintiff is justified in proceeding on a construction of the trust deed that the eligible employees have not been removed as beneficiaries by reason of an "Employment Termination Event" having occurred;
* a direction and order that the Plaintiff is justified in treating the date the Settlor passed into voluntary administration as the date for calculation of entitlements of beneficiaries;
* a direction and order that the Plaintiff is justified in paying all entitlements at the same time and, if there are insufficient funds, paying them pro rata;
* a direction that the Plaintiff is justified in treating Dr Koch's Entitlements A (being leave entitlements, unpaid wages and superannuation) as having a quantum of $34,717.76 and her Entitlements B (being non leave entitlements less unpaid wages and superannuation) as having a quantum of $15,692.65;
* a direction and order that the Plaintiff is justified in taking into account the GEERS payments received by each eligible employee in assessing each eligible employee's entitlement to the trust fund;
* a direction that the Plaintiff is justified in paying each eligible employee without having to reimburse the Commonwealth for any GEERS payments;
* a direction that the Plaintiff is justified in paying out of the trust fund income remuneration for the trustee's services to 7 June 2007 in the sum of $5,955 and thereafter on a time basis at the rate of $75 per hour.

By consent, Dr Koch, DEWR and the administrator were ordered to file and serve evidence and submissions by 2 March 2007. Whilst Dr Koch did not provide any affidavits to the solicitors for the trustee or the court and did not appear when the matter was listed for directions and hearing she did provide to the trustee's solicitors a document entitled "Statement of Facts of Dr Angelika Koch" dated 26 March 2007.DEWR accepted that in determining entitlements to be paid to eligible employees the trustee is entitled to take into account GEERS payments and that DEWR did not intend to make any claim for recovery of GEERS payments from the employees to whom payments have been made or to assert a claim against APSET. However, DEWR reserved its position on the question of a claim on the fund established by the DOCA should the trustee pay any surplus over to APPL after payment of entitlements. **(c) Decision**As a preliminary matter, Rein AJ formed the view that it was appropriate for the court to give judicial advice in accordance with section 63 of the Act for the following reasons:* the trustee and court took appropriate steps to bring to the notice of interested parties the present application;
* formal appearances by Dr Koch and DEWR had been filed and orders made by consent that they and the administrator file and serve evidence and submissions;
* no application was made by any interested party to assert the inappropriateness of the recourse to section 63 of the Act;
* no evidence was filed or served by any interested party;
* the only interested party who appeared at the hearing (DEWR) supported the trustee's application;
* the fact that if the trustee's approach is correct on the GEERS point there will not only be sufficient funds to pay all of the entitlements that the trustee proposes to pay but a net surplus which will be repaid to APPL that will in all likelihood exceed the amount of all of Dr Koch's claims;
* at least one eligible employee has received no GEERS payments and no payments from APSET or APPL and all of the eligible employees other than Dr Koch have been precluded from receiving their entitlements from APSET to date;
* the cost of proceedings to date, and if extended the further costs, would not be insubstantial standing alone and in relation to the size of the trust fund.

Rein AJ further found that, despite an attack by Dr Koch as to Mr Hinde's standing (on the basis that he was an employee of APPL (but not an eligible employee as defined under the trust deed) and was an unsecured creditor), Mr Hinde was the trustee and entitled to seek relief under section 63 of the Act.In relation to the issues on which advice / orders were sought, Rein AJ held as follows:* the trustee was entitled to proceed upon the basis that employees' rights to payment of entitlements under the trust deed were not terminated (as any other construction would undermine the effectiveness of that document);
* as the administrator had calculated unpaid entitlements for Dr Koch from 30 November 2000 and that other employees who worked on past 15 November 2004 were paid entitlements accruing after that date as part of the administration of APPL, any issue with respect to whether the termination event should be interpreted as the date of appointment of the administrator (15 November 2004) was no longer of any significance;
* in relation to whether the trustee should pay Dr Koch and other employees in accordance with the administrator's determinations of entitlement, having regard to the terms of the trust deed, the trustee was entitled to rely on the calculations of the administrator as to the employees' entitlements and would be acting appropriately by paying the amounts determined by the administrator;
* in relation to how GEERS payments were to be treated, since the administrator had paid money, the source of which was GEERS, to employees to whom Entitlements A or B (or both) were due it seemed entirely appropriate that such payments (notwithstanding the source of the fund) should be viewed as payments in reduction of amounts due from APSET just as if the company had paid the employees' entitlements without calling on the trust fund. In relation to Dr Koch's assertion that the effect of the approach which the trustee wished to take was one that would see APPL benefit at the expense of the Federal Government because treating the payments made under GEERS as a reduction of the amount due to be paid by APSET would produce a surplus which would go back to APPL, his Honour noted that:
	+ DEWR did not oppose the course proposed but supported it;
	+ the administrator received GEERS payments and paid them to the employees. Those payments could not be made unless the entitlements were due and payment reduced the liability of APPL to pay the employees by the amount so paid. The liability of APPL to repay monies so advanced under GEERS was not affected and DEWR reserved its position and may well claim to recover any net surplus proceeds returned to APPL by APSET;
* the consequence of permitting GEERS payments to be taken into account is that the trust fund is more than adequate to meet all outstanding claims, even Dr Koch's rejected claim;
* the sufficiency of funds meant that there was no need for prioritising. The trustee was justified in paying all of the determined entitlements at the same time; and
* the court has inherent power to authorise remuneration for past and future work as the court has jurisdiction to permit remuneration beyond that provided for in the trust deed when the trustee is called on to perform work and carry on duties significantly beyond those ordinarily involved. His Honour accepted that the court in the present situation ought to permit the trustee to obtain additional remuneration.

etailed Contents**5.5 An examination of the threshold criteria for imposing disqualifications and pecuniary penalties** (By Michael Capsalis, Mallesons Stephen Jaques)Vines v Australian Securities and Investments Commission [2007] NSWCA 126, New South Wales Court of Appeal, Spigelman CJ, Santow JA and Ipp JA, 22 June 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/june/2007nswca126.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/june/2007nswca126.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**The Court of Appeal was asked to reconsider the pecuniary penalty ordered against the Appellant due to a reduction (from a prior appeal to the Court of Appeal) of the number of contraventions of section 232(4) of the Corporations Law and their associated declarations.The Respondent cross-appealed with respect to the initial disqualification period, which it considered inadequate. The Cross-Respondent argued that the trial judge, Austin J, should not have imposed the disqualification period at all because his Honour should have concluded that the Cross-Respondent was a fit and proper person to manage a corporation, the existence of which would have precluded Austin J from imposing a prohibition on the Appellant.The Court of Appeal unanimously held that the disqualification period should not have been imposed at all, and by majority, reduced the pecuniary penalty from $100,000 to $50,000 to reflect the reduced number of contraventions from the prior appeal. Santow JA, in dissent on the penalty issue, argued that the contraventions did not amount to 'serious' contraventions (a threshold requirement, defined in section 1317EA(5), for the imposition of a pecuniary penalty) and should not have attracted any pecuniary penalty at all.**(b) Facts**This appeal was in relation to a number of breaches of section 232(4) of the Corporations Law, the previous equivalent to section 180(1) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), by the Appellant who was the Chief Financial Officer of GIO at the time of a hostile takeover bid by AMP Limited.The trial judge, Austin J, made eleven declarations in respect to seven contraventions. A pecuniary penalty of $100,000 was imposed, equating to eleven separate penalties of $10,000 for each contravention, with a small discount applied for mitigating factors. His Honour had also made an order disqualifying the Appellant from managing a corporation for three years (which expired on 30 June 2007).The Court of Appeal, in a previous appeal hearing, had dismissed four contraventions, leaving a total of three contraventions and six declarations.The three remaining contraventions were the failure of the Appellant:* To ensure that the Due Diligence Committee (DDC) of GIO was properly informed of all material aspects of the maintenance of a reinsurance profit forecast;
* To ensure that the DDC was informed of all material matters regarding an estimate of loss from Hurricane Georges; and
* To give directions to ensure that adequate monitoring arrangements were put in place at the divisional level of GIO.

The Appellant sought to have the pecuniary penalty reduced to correspond to the reduction of the number of contraventions and associated declarations. The Respondent cross-appealed, seeking to have the disqualification period extended.**(c) Decision****(i) The pecuniary penalty and the interpretation of a 'serious' contravention**The majority (Spigelman CJ and Ipp JA) held that Austin J had erred by taking an irrelevant consideration into account when determining the pecuniary penalty, specifically the fact that his Honour had included the individual declarations that were successfully appealed from in the earlier Court of Appeal decision. The penalty was reduced to $50,000, representing the six remaining declarations, discounted by mitigating factors.Furthermore, Ipp JA held that it was appropriate to determine the seriousness of each contravention separately and that the relevant factors included the degree by which the officer had departed from the requisite standard of care and the consequences, potential or actual, of the contraventions. The majority found that the consequences, especially to shareholders, of the breaches were serious and that therefore Austin J was correct in determining that the breaches were of a serious nature.In dissent on this issue, Santow JA argued that it was only necessary to examine the circumstances surrounding the breach itself, and not the resulting or potential consequences of that breach when determining the question of seriousness. His Honour found limited support for this argument from previous judicial consideration of the term 'serious misconduct' from workers' compensation cases. However, Ipp JA countered this argument, stating that the interpretation given to the term 'serious' from case law emanating from other statutes was not relevant and that it should be given its plain and ordinary meaning within the context of the Corporations Law. His Honour also briefly pointed out that the knowledge that the DDC had or may have had at the time did not absolve the Appellant of his duty of care and diligence in any way.In the alternative, Santow JA held that the contraventions arose essentially from only a single course of conduct and that only two declarations could have arisen from those breaches. His Honour therefore fixed the penalty amount to only $20,000.**(ii) The disqualification order and the meaning of a 'fit and proper person'**A unanimous court held that the Appellant was a 'fit and proper person' to manage a corporation and that therefore the trial judge was precluded, pursuant to the threshold requirement of section 1317EA(4) of the Corporations Law, from making an order under section 1317EA(3)(a) disqualifying the Appellant from managing a corporation. Spigelman CJ also found that the reliance upon all contraventions, including the rejected ones, amounted to Austin J taking into account irrelevant considerations when determining whether the Appellant was a fit and proper person.The test that Spigelman CJ utilised for determining a 'fit and proper person' was broadly construed to include the Appellant's capacity to manage within any role of management and within any corporation. His Honour conceded that, when interpreted in such a broad manner, the provision appeared to create a very high threshold that would have been difficult to meet in most circumstances. Furthermore, when determining fitness, the court should take into account the whole of the Appellant's experience and range of qualifications. The strong evidence presented at trial with respect to the Appellant's exemplary work ethic and skill post-GIO was given substantial weight by the court and, even when balanced with the seriousness of the contraventions, still resulted in the conclusion that the Appellant was a fit and proper person to manage a corporation.The Respondent's cross-appeal was dismissed, as they had provided no additional argument to support an extension of the disqualification order other than the initial reasoning of the trial judge.etailed Contents**5.6 When privilege attaching to a document is waived during discovery** (By Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth) In the matter of Actew Corporation Ltd v Mihaljevic [2007] ACTSC 39, Supreme Court of the ACT, Master Harper, 22 June 2007The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/act/2007/june/2007actsc39.htm](http://cclsr.law.unimelb.edu.au/judgments/states/act/2007/june/2007actsc39.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 addresses two separate issues regarding privilege claims during discovery. The first relates to a letter containing privileged material that mistakenly formed part of the plaintiff's list of discoverable documents and was subsequently disclosed to the first defendant. The second relates to various internal memoranda and correspondence over which the plaintiff claims privilege, on the basis that the documents were communications by the plaintiff and its legal counsel and board secretary, Mr Macara. It was held that the plaintiff had waived privilege over the letter, however the waiver did not extend to the actual legal advice that was referred to in the letter.With the various in-house documents, Master Harper considered each document individually and just over half of the documents were found to have privilege attached to them. **(b) Facts**The letter over which the plaintiff later claimed privilege in the application was written by a company manager to a CEO regarding a dispute the plaintiff was involved in. On page three, it outlined two legal options available to the plaintiff and also expressed Mr Macara's views on these options. The letter explained that the options set out were taken from a formal advice prepared by Minter Ellison to Mr Macara, and the author of the letter assumed the reader had perused this advice.A solicitor of Minter Ellison, who was undertaking the preparation of the plaintiff's discovery in the dispute, reviewed a large number of documents and categorised them as relevant and discoverable or relevant and privileged. The letter formed part of the discoverable list, although the solicitor later gave evidence in the application that this was inadvertent as she had not picked up that the paragraphs on page 3 summarised legal advice. The solicitor for the defendant was given access to and inspected the plaintiff's discoverable documents. The letter was tagged as relevant for copying and subsequently provided to the defendant. In this application, the plaintiff sought a declaration that the privileged portion of the letter was protected by client legal privilege and an order that the defendant deliver up any copies. The defendant claimed that privilege had been waived over the letter and that the plaintiff had also waived privilege over the Minter Ellison advice.The second dispute (which was given less attention in the judgment) related to a number of documents over which the plaintiff claimed privilege. The documents were said to be confidential communications between the plaintiff and Mr Macara (as its in-house lawyer) or confidential documents prepared by Mr Macara or other staff for Mr Macara, for the dominant purpose of either legal advice or litigation. The defendants argued that client legal privilege was not available because Mr Macara was not acting as a lawyer but rather as a managerial executive of the plaintiff. The judgment notes that at all times Mr Macara's name was on the role of legal practitioners and he held an unrestricted practising certificate.**(c) Decision**In considering whether the plaintiff had waived privilege over the letter, Master Harper turned to relevant case law such as Sovereign Motor Inns Pty Ltd v Bevillesta Pty Ltd [2000] NSWSC 521, Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd (1997) 145 ALR 391 and Guiness Peat Properties Ltd v Fitzroy Robinson Partnership [1987] 1 WLR 1027. Master Harper considered that the letter was, on its face, not an obviously privileged document and acknowledged that solicitors often have extreme time pressures within which they must review documents and put on their client's discovery. As such, Master Harper adopted the principle from Guiness Peat and quoted in Meltend: where solicitors mistakenly include a document in respect of which privilege could properly have been claimed, the court will ordinarily permit the solicitors to amend the list of documents at any stage before inspection; but once inspection has taken place, the general rule is that it is too late to correct the mistake. Accordingly, Harper M found that privilege over the letter had been waived. However, as the Minter Ellison advice had not been inspected by the defendant, it was held that "it would be highly artificial to impute.an intention to waive privilege in that letter" over the advice and as such, the advice was still privileged.With the documents relating to Mr Macara, Master Harper considered that within Mr Macara's duties for the plaintiff, half were clearly legal and the other half administrative and managerial. Adopting the principle regarding in-house communications set out in The Commonwealth of Australia v Vance (2005) 158 ACTR 47, Master Harper looked individually at each document to determine whether it fell within the category of confidential communications or documents prepared for the dominant purpose of either legal advice or professional legal services relating to a current or pending proceedings within sections 118 and 119 of the [Evidence Act 1995 No. 2 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6191" \t "default). Of the 15 documents, 7 were found to be privileged and a further 2 were found to contain privileged material which could be redacted.etailed Contents**5.7 Validity of the appointment of administrators to Aboriginal corporation** (By Simon Pitt, Freehills)Guiseppe v Registrar of Aboriginal Corporations [2007] FCAFC 91, Federal Court of Australia, Full Court, Gyles, Edmonds and Buchanan JJ, 15 June 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fcafc91.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fcafc91.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 appeal from the decision of a single judge of the Federal Court. The appeal was allowed, rendering invalid the appointment of an administrator to an Aboriginal corporation formed pursuant to the [Aboriginal Councils and Associations Act 1976 No. 186 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7110" \t "default) (the Act). The reasoning of the joint majority judgment was premised on the unreasonably short period of time allowed for the preparation of a response to the notice regarding the appointment. Buchanan J would have also held that the appointment was invalid on the ground that there was no prior approval, as required by the Act.**(b) Facts**The Mutitjulu Community Aboriginal Corporation (the Corporation) was established south west of Alice Springs in the Northern Territory under the Act. Its objects revolved around improving the life and well being of the members of the community. Section 71 of the Act empowered the Registrar of Aboriginal Corporations (the Registrar, constituted by Pt II of the Act) to appoint an administrator to an Aboriginal corporation if the Registrar 'considers that there may be reasonable grounds'. The Registrar is nonetheless obliged by that provision to provide the corporation with an opportunity to show cause why an administrator should not be appointed. The Registrar is further required to allow the corporation 'a reasonable period specified in the notice' to respond.On 30 June 2006, the Commonwealth Department of Families and Community Services and Indigenous Affairs (the Department) informed the Registrar that it would be discontinuing funding to the Corporation from 1 July 2006 and asked for an administrator to be appointed. On 10 July 2006 the Department reaffirmed that funding would not be continued unless an administrator were appointed.On 11 July 2006, the Registrar served a notice on the Corporation informing it that to avoid the appointment of an administrator it had to show cause why such appointment should not proceed before close of business on 12 July 2006. The governing committee of the Corporation faxed a response to the Registrar on the afternoon of 12 July. Four members of the committee were away from the community and the committee drafted the response without any substantive legal advice. At approximately 12:30PM on 14 July 2006, the Minister responsible for the administration of the Act (The Hon Mal Brough MP) signed a minute agreeing to a recommendation that another minister be appointed. This was motivated by advice that Mr Brough may have been in a position of conflict regarding the appointment of an administrator in this case. The Hon Kevin Andrews MP was appointed. Mr Andrews signed a minute agreeing to the recommendation to approve the appointment of an administrator some time before 3:44PM on 14 July. It was not until 4:02PM, however, that Mr Brough signed the actual instrument of authorisation appointing Mr Andrews.On 18 July the Registrar appointed an administrator. Legal action was quickly taken to challenge the appointment. Two main grounds were advanced by the plaintiffs in the course of the proceedings. The first related principally to the reasonableness of the period within which the Corporation had to respond to the notice (the reasonableness of notice issue) and procedural fairness (the fairness issue). The second related to whether the appointment was ultra vires on the basis that the Registrar did not technically obtain approval before appointing the administrator (the prior approval issue).**(c) Decision** The three judges who heard the appeal agreed on the orders to be granted. However, Buchanan J concurred with Gyles and Edmonds JJ on most issues, but his Honour did hand down a separate judgment which provided divergent analysis of the prior approval issue. This divergence did not affect the outcome of the case (and would not have, even if Buchanan J's view attracted majority support).Due to the substantial agreement between the judges, it is convenient to discuss their Honours' judgments under the rubric of each of the issues introduced above.**(i) Reasonableness of notice**Gyles and Edmonds JJ (with whom Buchanan J agreed) decided that the reasonableness of the period of notice under section 71 of the Act is objectively determinable as a question of fact. This, it was said, was a result of simply construing the words of the section, 'within a reasonable period specified in the notice.' In reaching this conclusion, their Honours rejected the decision in Jameson v Guri Wa Ngundagar Aboriginal Corporation [2001] FCA 1104, where it was found that section 71 gave the Registrar the power to determine what a 'reasonable period should be'. Their Honours did, however, consider that there is a role for limited deference to administrative decisions pursuant to the principles discussed by the majority of the High Court in Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135 at [39]-[50].On the facts of the instant case, their Honours found that the one-day period afforded to the Corporation to respond to the notice was not objectively reasonable. This conclusion was reached primarily on the basis that the primary judge 'significantly overestimated' the urgency of ensuring that Commonwealth funding was not withheld. In so holding, their Honours placed particular emphasis on the fact that the Corporation was not responsible for the provision of Centrelink payments or the supply of essential services. Accordingly, their Honours found that urgency could not justify the extremely short notice period, which could not on any view be regarded as giving the Corporation an opportunity to fully consider and respond to the allegations against it. Their Honours also considered that the primary judge underestimated the difficulties faced by the Governing Committee in responding to the notice.Their conclusion on this issue was sufficient to allow the appeal, however, their Honours also addressed the other issues that were argued.**(ii) Fairness**This ground was premised on two main submissions:* a number of the complaints regarding the Corporation's conduct which had led to the Department's decision to withhold funding were not made known to the Corporation, even though they were known to the Registrar. The Corporation therefore had no opportunity to respond.
* Because of the short time period allowed by the notice, the Corporation was not able to properly respond to those complaints that were communicated to it by the Registrar.

Notwithstanding their acceptance that the facts underlying these submissions were accurate, Gyles and Edmonds JJ (with whom Buchanan J agreed) were not persuaded that the primary judge erred by rejecting this ground because the notice was based on the Department's decision to suspend funding, and not the causes for that decision.**(iii) Prior approval**The final issue was whether the fact that Mr Brough signed the formal authorisation some 18 minutes after Mr Andrews signed the approval invalidated the appointment. Buchanan J disagreed with Giles and Edmonds JJ on this point, thus the positions expounded in the two judgments are examined separately below.**(iv) Gyles and Edmonds JJ**Gyles and Edmonds JJ considered that the appointment of the administrator was valid, and that there was prior approval in the sense required by the Act.Their Honours were able to reach this conclusion because they considered that the inference that Mr Andrews' approval operated continuously from the signing of the minute to the appointment of the administrator was supported by (a) the presumption of continuance and (b) the presumption of regularity. They further considered that this inference is stronger in the case of a minister of a state than it would be in an ordinary private law context. Accordingly, their Honours held that there was, relevantly, approval before the appointment, which was ultimately not effected until 18 July.**(v) Buchanan J**In contrast with the joint majority, Buchanan J found that the appointment was invalidated by the fact that Mr Andrews' approval was given before he was in fact authorised to execute it.Buchanan J found that the proper inference to be drawn from the facts as proven was that Mr Andrews thought that he was authorised when he signed the minute when in fact he was not. In so holding, Buchanan J rejected the view of the primary judge that Mr Andrews knew that he would be authorised and that upon authorisation his prior approval would be rendered effective.etailed Contents**5.8 Time after time: statutory demands and the court's ability to extend time for compliance after the period for compliance has expired** (By Henrietta Jones, Freehills)Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Limited [2007] VSCA 121, Supreme Court of Victoria, Court of Appeal, Maxwell P, Chernov, Nettle, Ashley and Neave JJA, 14 June 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/june/2007vsca121.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/june/2007vsca121.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**Esanda Finance Corporation Limited ("Esanda") served a statutory demand on Aussie Vic Plant Hire Pty Ltd ("Aussie"). Aussie challenged the statutory demand at the first instance to a Master of the Supreme Court and then on appeal to a Trial Judge of the Supreme Court of Victoria, who dismissed the appeal (in accordance with previous case law) because the time for compliance with the statutory demand had expired. Aussie appealed again to the Court of Appeal which also dismissed the appeal, despite finding (four to one) that the Trial Judge was empowered to extend the period for compliance, even though the period had expired, under the ordinary meaning of section 429F(2)(a)(i) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("Act").**(b) Facts**Aussie, a company in the business of plant hire, was party to eleven hire contracts and chattel mortgages for earthmoving equipment with Esanda. During late 2006 Aussie became increasingly indebted to Esanda culminating in the latter serving a statutory demand on Aussie under section 459E of the Act.Aussie applied to the Master of the Supreme Court of Victoria to have the demand set aside and although Master Efthim dismissed Aussie's application, he extended Aussie's time for compliance with the statutory demand as permitted under section 459F(2)(a)(i) of the Act. Aussie then appealed to Whelan J of the Supreme Court who, believing himself bound by previous case law, dismissed Aussie's appeal given that the time for compliance with the statutory demand (as earlier extended by Master Efthim) had expired. Aussie then appealed to the Court of Appeal. Three issues arose for determination:(i) Whether Aussie was required to seek leave from Whelan J to appeal Whelan J's order;(ii) Whether Whelan J was bound by previous case law to dismiss Aussie's appeal merely because the time for compliance with the statutory demand had expired before the matter came on for hearing; and(iii) If Whelan J was not bound per point (ii), whether the court had power to extend time for compliance with a statutory demand notwithstanding that the time for compliance had expired.**(c) Decision****(i) Leave to appeal**Section 17A(4)(b) of the [Supreme Court Act 1986 No. 110 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=248" \t "default) stipulates that leave to appeal is required where the order sought to be appealed is "an order in an interlocutory application". All five judges held that Whelan J's decision to dismiss Aussie's application to set aside Esanda's statutory demand was an interlocutory order (as opposed to a final order) and therefore leave to appeal was required.In support of their conclusion that Whelan J's order was interlocutory in character, the court distinguished A-Pak Plastics Pty Ltd v Merhone Pty Ltd (1995) 17 ACSR 176 ("A-Pak") and Asian Century Holdings Inc v Fleuris Pty Ltd [2000] WASCA 59 ("Asian Century") and instead relied heavily on Hayne J's reasoning in Mibor Investments Pty Ltd v Commonwealth Bank of Australia [1994] 2 VR 290, emphasizing that:* an order is interlocutory if it does not finally dispose of the rights of the parties; and
* whether an order "finally disposes" of the parties' rights depends on the order's legal, not practical, effect.

Therefore an order (such as Whelan J's) refusing to set aside a statutory demand is interlocutory, as it is still open to the debtor company to make a second application to set aside the statutory demand and thus there is no final determination of the parties' rights, whereas an order setting aside a statutory demand at first instance (as occurred in A-Pak and Asian Century) is a final order because the creditor can no longer rely on the demand to have the company wound up.However, having decided leave to appeal was required, only Chernov J and Ashley J discussed the merits of granting Aussie leave to appeal, with the former in favour on the ground that the issue sought to be raised on appeal was of considerable public importance and the latter strongly opposed on the ground that Aussie was unable to prove one of the two key requirements for a grant of leave to appeal, namely that allowing Whelan J's order to stand would result in substantial injustice to Aussie.**(ii) Whether Whelan J was bound by earlier authority**Whelan J considered himself bound by the decision in Buckland Products Pty Ltd v Deputy Commissioner of Taxation [2003] VSCA 85 ("Buckland") which concerned very similar facts to the present. Buckland made an application, within time, to set aside a statutory demand served on it and, as in the present case, Buckland's application was dismissed by the Master. Buckland's appeal was also dismissed on the ground that, by the time the appeal came on for hearing, the time for compliance with the demand had expired. Crucially however Maxwell P, Neave J and Chernov J distinguish Buckland as, in contrast to the facts here, no order had been made extending Buckland's time for compliance under section 459F(2)(a)(i) and thus, despite the factual similarities, Buckland's case ultimately turned on the interpretation of a different section, namely section 459F(2)(a)(ii), and therefore could be distinguished.**(iii) Power to extend time for compliance after the period has expired**Section 459F(2)(a)(i) of the Act empowers the court to extend the time for compliance with a statutory demand whilst section 70 provides that where the Act confers power to extend the period for doing an act, such power may be exercised even if the period for doing the act has ended. Maxwell P, Neave J, Nettle J and Ashley J therefore characterised the issue of whether the court can extend the period for compliance with a statutory demand after it has expired as a straightforward matter of statutory construction. Not only is section 70 plainly capable of applying to section 459F(2)(a)(i), to read in words imposing a significant time limit on the power conferred in section 459F(2)(a)(i) is to rewrite the section and thereby exceed the proper bounds of statutory interpretation.This finding seems to be a major departure from previous case law (including a High Court decision, David Grant & Co Pty Ltd v Westpac Banking Corporation (1995) 184 CLR 265) in which it has been held that the court has no jurisdiction to extend the period for compliance once it has expired. However all four judges distinguished the preceding authorities, whether for erroneous application of the Act or for irrelevancy to the present facts, eventually concluding that those authorities which are relevant are decisions of single judges only and involve departure from the language of the statute. Nonetheless, despite objecting to the past precedents, Nettle J and Ashley J eventually succumbed to their weight, applying the principle that if a particular judicial construction of a statute of doubtful meaning has been accepted for a long period of time it should not be overturned unless by the High Court or Parliament.By way of contrast, Chernov J asserted in dissent that once the period specified in the statutory demand has expired, the court does not have power to extend it under section 459F(2)(a)(i). In coming to this conclusion, Chernov J relied on previous case law and also on the policy reasons behind the introduction of section 459F(2)(a)(i) and its contextual provisions, Part 5.4 (winding-up in insolvency). Part 5.4 was introduced in 1992 as a complete code governing the winding-up of companies with a stringent, self executing timetable specifying the period within which permitted steps can be taken to challenge a statutory demand. Therefore giving the court power to extend the period for compliance would defeat the principal policy aims of Part 5.4. Chernov J also rejected the application of section 70 to section 459F(2)(a)(i), asserting that as section 70 is of general application it does not affect the operation of the later, specific provisions of Part 5.4 which is a code as to the time limits within which the prescribed steps may be taken.Thus, although Maxwell P and Neave J would have allowed Aussie's appeal and remitted the matter to Whelan J (and ordered that the time for compliance be extended until 21 days after the determination of Aussie's appeal), Nettle J and Ashley J dismissed Aussie's application holding that if the interpretation of section 459F(2)(a)(i) is to be revisited, it is a matter for the High Court or Parliament. Chernov J also dismissed Aussie's appeal albeit, as discussed above, on the ground that Whelan J did not have power to extend the period of compliance once the period had expired.etailed Contents**5.9 Repayment of money received by mistake** (By Stephen Magee)Wambo Coal Pty Ltd v Stuart Karim Ariff [2007] NSWSC 589, Supreme Court of New South Wales, White J, 12 June 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/june/2007nswsc589.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/june/2007nswsc589.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 and facts**Wambo was indebted to Quensor. When Wambo purported to pay its debt to Quensor, it accidentally made two payments to Singleton Earthmoving Pty Ltd (which had no connection with Quensor). At the time of payment, Singleton was in liquidation and its liquidator was Mr Ariff.Wambo had previously been a debtor of Singleton, but had already paid off that debt. However, Singleton's records were out of date and, on the basis of those records, Mr Ariff believed that Wambo's payment was the payment of a current debt.Mr Ariff then directed a transfer of money from Singleton's bank account to his own firm (for disbursements).When Wambo found out about the mistaken payments, it demanded the return of the money from Singleton. Mr Ariff claimed that Wambo was still a debtor. Singleton retained the money. Another transfer was made to Mr Ariff's firm's account.The court held that, from the date when Mr Ariff became aware that the money had been paid by accident, Singleton held the money on trust for Wambo.Mr Ariff was held liable to account as constructive trustee for the moneys received by his firm after he found out that the payments had been made by accident. Wambo was also entitled to personal remedies against Singleton, but as Singleton apparently had no assets, this was, in the court's words, academic.**(b) Decision** **(i) Did Singleton hold the mistaken payments on trust for Wambo?**The court rejected Wambo's argument that the recipient of money paid without consideration holds the money on trust for the payer where there is no presumption of advancement.However, there was an additional element which allowed the court to rule that Singleton held the money on trust: the fact that Singelton (through Mr Ariff) learned that the money had been paid by mistake:"42 I do not see why, in principle, a constructive trust arising from the retention of moneys known to have been paid by mistake, and for which there was no consideration, would not arise from the time the payee acquired such knowledge, if the moneys paid could still be identified at the time such knowledge was acquired. ...43 The payments made by Wambo to Singleton Earthmoving were not only made by mistake. They were also made for no consideration. It would be against conscience for Singleton Earthmoving to use the moneys as its own once it knew of Wambo's mistake. ... It is consistent with those cases in which a constructive trust is declared over property obtained by fraud where no consideration was provided for the payment (Bankers Trust Co v Shapira [1980] 1 WLR 1274 at 1282; Stocks v Wilson [1913] 2 KB 235 at 245, 247; Neste Oy v Lloyds Bank plc at 665-666; Westdeutsche at 716; Barrett & Sinclair v McCormack [1999] VUCA 11 in the passage cited in Orix Australia Corporation Ltd v Moody Kiddell & Partners Pty Ltd at [158]). The recipient's conscience is bound only upon being aware of the mistake. But once the recipient is aware that, by a mistake, he has got something for nothing, a proprietary remedy is appropriate."The fact that the recipient of the money was insolvent did not affect this conclusion. It would be an unwarranted windfall for the company's creditors to share in the payment.**(ii) Did Singleton have the requisite knowledge?**Mr Ariff's mind was Singleton's mind. On the evidence, the court concluded that he had not known that the money had been paid by mistake when the first transfer was made to his firm. However, he had known by the time the second transfer was made. The court said that, before authorising the first transfer, Mr Ariff had known that Singleton's records had not been updated. However, the issue was not whether he ought to have known that the payments were made in error, but whether he "did know that they had been paid by mistake, or whether he wilfully shut his eyes to that possibility, or wilfully and recklessly failed to make inquiries, or had actual knowledge of the circumstances which would indicate the facts to an honest and reasonable person." That moment arose when Wambo's solicitors informed him that the payment had been in error.**(iii) Mr Ariff's liability as a recipient of trust property**Wambo had taken recovery proceedings against Mr Ariff and Singleton. Mr Ariff argued that, since he was not a recipient of any money, he could not have any liability for the moneys that had been transferred from Singleton. He pointed out that the transfers had been made to his firm (S Ariff Nominees Pty Ltd), and that that firm was not a party to the proceedings.The court dismissed this argument, on the grounds that the money had been transferred to Mr Ariff's firm at his direction and that the authority for that direction had come from Mr Ariff's status as liquidator of Singleton:"[T]he office of liquidator is a personal office. If S Ariff Nominees Pty Ltd incurred expenses in the winding-up of Singleton Earthmoving, it could only have been because the liquidator incurred those expenses and S Ariff Nominees Pty Ltd paid them on his direction. The only person entitled to be indemnified out of the assets of Singleton Earthmoving in respect of expenses incurred in its liquidation was the liquidator. If A, being entitled to receive money from B, directs payment to C, A is as much the recipient of the payment as if he had physically received it and then transferred the moneys to C. Although Mr Ariff directed payment to S Ariff Nominees Pty Ltd, he was the recipient of the payments."That left the issue of the basis (if any) upon which Mr Ariff might be liable as recipient of the payments.The court held that he was liable under the first limb of Barnes v Addy, because he had knowledge of the facts constituting the relevant breach of trust (which constituted constructive notice of the breach of trust). The court dismissed Mr Ariff's argument that his only fiduciary duty was to Singleton: in this case, a separate fiduciary obligation arose from the circumstances in which the constructive trust arose.etailed Contents**5.10 Receivers' duties and their distribution of company assets surplus to their appointors' debts** (By Matthew Davis, Mallesons Stephen Jaques)Fraser v Australian Securities and Investments Commission, In the Matter of Lanepoint Enterprises Pty Ltd (Receivers and Managers Appointed) [2007] FCAFC 85, Federal Court of Australia, Full Court, Ryan, Finkelstein and Gilmour JJ, 8 June 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fcafc85.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fcafc85.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 considers the powers of receivers to deal with assets surplus to their appointers' debts where there are second or subsequent mortgagees. The sole (and common) director of two related companies, both under the control of receivers, sought the provision of funding, from the respective company's assets, to defend ASIC applications to have the two companies wound up. After being refused funding by the receivers, she brought an action under [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) section 1321. The trial judge had - although refusing other applications - allowed the application for legal funding in relation to the parent company. The receivers' appeal, supported by ASIC, was unanimously upheld.Receivers had been appointed to the property development company by the mortgagee. The receivers subsequently completed the relevant apartment development and sold off the properties.Gilmour and Ryan JJ in their joint judgment assumed that a receiver may make a payment to the mortgagor company, provided that they will have a surplus of funds after their secured creditor has been paid in full and all the costs and expenses of the receivership have been met. This may not be the case, however, where there are other mortgages outstanding, as the receivers may owe a duty to second or subsequent mortgagees.Finkelstein J looked at both the mortgage instrument and the relevant real property mortgage legislation in Western Australia (which stated the order in which mortgage sale proceeds payments ought be made) and held that the trial judge's order, requiring the receiver to make a payment out of the surplus produced by the sale of the apartments, was not an allowable payment. Accordingly, he ordered that the application under section 1321 could not be successful, and the order made by the judge was 'beyond power'.The effect of both judgments was the same - the receivers were not permitted to make such a payment in the circumstances of the case. In particular, the presence of a second mortgage and Bowesco's right to any money being subject to a charge by Bowesco itself in favour of Suncorp, meant that the order requiring funds to be provided to Bowesco was 'an excess of power'.The trial judge's orders had also directed that the funding be provided to Bowesco for the specified purpose of legal advice. Both the joint judgment and Finkelstein J's separate opinion accepted that this specificity was not allowable. Any money being given to Bowesco should fall under the control of its receivers (it too was in receivership), offsetting the debt to Bowesco; not as here, to be funnelled directly to the solicitors.**(b) Facts** In April 2005 Lanepoint Enterprises Pty Ltd ('Lanepoint') borrowed $5,875,900 from Suncorp-Metway Limited ('Suncorp') to develop 40 residential apartments in Western Australia. This money was secured by a real property mortgage over the land, a first debenture over Lanepoint's undertaking and a guarantee from Bowesco Pty Ltd ('Bowesco'), Lanepoint's parent company. In May 2005 Lanepoint granted a second debenture to Perpetual Nominees Limited ('Perpetual'), securing an amount in excess of $2.2 million. Lanepoint defaulted on its obligations to Suncorp. In March 2006, Suncorp appointed receivers to Lanepoint under both the mortgage and the debenture. The receivers were advanced money to complete the development and the apartments were then sold.Bowesco was owed close to $1 million by Lanepoint. Bowesco's rights were subrogated to the rights of Suncorp as a result of a payment made by Bowesco as guarantor of Lanepoint's debt to Suncorp. Bowesco was placed under a separate receivership.ASIC made applications to have Bowesco and Lanepoint wound up. The sole (and common) director of the two companies made applications to the receivers, on behalf of Lanepoint and Bowesco, for payments to defray various legal expenses - principally in defending ASIC applications for them to be wound up. These were refused on the grounds that to make such payments would be a breach of the receivers' duties to their appointor, Suncorp, and the debenture holder. The director took the matter to court, relying on section 1321 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), which provides that 'a person aggrieved by any act, omission or decision of a receiver . . . may appeal to the Court.'**(i) Trial judge**At trial, the director made applications for funding for the defence of the ASIC proceedings, along with other funding requests for legal and tax advices. French J refused funding for all these requests, except for the defence of the ASIC proceedings against Bowesco. This was the sole focus of attack by the appellants and ASIC in the present appeal. The contentious reasoning in the trial judgment was as follows:'Bowesco is a preferred creditor subrogated, by reason of payments made pursuant to its guarantee, to the rights of Suncorp-Metway . . . On that basis it can properly claim to be a person aggrieved by the refusal of the Lanepoint receivers to make funds available to it for the purpose of opposing its winding up application and prosecuting its appeal. In my opinion the receivers ought to have allowed Bowesco funding for that purpose out of the assets of Lanepoint having regard to the small quantum of funding sought.'The trial judge (French J) ordered that the receivers provide up to $50,000 to Bowesco; when the receivers failed to do so, in a separate hearing, Siopis J ordered that the receivers pay $20,524 directly to the Bowesco's solicitors on account of fees already incurred.**(ii) Receivers' appeal**The receivers, as appellants, argued that Bowesco's only claim to any money from Lanepoint's receivership was as a creditor of Lanepoint. Any entitlement as a creditor would arise only after payment of all expenses incurred in realising the assets of Lanepoint and payment of all moneys owing by Lanepoint to Suncorp. They felt that 'to make a payment to Bowesco to enable it to meet the identified legal expenses, would be in breach of their duty to Suncorp'.**(iii) ASIC's appeal**ASIC, the first respondent, supported the appeal. ASIC took issue with who the relevant 'aggrieved person' was for section 1321 purposes. ASIC argued that an 'aggrieved person' might include Suncorp, or Bowesco's receivers, but should not include Bowesco or the director, until the secured creditor's debt had been satisfied.ASIC argued that central to the phrase 'any person aggrieved' is the notion that the behaviour complained of has, or will have, a negative impact on the applicant's property. In the present case, ASIC argued that because the right to which Bowesco had been subrogated was caught by Suncorp's floating charge, it is Suncorp, rather than Bowesco, which could claim to be aggrieved. Moreover, ASIC argued that the real 'aggrieved person' in this case was the receiver of Bowesco and not Bowesco itself.**(c) Decision** The court heard appeals from the two separate orders of single judges (French and Siopis JJ respectively). All 3 judges allowed the appeal, with Ryan and Gilmour JJ publishing a joint judgment and Finkelstein J a separate opinion.**(i) Receivers had no power to pay Bowesco at all**Ryan and Gilmour JJ's joint judgment noted that the principal duty of the receivers of Lanepoint was to apply the proceeds from the assets in discharge of the debt due from Lanepoint to their appointor, Suncorp. They were, however, 'prepared to assume, without deciding', that receivers 'may have a discretion once they are satisfied that they will have a surplus of funds after their secured creditor has been paid in full and after all the costs and expenses of the receivership have been met, to make a payment in advance of their retirement to the mortgagor company'. However, they qualified this by acknowledging that the receivers owed a duty to second or subsequent mortgagees. In the present case, while Bowesco was entitled to a sum approaching $1 million, the right to obtain that money, to which Bowesco was entitled by way of subrogation, was properly subject to a charge by Bowesco itself in favour of Suncorp. Moreover, a second mortgage was also in place to Perpetual. Therefore, in the present scenario, the order requiring funds to be provided to Bowesco's solicitors was 'an excess of power'.Finkelstein J, in his separate judgment, looked at the relevant legislation dealing with the application of the proceeds of sale of mortgaged land in Western Australia, the [Transfer of Land Act 1893 No. 14 (WA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=15973" \t "default). Section 109 provides that mortgage sale proceeds are to be applied in the following order - to payment of expenses involved with the asset's sale, money due the mortgagee, money due on subsequent mortgages and charges and finally surplus paid to mortgagor. Accordingly, Finkelstein J felt that French J's order - requiring the receivers to make a payment out the surplus produced by the sale of the apartments - would be inconsistent with both section 109 of the [Transfer of Land Act 1893 No. 14 (WA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=15973" \t "default) and the mortgage instrument. He stated that 'the receivers would not be permitted to make [the payment] even if they were of opinion that it was desirable to advance money to Bowesco to fund the defence of the winding up application'. He held that the case was one in which the judge was 'being asked to do something they were prohibited from doing by statute and were not authorised to do by the mortgage instrument under which they were appointed'. Accordingly, the application under section 1321 could not be successful, and the order made by the judge was 'beyond power'.In a matter which was left undecided, Finkelstein J also questioned whether section 1321 - and Part 5.2 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) - applies to receivers appointed under real property mortgages; in the absence of argument before him, however, he did not decide the matter.**(ii) Receivers had no power to pay Bowesco on condition it use the money in certain ways**The joint judgment held that the receivers of Lanepoint had no power - as French J had ordered them - to make payments to Bowesco out of the proceeds from the sale of assets under their management, on condition that Bowesco apply the payment in defraying its costs in resisting its own winding up or other legal actions. They were unambiguous that 'the receivers would not be entitled to pay funds under their control to the mortgagor company on the condition that it apply those funds in a certain way or for some specified purpose. Such a condition could potentially cut down the rights of secured creditors of whom the receivers had no notice or of any unsecured creditors and might, if it matters, constitute a preference.'Finkelstein J also took issue with the directions that money be paid to Bowesco for the specified purpose of defending the ASIC action, thus preventing the money being taken by the receivers of Bowesco. The second order, made by Siopis J, funnelled $20,524 directly to Bowesco's solicitors. Finkelstein J stated that money received by Bowesco should fall under the control of its receivers, not as here, where the effect of the order was 'to confiscate property' belonging to Bowesco's receiver's appointor (again Suncorp).However, both the joint judgment and Finkelstein J's judgment accepted that the $20,524 paid directly to Bowesco's solicitors pursuant to Siopis J's order could not be re-couped from the director, as the receivers had requested, even though they accepted the payment to the solicitors should not have been ordered. Both judgments noted that she had not personally received the money nor could they seek damages from her suffered by an erroneous judgment.etailed Contents**5.11 Relevant considerations in security for costs applications** (By Justin Fox and Agatha Moczulski, Corrs Chambers Westgarth)Litmus Australia Pty Ltd (in liq) v Paul Brian Canty [2007] NSWSC 670, New South Wales Supreme Court, White J, 8 June 2007 The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/june/2007nswsc670.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/june/2007nswsc670.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 by two defendants for security for costs in the amount of $577,077. The application was brought under section 1335 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) and rule 42.21(1)(d) of the [Uniform Civil Procedure Rules 2005 No. 418 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "default). The plaintiff company was in liquidation and insolvent.The plaintiff advanced four grounds as to why security for costs should not be ordered. The plaintiff also contested the quantum of the security sought.White J held that it was appropriate to make an order for security for costs. It was ordered that the plaintiff provide security in the sum of $260,000 for the costs of the two defendants up to the conclusion of the preparation of evidence for hearing, but not including security for costs of the hearing. His Honour gave liberty to the first and third defendants to apply for further security for costs of the hearing at the relevant time.**(b) Facts** The plaintiff was placed into voluntary administration and on 4 May 2001, a meeting of creditors resolved that it be wound up. The plaintiff sought declarations that the first defendant had breached various duties as a director or officer of the plaintiff by effecting, permitting, or failing to stop the transfer of the business operations and undertaking of the plaintiff to the third defendant. The plaintiff claimed that the third defendant had been involved or knowingly concerned in the first defendant's breaches of duty. It sought compensation under section 1317H of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) or, alternatively, equitable compensation or, alternatively, damages pursuant to section 1324(10) of the Corporations Act.The first and third defendants applied for security for costs under section 1335(1) of the Corporations Act.The plaintiff relied on four grounds as to why the discretion to order security for costs should not be exercised. The first ground relied on was delay. The plaintiff identified the relevant period of delay as being the period between 27 September 2006, when particulars were provided, and 15 February 2007.The second ground relied on was that the claim was made bona fide and that the claim was apparently strong. It was undisputed that assets were transferred to the third defendant, and that the first defendant was the director of that company, at least at the time of the transfer. Whether the first defendant was a director of the plaintiff at the time was a matter of contest.The third ground relied on was that to order security in the amount sought would be to stultify the litigation.The fourth ground relied on was that the first and third defendants were the cause of the plaintiff's impecuniosities.**(c) Decision**His Honour did not accept that delay on behalf of the defendants in bringing the security for costs application was a reason for refusing the security sought. His Honour regarded the delay between 27 September 2006 and 15 February 2007 in filing an application for security for costs as being of little significance. The plaintiff acknowledged that it could not point to prejudice arising from delay. To show prejudice it generally must appear that not only will the plaintiff be unable to provide the required security from its own resources, but also that those standing behind the plaintiff who could be expected to benefit from the litigation are unable to provide the required security (Rhema Ventures Pty Ltd v Stenders [1993] 2 Qd R 326 at 333; Rickard Constructions Pty Ltd v Allianz Australia Insurance [2002] NSWSC 1162 at [17]-[18]). His Honour considered that no prejudice could be established.His Honour did not regard the claimed strength of the plaintiff's claim as a factor against ordering security. His Honour noted that it is not often that it a court is able to form any view as to the strengths of the respective parties' cases on an application for security for costs, so as to influence its discretion in ordering security for costs (Fiduciary Limited v Morningstar Research Pty Ltd (2004) 208 ALR 564 at 574 [37]-[39]). His Honour further noted that it was not possible to do so in this case as the plaintiff's claim was not articulated with precision.His Honour rejected the contention that to order security for costs would stultify the litigation. His Honour held that as it was not established that Mrs Aitken (the party whom it appeared would primarily benefit from the plaintiff being successful in the litigation) was unable to provide security in the amount sought, or unwilling to provide such security as may be ordered. His Honour held that the documents tendered did not establish that the first and third defendants were the cause of the plaintiff's impecuniosity. His Honour held that no conclusion as to the cause of the plaintiff's impecuniosity could be drawn in this case, as it could not be identified what assets were transferred, what their value was, and what was the value of the plaintiff's existing liabilities which the third defendant satisfied. Finally, it was not accepted that security for costs ought be denied on the basis that the defendants were the cause of the plaintiff's impecuniosity. His Honour noted that it would be impossible to reach that conclusion without trying the case.Accordingly, his Honour held that it was appropriate to make an order for security for costs. His Honour calculated the quantum of security by reference to costs incurred, and anticipated to be incurred from the filing of the statement of claim. The amount of $260,000 for security was fixed, to cover the period up to the conclusion of the preparation of evidence. The first and third defendants were given the liberty to apply for further security for the hearing when the matter was ready to be fixed. etailed Contents**5.12 The effect of general dispute resolution clauses on whether an expert determination is final and binding** (By Kathryn Finlayson, Minter Ellison)Toll (FHL) Pty Ltd v Prixcar Services Pty Ltd [2007] VSC 187, Supreme Court of Victoria, Hollingworth J, 8 June 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/june/2007vsc187.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/june/2007vsc187.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 determination by an expert of the value of the plaintiff's shares in accordance with clause 5.1 of the shareholder agreement was final and binding.The existence of the general dispute resolution clauses did not entitle the plaintiff to have the value determined by arbitration in the event that it disagreed with the expert's determination.**(b) Facts** The plaintiff, Toll (FHL) Pty Ltd (Toll), was required to dispose of its shares in the first defendant, Prixcar Services Pty Ltd, to satisfy an undertaking provided to the Australian Competition and Consumer Commission as part of Toll and its associated companies' takeover of Patrick Corporation.Relevantly, clause 5.1 of the shareholder agreement between Toll and the second, third and fourth defendants contained a specific procedure for the transfer of shares by a shareholder. The procedure required the 'Fair Value' of the shares to be established by the proposed transferor and the directors (other than the directors appointed by the proposed transferor) or, if agreement could not be reached within a nominated timeframe, the Fair Value was to be fixed by the first defendant's auditors upon the application of either the proposing transferor or the directors. Clause 5.1(j)(ii) provided that the auditors would 'act as an expert and not as an arbitrator'.The shareholder agreement also contained two general dispute resolution clauses, one of which provided that, if there was a substantial dispute between the shareholders relating to the interpretation or operation of the agreement, the dispute would be referred to appropriate professional advisers and then, if the shareholders were still unable to agree, to arbitration. The Fair Value of Toll's shares was not agreed within the nominated timeframe and was ultimately determined by Deloitte Touche Tohmatsu (Deloitte) (who, although not the first defendant's auditors, were appointed by the parties for the purposes of the fulfilling the duties of the auditors in respect of clause 5.1). Toll did not accept the determination and asserted that, for various reasons, Deloitte had not assessed the Fair Value of its shares in accordance with the shareholder agreement. The first defendant gave notice to Toll that it intended to transfer Toll's shares to the second, third and fourth defendants on a pro-rata basis in accordance with the procedure set out in clause 5.1. Toll commenced proceedings in the Supreme Court of Victoria for permanent injunctive relief preventing the first defendant from executing any transfer of shares pending the resolution of the 'dispute' by arbitration. It presented two alternative bases for the relief it claimed:* firstly, that the determination was not final and binding and that Toll had a right to have the Fair Value of its shares determined by arbitration; and
* secondly, that the determination was not made in accordance with the shareholder agreement, that this gave rise to a genuine dispute as to the impeachability of the determination and that that dispute was capable of and ought to be resolved in accordance with the general dispute resolution clauses in the shareholder agreement.

Accordingly, there were two main issues before the court:* was the determination final and binding or did Toll have a contractual right to have the Fair Value of its shares determined by arbitration?
* even if the determination was final and binding, could Toll establish the existence of an arbitrable dispute as to whether the determination was impeachable on the basis that it did not take place in accordance with the shareholder agreement?

**(c) Decision** In relation to Toll's primary argument, Justice Hollingworth held that the determination of Fair Value under clause 5.1 was final and binding and that the general dispute resolution clauses did not permit Toll to have the Fair Value determined by arbitration.In relation to Toll's alternative argument, her Honour held that Toll had not satisfactorily established the existence of an arbitrable dispute. Toll's criticisms were not that the determination of the Fair Value had not been made in accordance with the terms of the agreement but were essentially in relation to the weight to be given to various factors and the correctness of Deloitte's conclusion. In her Honour's opinion, those criticisms were not sufficient to establish the existence of an arbitrable dispute.Justice Hollingworth also noted that, even if Toll's criticisms could be characterised in such a way that there could be a dispute which might lead to impeachment, it would be inappropriate in the circumstances to grant the injunctions sought as the injunctions would not settle the dispute between the parties.etailed Contents**5.13 Appointment of directors via informal resolution** (By Rebecca Young, Blake Dawson Waldron)Hotien Holdings Pty Ltd v Frits Maré [2007] NSWSC 599, New South Wales Supreme Court, White J, 22 May 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/may/2007nswsc599.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/may/2007nswsc599.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 considers facts arising from the terminal illness of Mr Raymond Lord and his interests and directorship in Hotien Holdings. In response to Raymond Lord's illness, another company director purported to appoint new directors and, later, to issue new shares to Raymond Lord's son.Despite his illness, Raymond Lord remained a director of the company. This case considers whether the directors of Hotien Holdings reach the level of concurrence required to constitute an informal decision of directors related to the management of the company's affairs. Even considering the possibility of an informal "resolution" of directors, the appointment of new directors did not enjoy Raymond Lord's concurrence at the time it occurred, rendering it invalid. The subsequent issue of shares by the "new" directors was also invalid.**(b) Facts** Hotien Holdings Pty Ltd was established as an investment company with 500 shares. Coral Property Holdings Pty Ltd, a company controlled by Raymond Lord, held 498 shares. Raymond Lord also held one of the remaining shares and his ex-wife, Bevery Anne Lord, held the other. Raymond Lord and Frits Maré were the directors of Hotien Holdings.Raymond Lord suffers from terminal cancer. The court accepted Mr Maré's evidence that, in September 2006, Raymond Lord gave instructions to him to appoint his son, Alan Lord, as a director of Hotien Holdings. On 1 December 2006, Mr Maré gave Raymond Lord a letter outlining their agreed plan to appoint Alan Lord as a director and indicating that a meeting to do so would occur on 31 December 2006.Raymond Lord did not attend the meeting on 31 December 2006. In his absence, Mr Maré appointed Alan Lord and Mr Martyn Clapp ( a former acquaintance of Raymond Lord) as directors. Following this, Clapp, Maré and Alan Lord passed a resolution to issue 600 shares in the Company and allot them to Alan Lord.Underlying this case is the fact that Raymond Lord transferred his interest in Coral Property Holdings to another son, Breck Lord. White J notes that "a strong undercurrent of this case is that Alan Lord believes that Beverly Anne Lord and perhaps Breck Lord are influencing Raymond Lord in relation to ... disposition of his assets".Raymond Lord claims that he never gave instructions to Maré to appoint Alan Lord or Clapp as directors, nor did he receive notice of the meeting to approve the issue and allotment of additional shares. The defendants allege that Raymond Lord ceased to be a director due to mental capacity, thereby entitling Maré to increase the number of directors to the number necessary to reach quorum. They also argue that Raymond Lord's discussions with Maré about the appointment constitute an informal resolution of directors.Raymond Lord sought a declaration that the appointment of the directors and the issue and allotment of shares were invalid. Alan Lord, in turn, asked the court to appoint a receiver or, alternatively, an accountant to investigate the affairs of the company under section 241 of the Corporations Act.**(c) Decision** **(i) Cessation of directorship for reason of mental capacity**Hotien Holdings' Articles of Association provide for the cessation of a directorship due to mental incapacity. The court found that, despite his physically weakened state, there was little evidence that Raymond Lord's mental capacity had been affected.**(ii) Validity of appointment of new directors**The Articles provide that quorum for a meeting of directors is two. They also provide that, where the number of directors is insufficient to constitute a quorum, the remaining director can act to increase the number of directors to a sufficient number. Given that Raymond Lord had not ceased to be a director, there was still the sufficient number of directors to constitute a quorum and Maré could not increase the number of directors on this basis.The court then considered whether previous conversations between Maré and Raymond Lord about the appointment of Alan Lord constitute an informal appointment. The Articles confer power on a director at any time to appoint a director to either fill a casual vacancy or in addition to the existing directors.The court first pointed out that there was no evidence at all of Raymond Lord, formally or informally, appointing Clapp as a director.In relation to the appointment of Alan Lord, the court considered a number of cases where decisions relating to the management of the business of a company have been taken on an informal basis including Swiss Screens (Australia) Pty Ltd v Burgess (1987) 11 ACLR 756, Roden v International Gas Applications (1995) 18 ACSR 454, Polikwa v Heven Holdings Pty Ltd (1993) 8 ACSR 747 and Re Great Salt and Chemical Works; Ex parte Kennedy [1890] 44 Ch D 472. Based on this authority, the court emphasised that it was possible for directors to communicate with each other informally and thus express their concurrence in a decision about the management of the business of the company. It was emphasised, however, that "there must still be a concurrence in doing things in their capacity as directors and in the management of the company's affairs".The discussions between Maré and Raymond Lord in September about appointing Alan Lord as director were discussions which proceeded on the basis that further steps (eg arrangement of proper resolutions) had to occur prior to the appointment. Raymond Lord was free to change his mind any time up until the appointment took place. Raymond Lord's concurrence at the time of the appointment was necessary and this did not occur. On 31 December 2006, when the appointment was purportedly affected, Maré and Raymond Lord did not concur in reaching a business decision in their capacity of directors.No formal or informal resolution to appoint Alan Lord as a director had occurred. The court declared the appointment of both new directors on 31 December 2006 to be invalid.**(iii) Validity of issue of shares**It follows that the resolution to issue 600 shares and allot them to Alan Lord was also invalid. It was passed at a meeting of Maré, Alan Lord and Clapp. Maré, the only validly appointed director at the meeting, was unable pass such a resolution himself.Moreover, even if the resolution has been validly passed, it would not be a valid issue or allotment of shares. The Articles provide that no further shares could be issued or allotted without the consent of each person who was a member of the company. Raymond Lord gave no consent.The court also considered the resolution oppressive as its purpose was securing majority voting power for Alan Lord, thereby prevent existing members from exercising voting powers (Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285). **(iv) Standing to bring a claim under section 241 of the Corporations Act**The second defendant, Alan Lord, asked the court to order either the appointment of a receiver or an independent person to investigate the financial affairs of the company under section 241 of the Corporations Act. The court found that he had no standing to request such order, given that he was neither a director, member or creditor of Hotien Holdings.In addition, the court pointed out that the purpose of section 241 is to allow for interim orders in aid of the principal proceedings and that no relief under the section was necessary to resolve an issue in question in the proceedings.Finally, the court pointed out that Alan Lord's concern about his father and the state of the business is a matter properly for the Guardianship Tribunal and that these procedures should not be bypassed by an application under section 241.etailed Contents |

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Sent to : i.ramsay@unimelb.edu.au