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|  | |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  | | --- | --- | | **Bulletin No. 128**  Editor: [Professor Ian Ramsay](mailto:i.ramsay@unimelb.edu.au" \t "_new), 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/" \t "_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/" \t "_new), the [Australian Securities Exchange](http://www.asx.com.au/" \t "_new) and the leading law firms: [Blake Dawson Waldron](http://www.bdw.com.au/" \t "_new), [Clayton Utz](http://www.claytonutz.com/" \t "_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/" \t "_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/" \t "_new), [Freehills](http://www.freehills.com/" \t "_new), [Mallesons Stephen Jaques](http://www.mallesons.com/" \t "_new).   1. 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Recent Corporate Law and Corporate Governance Developments** |  |  | | |  | | |  | | --- | | **1.1 Seminar - Directors' Duties: Navigating the Storm on Board**  Directors' duties have recently been the subject of extensive media and regulatory scrutiny. High profile transactions have highlighted difficult issues for directors, and ASIC enforcement actions against executive and non executive directors have brought issues of liability to the fore.  This seminar, organised by the Centre for Corporate Law and Securities Regulation at the Melbourne Law School, brings together eminent speakers to discuss topical issues in directors' duties, from the perspective both of directors and of their legal advisors.   These include:   * The standard of care applicable to a director occupying a special position, such as the chair of a board committee; is it higher than that of other directors? * The business judgment rule: when does it apply, and how helpful is it? * Directors' duties in the context of management buy outs: what protocols should directors follow when management presents a buy out offer?   Speakers for the seminar are: Alan Cameron AM, Chairman of the Reliance Rail Group, Westpac Funds Management and Cameron Ralph Pty Ltd and a director of Audit Quality Review Board Ltd; David Gonsky AM, Chairman of Investec Bank (Australia) Ltd, Coca-Cola Amatil Ltd and a director of the Westfield Group, Singapore Airlines and ASX Ltd; Tim Bednall, a partner of Mallesons Stephen Jaques and Stuart McCulloch, a partner of Allens Arthur Robinson.  Date:       Thursday 1 May 2008  Time:       5.30pm - 7.15pm Location:  Mallesons Stephen Jaques, Level 61, Governor Philip Tower,  Farrer Place, Sydney Cost:        $90 + $9 GST = $99 RSVP:       Josephine Peters 03 8344 5281  The flyer and registration form are available [here](http://cclsr.law.unimelb.edu.au/go/news/index.cfm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.2 APRA draft prudential framework for supervision of general insurance groups**   On 15 April 2008, the Australian Prudential Regulation Authority (APRA) released a package that sets out its draft prudential framework for supervision of general insurance groups.   The package consists of three draft prudential standards and a discussion paper that responds to submissions received following two previous consultation rounds in 2006 and 2007. The package also responds to recommendations 38 and 39 of the HIH Royal Commission. Initial consultation with the general insurance industry on this topic began in May 2005.   The foundation of APRA's approach to the supervision of general insurance groups is that the group as a whole should meet essentially the same minimum capital requirements as apply to individual general insurers. Being part of a wider insurance group can alter the risk profile of an individual insurer through financial and operational inter-relationships with other group members and through decisions and initiatives taken at group level.   It is intended that the final prudential standards implementing general insurance group supervision will be released in the third quarter of 2008 and will become effective on 1 January 2009.   The package of draft standards and discussion paper is available on the [APRA](http://www.apra.gov.au/General/Proposals-relating-to-GI.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.3 PWG private-sector committees best practices for hedge fund participants**   Om 15 April 2008, two blue-ribbon private-sector committees established by the US President's Working Group (PWG) released separate yet complementary sets of best practices for hedge fund investors and asset managers to increase accountability for participants in this industry.  The PWG tasked the committees, selected in September 2007 and comprised of well-respected asset managers and investors, with collaborating on industry issues and developing a set of best practices for their respective groups of stakeholders. Their work was based on the PWG's Principles and Guidelines Regarding Private Pools of Capital issued in February 2007, which sought to enhance investor protections and systemic risk safeguards.   The PWG includes the heads of the US Treasury Department, the Federal Reserve, the Securities and Exchange Commission and the Commodity Futures Trading Commission.  The best practices for the asset managers call on hedge funds to adopt comprehensive best practices in all aspects of their business, including the critical areas of disclosure, valuation of assets, risk management, business operations, compliance and conflicts of interest.  The best practices for investors include a Fiduciary's Guide and an Investor's Guide. The Fiduciary's Guide provides recommendations to individuals charged with evaluating the appropriateness of hedge funds as a component of an investment portfolio. The Investor's Guide provides recommendations to those charged with executing and administering a hedge fund program once a hedge fund has been added to the investment portfolio.  The recommendations will be open for public comment for 60 days. The committees then will review and, as necessary, revise these best practices and standards. Comments may be submitted at the committees' website. The committees will continue to meet to discuss raising the standards for industry participants after the best practices are complete.   The best practices may be viewed at the [Committees'](http://www.amaicmte.org/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.4 Financial Stability Forum recommends actions to enhance market and institutional resilience**   On 12 April 2008, the Financial Stability Forum (FSF) presented to the G7 Finance Ministers and central bank Governors a report making recommendations for enhancing the resilience of markets and financial institutions. The recommended actions are in five areas:   * Strengthened prudential oversight of capital, liquidity and risk management * Enhancing transparency and valuation * Changes in the role and uses of credit ratings * Strengthening the authorities' responsiveness to risks * Robust arrangements for dealing with stress in the financial system.   The report is available on the [FSF](http://www.fsforum.org/" \t "_new) website.    In October 2007, the G7 Finance Ministers and central bank Governors asked the FSF to undertake an analysis of the causes and weaknesses that have produced the turmoil and to set out recommendations for increasing the resilience of markets and institutions going forward and to report in April 2008.  The findings and recommendations in the report are the product of an intensive collaborative effort of the main international bodies and national authorities in key financial centres. They draw on a large body of coordinated work, comprising that of the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissions (IOSCO), the International Association of Insurance Supervisors (IAIS), the Joint Forum, the International Accounting Standards Board (IASB), the Committee on Payment and Settlement Systems (CPSS), the Committee on the Global Financial System (CGFS), the International Monetary Fund (IMF), the Bank for International Settlements (BIS) and national authorities in key financial centres. Insights have been gained, as well, from private sector market participants.  The FSF brings together national authorities responsible for financial stability in significant international financial centres, international financial institutions, sector-specific international groupings of regulators and supervisors, and committees of central bank experts. It was established by the G7 Finance Ministers and central bank Governors in 1999 to promote international financial stability through enhanced information exchange and international cooperation in financial market supervision and surveillance.  **Summary of recommendations**  **(a) Strengthened prudential oversight of capital, liquidity and risk management**  Basel II provides the appropriate framework for supervisors to incentivise and monitor the process by banks and securities firms to address the weaknesses that the turmoil has revealed. Its implementation should proceed with priority. But, to improve resilience, elements of Basel II need to be strengthened. A fundamental review of supervisory liquidity guidelines is also taking place.  It is especially important to strengthen the prudential framework for securitisation and off-balance sheet activities. Initiatives are also required to make the operational infrastructure for over-the-counter (OTC) derivatives more robust.  **1. Capital requirements**   Supervisors, working through the Basel Committee, will enhance the Basel II capital treatment of structured credit and off-balance sheet activities.  The Basel Committee will issue proposals in 2008 to:   * raise capital requirements for certain complex structured credit  products such as collateralized debt obligations of asset-backed securities; * introduce, together with IOSCO, additional capital requirements for credit exposures in the banks' and securities firms' trading books; and * strengthen the capital treatment for banks' liquidity facilities to off-balance sheet asset-backed commercial paper (ABCP) conduits.   Supervisors will assess the impact of Basel II implementation on banks capital levels and will decide whether additional capital buffers are needed.    Supervisors will continue to update the risk parameters and other provisions of Basel II and will rigorously assess banks' compliance with the framework. They will assess the cyclicality of the Basel II framework.    Insurance supervisors should strengthen the regulatory and capital framework for monoline insurers in relation to structured credit.    **2. Liquidity Management**   The turmoil demonstrated the central importance that effective liquidity risk management practices and high liquidity buffers play in maintaining institutional and systemic resilience in the face of shocks.   The Basel Committee will issue for consultation sound practice guidance on the management and supervision of liquidity by July 2008. It will cover the following areas:   * the identification and measurement of the full range of liquidity risks, including contingent liquidity risk associated with off-balance sheet vehicles; * stress tests, including greater emphasis on market-wide stresses and the linkage of stress tests to contingency funding plans; * the role of supervisors, including communication and cooperation between supervisors, in strengthening liquidity risk management practices; * the management of intra-day liquidity risks arising from payment and settlement obligations both domestically and across borders; * cross-border flows and the management of foreign currency liquidity risk; and * the role of disclosure and market discipline in promoting improved liquidity risk management practices.   National supervisors should closely check banks' implementation of the updated guidance as part of their regular supervision. If banks' implementation of the guidance is inadequate, supervisors will take more prescriptive action to improve practices.    Supervisors and central banks will examine the scope for additional steps to promote more robust and internationally consistent liquidity approaches for cross-border banks. This will include the scope for more convergence around liquidity supervision as well as central bank liquidity operations.   **3. Supervisory oversight of risk management, including of off-balance sheet entities**  Firms' boards and senior management must strengthen risk management practices according to the lessons they have learned from the turmoil. Supervisors for their part will act to monitor the progress of banks and securities firms in strengthening risk management and capital planning practices.  National supervisors will use the flexibility within Basel II to ensure that risk management, capital buffers and estimates of potential credit losses are appropriately forward looking and take account of uncertainties associated with models, valuations and concentration risks and expected variations through the cycle.   The Basel Committee will issue further guidance for supervisory review over the course of 2008 and 2009 in a number of areas, as described below:   * To strengthen guidance relating to the management of firm-wide risks, including concentration risks. * To strengthen stress testing guidance for risk management and capital planning purposes. * To require banks to manage off-balance sheet exposures appropriately. * To strengthen risk management relating to the securitisation business. * To strengthen their existing guidance on the management of exposures to leveraged counterparties.   Individual jurisdictions will also issue strengthened guidance on these issues.  **4. Operational infrastructure for OTC derivatives**  Market participants should act promptly to ensure that the settlement, legal and operational infrastructure underlying OTC derivatives markets is sound. Market participants should amend standard credit derivative trade documentation in accordance with the terms of the cash settlement protocol that has been developed, but not yet incorporated into standard documentation.  Market participants should automate trade novations and set rigorous standards for the accuracy and timeliness of trade data submissions and the timeliness of resolutions of trade matching errors for OTC derivatives.  The financial industry should develop a longer-term plan for a reliable operational infrastructure supporting OTC derivatives.  **(b) Enhancing transparency and valuation**  This period of market turmoil and illiquidity has highlighted the importance to market confidence of reliable valuations and useful disclosures of the risks associated with structured credit products and off-balance sheet entities.  **1. Risk disclosure by market participants**   Enhanced disclosures by financial firms of more meaningful and consistent quantitative and qualitative information about risk exposures, valuations, off-balance sheet entities and related policies are important to restore market confidence.  The FSF strongly encourages financial institutions to make robust risk disclosures using the leading disclosure practices summarised in the report, at the time of their upcoming mid-year 2008 reports.   Going forward, investors, financial industry representatives and auditors should work together to provide risk disclosures that are most relevant to the market conditions at the time of the disclosure.   The BCBS will issue by 2009 further guidance to strengthen disclosure requirements under Pillar 3 of Basel II for securitisation exposures, sponsorship of off-balance sheet vehicles, liquidity commitments to ABCP conduits, and valuations.  **2. Accounting and disclosure standards for off-balance sheet vehicles**   The build-up and subsequent revelation of significant off-balance sheet exposures has highlighted the need for clarity about the treatment of off-balance sheet entities and about the risks they pose to financial institutions.   The IASB should improve the accounting and disclosure standards for off-balance sheet vehicles on an accelerated basis and work with other standard setters toward international convergence.    **3. Valuation**   Potential weaknesses in valuation practices and disclosures, and the difficulties associated with fair valuation in circumstances in which markets become unavailable, have become apparent from the turmoil. International standard setters should enhance accounting, disclosure and audit guidance for valuations. Firms' valuation processes and related supervisory guidance should be enhanced.   To address these issues:   * The IASB will strengthen its standards to achieve better disclosures about valuations, methodologies and the uncertainty associated with valuations. * The IASB will enhance its guidance on valuing financial instruments when markets are no longer active. To this end, it will set up an expert advisory panel in 2008. * Financial institutions should establish rigorous valuation processes and make robust valuation disclosures, including disclosure of valuation methodologies and the uncertainty associated with valuations. * The Basel Committee will issue for consultation guidance to enhance the supervisory assessment of banks' valuation processes and reinforce sound practices in 2008. * The International Auditing and Assurance Standards Board (IAASB), major national audit standard setters and relevant regulators should consider the lessons learned during the market turmoil and, where necessary, enhance the guidance for audits of valuations of complex or illiquid financial products and related disclosures.   **4. Transparency in securitisation processes and markets**   Market practices regarding initial and ongoing disclosures relating to structured products, both in public and private markets will need to improve in the light of recent events. Securities market regulators will work with market participants to this end. IOSCO will assess the progress made by end-2008.  Originators, arrangers, distributors, managers and credit rating agencies should strengthen transparency at each stage of the securitisation chain, including by enhancing and standardising information on an initial and ongoing basis about the pools of assets underlying structured credit products.  **(c) Changes in the role and uses of credit ratings**  Credit rating agencies (CRAs) play an important role in evaluating and disseminating information on structured credit products, and many investors have relied heavily on their ratings opinions. Poor credit assessments by CRAs contributed both to the build-up to and the unfolding of recent events. CRAs have undertaken a series of actions to draw lessons for their internal governance and operational practices. The steps are welcome but more is needed.  **1. Quality of the rating process**  CRAs should improve the quality of the rating process and manage conflicts of interest in rating structured products. To this end:   * IOSCO will revise its Code of Conduct Fundamentals for Credit Rating Agencies by mid-2008. * CRAs should quickly revise their codes of conduct to implement the revised IOSCO CRA Code of Conduct Fundamentals. Authorities will monitor, individually or collectively, the implementation of the revised IOSCO Code of Conduct by CRAs, in order to ensure that CRAs quickly translate it into action.   **2. Differentiated ratings and expanded information on structured products**  Structured products have different credit risk properties from traditional corporate debt ratings.   CRAs should clearly differentiate, either with a different rating scale or with additional symbols, the ratings used for structured products from those for corporate bonds, subject to appropriate notification and comment.   CRAs should expand the initial and ongoing information that they provide on the risk characteristics of structured products.    **3. CRA assessment of underlying data quality**   CRAs should enhance their review of the quality of the data input and of the due diligence performed on underlying assets by originators, arrangers and issuers involved in structured products. CRAs should:   * require underwriters to provide representations about the level and scope of due diligence that they have performed on the underlying assets; * adopt reasonable measures to ensure that the information they use is of sufficient quality to support a credible rating; * establish an independent function to review the feasibility of providing a credit rating for new products materially different from those currently rated; * refrain from rating a security where the complexity or structure of a new type of structured product, or the lack of robust data about underlying assets, raises serious questions as to whether CRAs can determine a credit rating; * disclose what qualitative reviews they perform on originators' underwriting standards; and * take into account the information on the portion of underlying assets held by originators when rating securitised products.   **4. Use of ratings by investors and regulators**  Enhanced disclosure by CRAs is useful only if investors make appropriate use of the information for their due diligence and risk management. Investors should address their over-reliance on ratings.   Investors should reconsider how they use credit ratings in their investment guidelines and mandates and for risk management and valuation. Ratings should not replace appropriate risk analysis and management on the part of investors. Investors should conduct risk analysis commensurate with the complexity of the structured product and the materiality of their holding, or refrain from such investments.    Credit ratings are referred to in various regulatory and supervisory frameworks both at the international and at the national level.   Authorities should check that the roles that they have assigned to ratings in regulations and supervisory rules are consistent with the objectives of having investors make independent judgment of risks and perform their own due diligence, and that they do not induce uncritical reliance on credit ratings as a substitute for that independent evaluation.   **(d)  Strengthening authorities' responsiveness to risk**  Some of the weaknesses that have come to light were known or suspected within the community of financial authorities before the turmoil began. Much work was underway at international levels that if already implemented might have tempered the scale of the problems experienced. However, international processes for agreeing and implementing regulatory and supervisory responses have in some cases been too slow given the pace of innovation in financial markets.  **1. Translating risk analysis into action**  Supervisors, regulators and central banks - individually and collectively - will take additional steps to more effectively translate their risk analysis into actions that mitigate those risks.  Supervisors should see that they have the requisite resources and expertise to oversee the risks associated with financial innovation and to ensure that firms they supervise have the capacity to understand and manage the risks.    Supervisors and regulators should formally communicate to firms' boards and senior management at an early stage their concerns about risk exposures and the quality of risk management and the need for firms to take responsive action. Those supervisors who do not already do so should adopt this practice.  **2. Improving information exchange and cooperation among authorities**  Authorities' exchange of information and cooperation in the development of good practices will be improved at national and international levels. The use of international colleges of supervisors should be expanded so that, by end- 2008, a college exists for each of the largest global financial institutions. Supervisors involved in these colleges should conduct an exercise, by 2009, to draw lessons about good practices in operating colleges.  Supervisory exchange of information and coordination in the development of best practice benchmarks should be improved at both national and international levels.  Supervisors and central banks should improve cooperation and the exchange of information, including in the assessment of financial stability risks. The exchange of information should be rapid during periods of market strain.  To facilitate central bank mitigation of market liquidity strains, large banks will be required to share their liquidity contingency plans with relevant central banks.    **3. Enhancing international bodies' policy work**   International bodies will enhance the speed, prioritisation and coordination of their policy development work.   International regulatory, supervisory and central bank committees will strengthen their prioritisation of issues and, for difficult to resolve issues; establish mechanisms for escalating them to a senior decision-making level.    National supervisors will, as part of their regular supervision, take additional steps to check the implementation of guidance issued by international committees.    The FSF will encourage joint strategic reviews by standard-setting committees to better ensure policy development is coordinated and focused on priorities.    The FSF and IMF will intensify their cooperation on financial stability, with each complementing the other's role. As part of this, the IMF will report the findings from its monitoring of financial stability risks to FSF meetings, and in turn will seek to incorporate relevant FSF's conclusions into its own bilateral and multilateral surveillance work.    **(e) Robust arrangements for dealing with stress in the financial system**  **1. Central bank operations**  Central bank operational frameworks should be sufficiently flexible in terms of potential frequency and maturity of operations, available instruments, and the range of counterparties and collateral, to deal with extraordinary situations.    Overall, central banks' responses to the liquidity tensions caused by the financial market turmoil have been reasonably effective at relieving pressures in interbank funding markets. They could not, and were not intended to, address the underlying causes of the problems, which lay well beyond the scope of central banks' reserve-providing operations. Nevertheless, the experience offers some lessons that could lead in some cases to a revision of central bank operational objectives and policy instruments.  To meet an increased but uncertain demand for reserves, monetary policy operational frameworks should be capable of quickly and flexibly injecting substantial quantities of reserves without running the risk of driving overnight rates substantially below policy targets for significant periods of time.  Policy frameworks should include the capability to conduct frequent operations against a wide range of collateral, over a wide range of maturities and with a wide range of counterparties, which should prove especially useful in dealing with extraordinary situations.  Central banks should have the capacity to use a variety of instruments when illiquidity of institutions or markets threatens financial stability or the efficacy of monetary policy.  To deal with stressed situations, central banks should consider establishing mechanisms designed for meeting frictional funding needs that are less subject to stigma.  To deal with problems of liquidity in foreign currency, central banks should consider establishing standing swap lines among themselves. In addition, central banks should consider allowing in their own liquidity operations the use of collateral across borders and currencies.  **2. Arrangements for dealing with weak banks**  National arrangements for dealing with weak banks have been tested by recent events and are the subject of review in some countries. The nature of the turmoil, the effects of which have been felt in many countries and in many different types of institutions, has emphasised the need to continue to work on crisis cooperation.  Domestically, authorities need to review and, where needed, strengthen legal powers and clarify the division of responsibilities of different national authorities for dealing with weak and failing banks.  Internationally, authorities should accelerate work to share information on national arrangements for dealing with problem banks and catalogue cross-border issues, and then to decide how to address the identified challenges.  Authorities should agree a set of international principles for deposit insurance systems. National deposit insurance arrangements should be reviewed against these agreed international principles, and authorities should strengthen arrangements where needed.  For the largest cross-border financial firms, the most directly involved supervisors and central banks should establish a small group to address specific cross-border crisis management planning issues. It should hold its first meeting before end-2008.  Authorities should share international experiences and lessons about crisis management. These experiences should be used as the basis to extract some good practices of crisis management that are of wide international relevance.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.5 Senior Supervisors Group report on leading practice disclosures for selected exposures**  Senior financial supervisors from five countries (collectively the "Senior Supervisors Group") published a report on 11 April 2008 that reviews the disclosure practices of financial services firms concerning their exposures to certain financial instruments that the marketplace now considers to be high-risk.  This report "Leading-Practice Disclosures for Selected Exposures" provides examples of current leading practices in the reporting of information about exposures associated with such instruments as collateralized debt obligations, residential mortgage-backed securities, and commercial mortgage-backed securities, other special purpose entities, and leveraged finance loans.  This work was undertaken in response to a request from the Financial Stability Forum.  The report is available [here](http://www.occ.treas.gov/ftp/release/2008-39a.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.6 Parliamentary committee calls for more protection for Australian property investors**   On 10 April 2008, the State of Victoria Parliamentary Law Reform Committee released a report calling for more protection for investors against unscrupulous property investment advisers and marketeers.  The Committee heard that advisers and marketeers dealing with direct property investment are relatively unregulated compared with financial product advisers, who have to meet licensing, conduct and disclosure requirements under the Commonwealth Government's financial services regulation.  The Committee has recommended that the Victorian Government renew calls for the Commonwealth Government to extend its financial services regulation to property investment advisers.  The Committee has recommended that the Victorian Government introduce its own regulation to protect Victorians if governments cannot agree on a national solution at the Ministerial Council's next meeting.  The Committee has also recommended that the Victorian Government:   * legislate to require all property investment marketers and sellers to provide simple 'product disclosure' information to potential investors; * develop a strategy for timely and targeted consumer warnings about unscrupulous property investment advisers and marketeers; * publish a free information booklet about property investment and examine other ways to improve financial and consumer literacy; * publish more information about property sales in Victoria to improve transparency in the property investment market; * urge lenders to alert borrowers when the lender's valuation of a property is 10% or more below the sale price for the property; and * take steps to improve access to dispute resolution services.   The Committee has recommended that governments work with industry to implement a number of its proposals. The Committee has also called on the Victorian Government to urge industry associations to review and enforce their own codes of conduct.  The Victorian Government has six months to table its response to the Committee's recommendations in the Parliament.  The Committee's report is available [here](http://www.parliament.vic.gov.au/lawreform" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.7 OECD report on sovereign wealth funds**  OECD countries are committed to keeping their investment frontiers open to sovereign wealth funds (SWFs) as long as these funds invest for commercial, not political ends, according to an OECD report published on 9 April 2008.   OECD members have agreed to base their investment policies towards SWFs on existing investment instruments which call for fair treatment of investors. Two key instruments are the OECD Code of Liberalisation of Capital Movements, adopted in 1961, and the OECD Declaration on International Investment and Multinational Enterprises, issued in 1976 and revised in 2000.   They embody five basic principles, including commitments to non-discrimination, transparency, progressive liberalisation and undertakings not to introduce new restrictions and not to insist on reciprocity as a condition for liberalisation. They also involve a process of regular "peer review" to monitor countries' observance of the principles.   The newly published OECD report, "Sovereign Wealth Funds and Recipient Country Policies", recognises that "sovereign wealth funds bring benefits to home and host countries".    OECD investment instruments recognise the right of member countries to take actions to protect national security, and investments by SWFs can raise concerns as to whether their objectives are commercial or driven by political, defence or foreign policy considerations. However, OECD countries have accepted that the national security clause should be applied with restraint and not be used as a general escape clause from their commitments to open investment policies.   The OECD Investment Committee will continue its work in this area, in close co-operation with the IMF, and deliver a final report in mid-2009. This will include a menu of best practices and, if appropriate, suggestions for clarifications to existing OECD instruments.   The report is available on the [OECD](http://www.oecd.org/dataoecd/34/9/40408735.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.8 US Treasury competitiveness study on the changing nature and consequences of financial restatements**  On 9 April 2008, US Treasury Secretary Henry Paulson announced the publication of the US Treasury commissioned study, "The Changing Nature and Consequences of Public Company Financial Restatements", as part of his efforts announced in May 2007 to encourage US capital markets competitiveness.  The study examines the soaring number of financial restatements in the years before and after the Sarbanes-Oxley Act. Financial restatements grew nearly eighteen-fold in this time, from 90 in 1997 to 1,577 in 2006 with acceleration in restatement activity occurring in 2001 before the implementation of the Sarbanes-Oxley Act.  However, restatements associated with fraud and revenue declined after 2001. Fraud was a factor in 29 percent of all 1997 restatements, but only 2 percent of 2006 restatements. The proportion of revenue-related restatements also decreased from 41% in 1997 to 11% in 2006.  Market reactions to the restatements dampened over the decade study period, while the number of restatements grew. Market reaction to financial restatements tended to be more negative when the restatement involved fraud or revenue errors.  Additionally, the study noted that restating companies are typically unprofitable even before the restatement. In the year prior to announcing a restatement, more than half of restating companies reported a net loss.  Treasury did not ask the study's author to develop policy recommendations. The study was intended to inform federal regulators and advisory committees, such as the SEC's Advisory Committee on Improvements to Financial Reporting. The goal was to examine figures often used when discussing US companies' competitiveness and investor confidence in financial reporting.    The study is available on the [US Treasury](http://www.treas.gov/press/releases/reports/FinancialRestatements_1997_2006.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.9 IIF interim report of its special committee on market best practices**  A report dealing with the critical issues in financial markets was published on 9 April 2008 by the Institute of International Finance (IIF), the global association of financial institutions.    The IIF's Committee on Market Best Practices (CMBP) noted that its Interim Report reviews the fundamental issues posed by the recent market stress and provides clear indications of the direction of the CMBP's thinking for best-practice recommendations.    **(a) Transparency and compensation**   The report contains proposals aimed at strengthening transparency and disclosure, both for structured products and at the level of institutions.    According to the report, "another area where improved transparency is needed is compensation. Compensation policies should remain the responsibility of senior management, based on transparent principles and subject to the approval of the Board of Directors. The report recommends that incentive compensation models should be better aligned with shareholders' interests and long-term, firm-wide profitability. The same principles should apply to severance packages.    **(b) Risk management**   The report notes that the market turmoil has underscored the central importance of sound risk management. Management has key responsibilities in this area, which include building a robust risk management culture across the firm and ensuring sound implementation. Firms need to build risk management into their overall business strategies. The Chief Risk Officer needs to be both a risk manager and a risk strategist, with an independent voice and part of the highest levels of management.    The report provides detailed suggestions for an array of improvements in risk management processes.   **(c) Rating agencies**   With regard to rating agencies, the report notes they play key roles as not all investors are in a position to make fully independent evaluations. The IIF's Committee has been engaged in a continuous dialogue with the rating agencies at the most senior levels, and this will continue.   The report recommends that ratings models should be consistent with industry-developed standards and subject to independent review and external validation, not unlike the review and validation that exist for the internal ratings and risk methodologies at banks. The report proposes that a means be established that would enable the independent, industry-based, external review of the methodologies, models and internal governance processes of rating agencies. This is not intended to change rating outcomes or proprietary models, but trust has to be restored in the ratings process as well as in the credit markets and its financial institutions.   **(d) Valuation**  In the context of the issues discussed in the report, few are more complicated or important than those relating to the valuation of complex structured products.   The report analyzes the issues at two levels: first, practical problems of how to effect valuations in a difficult environment and whether there are ways to correct specific difficulties with fair value that have been encountered in recent markets; and second, the need for broad dialogue on the long-term implications of fair-value accounting.   The report notes that over the past decade, fair-value/mark-to-market accounting has proven valuable in promoting sound risk management, transparency and market discipline, and it continues to be an effective approach for securities in liquid markets. The challenge is to apply this approach in circumstances when liquidity dries up in secondary markets. Banks alone cannot resolve the issues here. The report proposes as an urgent priority that a top level technical dialogue be initiated among firms with auditors, rating agencies, investors, analysts and supervisors to address many of the limitations in the current mark-to-market system. According to the report, such a dialogue together with improved disclosure can result in more reliable valuation approaches.   The report is available on the [IIF](http://www.iif.com/download.php?id=SDzcEc8juCI=" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.10 Recommendations regarding the definition of capital instruments for financial conglomerates**   On 7 April 2008, the Committee of European Banking Supervisors (CEBS) together with the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) published recommendations to address the consequences of the differences in sectoral rules on the calculation of own funds of financial conglomerates. These recommendations have been produced by the Interim Working Committee on Financial Conglomerates (IWCFC) at the request of the European Financial Conglomerates Committee. This advice has been sent to the European Commission.  The recommendations are the third and last part of the advice on the cross-sectoral comparison of the sectoral rules for the eligibility of capital instruments in regulatory capital. The other two parts were published in January 2007 and August 2007.   The recommendations in this advice focus on the four main differences that were gathered during the analysis: the treatment of hybrids, revaluation reserves/latent gains, deduction of holdings and the differences in consolidation approaches and methods foreseen by the Financial Conglomerates Directive.  On the treatment of hybrids the IWCFC proposes to harmonize sectoral rules and hybrid instruments that meet certain requirements should be eligible for inclusion at the latest, with the implementation of Solvency II in the insurance sector, taking into account current work of CEBS and CEIOPS.  On the treatment of revaluation reserves and latent gains the IWCFC recommends striving for consistency in the national transposition of the sectoral directives and the national application of prudential filters across the EU.  On the deduction of holdings in banks and insurers the IWCFC sets out the possible directions the alignment of the treatment of those holdings could take without recommending one single option as no regulatory arbitrage has yet been demonstrated.  As for the method to calculate the capital requirement for financial conglomerates the accounting consolidation method is being proposed as the default method. However the supervisory authorities should have the discretion to require companies to use the deduction and aggregation method or a combination of methods.   The advice is available on the [CEBS](http://www.c-ebs.org/Advice/advice.htm" \t "_new) website.  The publications/submissions are available on the [CEIOPS](http://www.ceiops.eu/content/view/17/21" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.11 UN Special Representative on Business and Human Rights recommendations on corporate responsibility for human rights**   On 7 April 2008, the UN Special Representative on Business and Human Rights released his report dealing with key issues for business and human rights.  The key recommendations in the report include:  1. States should promote a corporate culture of respect for human rights and regulate parent companies which are registered within their jurisdiction, even if the activities in question are managed through foreign subsidiaries. 2. Companies should manage human rights risks with the same management tools used in relation to other risks, such as health and safety, and undertake due diligence in relation to human rights in all aspects of their operations.    **Recommendations**  The report proposes a three-pronged Framework, recommending (1) actions by the State, (2) corporate behaviour to manage human rights risks, and (3) the provision of accessible remedies for harm done. The report rejects the call for a set or list of human rights standards against which companies should be judged, as this list could not be comprehensive and that almost all internationally recognised human rights can be impacted upon by business.  **(1) Actions by the State**  Under international human rights instruments, the duty to protect includes the prevention, investigation, punishment of abuse and access to reparation. The report recommends that States take positive steps to foster a corporate culture of respect for human rights through:   (i)      transparency measures, such as sustainability reporting for registered companies; (ii)     increased governance obligations, such as the extension of fiduciary duties under the UK Companies Act 2006, so that Directors "have regard           to the impact of the company's operations on the community and the environment": (iii)    reference to corporate governance or culture when considering accountability for regulation and criminal sanction; and (iv)    policy alignment favouring the protection of human rights.  **(2) Corporate responsibility**   The report recognises both legal and public expectations, and that corporate human rights risks can arise from potential legal action and reputational concerns. As a basic minimum, the report suggests that corporations should strive to "Do no harm" and focus on identifying and avoiding human rights risks through due diligence.  **(3) Remedies**  It stated in the report that all attempts to build a corporate culture respecting human rights require mechanisms to deal with failings. Voluntary initiatives, such as the Voluntary Principles on Security and Human Rights, the Equator Principles and the Global Compact, have all faced recent criticism for want of enforcement mechanisms.  This report states that at a State level, there is an obligation under international law to investigate and punish human rights abuses. It suggests that there is an expectation on States to strengthen the courts' ability to deal with these issues, including jurisdictional hurdles and piercing the corporate veil in relation to parent company responsibility.  The report also recommends company level grievance processes to deal with human rights issues, such as a complaints service which includes discussion through expert mediators.   The report is available [here](http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.12 Key governance challenges for investors in Greater China**   On 2 April 2008, the RiskMetrics Group released a study contrasting the corporate governance protections available to investors in Hong Kong and China. The report, which examined the governance practices prevalent in these two markets, including regulatory and exchange requirements, found that Hong Kong enjoys a comparative advantage over mainland China in protecting minority investor interests.    While Greater China has made significant progress with respect to shareholder rights, in both jurisdictions key institutional and enforcement limitations may hide risks for the unwary. With the prevalence of controlling shareholders in both markets, minority investors should pay closer attention to minority shareholder protections than in other markets with broader share ownership. Many Chinese companies are majority-owned by the State, while the Hong Kong market is characterized by family-controlled entities. The report also cautions investors not to over-rely on boards to uphold minority rights, given most directors are effectively appointed by majority owners and related-party transactions are common.    The report cites Hong Kong's history and commitment to minority shareholder rights as the source of its comparative governance advantage over the mainland. In recent years, China has reformed its securities markets; mandating independent directors, making it easier to sue directors and bringing financial reporting substantially in line with International Financial Reporting Standards. These shareholder protections have long been established in Hong Kong and the report confirms that the rules there are consistently enforced for the benefit of investors.    The report also states that foreign acquirers could see bids delayed in China as a result of regulations designed to protect state economic security and well-known brands. Hong Kong does not require quarterly reporting for listed companies and thus laggs China on this issue. While other financial reporting and auditing requirements in China and Hong Kong are similar, the report found China has a shortage of experienced auditors and accountants.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.13 APRA general insurance refinements proposals**   On 2 April 2008, the Australian Prudential Regulation Authority (APRA) announced it had finalised its position on the proposed general insurance refinements package following industry consultation.   On 19 December 2007, APRA published its second consultation package on refinements to the general insurance prudential framework.  APRA received a substantial number of submissions from industry on its proposals in that package, mostly concentrating on the proposals relating to reinsurance recoverables and investment capital factors.    APRA also sought, on a voluntary basis, data submissions from insurers to assess the quantitative impact of the proposals and responses to a related survey from reinsurance brokers.   APRA had proposed no recognition of reinsurance recoverables from non-APRA authorised reinsurers from the second balance date following claim occurrences, except where the recoverables are supported by security arrangements in Australia.  This proposal was to apply to all future new reinsurance arrangements and, after a transition period, to all recoverables from pre-existing reinsurance arrangements.    APRA is now intending to apply a risk-based scale to the recognition of these reinsurance recoverables, based on reinsurer ratings, in place of the nil recognition previously proposed.   APRA had also proposed to increase the capital factors for listed equity investments from 8 per cent to 25 per cent, and for direct property and other unlisted investments from 10 per cent to 30 per cent.   APRA has now decided, as an initial step, to increase the factors to 16 per cent and 20 per cent respectively, instead of 25 per cent and 30 per cent, and to consider further changes in 2009.  APRA will also proceed immediately with the 'look through' proposal for unit trusts and the recognition of derivative and hedging instruments.   Further information is available on the [APRA](http://www.apra.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.14 UK Treasury consultation to update the Myners principles**  On 31 March 2008, the UK Treasury, the Department for Work and Pensions and the Pensions Regulator (TPR), launched a consultation on updating the Myners principles, a voluntary set of 'comply or explain' principles designed to improve trustee investment decision-making and governance of pension funds.  The consultation responds to last year's National Association of Pension Fund (NAPF) review "Institutional Investment in the UK: Six Years On", which recommended updating the Myners principles to ensure the continued spread of best practice among pension schemes.  The consultation proposes a set of refreshed and simplified, higher-level principles and the development of a comprehensive suite of authoritative best practice guidance and tools, which will help trustees to improve investment decision-making and governance.  Following the NAPF's recommendation that the pensions industry should take increased ownership of the principles, the consultation proposes establishing a joint Government-industry Investment Governance Group to co-own the principles, monitor their effectiveness and the quality of reporting against them, and make recommendations for improvements to investment decision-making and governance.  The consultation paper is available on the [HM Treasury](http://www.hm-treasury.gov.uk/media/3/7/consult_myner_310308.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.15 US Treasury blueprint for stronger regulatory structure**  On 31 March 2008 the US Treasury department released its Blueprint for an improved financial regulatory structure, aimed at strengthening consumer protections, improving tools for market stability and enhancing financial innovation. Treasury's Blueprint for a Modernized Financial Regulatory Structure presents a series of short, intermediate and long-term recommendations for reform of the US regulatory structure.    The short-term recommendations include improvements to regulatory coordination and oversight that regulators can make quickly. The Blueprint recommends creating a new federal commission for mortgage origination to better protect consumers. The report also recommends modernizing the President's Working Group on Financial Markets and clarifying the Federal Reserve's liquidity provisioning.  Intermediate-term recommendations focus on eliminating some of the duplication in the existing US regulatory system, but more importantly they offer ways to modernize the regulatory structure for certain financial services sectors, within the current framework. Recommendations include eliminating the thrift charter, creating an optional federal charter for insurance and unifying oversight for futures and securities  The long-term recommendation is to create an entirely new regulatory structure using an objectives-based approach for optimal regulation. The structure will consist of a market stability regulator, a prudential regulator and a business conduct regulator with a focus on consumer protection.  The current US regulatory framework for financial services providers includes:   * Five federal depository institution regulators in addition to state-based supervision. * One federal securities regulator, additional state based supervision of securities firms, and self-regulatory organizations with broad regulatory powers. * One federal futures regulator. * Insurance regulation that is almost wholly state-based, with 50+ regulators.   According to the Blueprint, this structure also has an international dimension that can be inefficient, costly and harmful to US competitiveness.    Further information is available on the [US Treasury](http://www.treas.gov/offices/domestic-finance/regulatory-blueprint" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.16 APRA annual superannuation bulletin**   On 26 March 2008, the Australian Prudential Regulation Authority (APRA) released its Annual Superannuation Bulletin which includes a wide range of statistics for the full financial year to 30 June 2007. Total superannuation assets rose in the period by $225.4 billion, or 24.6 per cent, to $1.14 trillion.   Corporate funds showed the largest growth during the year, with assets increasing by 32.6 per cent to stand at $69.2 billion. Industry funds assets increased by 31.3 per cent to $197.3 billion, small funds 30.1 per cent to $286.6 billion, retail funds by 23.7 per cent to $369.7 billion and public sector funds by 16.3 per cent to $177.6 billion.   For the year to 30 June 2007, contributions to all superannuation entities totalled $122.6 billion, with employers contributing $64.7 billion and member contributions totalling $56.3 billion. Other contributions, including spouse contributions and government co-contributions, totalled $1.6 billion.   Contributions to funds with more than four members totalled $96.1 billion. Of these funds, retail funds received 46.8 per cent ($45.0 billion) of total contributions, public sector funds 25.0 per cent ($24.0 billion), industry funds 24.0 per cent ($23.1 billion) and corporate funds 4.2 per cent ($4.0 billion).   Benefit payments from superannuation entities were $41.1 billion for the year to 30 June 2007, and net rollovers totalled $7.2 billion.   The return on assets (ROA) for superannuation entities with more than four members was 13.2 per cent for the year to 30 June 2007. Corporate funds had an ROA of 14.7 per cent, followed by industry funds with 14.2 per cent, public sector funds with 13.3 per cent and retail funds with 12.5 per cent.   The Bulletin includes for the first time information on the manner in which superannuation funds invest their assets, with figures on the number of investment managers, on direct and indirect investments, and on investments in associated parties.   The publication shows that, on average, funds used more than three times the number of investment managers at June 2007 than they did at June 2004. The average number of investment managers per fund rose from 1.4 at June 2004 to 4.6 at June 2007. In addition, the proportion of funds that directly invested all their assets decreased from 24 per cent to 6 per cent over the three years to June 2007.   These changes can be largely attributed to the exit of funds that either invested directly, or didn't use investment managers. Of the 1,277 funds that exited the industry since June 2004, more than 70 per cent did not use an investment manager and more than 30 per cent invested all assets directly.   In addition, the proportion of funds that invested in associated parties - entities with which the fund has a relationship - increased from 27 per cent to 43 per cent over the three years to June 2007.   The Bulletin also reports for the first time information on death and disability insurance in superannuation. Death and disability insurance has become more prominent in the superannuation industry, with the proportion of funds that provide insurance increasing from 61.5 per cent at June 2004 to 75.1 per cent at June 2007.  This trend corresponds with an increase in the amount of premiums paid by funds on behalf of members, and an increase in proceeds received by funds on death or disablement of a member. Premiums increased 56.9 per cent from $1,333 million at June 2004 to $2,092 million at June 2007, whilst proceeds increased 47.0 per cent from $619 million at June 2004 to $909 million at June 2007.   The Annual Superannuation Bulletin is available on the [APRA](http://www.apra.gov.au/Statistics/Annual-Superannuation-Publication.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.17 Moves to enhance supervision in wake of Northern Rock**  On 26 March 2008, the UK Financial Services Authority (FSA) published a summary of a review carried out by its internal audit division into its supervision of Northern Rock. The review identifies a number of areas for improvement in the execution of supervision, which will be advanced urgently by the FSA's management, via a dedicated supervisory enhancement program. This program also includes a number of improvements already in train.  The Board of the FSA, having considered the internal audit report and the program of work set out by the management in response, confirmed its support for the FSA's fundamental philosophy of outcomes-focused, more principles-based regulation. It reiterated that the boards and managements of regulated firms carry the primary responsibility for ensuring their institutions' financial soundness. The Board also noted that, even if supervision had been carried out at a level acceptable to the FSA, it was by no means the case that that would have changed the outcome.  The internal audit review identifies the following four key failings specifically in the case of Northern Rock:  1. A lack of sufficient supervisory engagement with the firm, in particular the failure of the supervisory team to follow up rigorously with the management of the firm on the business model vulnerability arising from changing market conditions.  2. A lack of adequate oversight and review by FSA line management of the quality, intensity and rigour of the firm's supervision.  3. Inadequate specific resource directly supervising the firm.  4. A lack of intensity by the FSA in ensuring that all available risk information was properly utilised to inform its supervisory actions.  The review concluded that, overall, the supervision of Northern Rock was at the extreme end of the spectrum within the firms reviewed in respect of these failings and that its supervision did not reflect the general practice of supervision of high-impact firms at the FSA.   The main features of the FSA's supervisory enhancement program are:   * A new group of supervisory specialists will regularly review the supervision of all high-impact firms to ensure procedures are being rigorously adhered to. * The numbers of supervisory staff engaged with high-impact firms will be increased, with a mandated minimum level of staffing for each firm. * The existing specialist prudential risk department of the FSA will be expanded following its upgrading to divisional status, as will the resource of the relevant sector teams. * The current supervisory training and competency framework for FSA staff will be upgraded. * The degree of FSA senior management involvement in direct supervision and contact with high-impact firms will be increased. * There will be more focus on liquidity, particularly in the supervision of high-impact retail firms. * There will be raised emphasis on assessing the competence of firms' senior management.   The internal audit review makes seven high level recommendations for firms' supervision in the future. The principal high level recommendations in the report are:   * FSA senior management to have increased engagement with high impact firms; * FSA to increase the rigour of its day to day supervision; * FSA to increase its focus on prudential supervision, including liquidity and stress testing; * FSA to improve its use of information and intelligence in its supervision; * FSA to improve the quality and resourcing of its financial and sectoral analysis; * FSA to strengthen supervisory resources; and * FSA senior management to increase the level of oversight of firms' supervision.   A summary of the review, the recommendations made by internal audit and the response of the executive of the FSA is available on the [FSA](http://www.fsa.gov.uk/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.18 IOSCO consults on changes to code of conduct for credit rating agencies**   On 26 March 2008, the International Organization of Securities Commissions (IOSCO) published for consultation its report on "The Role of Credit Rating Agencies in Structured Finance Markets", which includes proposed changes to the Code of Conduct Fundamentals for Credit Rating Agencies (Code of Conduct).    The report, prepared by IOSCO's Technical Committee which is composed of securities regulators from the major developed capital markets, discusses the role of credit rating agencies (CRAs) in the recent credit crisis and proposes ways to strengthen processes and procedures at CRAs. In particular, the report proposes expanding upon the Code of Conduct provisions relating to the quality and integrity of the rating process; CRA independence and avoidance of conflicts of interest; CRA responsibilities to the investing public and issuers; and disclosure of the CRA's code of conduct and communication with market participants.    The consultation report proposes making the following revisions under three main areas of the Code of Conduct:    **(a) Quality and integrity of the rating process - Code of Conduct section 1**    Key proposed changes in this area require that CRAs should:   * ensure that the decision-making process for reviewing and potentially downgrading a rating of a structured finance product is conducted in an objective manner; * establish an independent function responsible for periodic reviews of the firm's rating methodologies and models; * take reasonable steps to ensure that the information they use is of sufficient quality to support a credible rating. Ratings involving products with limited historical data should have these limitations made clear; * refrain from rating a product if the complexity or structure of a new type of rating creates doubts about the feasibility of a rating action; * prohibit analysts from making proposals or recommendations regarding the design of structured finance products that the CRA rates.   **(b) CRA independence and avoidance of conflicts of interest - Code of Conduct section 2**    Key proposed changes in this area require that CRAs should:   * establish policies and procedures for reviewing the work of analysts who leave to join an issuer the CRA rates, or a financial firm with which the CRA has significant dealings; * conduct formal and periodic reviews of remuneration policies and practices for its employees to ensure that these policies do not compromise the CRA's rating process; * disclose whether any one client and its affiliates make up more than 10 percent of the CRA's annual revenue; * define what it considers and does not consider to be an ancillary business and why.   **(c) CRA responsibilities to the investing public and issuers - Code of Conduct section 3**   Key changes in this area will require that CRAs should:   * assist investors in understanding what a credit rating is, the attributes and limitations of each credit opinion, and the limits to which it verifies information provided to it by the issuer of a rated security; * disclose on a periodic basis all cases where an issuer of a structured finance product has asked the CRA for a preliminary rating of the proposed structure, but does not subsequently contract that CRA for a final rating, or contracts for a final rating and does not publish it but does publish the ratings of another CRA for that same product; * when rating a structured finance product, provide investors/subscribers with the information to understand the basis for the CRA's rating; * disclose whether it uses a separate set of rating symbols for rating structured finance products, and why; * disclose the methodology or methodology version in use in determining a rating.   The consultation paper is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD263.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.19 Research report: Why do employees participate in employees share plans? A conceptual framework**   The Employee Share Ownership Project at Melbourne Law School, University of Melbourne, has published a new research report titled "Why do employees participate in employees share plans? A conceptual framework".  Non-executive employees are increasingly being offered the opportunity to participate in employee share ownership plans. In many cases, companies provide their employees with shares or options as a 'gift', either on a one-off or regular basis.   Many plans, however, are structured so as to require employees to contribute to the value of the securities. In the cases of contributory plans, the reasons why employees choose to participate are not always clear. This report reviews existing studies and presents a conceptual framework to explain why employees participate in employee share plans. It examines the relationship between the decision to participate in a plan and a number of demographic and workplace-specific variables. It also identifies key factors that may moderate this relationship, such as the extent of company communication on the plan and company performance. This conceptual framework has been developed on the basis of a synthesis of previous studies and twelve semi-structured interviews conducted with human resource managers and trade union representatives within publicly listed companies.  The research report is available [here](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1119123" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.20 Research report: Corporate regulators in Australia (1961-2000): From Companies' Registrars to the Australian Securities and Investments Commission**    The Centre for Corporate Law and Securities Regulation at Melbourne Law School, University of Melbourne, has published a new research report titled "Corporate Regulators in Australia (1961-2000): From Companies' Registrars to the Australian Securities and Investments Commission".    It is now 50 years since the first steps were taken towards the establishment of a federal scheme of companies and securities regulation in Australia and the development of a single, national securities commission to police the relevant legislation. Sweeping and fundamental changes in conceptual, legislative and institutional approaches to companies and securities regulation have ensued over the last half-century with the development of a national corporations scheme. The paper is a preliminary survey and investigation of the many complexities - personal, political, legal, social and institutional - that have influenced, motivated and constrained the development of the present system of Australian companies and securities regulation, particularly in reference to the bodies which have been mandated the task of policing corporate and securities laws.   The report is available [here](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1123830" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1)  **1.21 Competition law overview - one day seminar**   The Melbourne Law School is offering 'Competition Law Overview: A One Day Seminar' on Saturday 28 June 2008 (8:30am - 5:00pm) and Saturday 7 February 2009 (8:30am - 5:00pm).  This one day program provides an excellent opportunity for practitioners to quickly bring themselves up to speed with the basics of competition law.  It will also be of interest to those wishing to acquaint themselves with core competition law concepts prior to embarking on the specialised subjects offered in the graduate program in competition law.   Further details are available [here](http://www.masters.law.unimelb.edu.au/competitionlaw" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  |  | | |  | | |  | | --- | | **2.1 Enhanced disclosure in unlisted unrated debentures**  On 23 April 2008, the Australian Securities and Investments Commission (ASIC) published Report 127: "Debentures - Improving disclosure for retail investors" which presents the findings of a review into disclosures made by each of the unlisted, unrated debenture issuers against the new disclosure regime introduced last year.   The required disclosures are based on benchmarks on issues ranging from equity capital levels to enhanced transparency of valuations.  ASIC has also complemented the improved disclosure required from issuers with a new publication, "Investing in debentures? Independent guide for investors reading a prospectus for unlisted debentures", designed to provide further explanation of the new benchmarks.   The regulator also commissioned research to better understand the profile and motivations of investors in unlisted and unrated debentures. It released a report on the research, "Understanding investors in the unlisted unrated debenture market".  The research showed that the most important investment features for unlisted unrated debentures were the return/interest rate, the perceived low level of risk and the protection of funds invested. Nearly half the investors in this type of product were investing to produce income for their retirement or long-term savings.   ASIC is using the results of this research to improve investor education. The new investor guide on debentures is the first example of new initiatives in investor education.  ASIC will continue to monitor the disclosures made by debenture issuers over the next 12 months and develop further investor education initiatives.   ASIC will conduct further visits with debenture issuers in October this year and will provide a further report in April 2009.   **Background**  In October 2007 ASIC released "Regulatory Guide 69: Debentures - Improving Disclosure for Retail Investors", requiring debenture issuers to disclose against eight benchmarks on an 'if not - why not' basis in their prospectuses and on-going disclosures.  ASIC has also developed and implemented advertising guidance, "Regulatory Guide 156 - Debenture Advertising for all debenture issuers and publishers", setting out standards that ASIC expects the issuers to meet when advertising debentures that are offered to retail investors. These guidelines became effective at the end of January 2008, and ASIC continues to monitor the standard of advertising among the debenture issuers.  Further information is available on the [ASIC](http://www.asic.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h2)  **2.2 ASIC review of mortgage entry and exit fees**  On 5 April 2008, the Australian Securities and Investments Commission (ASIC) published its review of mortgage entry and exit fees. The review reveals that exit fees vary dramatically, highlighting the importance of ensuring banks and other lenders face as much competitive pressure as possible.  The report is available on the [Treasury](http://www.treasurer.gov.au/Ministers/wms/Content/pressreleases/2008/attachments/018/018_attachment.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h2)  **2.3 Facilitating online financial services disclosures**  On 1 April 2008, the Australian Securities and Investments Commission (ASIC) released a Consultation Paper proposing to facilitate disclosure of financial services information through email and the internet as part of the Retail Investor Taskforce work to improve access to such information.    ASIC recognises that many financial consumers and product issuers are seeking to communicate through electronic means and online information has the potential to make disclosure more interactive, innovative and user-friendly. It also has the potential to deliver cost savings for business in meeting legal requirements.    ASIC is proposing relief to enable providers to give their financial services disclosures by:   * notifying clients via email that the relevant information is available from a website and with instructions on where the information can be found; or * sending clients an email with a hyperlink to the relevant information.   ASIC is also proposing relief to enable trustees of superannuation entities to use a website as the default method of delivering annual superannuation information (other than personal disclosures, such as periodic statements of a member's holding). The proposed relief will mean that annual superannuation information is treated in much the same way as company annual reports.   ASIC invites comments on the proposals in the consultation paper. In particular, ASIC seeks feedback on the benefits and risks of allowing disclosures to be delivered by hyperlink. ASIC are also interested in feedback on other areas of the law where ASIC could facilitate greater use of online disclosure.   Submissions should be emailed to [policy.submissions@asic.gov.au](mailto:policy.submissions@asic.gov.au) by 28 May 2008.   The consultant paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Consultation_paper_93_Facilitating_online_financial_services_disclosures.pdf/$file/Consultation_paper_93_Facilitating_online_financial_services_disclosures.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h2)  **2.4 ASIC issues report on relief applications decided between September to November 2007**  On 1 April 2008, the Australian Securities and Investments Commission (ASIC) released a report outlining its recent decisions on applications for relief from the corporate finance, financial services and managed investment provisions of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) between 1 September and 30 November 2007.   The report, 'Overview of Decisions on Relief Applications' (September to November 2007) provides an overview of situations where ASIC has exercised, or refused to exercise, its exemption and modification powers from the financial reporting, managed investment, takeovers, fundraising and financial services provisions of the Act.   The report also highlights instances where ASIC decided to adopt a no-action position regarding specified non-compliance with the provisions, and features an appendix detailing the relief instruments it executed. For ease of reference, the appendix contains cross-references linking the instruments to the relevant paragraph(s) of the report. The appendix now also contains hyperlinks to the relevant ASIC Gazette where those instruments have been published.  **Background**  ASIC is vested with powers to exempt or modify the Act under the provisions of Chapters 2D (officers and employees), 2J (share buy-backs), 2L (debentures), 2M (financial reporting and audit), 5C (managed investment schemes), 6 takeovers), 6A (compulsory acquisitions and buy-outs), 6C (information about ownership of entities), 6D (fundraising) and 7 (financial services) of the Act.  ASIC uses its discretion to vary or set aside certain requirements of the law, where the burden of complying with the law significantly detracts from its overall benefit, or where business can be facilitated without harming other stakeholders.   ASIC publishes a copy of most of the exemption and/or modification instruments issued in the ASIC Gazette which is available from the [ASIC](http://www.asic.gov.au/gazettes" \t "_new) website.  The report, 'Overview of Decisions on Relief Applications' (September to November 2007) is available from the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_124_Omnibus_Relief_Report_%20SepttoNov07.pdf/$file/REP_124_Omnibus_Relief_Report_%20SepttoNov07.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h2)  **2.5 Changes to class order 98/1418 relief and new class order relief for disclosing entities**  On 31 March 2008, the Australian Securities and Investments Commission (ASIC) announced a number of changes to class order 98/1418 wholly-owned entities, which provides certain wholly-owned subsidiaries with relief from the requirement to prepare financial reports. The changes will enable more companies to rely on the relief and reduce the administrative work for group companies.   ASIC has also announced new relief under Class Order 08/15 Disclosing entities - half-year financial reporting relief. CO 08/15 relieves a disclosing entity from the requirement to prepare and lodge a half-year financial report and directors' report during the first financial year of the entity, where that first financial year lasts for eight months or less.  **(a) Changes to CO 98/1418**  The main changes are:  (i) removing the requirement for a three year compliance history with the financial reporting requirements of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) (paragraph (p) of the first order of CO 98/1418);  (ii) replacing the requirement to lodge an annual notice concerning use of the class order with a requirement to lodge a notice when the relief is first applied or the group holding entity changes, and another notice when the company ceases to apply the relief;  (iii) reducing the matters which must be addressed in the certificate required under CO 98/1418;  (iv) removing the requirement for a statutory declaration when first entering into a deed; and  (v) removing the requirement to lodge solvency statements by directors under the order and simplifying the signing requirements for those statements.  ASIC is also adopting a no action position in relation to certain past failures to lodge the annual notice referred to in (ii) above.  **Background**  CO 98/1418 provides conditional financial reporting preparation, audit and lodgment relief to a company that is party to a deed of cross guarantee. The company must be a wholly-owned subsidiary (as defined in the order) of another company (the Holding Entity) and:   * the company and its Holding Entity (and other companies in the same corporate group relying on the relief) enter into a deed cross guaranteeing each others debts; * the Holding Entity lodges a consolidated financial report covering at least those group companies relying on the relief; and * the other conditions of CO 98/1418 are satisfied.   **(b) Class order 08/15**  Disclosing entities are required to prepare and lodge financial reports for each half-year and full financial year. ASIC has previously given case-by-case relief from preparing and lodging half-year reports to entities with a financial year of eight months or less. Relief for first financial years of eight months or less is now available under CO 08/15. This will save entities that can rely on CO 08/15 the cost of making individual applications for relief.  Further information is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/Relief+for+wholly-owned+entities+under+Class+Order+98-1418?openDocument" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h2)  **2.6 ASIC/FICA research findings on the costs of compliance**   Late last year the Australian Securities and Investments Commission (ASIC), with the support of the Finance Industry Council of Australia (FICA), commissioned Chant Link & Associates to conduct a preliminary study on the cost impact of the regulatory framework ASIC administers. The study is one of ASIC's Better Regulation initiatives.  Chant Link's report was published on 26 March 2008. It presents the findings from interviews conducted by Chant Link & Associates with 64 financial sector organisations in November and December 2007.   The key findings of the study are:   * respondents have a positive attitude towards the notion of regulatory oversight, seeing benefits accruing both to their own organisation and to the market in general; * the main concerns about regulatory control are:           - poor implementation of some legislation           - some regulation is seen to be unnecessary, and           - the volume of regulatory requirements is difficult to manage; * compliance costs are generally accepted and most regard them as not only inevitable but also integral to maintaining consumer confidence and enhancing business regulation within the financial sector - many said they could justify some of the costs on commercial grounds, regardless of regulation; * although compliance costs are perceived to be high, most readily admitted to not having a complete picture of how much their ongoing compliance activities are costing them overall and many perceived little value in doing so given that the systems to track compliance costs comprehensively would be expensive and would not be able to be used for business purposes, only a few were able to give estimates; and * most believe their compliance costs would be reduced overall if the quality of the regulatory process were to be improved.   ASIC will use the findings of the study to engage in further dialogue with industry on the impact of its regulation on business and to inform its thinking as part of ASIC's current strategic review. In particular, suggestions made by respondents about what ASIC could do to reduce unnecessary regulation and improve ASIC's interactions with regulated businesses more generally will be reviewed.   This is a separate initiative to the broad stakeholder survey ASIC is conducting as part of its strategic review.  The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_123_A_Report_on_Costs_of_Financial_Services_2007.pdf/$file/REP_123_A_Report_on_Costs_of_Financial_Services_2007.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  |  | | |  | | |  | | --- | | **3.1 ASX public consultation paper on short selling**   ASX issued a Public Consultation Paper on 28 March 2008, regarding initiatives to improve the transparency of short selling volumes (including 'covered' short sales) and other issues in the regulation of short selling. As referred to in the Consultation Paper, the Government has also indicated an intention to pursue legislative change to address the ambiguity around disclosure of 'covered' short sales.   The consultation paper is available on [ASX](http://www.asx.com.au/about/regulatory_policy_unit/index.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  |  | | |  | | |  | | --- | | **4.1 Takeovers Panel revises Guidance Note 1 on unacceptable circumstances**   On 18 April 2008, the Takeovers Panel announced that it had published a revised version of its Guidance Note 1 on Unacceptable Circumstances.   Guidance Note 1 discusses when the Takeovers Panel may make a declaration of unacceptable circumstances under section 657A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and some of the matters which the Panel will take into account in making such a declaration.   The amendments to the Guidance Note update some references and add to the examples in paragraph 1.18 of circumstances that the Panel may consider unacceptable.  The example added relates to agreements restraining disposal of a parcel of voting shares in reliance on the exception in section 609(7) of the Corporations Act.  Section 609(7) provides that a person does not have a relevant interest in shares merely because of an agreement to acquire the shares, provided the agreement does not restrict disposal for more than 3 months, gives no control over the voting power of the shares and is conditional on shareholder approval or ASIC granting an exemption. The new example says the Panel will look at circumstances where a person enters such an agreement then makes a bid.   The revised Guidance Note is available on the [Panel](http://www.takeovers.gov.au/display.asp?contentid=122" \t "_new) website.   A copy of the Guidance Note with the changes to it marked-up is available [here](http://www.takeovers.gov.au/display.asp?ContentID=10" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h4)  **4.2 Equity derivatives - Panel publishes final Guidance Note and public consultation response paper**  On 11 April 2008, the Takeovers Panel released Guidance Note 20 in relation to when the use of equity derivatives may constitute unacceptable circumstances.  Guidance Note 20 follows a draft Guidance Note and Discussion Paper which were published on 10 September 2007.  The Panel received six submissions in response to the draft Guidance Note and Discussion Paper. The Panel has also released a Public Consultation Response Statement which sets out the main comments that the Panel has received and what changes the Panel has made in response to those comments.  The Guidance Note and Response Statement are available on the [Panel](http://www.takeovers.gov.au/display.asp?ContentID=122" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h4)  **4.3 Collateral benefits - Panel publishes final Guidance Note**    On 14 April 2008, the Takeovers Panel released Guidance Note 21 in relation to when collateral benefits may constitute unacceptable circumstances.  Guidance Note 21 follows an issues paper published on 9 November 2005. The Panel received 5 submissions.     The Guidance Note is available on the [Panel](http://www.takeovers.gov.au/display.asp?ContentID=122" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h4)  **4.4 Mount Gibson Iron Limited - Panel decision**   On 1 April 2008, the Takeovers Panel (Panel) made a declaration of unacceptable circumstances and final orders in relation to an application dated 18 February 2008 by Mount Gibson Iron Limited (Mount Gibson) in relation to the affairs of Mount Gibson (TP08/13).   The application referred to a proposed transaction involving approximately 156.8 million shares (constituting approximately 19.72% of Mount Gibson's share capital). The proposed transaction was to be in two parts - the conditional sale of 77,436,215 shares in Mount Gibson by Gazmetall Holding (Cyprus) Ltd (Gazmetall) to Shougang Concord International Enterprises Company Limited (Shougang); and the granting of an option by Gazmetall to Shougang to acquire a further 79,333,682 shares in Mount Gibson (proposed transaction).   Mount Gibson submitted that there is an association between Shougang and APAC Resources Limited (APAC), the owner of 160.8 million shares in Mount Gibson (constituting approximately 20.19% of Mount Gibson's share capital).    Mount Gibson sought a declaration of unacceptable circumstances because of: a. a contravention of section 606 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default);  b. the effect of the proposed transaction on the efficient, competitive and informed market for voting shares in Mount Gibson;  c. holders of Mount Gibson shares not knowing the identity of the person proposing to acquire a substantial interest in Mount Gibson; and  d. holders of Mount Gibson shares not having an equal opportunity to participate in any benefits.    The Panel made a declaration of unacceptable circumstances on alternative bases. The first basis is that Shougang is associated with APAC and therefore the circumstances are unacceptable because they constitute or give rise to a contravention of Chapter 6. The second basis is that the relationship between Shougang and APAC is such that there will be an unacceptable effect on the control or potential control of, or on the acquisition or proposed acquisition of a substantial interest in, Mount Gibson if Shougang acquired Gazmetall's shares in Mount Gibson pursuant to the proposed transaction.   The Panel's reasons in this matter will set these out in due course. However, in summary, these factors included (but were not limited to) the following:   * The role of directors, executives and advisers of Shougang entities and APAC and relationships between these individuals; * The various incidences of investments in the same entities by Shougang entities, APAC and entities with links to APAC and Ms Chong; * Transactions and other circumstances relating to Mount Gibson before the proposed transaction, including a proxy given by a Shougang entity and an APAC entity in relation to the 2006 Mount Gibson annual general meeting which considered a change in the composition of the board of Mount Gibson; * Transactions in Shougang shares and APAC shares before the proposed transaction; * The circumstances surrounding the sale by Gazmetall the subject of the application, including the objectives of each of Shougang and APAC in relation to offtake from Mount Gibson and various meetings that were held; and * The investment decision by Shougang in the Mount Gibson shares the subject of the proposed transaction and its bases.   On 29 February 2008 the Panel made interim orders (to maintain the status quo) prohibiting completion of the proposed transaction.   On 31 March 2008 the Panel made final orders cancelling the contracts effecting the proposed transaction.   Further information is available on the [Panel](http://www.takeovers.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  |  | | |  | | |  | | --- | | **5.1 English courts' power to remit assets held by English provisional liquidators to foreign liquidators**   (By Matt Bernardo, Mallesons Stephen Jaques)   McGrath v Riddell [2008] UKHL 21, House of Lords, Lords Hoffman, Phillips, Scott, Walker and Neuberger, 9 April 2008    The full text of this judgment is available at:  [http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080409/mcgrat-1.htm](http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080409/mcgrat-1.htm" \t "_new)   **(a) Summary**    The Supreme Court of New South Wales applied to the UK High Court, asking them to remit assets held by English provisional liquidators to Australian liquidators for distribution in Australia, pursuant to the HIH liquidation. The UK Court of Appeal refused the request, and the House of Lords allowed the appeal and granted the request, holding that:   * section 426(4) and (5) of the Insolvency Act 1986 gave the UK court jurisdiction to grant the request of the Australian court; and * on the facts of the case, the court should grant the request.   **(b) Facts**  On 4 March 2001, winding up petitions for four companies in the HIH group were presented to the Supreme Court of New South Wales. Some of their assets were situated in London (reinsurance claims on policies taken out in London). Provisional liquidators were appointed in England to protect these assets. A letter of request was sent to the High Court in London by an Australian judge, asking the provisional liquidators to remit the assets to the Australian liquidators for distribution.   Section 562A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) confers on all creditors of an insurance company with reinsurance claims priority over all other creditors in respect of re-insurance recoveries.  This departs from the UK's insolvency principle of a pari passu distribution of assets among unsecured creditors.  The central issue of the case was whether the English court could (and should) grant the request to remit the assets to the Australian liquidators.  The power to grant the request is based on two possible grounds:   * the inherent power of the court established by previous judicial decisions; and * provisions in the UK's Insolvency Act 1986.   Section 426(5) of the Insolvency Act describes the assistance which a UK court may give to another court.  A request from the court of a relevant country is 'authority for the court ... to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction'  Further, 'in exercising its discretion ... a court shall have regard ... to the rules of private international law'. The UK Secretary of State has power to designate a country as a 'relevant country'.  The Court of Appeal held that it did not have power to remit the assets, because the scheme for pari passu distribution in Australia was not substantially the same as that under English law. The House of Lords on appeal had to decide whether the UK court could in fact grant the request by the Australian court to remit assets to the Australian liquidators.      **Decision**   **(i) UK court's inherent power to remit assets to Australian liquidators**  As noted, one source of the UK court's power to remit the assets is based on the inherent power of the court established by previous judicial decisions and practice. Hoffman LJ noted that strong judicial practice had developed over time whereby the English winding up of a foreign company was treated as ancillary to a winding up by the court of its domicile. Although the English court had complete jurisdiction to wind up the company if it had assets in England, the court disapplied the statutory trusts and duties in relation to the foreign assets of foreign companies. This practice was strongly based on the principle of universalism - the desirability of a single bankruptcy administration which dealt with all the company's assets (per Sir Richard Scott V-C in Re Bank of Credit and Commerce International SA (No 10) [1997] Ch 213, 247).   The Australian liquidators asked the UK court to use this jurisdiction. The Court of Appeal held that this jurisdiction did not extend to authorising the assets to be remitted for distributions which were not pari passu but gave preference to some creditors to the prejudice of others. There was an exception to this rule where the distribution in Australia produced advantages for the non-preferred creditors which counteracted the prejudice they suffered. This was not, however, satisfied on the facts in this case - if the English assets were sent to Australia, the outcome for creditors would be different than if they were distributed under the UK insolvency provisions (insurance creditors would benefit, while other creditors would suffer).  Accordingly, the Court of Appeal dismissed the appeal.  Hoffman LJ in the House of Lords disagreed with this. Although Australian law would treat insurance creditors better and non-insurance creditors worse than English law would, this was immaterial. It did not offend against basic principles of justice, because English law itself had adopted a regime for the winding up of insurance companies which gave preference to insurance creditors (for example, regulation 21(2) of the Insurers (Reorganisation and Winding Up) Regulations 2004). As such, English courts were not in a position to say that an exception to the pari passu rule for insurance creditors ran contrary to basic principles of justice.  **(ii) Inconsistencies with judicial practice and English scheme of liquidation**  Having accepted that there were no administrative savings to be gained from remitting the assets to Australia, all that had to be decided was whether an order for remittal should be made because it was the right thing to do. Hoffman LJ held that the judicial practice adhering to universalism was clearly inconsistent with the proposition that creditors cannot be deprived of their statutory rights under the English scheme of liquidation.  This is so because the whole point of the doctrine of ancillary winding up is based on the fact that the English court will 'disapply' parts of their own statutory scheme by relieving the English liquidator from the duty of distributing the assets himself, and directing him to remit the assets for distribution by the foreign liquidator. Accordingly, it is only natural that those assets need not be distributed according to English law. It would not make sense to confine the power to direct remittal to cases in which the foreign law of distribution coincided with English law - in such a case remittal would serve no purpose.  **(iii) The concept of 'universalism' in private international law**  When the case came before the Court of Appeal, it held that the jurisdiction to remit should not be exercised because no private rule of international law required the court to disregard the principles of their own English insolvency law.  The House of Lords also disagreed with this proposition.  Hoffman LJ held that the primary rule of private international law applicable here was that of universalism, which had been 'the golden thread running through English cross-border insolvency law since the 18th century'. This requires English courts to cooperate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. Based on these considerations, Hoffman LJ allowed the appeal and made the order requested by the Australian court. Walker LJ agreed with Hoffman LJ, as did Phillips LJ, who reached the same conclusion, influenced by the following material factors:   * The companies in liquidation were Australian insurance companies. * Australian law makes specific provision for the distribution of assets in the case of the insolvency of such companies. * These do not conflict with any provision of English law designed to protect the holders of policies written in England. * The policy behind these provisions accords with the policy of the regulations that have been introduced in this area of law.   Neuberger LJ also made an order granting the request, holding that while remittal of assets can be effected pursuant to established judicial practice, the power to do so where the distribution will not be in accordance with the English insolvency regime derives from section 426 of the Insolvency Act 1986. Furthermore, Neuberger LJ explained that different insolvency regimes will have slightly different categories of preferential creditors, and these differences should not be a bar to an order for remittal, since this is inconsistent with the purpose of section 426(4) and (5) of the Insolvency Act, especially in light of the reference to 'the rules of private international law' in subsection (5).   Scott LJ also allowed the appeal, but on the footing that the power to grant the request was derived from section 426 and not from any inherent jurisdiction of the court. Scott LJ's reasoning was that if it were otherwise, it would mean that assistance could be given in relation to a winding up being conducted in a foreign country that had not been designated a 'relevant country' under section 426(5) by the Secretary of State. This would constitute the usurpation by the judiciary of a role expressly conferred by Parliament on the Secretary of State.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h5)  **5.2 Recovery of a receiver's costs - priorities between the receiver and secured creditors**   (By Sabrina Ng and Katrina Sleiman, Corrs Chambers Westgarth)  Australian Securities and Investments Commission, in the matter of GDK Financial Solutions Pty Ltd (in liq) v GDK Financial Solutions Pty Ltd (in liq) No 3 [2008] FCA 448, Federal Court of Australia, Finkelstein J, 4 April 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/april/2008fca448.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/april/2008fca448.htm" \t "_new)   or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   Mark Mentha and Brian McMaster (Receivers) were appointed as receivers to oversee the winding up of the Mews Village, an unregistered managed investment scheme. A parcel of land in Western Australia, registered in the name of Western Retirement Village Management Pty Ltd (in liq) (WRVM) and known as the Mews land, was an asset of the scheme. The Mews land, which was encumbered by two mortgages, was sold. The application concerned the Receivers' claim on the proceeds of sale.  **(b) Facts**  On 13 March 2008 the first mortgagee, National Australia Bank Ltd (NAB), and the second mortgagees, AVS Property Pty Ltd (AVS) and Rental Fleets Australia Pty Ltd (Rental Fleets), were ordered to discharge their respective mortgages over the Mews land so that the contract for its sale could be completed. The order required NAB to deliver at settlement a duly executed discharge of its mortgage in exchange for payment of the amount due to the bank. The second mortgagees were ordered to deliver at settlement a discharge of their mortgage together with a partial discharge of a charge held over the assets of WRVM on the basis that the net balance of the purchase price would be paid into court.   When the orders for the discharge of the mortgages were made Finkelstein J left outstanding a request by the second mortgagees to stay the operation of orders made by Goldberg J on 12 February 2008. The effect of the orders was that the Receivers could appropriate out of the net proceeds of sale their costs incurred between 28 November 2006 and 9 December 2007, which had been assessed in the amount of $1,143,171.26. The second mortgagees contended that the Receivers were only entitled to their costs out of the assets under their control after the debt to AVS had been paid in full and that where the proceeds of sale would not cover their secured debt the Receivers could not have recourse to the proceeds for their costs.   **(c) Decision**   Finkelstein J referred to English and Australian authority in support of the proposition that a court appointed receiver's costs and expenses do not have priority over a fixed charge in subsistence at the time of the receiver's appointment, that is, the appointment of a receiver does not affect the rights of a prior encumbrancer.     However, Finkelstein J identified the following circumstances in which a receiver's costs will stand ahead of the claims of a secured creditor:   * A receiver is entitled to be paid out of the proceeds of sale of mortgaged property the cost of any work that directly benefits the mortgagee. * The prior encumbrancer is a party to the action in which the receiver is appointed and consents to the appointment and to the receiver's administration of the charged property. * The prior encumbrancer is guilty of "unconscientious" conduct.   Another (often overlooked) circumstance in which a fund that belongs to a secured creditor may be charged with another person's costs arises from the rule that the costs incurred for the benefit of all persons having an interest in an asset must be borne by the fund (referred to as the rule in Ford v Earl of Chesterfield (1856) 21 Beav 426 [52 ER 924]).    While Finkelstein J considered that there may be good reason not to order a party to pay the receiver's costs by an interlocutory order, his Honour saw no principle that stands in the way of an appropriate order which subjects one of the parties to pay the receiver's costs being made at the conclusion of the litigation by which time the rights and wrongs of the parties' actions will have been established.     Although AVS claimed the whole of the net proceeds of sale, Finkelstein J did not stay the operation of Goldberg J's orders for the following reasons:   * A significant part of the Receivers' claim was to costs incurred in the realisation of the Mews land; that is, costs which they are entitled to take out of the proceeds. * The order appointing the Receivers required them to carry out enquiries so as to identify all persons who might have a claim upon the fund created by the sale of the Mews scheme assets, and all persons who were prior encumbrancers of the Mews land.  Without these enquiries it would not be possible to distribute the fund produced on the sale of the land.  Accordingly, the cost of conducting those enquiries must also come out of the fund. * The Receivers had given an undertaking that, if it turns out they are not entitled to all they had taken, they would return that amount to the fund in accordance with the rule in Ford v Earl of Chesterfield. * As the second mortgagees asserted at a late stage in the proceedings that the claimed amount owed to AVS was substantially increased, his Honour considered that the Receivers may well have a good argument that they incurred costs in the belief (fostered by the second mortgagees) they would be met out of uncharged assets, and that the second mortgagees are bound by that position, at least until they give notice of the full quantum of their claim. * There was doubt that AVS had a good claim to the whole of the net proceeds.   Accordingly, Finkelstein J refused the application on behalf of the second mortgagees to stay the operation of the orders of Justice Goldberg of 12 February 2008.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h5)  **5.3 Be careful what you say: misleading and deceptive conduct in the advertisement of investment products**   (By Kathryn Finlayson, Minter Ellison)   Delmenico v Brannelly [2008] QCA 74, Supreme Court of Queensland, Keane and Fraser JJA, Chesterman J, 4 April 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2008/april/2008qca74.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2008/april/2008qca74.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   A consumer who is in fact induced to rely upon a statement which is objectively misleading can recover any loss consequent upon that reliance despite being able to avoid the loss by the exercise of reasonable care.   **(b) Facts**   The first defendant (Paul Brannelly) was a director and duly authorised agent of the second defendant (Brannelly Financial Pty Ltd).  The second defendant carried on the business of providing financial services.   On 6 April 2005, the plaintiff contacted the first defendant in answer to an advertisement of investments available through the second defendant.     The defendants proposed an investment in Bayshore Mezzanine Pty Ltd to the plaintiff.  The letter referred to the investment as 'an excellent opportunity to invest in high yielding promissory notes offering a 14% return on a minimum of $50,000 with a company who have an established track record of over 20 years'.  It also provided further information in a summary form about the attraction of the proposed investment and contained a disclosure notice.  After further discussion and an exchange of correspondence, the plaintiff lent $100,000 to Bayshore upon the security of two promissory notes.   On 6 December 2005, administrators were appointed to Bayshore. The plaintiff recovered none of the principal of his loan.   The plaintiff commenced proceedings to recover the loss suffered on two alternate grounds:   * contravention of section 12DA of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default); and * negligent advice.   Section 12DA of the ASIC Act provided that 'a person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or likely to mislead or deceive'.   The primary judge upheld the plaintiff's claim on both grounds.  The plaintiff was awarded $114,736.62 and costs.   The defendants appealed on two grounds:   * the plaintiff acted upon an erroneous understanding of the structure of the investment and not upon the advice or information provided by the defendants; and * the findings made by the primary judge in relation to negligence were not open on the evidence.   The plaintiff cross-appealed and sought an order under rule 360 of the [Uniform Civil Procedure Rules 1999 (Qld)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14486" \t "Default) (the Rules) that he was entitled to costs on an indemnity basis as he had made an offer to settle the proceedings for a sum less than the amount of judgment he was awarded at trial.  **(c) Decision**    The court unanimously dismissed both the appeal and the cross-appeal.   In relation to the first ground of appeal, the court held that the defendants' argument that the plaintiff was solely responsible for his misunderstanding of the terms of the investment was not supported by settled principles. The circumstance that a consumer who is in fact induced to rely upon a statement which is objectively misleading could have avoided the loss consequent upon that reliance by the exercise of reasonable care does not mean that the consumer did not act in reliance upon the statement and cannot recover accordingly. The court also held that, to the extent that the plaintiff's loss was the result of his failure to understand the structure of the investment, that confusion was itself the product of statements made by the defendants.   In relation to the second ground of appeal, the court held that the conclusions drawn by the primary judge were based on an uncontradicted expert report of which the defendants had appropriate notice.   The court dismissed the plaintiff's cross-appeal as he had not disclosed a diary note which provided substantial support for an important aspect of his case.  The court noted that an applicant for an order for indemnity costs who had failed to observe important obligations imposed by the Rules in relation to disclosure would rarely be in a position to insist upon an application of other rules which overlooked the applicant's failure.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h5)  **5.4 Application for interlocutory injunction to restrain the sale of shares by the legal owner**  (By Julie Lyons, Blake Dawson)   CMG Equity Investments Pty Ltd v Australia and New Zealand Banking Group Ltd [2008] FCA 455, Federal Court of Australia, Finkelstein J, 3 April 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/april/2008fca455.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/april/2008fca455.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   CMG Group(CMG), which has a $25 million share portfolio tied up in collapsed stockbroker Opes Prime Stockbroking Ltd (OPS), failed in its application for an interlocutory injunction to stop the ANZ from selling what CMG believes to be its shares, pending a Federal Court hearing of CMG's bid to regain control of the portfolio.   **(b) Facts**    The CMG Group's head of investments Mr Dixon attended a presentation held by OPS concerning some of the various products and services OPS offered.  A week or so after, Mr Dixon received an email from OPS providing further information. Subsequently, CMG entered into an agreement with a related company of OPS, Opes Prime Securities Ltd (OP Securities) which was incorporated in the Virgin Islands. The basic premise of this agreement (for the purposes of this case) was that CMG would buy shares (which it did with money lent from OPS) and then "lend" these shares to OP Securities.  In return, CMG received cash "collateral".   When the administrators were appointed to OPS, CMG decided to repay its debt to OPS and then get its shares back from OP Securities. However, under the agreement with OP Securities, "ownership" of the "lent" shares passed to OP Securities in exchange for an unsecured promise to deliver an equivalent number of shares and therefore OP Securities was entitled to deal with the shares as it pleased. Evidence in the case showed that the shares were transferred to one or more of three institutions. CMG were claiming that they went to the Australia and New Zealand Banking Group Ltd (ANZ) (it was never verified in the case whether ANZ actually had all of CMG's particular shares, though it was concluded it was likely they had "some"). Given the collapse of OPS, and that OPS owed ANZ several hundreds of millions of dollars, ANZ was looking to dispose of its shares.  The focus of this case was CMG seeking an interlocutory injunction (pending trial) to restrain ANZ from selling those shares.     However, the shares could not be redeemed because "ownership" of the lent shares passed to OP Securities. CMG claimed that they were the beneficial (or equitable) owners of the shares and in that sense, retained a proprietary interest in those shares. CMG did however concede that this is not what the agreement with OP Securities reflected; however, they did argue they were misled by the agreement with OP Securities as CMG believed it would retain beneficial ownership of the shares it put up as collateral. Therefore, to overcome the terms of the agreement, CMG sought to argue that they have a good case for rectification of the agreement.    **(c) Decision**   Justice Finkelstein found that to establish a case for rectification, there must have been some mistake in the document, that is, a failure to record accurately the intention of both parties, and that rectification is a discretionary remedy.  As it is discretionary, if rectification is to affect an innocent party, the remedy would be refused. ANZ in this case claimed to be the innocent third party as a bona fide purchaser of the legal title to the shares.     Finkelstein J then went on to note that there were times when a legal owner will forfeit the priority which his legal estate gives him, but only when there is fraud or "carelessness". Carelessness was claimed in this case as CMG argued ANZ was under a duty to ascertain whether OPS could pass title to the shares. Justice Finkelstein did not accept there was such a duty and even if ANZ did not obtain a legal interest in the shares, its interest was confined to an equitable estate (like a mortgagee or chargee) and CMG would still "be in trouble" as the rule is that the holder of the first equity has priority over the later. That is not true where the prior equity is a "mere equity" such as an equity to set aside a contract, where in that kind of case, precedence is given to the later equity.  Rectification is a "mere equity" that would not defeat a later equitable interest.   Justice Finkelstein noted that even if he was wrong in his conclusion and it was arguable that CMG could, with rectification, claim an equitable interest of a kind that takes priority over a later interest, in all likelihood they would nevertheless lose priority as traditionally, priority can be lost by conduct.  Finkelstein J concluded that CMG likely displaced their equitable interest by entering into the agreement with OP Securities and allowing OP Securities to become the legal owners of the shares.   Justice Finkelstein was not "particularly troubled" by the assertion that CMG was misled by OP Securities in relation to the agreement, but whether CMG could use that to obtain priority over ANZ.     However, there were two other factors Finkelstein J considered. His Honour noted that in order to establish a right to an interlocutory injunction, the plaintiff must show he is sufficiently threatened with irreparable damage (Beecham Group Ltd v Bristol Laboratories Pty Ltd [1968] HCA 1). In this case, even if the plaintiffs could show ANZ wrongfully sold the shares, the plaintiffs could obtain two other forms of relief and therefore would not suffer any disadvantage. Secondly, Finkelstein J looked at the undertaking in damages, noting that an undertaking in damages is sometimes not enough to obtain an injunction. In dismissing the application, his Honour decided it would be wrong to restrain the sale of the shares without providing ANZ full protection in the event the plaintiffs lost the trial and the shares fell in value in the meantime.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h5)  **5.5 Effect of company reinstatement - power of the court to set aside reinstatement**  (By Gillian White, Freehills)   Miltonbrook Pty Ltd v Westbury Holdings Kiama Pty Ltd [2008] NSWCA 38, New South Wales Court of Appeal, Spigelman CJ, Tobias JA, Campbell JA, 2 April 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/april/2008nswca38.html](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/april/2008nswca38.html" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**  The appropriate scope of a statutory power of rectification under section 1322(4)(b) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) must be commensurate with the full range of circumstances that call for its exercise.    The case authorities, the immediate textual context and the broader context of the legislation suggest a broader interpretation of section 1322(4)(b). The power to rectify a register of companies under section 1322(4)(b) extends to removing a company from the register where the process leading to the reinstatement of the company was invalid.   The process will be invalid if there has been a denial of procedural fairness. The applicants were not given a reasonable opportunity to be heard in the reinstatement proceedings. The facts not disclosed to the court below could have affected the decision to order reinstatement.   The denial of procedural fairness by a court is a fundamental irregularity which grounds the exercise of the discretions under section 1322(4)(b) and rule 36.15 Uniform Civil Procedure Rules (UCPR).   The court should exercise its discretion under 36.15 UCPR and section 1322(4)(b) due to the combined effects of material non-disclosure and the denial of procedural fairness.    **(b) Facts**    Churnwood Holdings Pty Ltd (Churnwood) and the first and second applicants were parties to deeds granting Churnwood, or its nominee, options to purchase property. During the process of voluntary liquidation of Churnwood, it nominated Westbury. The Australian Securities and Investment Commission (ASIC) deregistered Churnwood on 29 January 2005.   After the deregistration of Churnwood, Westbury purported to exercise the options to purchase the relevant property. Westbury applied to the Supreme Court of New South Wales for the reinstatement of Churnwood's registration in accordance with section 601AH of the Corporations Act (the Act).   In Westbury Holdings Kiama Pty Ltd v ASIC [2007] NSWSC 115 Barrett J ordered the reinstatement of Churnwood. His Honour was satisfied that Westbury was a person aggrieved by the deregistration (section 601AH(5)(2)(ii)) and that it had an interest in the reinstatement because of a dispute that had arisen with Miltonbrook (the first applicant) over the exercise of the options.   In subsequent proceedings, the applicants sought an interlocutory order to set aside Barrett J's order of reinstatement. The applicants sought this order in accordance with 36.15 UCPR which empowers the Court to set aside an order on 'sufficient grounds being shown' that 'the order was made, irregularly, illegally or against good faith'.   The applicants claimed that there were four grounds that justified the order being set aside and discharged:   * Material facts were not disclosed to the court when the application was made; * The first respondent (Westbury) was not a person aggrieved by the deregistration; * The applicants, as persons likely to be affected by the order, should have been given the opportunity to be heard; * It was not 'just' to reinstate Churnwood for the purpose of the proposed proceedings against Miltonbrook.   Barrett J dismissed the applicants claim with costs. His Honour refused to exercise his power under UCPR 36.15 on the basis that there was no utility in rehearing the original application for reinstatement of Churnwood, as the court's order had already been carried into effect. Barrett J also concluded that there had been no denial of procedural fairness (Westbury Holdings Kiama Pty Ltd v ASIC [2007] NSWC 466).   Miltonbrook Pty Ltd v Westbury Holdings Kiama Pty Ltd [2008] NSWCA is an appeal of this decision.    **(c) Decision**    Spigelman CJ delivered judgment, with Tobias JA and Campbell JA agreeing.   The judgment sets out four issues for determination: 1. Did Barrett J err in deciding that there was no utility in setting the orders aside on the basis of his Honour's interpretation of section 601AH(2) and section 1322(4)(b) of the Act? 2. Did Barrett J err in his analysis of the scope of the inadequate disclosure of the rectification proceedings to the applicants'? 3. Did Barrett J err in concluding that there was no UCPR 36.15 irregularity by denying procedural fairness? 4. Should the Court of Appeal decide the issue or remit?   **(i) Utility of setting aside reinstatement of company register**   At first instance, Barrett J concluded that there was no utility in setting aside the reinstatement of Churnwood because '... After ASIC had acted, the court's order of 5 March 2007 had no further work to do. The renewal of Churnwood's existence had been completed and is ongoing.' Barrett J reached this conclusion based on his interpretation of section 1322 of the Act. Section 1322(4)(b) states that the court can impose an order directing the rectification of any register kept by ASIC. Barrett J characterised the scope of the power under section 1322(4)(b) as  'exercisable where the content of the register does not conform with the law and is for that reason in need of correction'.   The Court of Appeal disagreed. Spigelman CJ stated that the word 'rectify' is capable of many meanings and that the appropriate scope of rectification in section 1322(4)(b) of the Act must be commensurate with the full range of circumstances that call its exercise into existence. Based on the case authorities, the immediate textual context and its context within the Act, Spigelman CJ concluded that the section 1322(4)(b) power to rectify the company register is a broad power which extends to removing a company from the register where the process is invalid not only where the content of the register is incorrect.    His Honour considered that a finding of denial of procedural fairness would constitute an invalid process.   **(ii) Failure to disclose and procedural fairness**   Spigelman CJ noted that the submissions treated the issues of failure to disclose and procedural fairness as separate matters. However, his Honour considered that the issues were not severable when assessing the exercise of discretion under UCPR 36.15.    In relation to non-disclosure, the Court of Appeal concluded that the failure to alert the court to the scope and nature of the dispute with the first applicant was significant because it could have affected the court's order and it meant that the court did not treat the proceedings as an ex parte application, requiring notice to be given to affected parties.   In relation to procedural fairness, the respondents claimed that not informing the applicants of the reinstatement proceedings was not a denial of procedural fairness. The first applicant's solicitor had become aware of the proceedings and had attended one of the court hearings, giving the party an adequate opportunity to be heard.   The Court of Appeal rejected this submission and concluded that the circumstances did constitute an 'irregularity' of 'sufficient cause' within the meaning of UCPR 36.15. This was because the information available to the first applicant's solicitor was not of a character to give it a reasonable opportunity to heard.    The Court of Appeal concluded that 'the denial of procedural fairness by a Court is a fundamental irregularity' and that the 'irregularity flows through to the exercise of the discretions under section 1322(4)(b) Corporations Act and UCPR 36.15.'   **(iii) Decide or remit decision**   The Court of Appeal held that Barrett J had not finally decided the issues relevant to the exercise of the discretion under UCPR 36.15 and that the court should make final orders.   The court held that on the basis of the combined effects of the material non-disclosure and the denial of procedural fairness, the court should exercise its powers under UCPR 36.15 and section 1322(4)(b) of the Act to, amongst other things, direct ASIC to rectify the register by vacating the reinstatement of the registration of the second respondent and to set aside Barrett J's orders with costs.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h5)  **5.6 Determining whether an application seeking an order that an inquiry be conducted into the conduct of a liquidator be dismissed on the basis that the application was inevitably bound to fail**   (By James Williams, DLA Phillips Fox)  Vink v Tuckwell [2008] VSC 100, Supreme Court of Victoria, Robson J, 1 April 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/april/2008vsc100.html](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/april/2008vsc100.html" \t "_new)   or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   The case involved the determination of an interlocutory application under rule 23.01 of the Supreme Court (General Civil Procedure) Rules 2005 ('Rules').  In essence, the Defendant sought an order dismissing an application under section 536(1)(b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Act') that an inquiry be conducted into the conduct of a liquidator.  In dismissing the application, Robson J held that:   * any person possesses the requisite standing to make a complaint under section 536(1)(b) of the Act; * a complainant seeking such an order bears the initial onus of establishing a prima facie case that there is something which requires inquiry, and if successful, it then falls to the discretion of the court to order an inquiry. * despite the fact that on the material before the court the application would very likely fail, and the court would very likely dismiss the originating process, it could not be said that the originating process inevitably must fail.   **(b) Facts**  Corporate Interior Constructions Pty Ltd ('Company') carried on business fitting out offices.  The business was conducted by Mr Van Oosterom, a director and secretary of the Company since its incorporation, and his wife, Ms Annie Linton, who had resigned her directorship on 6 December 1996. At the date of liquidation (8 May 2002), Mr Van Oosterom and Ms Linton were the two registered shareholders of the Company.   On 11 April 2002, at the request of the Company's board of directors, Mr Colin Roland Tuckwell ('Defendant'), an administrator, was appointed to the Company because of its financial difficulties.   At the second meeting of creditors on 8 May 2002, the creditors resolved that the Company go into liquidation and that the administrator be appointed liquidator in the creditors voluntary winding up of the Company.   By an originating process filed on 19 June 2007, Mr Martin Vink ('Plaintiff') sought an order pursuant to section 536(1)(b) of the Act that an inquiry be conducted into the Defendant's liquidation of the Company. The order was sought on the basis that the Defendant had inadequately and/or improperly conducted the liquidation of the Company. In accordance with Rule 2.4(1) of the Supreme Court (Corporations) Rules 2003.  The Plaintiff's application was supported by an affidavit in support.   The Plaintiff was neither a director, shareholder or creditor of the Company. The only connection between the Plaintiff and the Company at the liquidation date was the fact that Ms Linton was his de facto partner, and he had assisted her in the conduct of proceedings to have the Defendant removed as liquidator of the Company (which were ultimately resolved in October 2007).   On 31 July 2007, the Defendant made an interlocutory application under Rule 23.01 (which invokes the court's inherent jurisdiction to summarily dismiss claims that do not carry any prospect of success), seeking an order dismissing the Plaintiff's application. In particular, the Defendant contended that there was no evidence to support the Plaintiff's application as his evidence in support was inadmissible.    Dodds-Streeton J upheld the interlocutory application and dismissed the Plaintiff's originating process on 3 August 2007.  The Applicant sought leave to appeal, which was granted (on the basis that the Plaintiff had been denied natural justice in not being given an adjournment to consider the Defendant's written submissions).  The Court of Appeal remitted the Defendant's application to the court's commercial list for hearing and determination.    **(c) Decision**   In analysing the meaning of Rule 23.01, Robson J cited with approval the statement of Brooking J in R v Smith [1995] 1 VR 10: "[c]ivil or criminal proceedings are an abuse of process, not if it can be said of them only that they will very likely fail, but if it can be said of them that it is quite clear that they must inevitably fail."   Having considered the legislative history, applicable legal principles and the sorts of matters requiring inquiry under section 536(1)(b) of the Act, Robson J concluded:   * Where a complaint is made as the basis for holding an inquiry under section 536(1)(b), the complainant bears an initial onus of establishing a prima facie case that there is something which requires inquiry. * If the complainant does establish as a first step an initial case, then the court has a discretion whether or not to order an inquiry. * It is sufficient if the material cited by the Plaintiff merely establishes that there is something that should be investigated in terms of the conduct of the liquidator, but that the conduct in question should be confined to the liquidator's failure to observe the matters referred to in section 536(1)(a) of the Act. * Normally, the court should be satisfied that there is a public interest being served in holding the inquiry.   On the question of standing, Robson J concluded that the reference to "any person" in section 536(1)(b) should be afforded its literal meaning.  Accordingly, despite the Plaintiff's tenuous connection with the Company, he did possess the requisite standing.   Having reached these conclusions, his Honour addressed the Defendant's primary submission that the Plaintiff's application must inevitably fail.  In particular, the Plaintiff's affidavit in support of the originating process was inadmissible and should not be received into evidence and / or alternatively failed to state facts necessary to support the application.     While acknowledging that there were strong grounds for holding the affidavit ought to have been struck out or not permitted to be read, his Honour cited with approval the observation of Dixon J in Dey v Victorian Railway's Commissioners [2000] VSCA 48 that, under the cover of the inherent jurisdiction of the court to stop an abuse of process litigants are not to be deprived of the right to submit real and genuine controversies to the determination of the court.  Accordingly, despite considering it very unlikely that the Plaintiff would make out the requisite prima facie case (or in the event that he did, that the court would exercise its discretion to order an inquiry), his Honour could not find that the originating process was bound to fail. On that basis, he ordered that the Defendant's interlocutory application be dismissed.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h5)  **5.7 When is a charge a fixed charge?**  (By Jeremy McCarthy and Adam Purton, Corrs Chambers Westgarth)   B & B Budget Forklifts Pty Ltd v CBFC Ltd [2008] NSWSC 271, Supreme Court of New South Wales, Barrett J, 1 April 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/april/2008nswsc271.html](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/april/2008nswsc271.html" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   Under section 280 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act"), the priority of registered charges is generally determined by the date on which they were registered.  In this case, Barrett J considered the operation of section 279(3) of the Corporations Act, under which a registered fixed charge is deemed to take priority over an earlier registered floating charge, unless:   (a) creation of the subsequent registered charge contravened a provision of the earlier charge; and  (b) a notice in respect of this provision had been lodged with ASIC.   In this case, Barrett J held that:   (a) the subsequent registered charge was a fixed charge, despite the chargor parting with possession of some of the charged goods at regular intervals; and  (b) as a result the above, the failure of the first chargee to lodge an ASIC Form 309 specifying that the first registered charge prohibited the creation of a subsequent registered charge resulted in the second registered charge having priority.   In reaching this decision Barrett J offers some guidance on what makes a charge a "fixed charge" and also affirms the earlier Supreme Court of New South Wales decision in Sogelease Australia Ltd v Boston Australia Ltd (1991) 26 NSWLR 1 ("Sogelease") in relation to a "purchase money security".  **(b) Facts**  In 2003, the second defendant, Smeaton Forklifts Pty Ltd ("Smeaton") acquired the goodwill in a forklift hire business from the plaintiff, B&B Budget Forklifts Pty Ltd ("B&B") for $1 million. At Smeaton's request, B&B sold the fleet of forklifts to St George Bank, which then immediately leased the fleet back to Smeaton.  Payment of the $1 million to B&B was deferred and secured by a fixed and floating charge given by Smeaton to B&B, which was registered on 27 May 2004.  The charge contained a provision that prevented the creation of any further registered charges, however, this was not noted on the ASIC Form 309 lodged to register the charge.  In February 2007, Smeaton purchased the forklift fleet back from St George Bank. To do so, Smeaton borrowed funds from the first defendant, CBFC Limited (CBFC) which were secured by two charges that were registered on 12 April 2007 (of which only one is relevant to this proceeding) ("CBFC Charge").  At the time of registration of the CBFC Charge, the B&B charge had not crystallised.  The CBFC Charge was described as a "first mortgage over the Goods". "Goods" were defined as 122 forklifts, which were identified by make and registration number. Clause 33 of the CBFC Charge also provides that the Goods will include any forklifts acquired to replace any of the 122 forklifts that are the subject of the charge.  In terms of this case, the relevant provision of the CBFC Charge is clause 10, which is entitled "dealing with the goods". Clause 10 provides:   "I undertake that I will not, without your consent: (a) sell the Goods; (b) mortgage the Goods; (c) change the Goods; (d) let the Goods; (e) hire the Goods; (f) deposit the Goods with another Person as Security for the payment of money or the performance of an obligation; or (g) otherwise dispose of the goods."   Smeaton, with the consent of CBFC, let out a number of the forklifts from time to time in the course of its business.   On 31 October 2007, Smeaton went into liquidation.  Shortly after, the forklifts were sold for $572,950.00 and a dispute arose between CBFC and B&B as to who had priority to the proceeds of the sale.   CBFC submitted two arguments supporting the contention that priority should not be afforded to B&B in this case.  First, CBFC submitted that the priority of B&B's charge was postponed by virtue of section 279(3) of the Corporations Act on the basis that there was a deemed consent by B&B for its charge to be postponed to the CBFC Charge.  As a second submission, CBFC submitted that its charge did not fully compete with the earlier charge.   **(c) Decision**   **(i) Fixed charge**  In order for B&B to have been deemed to have consented to its charge being postponed to the CBFC Charge under section 279(3), Barrett J held that the following considerations were relevant:   * whether B&B's charge was a fixed charge or a floating charge at the time at which the CBFC Charge was registered; * whether B&B's charge prohibited the creation of subsequent charges, and if so, whether this was noted on the ASIC form registering the charge (section 279(3)(a) and (b) of the Corporations Act); and * whether the CBFC Charge was fixed.   It was common ground between the parties that B&B's charge was floating at the time at which the CBFC Charge was registered, and although the terms of the B&B charge did not allow the creation of a subsequent charge, the ASIC Form 309 lodged in respect of the B&B charge did not indicate this.  Therefore, the only issue for Barrett J to decide was whether the CBFC Charge was a fixed charge for the purposes of section 279(3) of the Corporations Act.  The term "fixed charge" is not defined in the Corporations Act, but it is made clear that "fixed charge" and "floating charge" are mutually exclusive categories.  Barrett J adopted the ratio of the Privy Council decision in Agnew v Commissioner of Inland Revenue ([2001] UKPC 28) and outlined a two stage process for deciding whether a charge is fixed or floating. First, the court must construe the charge documentation to determine the parties' intentions regarding their respective rights and obligations. Second, the court must decide the legal characterization dictated by the rights and obligations.  In other words, the court must examine the way in which the charge operates in practice. Accordingly, a charge may be floating, even though it is described by the parties as a fixed charge.  The essential indicia of a fixed charge is that the "assets charged as security are permanently appropriated to the payment of the sum charged, in such a way as to give the chargee a proprietary interest in the assets.  So long as the charge remains unredeemed, the assets can be released from the charge only with the active concurrence of the chargee". (Re Spectrum Plus Ltd [2005] UKHL 41)  Ultimately, Barrett J held the subject matter of the CBFC Charge was sufficiently identified, and that clause 10 (set out above) operated to restrict Smeaton's dealings with the assets in such a way that the charge was correctly classified as a fixed charge. The charge made it clear that Smeaton was not free to dispose or deal with the assets unless CBFC had provided their permission. The fact that Smeaton parted with possession of the forklifts from time to time in the course of its ordinary business was immaterial as to whether the charge was fixed or floating.     B&B submitted that the very operation of the forklift hire business was inconsistent with a fixed charge, as Smeaton freely leased the forklifts out as part of its ordinary business. This was rejected on the basis that CBFC had consented to Smeaton leasing the forklifts. The fact that Smeaton had leased the forklifts was not an indication that Smeaton had, or considered itself to have, a right to dispose of the forklifts subject to the CBFC Charge.     Based on the above, Barrett J held that B&B was deemed to have consented to the registration of the CBFC Charge, which was accordingly afforded priority under section 279(2) of the Corporations Act.   **(ii) Purchase money security**   The second argument advanced by CBFC was that the CBFC Charge operated as a "purchase money security" and was therefore not fully competing with the B&B charge. Whilst not required to rule on this argument, Barrett J nonetheless affirmed the earlier New South Wales Supreme Court decision of Sogelease.  CBFC agreed to lend money to Smeaton for the sole purpose of allowing Smeaton to purchase the fleet of forklifts from St George.  The charge was created before Smeaton made the purchase and in that sense, Smeaton never acquired anything but title to the forklifts encumbered by the CBFC Charge.  The effect of this was that the prior general charge held by B&B attached to the title to the forklifts already encumbered by the purchase money security.  Accordingly, Barrett J held that the specific, fixed charge over the forklifts took priority over the earlier, general floating charge.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h5)  **5.8 Pooling liquidations under section 579E of the Corporations Act**  (By Paul Schaefer, Blake Dawson)   Allen v Feather Products Pty Ltd [2008] NSWSC 259, New South Wales Supreme Court, Barrett J, 27 March 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/march/2008nswsc259.html](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/march/2008nswsc259.html" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   The plaintiffs were the liquidators of three companies: Feather Products Pty Ltd (Feather), Snuggle Pty Ltd (Snuggle) and Ilume Pty Ltd (Ilume).   Feather and Snuggle went into voluntary administration on 22 October 2007 and became subject to creditors voluntary winding up on 16 November 2007.   On 4 February 2008, Hammerschlag J ordered that the liquidations of Feather and Snuggle be pooled.  Following this, the court ordered Ilume's winding up on 17 March 2008.   This case concerned an application made by the plaintiffs for the pooling of the liquidation of Ilume with the liquidations of Feather and Snuggle.   **(b) Facts**   Feather, Snuggle and Ilume were parties to an arrangement under which each contributed part of what was required to carry on a business.  Ilume provided human resources, Feather provided manufacturing facilities and Snuggle attended to the sale of the manufactured product.   Feather held all the issued shares in Ilume.  Ilume held 89.94% of the issued shares in Snuggle.  Feather held the remaining 10.04% of Snuggle.  Feather, Snuggle and Ilume were therefore related bodies corporate for the purposes of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act).   **(c) Decision**   The application for the pooling of the liquidation of Ilume with those of Feather and Snuggle was made by reference to section 579E of the Corporations Act.   In His Honour's judgment, Barrett J noted that section 579E(1) is in the following terms: "If it appears to the court that the following conditions are satisfied in relation to a group of 2 or more companies: (a) each company in the group is being wound up; (b) any of the following subparagraphs applies: (i)  each company in the group is a related body corporate of each other company in the group; (ii) apart from this section, the companies in the group are jointly liable for one or more debts or claims; (iii) the companies in the group jointly own or operate particular property that is or was used, or for use, in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group; (iv) one or more companies in the group own particular property that is or was used, or for use, by any or all of the companies in the group in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group; the court may, if the court is satisfied that it is just and equitable to do so, by order, determine that the group is a pooled group for the purposes of this section."   His Honour noted that for the purposes of section 579E(1), a "group" will exist simply if two or more companies are identified.   In applying the section, Barrett J went on to state that paragraph (a) requires that the court be satisfied that each company in the group is being wound up. His Honour felt that this requirement had been satisfied in the case of Feather, Snuggle and Ilume.   Justice Barret then noted that paragraph (b) of section 579E requires that the court be satisfied that any one of subparagraphs (i) to (iv) applies.  His Honour held that subparagraph (i) was clearly satisfied.   In addition, Barrett J felt that subparagraph (iv) was applicable, as the total business of manufacturing and selling feather and down products was carried on by Feather, Snuggle and Ilume jointly, and those of the three companies that owned relevant physical property caused it to be used in the joint enterprise.   His Honour went on to note that the application of section 579E was subject to the transitional provision outlined in section 1480(20) of the Corporations Act.   Justice Barrett noted that section 1480(20) is in the following terms: "Subsections 571(1) and 579E(1) of the amended Act apply in relation to a group of 2 or more companies if the winding up of each company in the group begins on or after the day on which those subsections commence."   His Honour held that for the purposes of section 1480(20), "the amended Act" is the Corporations Act as amended by the [Corporations Amendment (Insolvency) Act 2007 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=98069" \t "Default).   His Honour went on to note that the day on which section 571(1) and section 579E(1) commenced was 31 December 2007.   It was submitted by the plaintiffs that when construing section 1480(20), the court should have regard to section 579N, which states: "To avoid doubt, for the purposes of: (a) this Division; or (b) any other provision of this Act to the extent to which it relates to this Division; a group of 2 or more company need not be associated with each other in any way (other than a way described in paragraph 571(b) or 579E(1)(b))."   Specifically, the plaintiffs appeared to submit that section 579N removes or countermands any requirement outlined in section 1480(2), so that the only association needed among companies for the purposes of section 579E is association in the way described in section 579E(1)(b).   Justice Barrett rejected this submission, stating that if such an interpretation was adopted by the court, it would deprive section 1480(20) of all meaning and effect.   In doing so, his Honour also noted that the words "To avoid doubt" do not add meaning that would be absent if the words themselves were absent from the section.   His Honour held that because the winding up of Feather and Snuggle began before 31 December 2007, section 1480(2) meant that the group of companies consisting of Feather, Snuggle and Ilume was not a group in relation to which section 579E(1) could apply.   Consequently, the court could not make a determination under section 579E of the Corporations Act that Feather, Snuggle and Ilume comprised a "pooled group".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h5)  **5.9 Extension of time for compliance with statutory demand**    (By Stephen Magee)   Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Limited [2008] HCA 9, High Court of Australia, Gleeson CJ, Kirby, Hayne, Crennan and Kiefel JJ, 26 March 2008.   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/high/2008/march/2008hca9.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2008/march/2008hca9.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   If the time for complying with a statutory demand has expired, a court has no power under section 459F(2) to extend the time for compliance with the demand.   **(b) Facts**    A company applied to the Supreme Court of Victoria to set aside a statutory demand. The application was dismissed at first instance, but the judge extended the time for compliance to 4 July (under section 459F(2)(a)(i)). The company lodged an appeal before 4 July, but the appeal was not heard until 28 July. The appeal judge followed Buckland Products v DCT, and dismissed the appeal, on the grounds that the appeal was now futile.   The company appealed to the Court of Appeal. Among other things, this required the Court of Appeal to consider whether an order could be made to extend the time for compliance with a statutory demand after the time for compliance had expired.   There was little doubt that an appeal would be nugatory if the company had run out of time to comply with the statutory demand. This was because the automatic presumption of insolvency would apply as soon as the time for compliance expired (and that presumption would not be affected by an order setting aside the statutory demand).    A critical question, therefore, was whether the time for compliance would be "revived" by an extension after the compliance period had ended. In other words, could an application for extension be made after the time for compliance had expired?   There were many authorities to the effect that the expiry of the time for compliance means that no further extension can be granted.    The Court of Appeal was divided on this issue:   * Maxwell P and Neave JA held that an application could be made and granted under section 459F(2)(a)(i) after an extension order had already expired; a significant part of the reasoning rested on section 70 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), which says that a power to extend a time period under the Act can be exercised even if the period has expired; * Nettle and Ashley JJA also thought that it should be possible to apply for and get an extension after an extension order had expired; however, they acknowledged that there is longstanding and widely accepted authority to the contrary; accordingly they followed Marlborough Goldmines, and held that there was no power to grant "late" extension applications; * Chernov JA was the only judge who held and believed that the section 459F(2)(a)(i) power could not be exercised once the time for compliance had expired.   Accordingly, the appeal was dismissed. The company then appealed to the High Court.  **(c) Decision**   The High Court dismissed the appeal in less than six pages (Kirby J dissenting).   The High Court recognised that the Gordian knot of conflicting views on this point would only be cut by a decision that reflected the underlying policy of the post-Harmer statutory demand regime. The key policy identified by the High Court was that set-aside applications should be resolved speedily. It would be "sharply at odds" with that policy to allow extensions of time for compliance after the time for compliance had expired.    This was supported by section 459C, which deems a company to be insolvent if it has not complied with a statutory demand within time. Section 459C requires a court to presume that a company is insolvent if, at some point during the three months before the winding up application was made, the company "failed to comply" with a demand as defined by section 459F. Section 459F requires a company to comply with a demand within the "period for compliance". In the High Court's view, allowing the period for compliance to be extended by an order made out of time "would focus attention upon the state of affairs at either the time of commencement of the winding up application or the date of hearing that application":  "But section 459C neither requires nor permits that focus. It directs attention to what has happened at any time during a period, not upon a state of affairs at either of the particular times just nominated (commencement or hearing of the winding up application)."  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h5)  **5.10 The heavy burdens of fiduciaries**    (By Alexandra Feldman, Freehills)   Glandon v Tilmunda [2008] NSWSC 218, New South Wales Supreme Court, Gzell J, 25 March 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/march/2008nswsc218.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/march/2008nswsc218.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Facts**  The Plaintiff, Glandon Pty Ltd ('Glandon') and the Defendant, Tilmunda Pastoral Co Pty Ltd ('Tilmunda'), together with Liddle, formed a partnership in 1978 (the 'Partnership'). Glandon and Tilmunda owned 2/5 of the Partnership each, Liddle owned 1/5.   The Partnership's principal asset was a property valued at $700,000 which contained alluvial topsoil and access to sand deposits. The Partnership had a permit to mine the topsoil that was due to expire in November 1998. Graham, the controller of Tilmunda, managed the Partnership for a management fee. In August 1999, Glandon transferred its interest to Tilmunda for $55,000 and various indemnities.   **(b) Issues**   Glandon's controllers, Mr and Mrs Lewis, alleged that Glandon was induced into assign its interest by various misrepresentations that amounted to a breach of:   * Tilmunda's and by association, Graham's fiduciary duties; * Section 52 of the [Trade Practices Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) ('TPA') and section 42 of the [Fair Trading Act 1987](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3955" \t "Default) ('FTA'); and * the deed of assignment of interest.   **(c) The misrepresentations**   **(i)   Profits**  Graham alleged the Partnership was operating at a loss despite evidence to the contrary. He did not correct this assertion.   **(ii)  Extraction of soil**  Graham asserted that the soil was 'running out' and extraction would 'cease in late 1998'. Extraction actually ceased in 2001. Further, Graham did not inform the Partnership that the soil extraction permit was renewed.    **(iii) Property value**  Graham told the Partnership that the property's value was $300,000 despite acknowledging that he knew the property's worth was 'substantially more'.   **(iv) Representations as to subdivision**   Graham failed to correct his assertion that council had refused subdivision of the remaining land.   **(v) Representation as to restoration**   Graham failed to correct his valuation of the restoration at $72,600 to $10,000.   **(d) Decision**   Glandon was entitled to an account of $568,531 because Tilmunda profited by the transfer of Glandon's interest in the Partnership. Graham failed in his argument that a partner seeking to purchase another's share, is 'not engaged' in the business of the partnership and 'does not owe a fiduciary duty.'  The court concluded that because Graham discovered the information about the Partnership's increased profit in his capacity as a fiduciary, Tilmunda owed a duty to disclose that information to the other partners.     Gzell J did not resolve whether the $55,000 paid to Gandon for its interest should be deducted from the account. Nor did he resolve if any interest was due on the $568,531 and whether Graham should be held liable as an accessory to Tilmunda's breach.  However, Gzell J did decide that Graham's management fees should not be deducted from the account, because, despite the general principle in section 24 of the [Partnership Act 1892 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=5850" \t "Default), that partners should not be remunerated; the parties had agreed that Graham was entitled to a fee for managing the Partnership.    In relation to Graham's assertions regarding profits, Gzell J did not consider if there was a breach of section 52 of the TPA or section 42 of the FTA. However, Gzell J concluded that if Graham did breach section 52 of the TPA or section 42 of the FTA by asserting that he 'expected to run out of soil,' (which was not conclusively held to be a representation as to a future matter or as to his current state of mind), it could not be demonstrated that Glandon suffered loss or damage as a result of the statement, which is a necessary prerequisite under section 82 and section 87 of the TPA.   Tilmunda breached its contractual promise to indemnify Glandon in respect of "income tax payable in respect of the assignor's share of the net profit," by not paying a $23,108 income tax liability on Glandon's share of the profits.    **(e) Conclusion**    Fiduciary relationships are relationships of confidence. A fiduciary that takes advantage of its position for benefit, at the confiding party's expense, must account for its profits, regardless of the confiding party's loss (if any).     The Partnership Act 1892 (NSW), section 28(1), renders 'partners bound to disclose true accounts, and full information of anything affecting the partnership'. Therefore, Tilmunda, (and Graham as accessory) breached its duty by failing to disclose the Partnership's increased profits.    Graham's failure to disclose the property's true value and his misrepresentation regarding the subdivision, also amounted to a breach of duty. However, his failure to disclose the extension of the permit did not breach the duty, as fiduciaries are not bound to advise the Partnership of every action taken in the Partnership's interests.    Gzell J demonstrated that fiduciaries labour under a 'heavy duty' to show the righteousness of their transactions and where a breach of duty does occur, 'equity will intervene'. This is 'not so much to recoup the loss suffered by a plaintiff' (as in the case of breach of contract) but, as to hold a fiduciary to its duties, and vindicate its obligations to the plaintiff (per Brennan CJ, Gaudron, McHugh, Gummow JJ in Maguire v Makaronis 188 CLR 449).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h5)  **5.11 Determining the entitlement of a liquidator to remuneration**   (By James Williams, DLA Phillips Fox)   Conlan v Adams [2008] WASCA 61, Supreme Court of Western Australia, Court of Appeal, McLure JA, Buss JA, Newnes AJA, 17 March 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/march/2008wasca61.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/march/2008wasca61.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   Mark Anthony Conlon ('Appellant'), as liquidator of Rowena Nominees Pty Ltd (receiver and manager appointed) (in liquidation) ('Rowena'), appealed against an order made by Master Sanderson of the Supreme Court of Western Australia under section 473(3) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Act') on the basis that the remuneration awarded was insufficient. The basis for the appeal included the Appellant's claim that the Master had erred in determining the entitlement by adopting a 'broad brush' approach and taking into account irrelevant considerations. McLure JA (Buss JA and Newnes AJA concurring) allowed the appeal, and increased the level of remuneration payable to the Appellant.   **(b) Facts**   Rowena was a finance broker licensed under the [Finance Brokers Control Act 1975 (WA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=15173" \t "Default) ('Finance Brokers Act') and collapsed in 1999. The Appellant was appointed liquidator of Rowena on 21 July 1999.    On 23 July 1999, the Appellant was also appointed as the supervisor of Rowena's finance broking business pursuant to section 73 of the Finance Brokers Act and was to be remunerated in this capacity by the Government of Western Australia ('GWA'). A letter of instruction from the Finance Brokers Supervisory Board stipulated that the services to be provided by the Appellant as supervisor were not to include any work that was solely referable or reasonably incidental to any of the duties performed as liquidator of Rowena. The Appellant was removed as supervisor on 1 August 2002.   After unsuccessfully seeking to have his remuneration approved by a resolution of creditors in accordance with section 472(3) of the Act, the Appellant sought to have his remuneration entitlement determined by the court. The Appellant claimed he was entitled to total remuneration of $597,970. The Respondents objected to the Appellant's claim.   On 30 March 2006, Master Sanderson made an order allowing remuneration for the Appellant in the sum of $200,000. In reaching his determination, Master Sanderson:   * adopted a broad brush approach in light of the large volume of time-costing records. * made no allowance for work completed by the Appellant during the period the Appellant was also acting as supervisor of Rowena on the basis that he was not satisfied that there was sufficient extra work undertaken (in addition to work completed by the Appellant in his capacity as supervisor) which should be charged to the creditors. * cited the fact that the Appellant had been paid millions of dollars by GWA for work undertaken as supervisor. * was not satisfied that the work conducted, including proceedings instigated by the Appellant, was of benefit to the creditors.   The Appellant appealed against the Master's remuneration order on the basis that he had erred in adopting a broad brush approach, acted arbitrarily and unreasonably, took into account irrelevant considerations (such as the fact that the Appellant had been paid millions by GWA), and failed in his duty to provide adequate reasons in a timely fashion (with the result that he overlooked relevant evidence).   The Respondents contended that the Appellant had failed to discharge the requisite onus of establishing a prima facie case and that, therefore, the Master was justified in adopting a broad brush approach to determining the Appellant's entitlement.   **(c) Decision**   In discussing the principles and procedures applicable to section 473(3) of the Act, McLure JA referred to Venetian Nominees Pty Ltd v Conlan (1998) 20 WAR 96 ('Venetian Nominees'), where the court considered the remuneration provision in section 473(2) of the Act. In particular, McLure JA concluded that:   * a liquidator is entitled to remuneration that is fair and reasonable, and bears the onus of establishing that entitlement. * in determining the remuneration to which a liquidator is entitled, the court should bring an independent mind to bear on the relevant issues. * the liquidator initially bears the onus of establishing a prima facie case for determination. This means that the liquidator's evidence must be sufficient to enable the court to determine whether the claimed remuneration is fair and reasonable. Ordinarily, the liquidator will provide the court with a statement of account reflecting in appropriate itemised form, details of the work done, the identity of the persons who did the work, the time taken for doing the work, and the remuneration claimed accordingly.   McLure JA noted that all parties had accepted a time cost basis for determining remuneration was appropriate. Her Honour then cited a number of authorities which discuss the fact that time-based costing does not constitute the most reliable means of arriving at a fair and reasonable remuneration amount. Therefore, other factors, such as the complexity of the case, the extra responsibilities placed on the liquidator and the effectiveness of the liquidation must be considered. Her Honour concluded that the work done must be proportionate to the difficulty or importance of the task in the context in which it needs to be performed.   Having established the means by which a court should determine a liquidator's remuneration under section 473(3) of the Act, McLure JA (with Buss JA and Newness AJA concurring) allowed the appeal.    In reaching her decision, McLure JA:   * accepted that the Appellant's evidence was sufficient to enable the court to determine whether the claimed remuneration was fair and reasonable and therefore, that a prima facie case was made out. * cited the fact that the Master had erred in making no allowance for work completed by the Appellant during the period the Appellant was also acting as supervisor of Rowena. Further, that the Master's reference to the fact that the Appellant had been paid millions by GWA in reaching his decision was an irrelevant consideration in the circumstances. * agreed with the Master's finding that in terms of a particular piece of litigation, the Appellant failed to conduct himself in a cost-effective way which warranted a reduction in the amount of remuneration allowed.   McLure JA ordered that the Appellant was entitled to further remuneration in the sum of $397,970 less the amount claimed for the aforementioned piece of litigation and any amounts disallowed in relation to costs.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h5)  **5.12 Voidable transaction proceedings and section 588FF(3) of the Corporations Act**  (By Julian Berenholtz, Clayton Utz)  Harris Scarfe Ltd (in liq) & Harris Scarfe Wholesale Pty Ltd (in liq) (No 3) [2008] SASC 74, Supreme Court of South Australia, Debelle J, 14 March 2008  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2008/march/2008sasc74.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2008/march/2008sasc74.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   This decision concerned:   * the validity of an ex parte order granting liquidators an extension of time to commence proceedings in respect of voidable transactions pursuant to section 588FF(3) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) as against an unidentified class of creditors; and * an application by those liquidators to join the unidentified creditors after the ex parte order was set aside due to a want of procedural fairness.   The case is an epilogue to the decision of Debelle J in Harris Scarfe Ltd (in liq) & Harris Scarfe Wholesale Pty Ltd (in liq) [2006] SASC 227 where his Honour held that an ex parte order made pursuant to section 588FF(3)(b) against an unidentified class of creditors was binding against all unidentified creditors except those who have successfully applied to have it set aside.   Debelle J held that:   * where such an order was set aside due to a want of procedural fairness, the original application would be re-heard as against those affected creditors and, accordingly, the formal joinder of these creditors as parties to the application would be unnecessary; and * that, while it was strictly unnecessary to decide this point, as a matter of law, any application for joinder would not be considered a fresh application made out of time and thus not defeated by section 588FF(3).   **(b) Facts**  On 3 April 2001 (the relation back date for the purposes of section 588FF of the Corporations Act) administrators were appointed to Harris Scarfe Ltd (HSL) and Harris Scarfe Wholesale Pty Ltd (HSW). Creditors' meetings for both companies subsequently resolved for a voluntary winding up of each company and the administrators were appointed as liquidators.   On 31 March 2004 the liquidators issued proceedings applying for orders under section 588FF(3)(b) of the Corporations Act for an extension of time to initiate proceedings seeking orders under section 588FF(1). The application sought an extension of the limitation period by 18 months against two classes of creditors; 13 'ascertained creditors' and the 'unidentified creditors.   The application was framed in this way because the liquidators had insufficient information to determine the identity of all of the creditors against whom claims could be made.  Relevantly, the application was not served on the 'unidentified creditors'. On 14 April 2004 Master Kelly granted the application, extending the period of time within which a section 588FF(1) application could be made until 2 October 2005.   New liquidators were subsequently appointed, and on 30 September 2005, in reliance on the order made on 14 April 2004, brought actions under section 588FF(1) against 19 previously unidentified creditors.  In Harris Scarfe Ltd (supra) his Honour held that while the liquidators could rely on the orders of Master Kelly as against the identified creditors, the 'unidentified creditors' were entitled to an order setting aside the order made on 14 April 2004 (thereby invalidating the application in respect of section 588F(1) relating to those particular creditors).   The basis of this ruling was that the ex parte order was made in breach of the rules of procedural fairness.  His Honour did however (reluctantly) maintain the validity of the order as against those 'unidentified creditors' who had not made an application to set aside the 14 April 2004 order (a decision which was affirmed by the Full Court on appeal: Gazal Apparel Pty Ltd v Davies [2007] SASC 91).   As a consequence of this decision, on 6 December 2007 the liquidators made an application to join the 19 previously unidentified creditors to proceedings commenced on 30 September 2005 under section 588(1) and sought to have the question determined as to whether an order pursuant to section 588FF(3)(b) should be made against them, which in turn, would permit the application pursuant to section 588FF(1) against them stand.   **(c) Decision**   In Harris Scarfe (supra) Debelle J had previously held that the 19 'unidentified' creditors were not bound by the 14 April 2004 order on the basis of a lack of notice of the application and the fact that they were given no opportunity to be heard.  His Honour held that notwithstanding the expiration of the extended limitation period granted by the court, the liquidators were at liberty to have the application made on 31 March 2004 re-heard as against the 19 'unidentified' creditors.  The fact that the 19 creditors had no notice of the 31 March 2004 application was irrelevant: section 588FF required only that the application was commenced (and not that it be heard) before the expiration of the (extended) statutory time limit.   Accordingly his Honour found that, as the initial application was made within time, any re-hearing relating to the application dated 31 March for an application for an extension of time would also be within time.  It was therefore unnecessary for the liquidators to obtain an order to join the 19 creditors as parties to the application dated 30 September 2005 (because, in the event that they were successful against the unidentified creditors on the re-hearing of the application dated 31 March, they would be a party to that proceeding).   Debelle J held that, if he had erred and joinder was necessary, he would have granted the application for joinder dated 6 December 2007. This analysis was predicated on the view adopted by Spigelman CJ in BP Australia Ltd v Brown (2003) 58 NSWLR 322, that an order setting aside an ex parte order did not amount to a determination of the original application.  It followed, that given the decision of Spigelman CJ in BP Australia, an application to join a creditor against whom a general order granting an extension has been set aside is a re-hearing of the application made within the time prescribed by section 588FF(3).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h5)  **5.13 Breakdown of joint venture agreements: implications for joint venturers**   (By Jonathan Mackie, Mallesons Stephen Jaques)   Lawfund Australia Pty Ltd v Lawfund Leasing Pty Ltd [2008] NSWSC 144, New South Wales Supreme Court (Equity Division), Brereton J, 28 February 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/february/2008nswsc144.html](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/february/2008nswsc144.html" \t "_new)  or   [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   This case examined the responsibilities of parties upon the breakdown of a joint venture agreement.  The decision indicates the following:   * A joint venture, though incorporated in form, may be in substance a partnership superimposing equitable obligations. * Those equitable obligations do not oblige parties to maintain their relationship notwithstanding a loss of trust and confidence in each other. * It is not a breach of the obligation of good faith for parties to terminate the joint venture on reasonable notice, if not at will, if they no longer wish to be associated with each other, absent special provision. * If the parties intend that, in the event of termination, each is to be at liberty to carry on business and retain the clients they brought to the joint venture, then upon termination, each party may be entitled to establish its own business, not only to build up a new client base, but also to service existing clients. * However, parties are not entitled to carry on a business using the name, logo, goodwill or capital of the joint venture, without accounting for it, nor to appropriate the business of the joint venture for their own benefit.   **(b) Facts**  Lawfund Australia Pty Ltd (Lawfund) carried on business as a mortgage aggregator.  In 2002, it sought to extend its business into the field of lease finance and entered into a joint venture with the second defendant (Ward), who had extensive experience and expertise in that field through her company the third defendant (A-Ward).  Lawfund Leasing Pty Ltd (Leasing) was incorporated as a joint venture vehicle on 12 September 2002, with Lawfund and Ward each holding 50 shares in Leasing.  Ward and Carrero (Lawfund's Business Development Manager) were appointed as directors of Leasing.  Over the ensuing two years, each of Lawfund and Ward perceived difficulties with and made complaints about the other, and by 2004 the relationship was strained. On 28 September 2004, Lawfund wrote to Ward, stating that it was highly desirable to terminate the relationship, and proposing terms on which that might be done.  This included a winding up of Leasing and Ward vacating the Lawfund premises by 31 October 2004.   On 23 and 24 October 2004, Ward - without informing Lawfund of her intentions - vacated Lawfund's premises and moved (with all hardware and software associated with the business) to separate premises she caused Leasing to occupy under a sublease from her company A-Ward. On 25 October 2004, Lawfund received a letter from Ward's solicitors asserting that the 28 September 2004 letter inappropriately threatened unilaterally to wind up Leasing for no compensation in breach of the joint venture agreement, that this was no way to address a business partner, and that their instructions were to enforce the joint venture agreement.   Lawfund commenced proceedings on 23 December 2004.  Leasing continued to trade under Ward's control until August 2005 and had no Lawfund nominee on its board during that period. On 2 August 2005, Ward filed her cross-claim.  On 16 August 2005, Ward's then solicitors wrote to Lawfund stating that the letter of 28 September 2004 constituted a repudiation of the joint venture agreement, that repudiation was accepted by Ward and she had elected to treat the contract as terminated.  Having purported to accept Lawfund's alleged repudiation, Ward thereupon caused Leasing to cease trading, and her own company A-Ward took over Leasing's business undertaking and continued to operate from the same premises.   **(i) Lawfund's claim**  Lawfund claimed the following:   * By way of derivative action on behalf of Leasing (pursuant to sections 236 and 237 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act')), compensation and/or an account of profits from Ward and A-Ward for:   + alleged contraventions of sections 181, 182 and 183 of the Act, in which A-Ward is said to have been a person involved in the contravention; and   + breaches of Ward's fiduciary duty as a director of Leasing, in respect of which A-Ward is said to have been a knowing recipient, so as to attract accessorial liability. * Injunctive relief, restraining Ward and A-Ward from continuing to use the name Lawfund (including cancellation of the registration of "Lawfund" by Leasing as a trade mark) and the database of the former joint venture which included a list of Lawfund's membership. * The winding up of Leasing on the just and equitable ground.   **(ii) Ward's cross-claim**  Ward and A-Ward had no objection to cancellation of the trade mark, but cross-claimed for the following:   * Damages for repudiation and other alleged breaches of the joint venture agreement.  It was alleged that Lawfund repudiated the agreement by:   + purporting to terminate the agreement other than by agreement   between the parties or on proper grounds;   + purporting to set out terms on which the joint venture agreement would be terminated which had not been the subject of negotiations and which were severely disadvantageous to Ward; and   + requiring Ward to vacate Lawfund's office by 31 October 2004, in breach of its duty to act in good faith being a period of notice which in the circumstances was unreasonable and highly detrimental to Ward   + Damages for misleading and deceptive conduct said to have been engaged in by Lawfund in entering into the joint venture agreement.   + Relief for oppression under section 232 of the Act, and in particular an order that Lawfund acquire Ward's shares in Leasing.   **(c) Decision**  Brereton J first dealt with Ward and A-Ward's cross claims.  **(i) Repudiation and other breaches of joint venture agreement**  The court held that Lawfund did not repudiate or otherwise breach the joint venture agreement while it subsisted. The joint venture between Lawfund and Ward, though incorporated in form, was in substance a partnership, such that fiduciary obligations were superimposed on the corporate relationship.  Accordingly, Lawfund and Ward owed each other, and Leasing as the joint venture vehicle, fiduciary obligations to act with respect to the joint venture. This required them to act in good faith, and not to use their position or any information or entitlement acquired by them in the course of and for the purposes of the joint venture to their own separate advantage or in a manner inconsistent with the interests of Leasing as the joint venture vehicle, without the fully informed consent of the other and of Leasing.  However, Brereton J held that those equitable obligations were not such as to oblige either party to maintain their relationship notwithstanding a loss of trust and confidence in the other.  Either was entitled to terminate the joint venture on reasonable notice, if not at will, if it no longer wished to be associated with the other, and it was not a breach of the obligation of good faith for Lawfund to do so.  Brereton J found that the repudiation case failed for the following reasons:   * Primarily, because either joint venturer was entitled to decide at any stage, at least on reasonable notice, that it no longer wished to be associated with the other, and the time allowed was reasonable. * Secondly, because the 28 September 2004 letter did not convey a definite determination not to perform Lawfund'' obligations, but rather was an offer to negotiate the terms of an exit strategy. * Thirdly, even if Lawfund's letter were repudiatory, Ward elected to affirm   None of the other breaches of contract alleged by Ward against Lawfund were established.   **(ii) Misleading and deceptive conduct**   The court held that Lawfund did not engage in misleading and deceptive conduct. Ward had alleged that in conversations prior to entering into the agreement and in a summary letter of the proposed agreement, Lawfund had made representations that were misleading and deceptive in contravention of section 52 of the [Trade Practices Act 1952 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default).  Brereton J was of the view that Ward's case was misconceived, as it would treat expressions of aspiration and intent as promises.  **(iii) Rights and obligations upon termination**  Brereton J held that the joint venture agreement was terminated by abandonment in or about October 2004. Upon termination of the joint venture, each party was entitled to establish its own business, not only to build up a new client base, but also to service existing clients. However, neither party was entitled to carry on a business using the name, logo, goodwill and capital of the joint venture, without accounting for it, nor to appropriate the business of the joint venture for the party's own benefit.  Lawfund did not breach its fiduciary obligations as a joint venture partner after termination.  Lawfund was entitled to establish a business under the name Probitas, in the field of lease finance broking, and to exploit the clientele referred by its members to the joint venture. Leasing held the trademark "Lawfund" upon trust for Lawfund.  In circumstances where the business was not to be sold, and the parties were entitled to set up in competing businesses, and in the absence of any obligation of confidentiality, both parties remained entitled to use the database of the former joint venture business.  **(iv) Breach of directors' duties**  Brereton J found that Ward had contravened her duties as a director and was liable to pay compensation or an account of profits. Although Ward would have been entitled to establish a lease finance broking business under the name of A-Ward, and exploit the clients she had introduced to the joint venture, she remained bound by her duties as a director of Leasing.  The non-declaration and non-payment of a dividend was not a breach of those duties. However, it was not bona fide in the interests of Leasing as a whole for Ward to cause it to cease trading, and its business to be taken over by A-Ward, for no consideration. Ward was found to have breached the Act by doing the following:   * Making use of her position as an officer of Leasing for an improper purpose and other than in good faith and in the best interests of Leasing, in contravention of section 181(1) of the Act. * Making improper use of her position as a director of Leasing to gain advantage for herself and A-Ward and to cause detriment to Leasing, in contravention of section 182(1) of the Act.   The court held that A-Ward was a "person involved" in Ward's contraventions, being "knowingly concerned" in them. Ward's breach of duty resulted in Leasing being deprived, without compensation, of the value of its business as at August 2005. Alternatively, Ward and/or A-Ward had received the profits of the business since that date.   **(v) Compensation/account of profits**   The court held that Leasing was entitled to compensation for the loss or an account of the profits.  Ward was entitled to exploit for her own benefit the clients she had introduced to Lawfund. The compensation she and A-Ward were required to pay or the profits for which they were to account, were to exclude the value of those clients or the profits generated by them.   Lawfund was not obliged to bring to account the profits it derived from the Probitas business, nor was relief debarred by a lack of clean hands.  Unclean hands did not deny relief as: in substance it was Leasing and not Lawfund claiming relief; it was claiming relief under the Act, which was not subject to equitable maxims; and, as Lawfund was not precluded, after termination of the joint venture, from establishing its own business under its own name to provide a similar service.  **(vi) Winding up on the just and equitable ground**  Brereton J concluded that Leasing should be wound up on the just and equitable ground.  Leasing was a "quasi-partnership" corporation to which the principles in Ebrahimi v Westborne Galleries Ltd [1973] AC 360 applied. Under the just and equitable ground, a company may be wound up where, in a company which is in substance an incorporated partnership, in which mutual confidence has been the essence of the relationship, that confidence has failed so that the partners can no longer work together in the way originally contemplated.  Ward submitted that Lawfund had engaged in oppressive conduct so as to be amenable to relief under section 232 of the Act and to make winding up inappropriate.  Ward submitted that it would be unfair to make such an order for winding up and instead sought to have Lawfund purchase her shares at a valuation.     Brereton J concluded that there was no basis for concluding that Ward was the victim of oppressive conduct, such as to justify declining a winding up order.  It was not oppressive for one partner to decide that he or she no longer wished to be associated with the other, and to take appropriate steps to bring about that result.  **(vii) Orders**  The cross-claim was dismissed and the following orders made:   * declarations of contravention of the Act; * orders directing an inquiry as to compensation; * a declaration of trust and order for the transfer of trademark; * an order that Leasing be wound up and a liquidator appointed; and * an order that Ward and A-Ward pay Lawfund's costs.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h5)  **5.14 Validity of the constitution of an incorporated association**   (By Jeremy McCarthy and Lachlan Tan, Corrs Chambers Westgarth)   Islamic Association of Western Suburbs Sydney Inc v Dr H R K Survery [2008] NSWSC 77, NSW Supreme Court, Hamilton J, 13 February 2008.   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/february/2008nswsc77.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/february/2008nswsc77.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   Members of the Islamic Association of Western Suburbs Sydney Incorporated ("Association") have been in dispute over the validity of its meetings and constitution for a number of years. This dispute involved tensions between two bodies having control over the Association's management: its executive council and its "foundation members", being those members who were present at the first general meeting of the Association.   The constitution of the Association ("Constitution") sets out the functions and procedures of the executive council, in accordance with the requirement of the [Associations Incorporation Act 1984 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3727" \t "Default) ("Act") that such provisions in respect of an association's managing body be included in the association's constitution.  However, the Constitution also allocated a number of quasi-managerial responsibilities to foundation members. These provisions, set out in Rule 3(6) of the Constitution, were alleged to be invalid, either due to inconsistency with the Act or for uncertainty.   Hamilton J considered the validity of the various paragraphs of Rule 3(6) with respect to the intentions of the Act, and to contract law principles of certainty. Rule 3(6) sets out a number of areas for which foundation members were to be "responsible", including "the development of central projects", "administrative and financial control", and "real estate management".  The practical effect of foundation members being "responsible" for these areas was held to be uncertain, especially given the broad coverage of these purported areas of responsibility. Accordingly, the relevant paragraphs were held to be invalid.   A further paragraph, which permitted foundation members to replace the executive council with a caretaker in certain circumstances, was held to be invalid due to non-compliance with the Act, which requires that associations be governed by a "body" of people.     However, a paragraph providing for the appointment by majority vote of a trustee to fill a vacancy on the executive council was held to be valid.  While this paragraph made no provision for the mechanism by which a majority vote would occur, Hamilton J considered that common law rules as to meetings could be appropriately relied on to make the paragraph sufficiently certain.     **(b) Facts**    The Association, the first plaintiff, along with the Australian Islamic College of Sydney, the second plaintiff, conducts an Islamic institution in Rooty Hill, New South Wales. The Association was incorporated under the Act in 1991. The defendants comprise all current and former presidents and secretaries of the Association.   At a prior hearing of this dispute, the Court made declarations on an agreed form of the Constitution, and also ordered that the validity of certain rules be the subject of a preliminary determination. It was alleged that these rules were invalid, due to being in conflict with the Act, and due to uncertainty.   The rules in question, appearing in Rule 3(6) of the Constitution, set out the functions of certain foundation members of the Association.  Rule 3(6) stated that foundation members would be "responsible" for:   (a) the development of central projects; (b) administrative and financial control; (c) real estate management; (d) to appoint by majority vote, a trustee to fill a position on the executive council which may have become vacant and the member so appointed  shall hold office, subject to these rules, until the conclusion of the annual general meeting next following the date of the appointment; (e) the foundation members shall have the power to dissolve the executive council and appoint an interim caretaker or dismiss individual office-bearers of the executive council. Such action can only be justified based on belief of either -            (i)   major conflict or potential conflict within the community; or           (ii)   in contradiction to the objectives on which the association has been                   founded for or falling performance."   **(c) Decision**    Hamilton J observed that the Act requires that the constitution of an incorporated association must make provision for the "name, constitution, membership and powers of the committee or other body having the management of the incorporated association", including the election or appointment of members of the committee and the filling of casual vacancies occurring on the committee.  In this context, the Constitution indicates that the Association's executive council is such a committee.   The plaintiffs submitted that each of the paragraphs in Rule 3(6) were contrary to the intention of the Act, since they allocated responsibilities to foundation members which, pursuant to the Act, ought to have resided with the executive council.  Furthermore, the plaintiffs argued that these paragraphs were too uncertain to evince a clear intention.   Hamilton J referred to section 11(2) of the Act, whereby the constitution of an incorporated association is to operate as a contract binding upon the association and all of its members, and to contract law principles of certainty.  Paragraphs (a), (b) and (c) were held to be unclear, due to the ambiguity of what was meant by members being "responsible for" these functions, given the breadth of the functions themselves.   Paragraph (d) provided for the filling of a vacancy on the executive council by a majority vote amongst foundation members. In spite of the plaintiffs' argument that this provision was uncertain since there was no explanation as to what is meant by 'majority vote', Hamilton J found that common law principles as to meetings could be relied on, and that the paragraph was thus sufficiently clear.  Furthermore, the provision for filling a casual vacancy was held not to conflict with the intention of the Act.   Finally, Hamilton J held that paragraph (e) was invalid due to it being in conflict with the Act.  Whereas the Act envisages that a group or committee will manage the affairs of an incorporated association, paragraph (e) made it possible for the executive council to be replaced by a single individual, with no provision for a replacement committee until the following annual general meeting.  His Honour did not find it necessary to rule on whether this provision was also void for uncertainty.   Paragraphs (a), (b), (c) and (e) were thus held to be invalid and of no legal effect.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h5) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Contributions** |  |  | | |  | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20128-%20April%202008.htm%23h1) | | |  |

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