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[View previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new) | [odify My Newsfeed](http://my.lawlex.com.au/default.asp?goto=news_sub) [earch Newsfeed Archive](http://my.lawlex.com.au/default.asp?goto=news) [iew user guide](http://my.lawlex.com.au/content/static/LawlexGeneralUserGuide.pdf) [earch the law](http://my.lawlex.com.au/default.asp?goto=search_leg) [bout legislative alert](http://www.lawlex.com.au/content/view/69/0) [bout SH&E Monitor](http://www.lawlex.com.au/content/view/94/146/)[bout Lawlex](http://www.lawlex.com.au/content/view/42/0) | | |  | | --- | | COPYRIGHT WARNING Use of this product must be in accordance with our licence agreement and the relevant licence fee paid by your organisation. 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In that case, the High Court held that a shareholder who is misled by a company into acquiring its shares can claim as a creditor in the external administration of the company. Such a claim is not postponed behind other unsecured creditors as are claims brought in a shareholder's 'capacity as a member of the company'. While clarifying the interpretation of relevant statutory provisions, the decision opens up underlying policy considerations, as was recognised by members of the court.  CAMAC has been asked to consider whether the current position should be retained or changed to postpone claims by shareholders as aggrieved investors, and whether other changes should be made to ameliorate the consequences of either outcome.  CAMAC's convenor, Richard St John, said the decision could be seen as cutting across accustomed notions about the primacy of general creditors over shareholders in an insolvency. In effect, it was the outcome of an intersection between those notions and the conferral, in more recent years, of rights on shareholders under various provisions for the protection of investors. There is a need for a careful balancing of interests in considering any change in the current position.  Commentators have raised concerns that the recognition of claims by shareholders as aggrieved investors will disadvantage unsecured lenders and trade and other creditors, with whose claims they will compete; that there will be added complexity and delay in the conduct of external administrations, and about possible consequences for corporate financing and the market in corporate debt. On the other hand, any move back from the position as set out by the High Court could be seen as rendering initiatives for the protection of investors less meaningful.  CAMAC requests submissions on a range of matters set out in the discussion paper. To assist respondents, the paper describes the current state of the law, explains the steps that aggrieved shareholders would need to take in making claims in an insolvency and considers the implications of these claims for the conduct of external administrations, corporate financing and financial markets.  The paper reviews various arguments for or against change to the current legal position and notes the divergence between the US and UK positions. It canvasses possible changes to the conduct of creditors' meetings and to the procedure for determining shareholder claims if the current position is retained. It raises the possibility of introducing a 'fraud on the market' principle to assist shareholder claims should the law be changed. Finally, the paper considers whether shareholders whose claims are postponed in a liquidation should still be treated as creditors, with voting and other rights in an external administration.  CAMAC will prepare its report following consideration of submissions received.    The discussion paper is available on the [CAMAC](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFDiscussion+Papers/$file/Sons_of_Gwalia_DP_Sep07.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.2 Call for reform of AGMs**    Governance professionals in the ASX Top 300 endorse the retention of face-to-face annual general meetings (AGM), even though the ability of modern telecommunications to fully facilitate the AGM's traditional reporting and decision-making functions has made physical attendance by shareholders technically unnecessary, according to information published by Chartered Secretaries Australia (CSA) on 19 September 2007.    A survey by CSA has found that 87 per cent of respondents from the ASX Top 300 believe there remains a role for face-to-face AGMs, with a strong majority of 72 per cent indicating that the AGM's main rationale should now be to provide a forum for shareholders to raise concerns with company management and directors.    Fewer than 50 per cent of respondents saw the AGM's other traditional roles of reporting on company performance and prospects, communicating information about sustainability and governance, and providing a forum for shareholder voting and decision-making, to be as prominent.    According to CSA, the findings confirm that while there is a role for technology in promoting shareholder engagement, there are also important dynamics of human interaction that technology cannot replace.   A popular model favoured by 41 per cent of respondents was to retain an annual meeting dedicated purely to formal business such as voting and elections, and provide additional forums and channels for targeted reporting and shareholder communication.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.3 AFMA reports strong and sustained growth in wholesale financial markets**  Sustained vigour in Australia's wholesale financial markets was a key feature of the 2007 "Australian Financial Markets Report" released on 19 September 2007 by the Australian Financial Markets Association.  Total turnover in exchange traded and over-the-counter financial markets in 2006/07 rose by 19.8%, these markets having grown at an average compound rate of 19.1% over the past five years.  In absolute terms, foreign exchange was again the prime driver, rising by $6,021 billion. Although relatively small in dollar terms, credit derivatives and equity derivatives built on the strong performances of last year.  The 2007 Australian Financial Markets Report is available on the [Australian Financial Markets Association](http://www.afma.com.au/afma:homepage" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.4 Amendments to the Trade Practices Act**    On 18 September 2007, the Australian Treasurer and the Minister for Small Business and Tourism announced that amendments to the [Trade Practices Amendment Bill (No 1) 2007](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=97923" \t "_new) had passed in the Senate.    The Bill amends the Trade Practices Act 1974 to provide greater protection against misuse of market power and unconscionable conduct.   The Bill amends the misuse of market power provisions in section 46 of the Act to:   * address concerns about establishing when a corporation has a substantial degree of power in a market, which is the threshold requirement for section 46 to apply; * specifically prohibit a corporation from leveraging market power from one market to another; and * refer to sustained below‑cost pricing conduct as a factor the court may consider in deciding whether a corporation has misused its market power.   The Government's new amendment includes a specific prohibition against a corporation with a substantial share of a market from engaging in sustained below-cost pricing conduct for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct in a market.   The Bill also makes amendments to the unconscionable conduct provisions in section 51AC of the Act to:   * include unilateral variation contract terms as a factor the Court may consider in deciding whether a corporation has engaged in unconscionable conduct; and * raise the transaction limit for section 51AC from $3 million to $10 million to extend the its application to a wider range of transactions.   Finally, the Bill creates a second Deputy Chairperson position at the ACCC.  The Government has announced that the second Deputy Chairperson appointment will be filled by a person who is experienced in small business matters.   The Bill will now be returned to the House of Representatives for final consideration.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.5 New Zealand Government acts to improve finance company regulation**  On 17 September 2007, the New Zealand Government announced it will act to ensure trustees have increased powers to supervise the activities of finance companies on behalf of investors.   The regulations amend the Securities Regulations 1983 to provide additional clauses that are deemed to be included in the trust deeds of finance companies. The finance companies affected are issuers that continuously offer debt securities to the public and either lend money or provide financial services, but that are not a building society, credit union, or co-operative company. The new deemed clauses apply to both existing and future trust deeds.   Under the new clauses, finance companies must:   * provide regular reports to the trustee about the issuer's financial position and regularly certify compliance with the trust deed; * keep the trustee informed of matters relevant to the trustee's duties; * have the borrowing group's half-yearly financial statements audited or, if that requirement is waived by the trustee, have them reviewed; * provide the trustee with copies of the borrowing group's annual and half-yearly financial statements; * consult the trustee on the appointment of auditors and inform the trustee if an auditor resigns or declines appointment or reappointment; and * include specific conditions in the terms of appointment of auditors, which will give auditors responsibilities vis-à-vis the trustee.   The new clauses will also give the trustee power to:   * appoint an independent auditor to audit the financial statements of the borrowing group; and * appoint an expert to assist the trustee to determine the true financial position of an issuer, and recover the fees and expenses from the issuer.   The regulations are available from the [New Zealand Securities Commission](http://seccom.govt.nz/downloads/securities-amendment-regs-07.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.6 Parliamentary Committee recommends Commonwealth regulation of credit**   On 17 September 2007, the House of Representatives Economics Committee released its report on home loan lending practices and the processes used to deal with people in financial difficulty.  The committee's key recommendation is that the Commonwealth Government takes over the regulation of credit from the states and territories. This includes the regulation of mortgage brokers and non-bank lenders.  Evidence to the inquiry raised concerns about the operation of 'predatory' lenders and brokers, who prey on people facing financial hardship. The committee heard that the current regulatory framework is not sufficient to deal with these practices.  The committee also examined the evolution of the Australian lending market, including the change to lending standards and the proliferation of non-bank lenders. Generally speaking, credit has become more readily available, reflecting the ongoing strength of the domestic and international economies. Mortgage arrears rates have increased in recent times, but remain very low by historical and international standards, suggesting that the majority of housing credit is being provided responsibly.   The committee makes two other recommendations. It recommends that:   * The Australian Bureau of Statistics begin collecting data on housing repossessions; and * The Banking and Financial Services Ombudsman increase its scheme limit to $500,000.   The report is available on the [Parliament of Australia](http://www.aph.gov.au/house/committee/efpa/banklending/report.htm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.7 APRA releases its proposed approach to the supervisory review process under Basel II**    On 12 September 2007, the Australian Prudential Regulation Authority (APRA) released a discussion paper on its proposed approach to the supervisory review process under the new Basel II capital adequacy regime, known as the Basel II Framework.   The supervisory review process, or Pillar 2, is one of three mutually reinforcing pillars on which the Framework is based.  The process is intended to ensure that locally incorporated authorised deposit-taking institutions (ADIs) have adequate capital to support all the risks in their business and to encourage ADIs to develop and use better risk management techniques in monitoring and managing their risks.   Consistent with its existing processes for determining capital adequacy, APRA is proposing to set a prudential capital requirement (PCR) for each ADI, which must be met at all times.  Subject to the minimum capital requirement of eight per cent established in the Framework, PCRs will be set at a level proportional to each ADIs overall risk profile.   A key requirement of Pillar 2 is that an ADI should develop, document and maintain a comprehensive internal capital adequacy assessment process (ICAAP), proportional to its operations and consistent with prudential requirements.  The information provided by an ADI in its ICAAP is essential input into APRA's supervisory review and determination of the PCR.   In line with the Framework, APRA intends to apply a limit on reductions in regulatory capital for ADIs accredited to use the advanced Basel II approaches, relative to what would have applied had the current Basel Capital Accord continued in force.  The limit will be 10 per cent in 2008 and this limit will be retained in 2009 pending a review of experience with the advanced Basel II approaches.   The Basel II Framework will come into force in Australia on 1 January 2008.   Comments on the discussion paper are invited by 26 October 2007 and can be sent to: [basel2@apra.gov.au](mailto:basel2@apra.gov.au).    Further information is available on the [APRA](http://www.apra.gov.au/ADI/Basel-II-implementation-in-Australia.cfm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.8 ALRC proposes a more comprehensive credit reporting regime**  On 12 September 2007, the Australian Law Reform Commission (ALRC) proposed the introduction of a more comprehensive credit reporting regime, in a Discussion Paper released as part of its major review of Australian privacy law and practice.  According to the ALRC, the [Privacy Act 1988 No. 119 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6129" \t "_new) generally allows credit files to include only 'negative' information, such previous defaults. Unlike the position in most countries, this makes it difficult for Australians to build up a record of responsible behaviour over time. If credit reporting agencies are able to gather a wider range of information, this may encourage improved lending practices and make it easier for some people on low incomes to obtain finance.  The ALRC proposes to expand the types of information that may be recorded on a credit file, to include information about current credit accounts, the dates those accounts were opened and closed, and the credit limits of each.  In response to concerns about identity theft, the ALRC proposes that an individual who has been a victim of identity theft should be able to advise credit reporting agencies and request that this be flagged on their file, so that any prospective credit provider is aware that an applicant for credit may be an impostor.   The ALRC also proposes a greater role for external dispute resolution, by requiring that any credit provider who lists debt defaults on credit information files to be part of an external dispute resolution scheme. This will provide a fast, simple process for consumers who wish to dispute a default listing.  The ALRC is seeking feedback on these proposals before the final report and recommendations are presented to the Attorney-General in late March 2008. Submissions close on 7 December 2007. These proposals are part of the ALRC's broader Privacy Inquiry and are published in Discussion Paper 72; Review of Australian Privacy Law.  The Discussion Paper is available on the [ALRC](http://www.alrc.gov.au/" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.9 IASB issues revised standard on the presentation of financial statements**    On 6 September 2007, the International Accounting Standards Board (IASB) issued a revised version of IAS 1 Presentation of Financial Statements. The revision is aimed at improving users' ability to analyze and compare the information given in financial statements.    The changes made are to require information in financial statements to be aggregated on the basis of shared characteristics and to introduce a statement of comprehensive income. This will enable readers to analyze changes in a company's equity resulting from transactions with owners in their capacity as owners (such as dividends and share repurchases) separately from 'non-owner' changes (such as transactions with third parties). In response to comments received through the consultation process the revised standard gives preparers of financial statements the option of presenting items of income and expense and components of other comprehensive income either in a single statement of comprehensive income with subtotals, or in two separate statements (a separate income statement followed by a statement of comprehensive income).    The revisions include changes in the titles of some of the financial statements to reflect their function more clearly (for example, the balance sheet is renamed a statement of financial position). The new titles will be used in accounting standards, but are not mandatory for use in financial statements. The revised standard will come into effect for the annual periods beginning on or after 1 January 2009, but early adoption is permitted.  The publication of IAS 1 marks the completion of the first phase of the IASB's joint initiative with the US Financial Accounting Standards Board (FASB) to review and harmonize the presentation of financial statements. The second phase, which has already begun, is examining more fundamental questions about the presentation of information in financial statements and the IASB expects to publish a discussion paper on the subject within the next six months.   Further information is available on the [IASB](http://www.iasb.org/Home.htm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.10 Report on understanding money**   On 6 September 2007, the Minister for Revenue and Assistant Treasurer, Peter Dutton MP, released a new report into the attitudes of Australians towards money.   "Financial Literacy - Australians understanding money" is the result of a survey of 7,500 Australians aged 12 to 75 on a range of money management issues from budgeting and saving to investing and protecting money.   According to the report, the vast majority of Australians report that they have the necessary understanding and skills to manage day to day money tasks, such as budgeting, saving and handling debt. Where people are less confident is on those tasks they have to do less frequently, such as investing and planning for their retirement. The report also highlights a number of beliefs that can stop people from achieving their financial goals.     Also launched by the Minister, "Financial Literacy Resources Australia" is a database of financial literacy programs and resources. This database, for the first time, brings together in one place a comprehensive listing of financial literacy programs and resources provided in Australia by government, education, industry, banking, finance and community organisations.    The report is available from the [Understanding Money](http://www.understandingmoney.gov.au/report" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.11 APRA releases Basel II reporting requirements**    On 5 September 2007, the Australian Prudential Regulation Authority (APRA) released its proposed reporting requirements for authorised deposit-taking institutions (ADIs) under the new Basel II capital adequacy regime, known as the Basel II Framework (the Framework).   The proposed requirements are outlined in a discussion paper and detailed in the draft reporting standards, reporting forms and instruction guides. They deal with the calculation of minimum regulatory capital for credit risk, market risk, operational risk and, for advanced ADIs, interest rate risk in the banking book.   The majority of ADIs in Australia will be using the standardised approaches available under the Framework. The reporting requirements for these ADIs broadly replicate existing reporting requirements, with some additions in areas such as operational risk and securitisation. For ADIs accredited by APRA to adopt the advanced Basel II approaches (advanced ADIs), the majority of reporting requirements will be new.   APRA proposes to finalise and issue the reporting standards, reporting forms and instruction guides in late 2007, following the release of the full suite of finalised Basel II prudential standards. The reporting standards will come into effect at the same time as the Framework, on 1 January 2008; the first submission of data will be for the period 1 January 2008 to 31 March 2008.   Comments on the discussion paper, draft reporting standards, reporting forms and instructions are invited by 5 October 2007 and can be emailed to: [basel2@apra.gov.au.](mailto:basel2@apra.gov.au.)   Further information is available on the [APRA](http://www.apra.gov.au/ADI/Basel-II-implementation-in-Australia.cfm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.12 Top global pension funds reach ten trillion dollar mark**  Total assets at the world's largest 300 pension funds grew by around 12% to US$10.4 trillion during 2006, adding US$1 trillion to the previous year's figure for the second year in a row, according to Pensions & Investments and Watson Wyatt research published on 5 September 2007. The P&I / Watson Wyatt global 300 ranking, conducted in conjunction with Pensions & Investments, a US investment newspaper, shows that increases in assets occurred in most major countries and that the size of this pool of assets has almost doubled in a five-year period.    According to the survey, the US remains the country with the largest market share of pension funds assets accounting for 43%, although its share has been eroded (53% in 2003) mainly because of a weak dollar and various significant developments around sovereign pension funds elsewhere. Japan has the second largest market share on 15%, largely because of the Government Pension Investment Fund of Japan which is still at the top of the ranking, a position it has held for the past five years, with assets of close to US$1 trillion. The UK has the third largest market share of 7% followed by the Netherlands on 6%. In addition, pension funds in the 'Other - developing world' category are growing in importance and now have a combined market share of 10% of the top 300, compared with 7% three years ago, with Korea, South Africa and Taiwan having the majority of the assets of this category.    The survey shows that assets in Australia have grown at one of the fastest rates over a three-year period; 71% p.a. in US$ terms and 68% p.a. in local currency terms. During the same period, the US funds grew at 9% p.a. while large pension funds in the 'Other - developing world'\* category grew at 32% pa.    In 2006, the top 20 funds grew at a faster rate than the remaining funds, consistent with the longer-term trend. According to the survey, the compound annual growth rate (CAGR) for the past five years of the top 20 funds is almost 19%, while the CAGR for total global assets for the same period is around 14%?.   These top 20 funds amount to US$3.8 trillion, constituting over 15% of global pension assets, with each fund except one holding more than US$ 100 billion. Major changes to the composition of the top 20 funds over the last three years include the arrival of the Government Employees Pension Fund of South Africa, a fund which rose 28 places to position 7 at the end of 2006 and Canada Pension, both from a growing breed of sovereign pension funds. Other new entrants over the past three years include the Pension Fund Association of Japan and the New York City Retirement fund.   A notable sub-group of the top 300 is the sovereign pension funds which are controlled by various nation states. Using the widest definition to describe these funds, they now amount to US$2.4 trillion, up 35% p.a. over the past three years.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.13 HKEx publishes consultation paper on periodic financial reporting**   On 31 August 2007, Hong Kong Exchanges and Clearing Limited (HKEx) published a consultation paper on periodic financial reporting.   The consultation paper seeks the market's views regarding: the shortening of reporting deadlines for half-yearly and year-end results announcements and reports for Main Board issuers; the introduction of quarterly reporting requirements for Main Board issuers; and alignment of the Growth Enterprise Market, or GEM, Listing Rules related to quarterly reporting with the proposed new Main Board requirements.   According to HKEx, implementation of the proposals would increase transparency and address concerns about the development of an information asymmetry between management, insiders and the investing public and bring Hong Kong's reporting standards into line with the standards in most of the other major international financial centres.   HKEx seeks comment in response to the consultation paper by 5 November 2007.   The consultation paper and the questionnaire booklet are available on the [HKEx](http://www.hkex.com.hk/consul/paper/consultpaper.htm" \t "_new) website.   If the proposals are adopted, HKEx plans to implement them in phases, commencing in 2008.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.14 Impact of sectoral differences in the definition of capital instruments for financial conglomerates**   On 30 August 2007, the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) published a report on the possible impact of the differences in the definition of capital instruments provided for by the European banking, insurance and securities regulation, for the supervision of a conglomerate. This assessment has been produced by the Interim Working Committee on Financial Conglomerates (IWCFC) in response to the Commission's call for advice on sectoral rules on eligible capital and analysis of the consequences for supervision of financial conglomerates.   This report follows the first report on the cross-sectoral comparison of the sectoral rules for the eligibility of capital instruments in the regulatory capital published in January 2007.   The impact analysis has been constructed around building blocks necessarily simplifying the complex reality of financial conglomerates and based on fictitious numerical examples.   This report focuses on the impact of the key differences flagged by the industry in the January report: the treatment of hybrids (including the limits), the different approaches to deductions, the treatment of unrealised profits and revaluation reserves. The differences in consolidation approaches and methods in each sector were not tested. Instead, the exercise used the three methods of calculation as laid down in the Financial Conglomerates Directive. Like for its first report, the analysis did not consider national implementation of the Directive.   The impact analysis confirms that the key differences identified in the January report can have an impact in the composition and amount of regulatory capital of a financial conglomerate. The Financial Conglomerates Directive (FCD) does not increase, nor alleviate, nor eliminate the differences in capital that are driven by the sectoral differences. This is valid across the three methods of consolidation allowed by the FCD.   The differences in the type of capital elements eligible in each sector and the differences in the limits to the inclusion of eligible items might create distortions and influence the localisation of certain assets or transactions within a conglomerate. Some market participants however pointed out that management decisions are not only driven by the prudential regulation and that there is no strong evidence that financial conglomerates take advantage of these differences.   In the next few months, together with market participants, the IWCFC will reflect on the rationale behind the sectoral differences and how to address these differences in sectoral rules from a financial conglomerates perspective.   The surveys of national implementations of the sectoral Directives are available from the [Committee of European Banking Supervisors](http://www.c-ebs.org/Advice/OF_part1_rules.pdf" \t "_new) (CRBS) and the report is available from the [Committee of European Insurance and Occupational Pension Supervisors](http://www.ceiops.org/media/files/publications/submissionstotheec/Reportontheimpactofthedifferencesinsectoralrulesonthecalculationofownfundsoffinancialconglomerates.pdf" \t "_new) (CEIOPS).  The report is published on the [CEBS](http://www.c-ebs.org/" \t "_new) and the [CEIOPS](http://www.ceiops.org/" \t "_new) websites.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.15 APRA releases discussion paper on consolidated group reporting for general insurers**    On 27 August 2007, the Australian Prudential Regulation Authority (APRA) issued a discussion paper on proposed reporting requirements for consolidated general insurance groups.   The proposals in the discussion paper ensure that reporting by general insurance groups is focused on APRA's key objective of assessing the capital adequacy and financial performance of such groups.   The paper is part of APRA's implementation of recommendation 38 of the HIH Royal Commission which states that APRA should prudentially regulate general insurance groups and apply a group minimum capital requirement.  APRA has previously issued a discussion paper in May 2005 and a response paper in October 2006 on this subject.    In submissions on the earlier papers, a key theme was concern by insurers with the possible reporting burden for consolidated general insurance groups.   This paper is an interim step in the development of consolidated general insurance group supervision and the full package of draft prudential standards and reporting standards will be released in late 2007 subsequent to the receipt of submissions on this paper.   APRA invites the insurance industry and other interested parties to comment by 12 October 2007 on the proposed consolidated group reporting requirements for general insurers.    The discussion paper is available on the [APRA](http://www.apra.gov.au/General/Proposals-relating-to-GI.cfm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.16 Call for independent audit oversight in New Zealand**   On 23 August 2007, the New Zealand Securities Commission and representatives of New Zealand operations of Deloitte, Ernst & Young, KPMG and PricewaterhouseCoopers wrote to the Minister of Commerce, Hon Lianne Dalziel, asking for independent audit regulation and oversight in New Zealand. It is stated in the letter that:   "It is the view of the Securities Commission and the Big 4 that there needs to be independent audit oversight in New Zealand in line with international best practice. New Zealand currently lacks an independent audit oversight structure and has fallen behind other jurisdictions in this regard.   "Currently audit oversight in New Zealand is carried out by the New Zealand Institute of Chartered Accountants (NZICA) which is the professional body that most auditors in New Zealand belong to. Where the oversight role is undertaken solely by such a professional body it lacks the crucial elements of perceived independence and objectivity. Such an arrangement does not have the capability and credibility to engage with other regulators and participate in international audit regulator forums such as the International Forum of Independent Audit Regulators (IFIAR).    "New Zealand is a very small part of the global capital markets and it cannot afford to ignore these issues and continue to act in a way that differs from jurisdictions that are major players in the capital markets.   "The CEOs of the International Audit Networks (representing the six largest global accounting firms) in a recently published vision document (November 2006) state that they recognise that the establishment of independent audit oversight regimes have reinforced the independence of auditors, and in their view, improved the governance and regulation of the auditing profession. They state that independent audit oversight regimes have led to audit firms putting greater emphasis on audit quality.   "The CEOs of the International Audit Networks have called for regulators to minimise national differences in the oversight of auditors and enforcement of relevant audit standards. They would like to see audit regulation more globally coordinated and believe that IFIAR may be an appropriate body to pursue this objective. There is little scope for regulatory convergence in audit regulation and oversight between New Zealand and other major capital markets if we do not have an independent audit regulation and oversight regime."   The letter is available on the [New Zealand Securities Commission](http://www.seccom.govt.nz/publications/documents/letter-audit2.shtml" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.17 APRA's Basel II approach to margin lending and rating agencies**   On 22 August 2007, the Australian Prudential Regulation Authority (APRA) released details on its proposed implementation of two aspects of the Basel II Framework:  margin lending, and recognition of external credit assessment institutions (ECAIs), more commonly known as credit rating agencies.  **(a) Margin lending**  APRA has been considering the appropriate risk‑weight for calculating capital requirements for margin lending activities of authorised deposit‑taking institutions (ADIs), under the standardised and advanced approaches of the Basel II Framework.   Under the Framework, both the standardised and advanced approaches to credit risk would typically result in a zero capital requirement for margin lending exposures, compared with eight per cent (a 100 per cent risk-weight) under current requirements.  However, APRA has previously stated that it did not regard this as acceptable and announced, in April 2005, that the issue required further analysis. APRA subsequently engaged an independent consultant to review the level of capital that may need to be set aside for margin lending exposures.  The consultant recommended that a capital charge of three per cent (equivalent to a 37.5 per cent risk‑weight) be applied to margin lending exposures, with an acceptable range between one per cent (12.5 per cent risk-weight) and four per cent (50 per cent risk-weight).  Based on its assessment of the relatively conservative policies and practices of ADIs currently involved in margin lending activities, APRA has decided that, as an interim measure, it will apply a risk-weight of 20 per cent to outstanding loans that are backed by listed equity investments; otherwise, exposures are to be treated as secured loans. This treatment will apply under both the standardised and advanced approaches to credit risk.   APRA will be further reviewing the detail of individual ADI approaches to margin lending; on the basis of those reviews, APRA may consider the application of variable risk-weights to margin lending exposures or recognition of internal models.  **(b) ECAI recognition**  Under the standardised approach to credit risk, ADIs may use credit assessments provided by recognised ECAIs, where available, to determine the risk‑weights on their rated credit exposures.   APRA has now released draft guidelines setting out the eligibility criteria by which it will recognise ECAIs. The guidelines also provide an outline of APRA's proposed process for mapping a recognised ECAI's credit assessments to the risk-weights under the standardised approach.  As part of these proposals, APRA will give automatic recognition to an ECAI if it is regulated by the US Securities and Exchange Commission as a 'nationally recognised statistical rating organisation'. In addition, if an ADI has an exposure domiciled in any one of 19 specified countries, it will be able to use the credit assessments of an ECAI recognised by the national supervisor in that country.   APRA's proposed recognition process is not a form of prudential regulation and does not constitute licensing of ECAIs.  APRA's focus is on ensuring that an ECAI's processes and policies are rigorous and systematic, and produce credit assessments of sufficiently high quality to be used by ADIs. It will be the responsibility of each ADI to determine whether it uses the ratings of a particular ECAI.  The draft ECAI guidelines are available on the [APRA](http://www.apra.gov.au/ADI/Basel-II-implementation-in-Australia.cfm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.18 Survey of US auditors' fees**  In a sign of a major increase in audit activity since the passage of the US Sarbanes-Oxley Act, the median fees earned by the top US auditing firms increased by 345 per cent in the five years to 2006 according to a study published on 22 August 2007.  The findings came in a study of 100 auditing firms and 1,300 companies by The Corporate Library, a US corporate governance research firm. The study said the work of auditors had changed "dramatically", taking into account "much more internal control testing" and compliance work than it did pre-2002.  Among its findings, the study revealed that clients of Arthur Andersen were divided equally among the "big four" after its demise in 2003. The study also found that:   * PwC had the highest share of the market among S&P 500 companies throughout the whole survey period; * The Big Four audit over 95 per cent of public companies with market capitalisations of over US$750m; * The rate at which companies changed their auditor dropped considerably after the failure of Arthur Andersen; * The median tenure for auditors rose from four years to five between last year and this year; * Median total auditor costs rose to US$2.7m last year, from US$1.4m in 2001; and * The rise of smaller firms first occurred in 2005, with market share at non-big four firms going from 1.97 per cent in fiscal 2001 to 5.5 per cent last year.   [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.19 Company audit reporting is inadequate say pension funds**  A quarter of the UK's larger companies do not provide proper reports to shareholders on audit practices, a major UK pension fund group has claimed in a media release published on 13 August 2007.   In its response to the UK Financial Reporting Council's (FRC) recent consultation on the Combined Code on corporate governance, the Local Authority Pension Fund Forum (LAPFF) says that its research has established that 23% of the FTSE 350 do not adequately report on the activities of their audit committees. LAPFF says that in these cases, companies' disclosures amount to little more than a summary of their audit committees' terms of reference.  The Forum research found that the standard of audit committee reporting varied by size of company. The Forum discovered that 11% of the FTSE100 did not produce adequate reports, compared to 30% of Midcaps and 40% of Smallcaps.  In its response to the FRC consultation, the Forum argues that the Combined Code should reinforce the need for an informative description of the work covered during the year, rather than a general statement of responsibilities. Although the Smith guidance, which is now incorporated into the Code, provided a proposed outline for audit committee reports, the Forum believes many companies do not act in the spirit of the guidance.  In February the Forum announced that it would carry out a major shareholder engagement campaign on audit reform during 2007. The campaign employs a tiered strategy aimed at both encouraging laggard companies to meet baseline industry practice, and embedding best practice.  Audit has become an increasingly high-profile corporate governance issue in recent years. In addition to concerns about the independence of auditors there has also been a focus on the concentrated nature of the audit business, with the so-called "Big Four" accounting firms dominating the market for company audit services.  The Forum's response to the FRC consultation is available on the [LAPFF](http://www.lapfforum.org/" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.20 Survey of UK pension funds' engagement**    On 13 August 2007, the 2007 Shareholder Engagement Survey was published by the National Association of Pension Funds (NAPF). It shows that Britain's largest pension funds are actively engaging with the companies in which they invest.   Some of the key findings are:   * Pension funds are playing an active role in corporate governance: More than three quarters of funds surveyed have helped change remuneration packages, board membership or corporate strategy by engaging with companies in which they invest. * Corporate governance standards are improving: Eight out of 10 funds believe corporate governance standards are continuing to improve. None believed standards had deteriorated. * The ISC Statement of Principles is being implemented: Every fund surveyed was aware of the Institutional Shareholders' Committee's Statement of Principles on institutional investors' responsibilities. The Statement says that investors and their agents should monitor company performance, and should be prepared to establish dialogue and intervene where necessary. Two thirds had incorporated the Principles into managers' contracts, with the very largest funds most likely to have done so. * Managers are reporting regularly: Pension funds are demanding regular and comprehensive reports from agents who vote or engage with companies on their behalf. On average, investment managers report to pension funds at least twice a year.   The NAPF's 2007 Shareholder Engagement Survey is available on the [NAPF](http://www.napf.co.uk/DocumentArchive/Policy/Reports%20and%20Responses%20to%20Consultations/10_2007/20070813_Pension%20Funds%27%20Engagement%20with%20Companies%20-%2013%20August%202007.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.21 Board composition and non-executive director pay in the top 100 Australian companies**    ISS Australia was commissioned by the Australian Council of Super Investors (ACSI) to conduct an empirical analysis of several key corporate governance features in the top 100 listed Australian companies for the 2006 financial year.    The major conclusion from the results of the 2006 study is that the 'professional non-executive director' (NED) is a continually growing phenomenon. A 'professional NED' is defined as someone who holds two or more non-executive positions on S&P/ASX 100 boards. In 2006, 134 individuals were appointed non-executive directors of an S&P/ASX 100 company; of these, 94 already held or had in the past held an S&P/ASX 100 company directorship. Well over half of new non-executive director appointees in 2006 were therefore experienced large company directors. In 2005, 85 of the 134 new appointees were past or present S&P/ASX 100 company directors; whereas in 2004, 25 of the 93 new appointees were past or present S&P/ASX 100 company directors. It appears that in 2006, as seen in 2005, a major qualification for gaining entry to an S&P/ASX 100 company board was to already be or have been a company director, and thus, the professional non-executive director phenomenon has consolidated.    This trend was also reflected in the growing number of S&P/ASX 100 company directors holding multiple board seats within the top 100. This trend has been growing steadily since 2001, when 72 professional NEDs held 164 board seats (30.6% of all S&P/ASX 100 company board seats). In 2006, 123 professional NEDs held 283 board seats (45.1% of all non-executive board seats), a small increase on 2005, when 117 professional NEDs accounted for 42.8% of all top 100 non-executive board seats. The average female director is more likely than the average male director to hold two or more S&P/ASX 100 board seats. In 2006, women accounted for 11% of all directors, up from 9.2% in 2005, and these women held 12.6% of all board seats, up from 11% a year earlier. Of the 68 women on S&P/ASX 100 company boards, 40 (58.8%) held more than one board seat at an ASX-listed company, compared to 43.8% of male S&P/ASX 100 directors.    The most common age band for non-executive directors is 60 to 69. This reflects the fact that retired former executives make up a very significant proportion of non-executive directors serving on S&P/ASX 100 boards. Separate research by ISS confirms that 50% of S&P/ASX 200 non-executive directors were, as at 2006, retired former corporate executives. (The vast majority had not held an executive position at the company on whose board they now sit as a non-executive director; their executive careers were with other companies).   In 2006, male non-executive directors were on average 7.4 years older than their female counterparts, and male executive directors were on average 2.3 years older than their female counterparts.    Non-executive director pay again increased in 2006, however at slower rates than in 2005. In 2006, the average non-executive director (excluding the chairperson) received $162,339; up by 5.3% from 2005 (NED pay grew by 7.1% between 2004 and 2005 and by 5.4% between 2003 and 2004). Non-executive chairpersons' remuneration has continued to increase, albeit at a decreasing rate - not even increasing in line with inflation over the period (the consumer price index increased 4.0% from 30 June 2005 to 30 June 2006). The average S&P/ASX 100 non-executive chairperson saw their remuneration increase 2.5% in 2006 to $372,793, which was a significantly smaller rate of increase than the 6.6% growth in average remuneration between 2004 and 2005 and the 9.9% growth between 2003 and 2004. The rate of increase in remuneration for non-executive directors however again outstripped inflation and growth in average weekly adult earnings, which grew by 4.2% between June 2005 and June 2006.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.22 IOSCO publishes responses received to its consultation report on market intermediary management of conflicts**  In August 2007, the International Organization of Securities Commissions (IOSCO) published the responses received to its consultation report on "Market Intermediary Management of Conflicts that Arise in Securities Offerings".  The responses are available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD252.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%231)  **1.23 Employees or shareholders - which are more important in corporate eyes?**   An Australian-first study into how company directors' rank employees, shareholders and other stakeholders, conducted by University of Melbourne corporate and employment law experts, shows that directors prioritise shareholders only slightly over employees, distinguishing Australian directors from their US counterparts.   Led by Professor Ian Ramsay, from the Centre for Corporate Law and Securities Regulation, and Professor Richard Mitchell, from the Centre for Employment and Labour Relations Law, the project involves the first in-depth survey of directors from a diverse range of Australian companies, including rarely studied small companies.   The research analyses the way that directors balance the competing and sometimes conflicting interests of stakeholder groups, such as employees, creditors and shareholders.   The report reveals that a majority of directors (55 percent) believe that acting in the best interests of the company means they are required to balance the interests of all stakeholders. Very few directors equate the best interests of the company with the short-term interests of shareholders (0.3 percent).   The findings have significant policy implications. The obligations of directors toward company stakeholders and whether the law of directors' duties needs to be changed have been the subject of much public debate.  Two recent government inquiries conducted by the Parliamentary Joint Committee on Corporations and Financial Services and the Federal Government's Corporations and Markets Advisory Committee resulted in two reports on this topic in the past year. However, there has, until the University of Melbourne survey, been little evidence of directors' attitudes and business practice.   According to the researchers, the survey reveals that there may be less need to change the law of directors' duties to require directors to take into account the interests of defined groups of stakeholders other than shareholders in light of evidence that most directors are already balancing the interests of a range of stakeholders. The survey shows that an overwhelming majority of directors (94.5 percent) believe that the law concerning directors' duties is broad enough to allow them to consider the interests of stakeholders other than shareholders.    The survey also shows that ensuring customers are satisfied, growing the business and ensuring employees are fairly treated are the matters that are rated as important by the largest proportion of directors. Overall, less than half (45 percent) of the directors surveyed feel that increasing the share price is important to them, although the proportion among directors of listed companies holding this view is considerably higher (60.4 percent).   The [report](http://cclsr.law.unimelb.edu.au/index.cfm?objectid=E3D38F25-B0D0-AB80-E2F1BF648C87997F" \t "_new) is available from the Centre for Corporate Law and Securities Regulation.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%233) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007_files/spacer%281%29.gif | | |  | | --- | | **2.1 ASIC issues report on relief applications decided between January to May 2007**  On 6 September 2007, 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 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) (the Act) between 1 January and 31 May 2007.   The report, 'Overview of decisions on relief applications (January to May 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/asic/asic.nsf/byheadline/ASIC+Gazette?openDocument" \t "_new) website.   **Applying for relief**  Applications for relief must be in writing and should address the requirements set out in Regulatory Guide [RG 51] Applications for relief. Applications can be submitted electronically to: [applications@asic.gov.au](mailto:applications@asic.gov.au).   More information on applying for financial services relief is available at: [http://www.asic.gov.au/asic/asic.nsf/byheadline/Applying+for+relief+from+the+FSR+provisions?openDocument](http://www.asic.gov.au/asic/asic.nsf/byheadline/Applying+for+relief+from+the+FSR+provisions?openDocument" \t "_new)  Information on applying for corporate finance relief is available at: [http://www.asic.gov.au/asic/asic.nsf/byheadline/Applying+for+relief+-+corporate+finance+and+markets?openDocument](http://www.asic.gov.au/asic/asic.nsf/byheadline/Applying+for+relief+-+corporate+finance+and+markets?openDocument" \t "_new)  ASIC has published previous information releases on its relief decisions including:   * Information Release [IR07/17] ASIC issues report on relief applications - October to December 2006 (15 May 2007); * Information Release [IR 07/01] ASIC issues report on relief applications - July to September 2006 (18 January 2007); * Information Release [IR 06/33] ASIC issues report on relief applications decided between April to June 2006 (29 September 2006); and * Information Release [IR 06/27] ASIC report on relief applications expands to include corporate finance applications (25 July 2006).   The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_97_Relief_report_Jan-May07.pdf/$file/REP_97_Relief_report_Jan-May07.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%234) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007_files/spacer%281%29.gif | | |  | | --- | | **3.1 ASX Annual General Meeting**   ASX Limited will hold its 20th Annual General Meeting (AGM) on Tuesday 30 October 2007.     Further information about the AGM is available on the [ASX](http://www.asx.com.au/about/shareholder/index.htm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h3)  **3.2 ASX Listing Rules Guidance Note 4 - foreign entities international listings**  ASX has reviewed its approach to waiver applications made by foreign companies with a primary listing on another exchange ("foreign companies") seeking relief from certain obligations under the ASX Listing Rules.   Such waivers have been granted sparingly. Whilst this is unlikely to change significantly, some limited circumstances have been identified where applications that may have been denied in the past would now be likely to succeed.    Where the company is also listed on one of the world's other major exchanges and ASX is satisfied that differences between the two sets of listing rules in relation to a particular obligation are merely "around the edges" rather than differences as to the substance of the obligation, then ASX may recognise compliance with the obligation created by the listing rules in the place of primary listing as constituting full compliance with the ASX requirements.   ASX does not propose to devise inflexible rules as to which exchanges are sufficiently "major" to warrant this form of recognition or which aspects of which rules will be regarded as being sufficiently ancillary to warrant this treatment.   Instead, ASX will be guided by considerations such as:   * will the inconvenience to the listed company, in satisfying two sets of requirements which are assessed as not being significantly different, outweigh any detriment to users of the ASX market from non-application of ASX requirements; and * will the outcome be consistent with the underlying purpose of the relevant rule and with the principles that are taken into account in applying the rules generally.   Guidance Note 4 to the ASX Listing Rules will be amended to reflect the greater preparedness to issue waivers to foreign entities involving substituted compliance. | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%235) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007_files/spacer%281%29.gif | | |  | | --- | | **4.1 Guidance Note 04**   On 11 September 2007, the Takeovers Panel announced that it has published a revised version of its Guidance Note 04, "Remedies and Enforcement".    The reissue follows an amendment to paragraph 4.6, which deals with Panel orders and compliance with the statutory provisions. In the revised version the Panel states that it considers that its power to make orders under section 657D includes a power to make an order that a person do something contrary to a relevant provision in the Act, but not a power to make an order that a person do something contrary to another law.   The Panel also took the opportunity to update the guidance note to reflect the recent amendments in the [Corporations Amendments (Takeovers) Act 2007.](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=95468" \t "_new)  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h4)  **4.2 Equity derivatives - draft Guidance Note for discussion**    On 10 September 2007, the Takeovers Panel released a draft Guidance Note, and discussion paper, seeking public discussion and comment on the approach which the Panel proposes as to when, and in what circumstances, the use of equity derivatives may constitute unacceptable circumstances. The purpose of the draft Guidance Note is to facilitate discussion among, and obtain feedback from, market participants and investors who may be affected by any guidance which the Panel publishes on equity derivatives, or otherwise have an interest in such guidance.    The central proposition is that for control and substantial holding disclosure purposes, at least, long equity derivatives (cash settled or deliverable) should be treated the same as physical holdings of the relevant securities.   The draft Guidance Note follows a number of significant developments in takeovers law and regulation in Australia over the last two years, including:   * the Panel's decisions in the Austral Coal proceedings; * the court's decisions in the Glencore litigation and in the Australian Pipeline Trust litigation; and * the commencement of the [Corporations Amendments (Takeovers) Act 2007 No. 67 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=95468" \t "_new) on 13 May 2007.   The Panel notes similar regulatory developments in the United Kingdom with the amendments to the London City Code on Takeovers and Mergers in 2006. The draft Guidance Note is open for comment for 12 weeks. The Panel will publish the results of this consultation process, including the main suggestions received, the changes made as a consequence, and the reasons the Panel takes up, or does not take up, submissions. Responses are due by 7 December 2007.    In essence the Panel's discussion Guidance Note indicates that:   * when considering whether or not unacceptable circumstances exist, the Panel will normally treat a person's long equity derivative interests and voting power in listed entities in a combined manner (Combined Holding); * persons considering disclosure of their interests in listed entities should look to their Combined Holding and disclose a Combined Holding that would meet the shareholder disclosure thresholds in Chapter 6C.2 if the person held a relevant interest in all of the securities to which the Combined Holding relates; * when considering whether or not unacceptable circumstances exist the Panel is unlikely to look through a person's equity derivative holding to determine whether or not the equity derivative they hold is fully or substantially hedged by the underlying securities, nor whether or not the holder of the equity derivative was aware of the hedge status of the equity derivative; * the Panel does not consider it appropriate to require disclosure of "short" equity derivative interests in the absence of any other Combined Holdings which would trigger disclosure obligations; * the Panel considers that it would be inappropriate to "net off" long and short equity derivative positions against each other or against physical holdings when calculating a person's Combined Holding.   **(a) Background**   The area of equity derivatives came to the attention of the Panel in late 2004 and early 2005 and the Panel commenced consideration of the issues in early 2005. Items which came into the public domain over that period included:   * In early 2005 the Code Committee of the London Takeover Panel published a Public Consultation Paper entitled "Dealings in Derivatives and Options" (7 January 2005). The changes proposed in the consultation paper were introduced in November 2005. * In February and March 2005 there was media comment on the acquisition of 11 per cent of Portman Limited during Cleveland Cliffs' takeover offer which was discussed as potentially being related to an equity derivative contract. * In March 2005 BHP Billiton disclosed that it had acquired an economic interest in 4.3 per cent of WMC Ltd via an equity derivative leading up to BHP's successful takeover offer for WMC.   It was agreed by the Panel's members that the Panel should develop some Panel guidance in this area to assist the market. Given the complicated nature and structure of derivatives contracts, it was suggested that the guidance committee include at least one representative from the derivatives market. Since that time there has been regular commentary in the media concerning the use of equity derivatives in takeover situations both in Australia and overseas in a number of high profile takeover bids.  **(b) Why did the Panel decide to draft a guidance note on equity derivatives?**  The Panel was conscious that equity derivatives were being increasingly used by potential bidders, and by speculators such as hedge funds, in respect to target shares prior to the announcement of, or during, a takeover, both in Australia and overseas. The Panel was concerned that equity derivatives should not be used in ways that undermine the policy of Chapter 6 or avoid the provisions of Chapter 6-6C. The Panel considered that it would be desirable for it to give some guidance as to when, and in what circumstances, the use of equity derivatives may constitute unacceptable circumstances. Such guidance would also assist bidders and other persons as to measures that they might take to reduce any risk that conduct they take in relation to equity derivatives would give rise to unacceptable circumstances. The Panel emphasised in its discussion document that it does not wish to disrupt, or place unreasonable restrictions on the equity derivative market in Australia. The Panel considers that the approach which it is proposing for discussion in its draft Guidance Note will affect a very small percentage of equity derivative transactions in Australia, and the costs imposed on these types of transactions are reasonable and measured when assessed against the benefits of an efficient, competitive and informed market as a whole.  The Panel noted that even after it develops a final document following the discussion process its document will continue to be a work in progress and that the Panel will monitor the equity derivative market in Australia closely to see how its guidance is working in light of developments in the market.  **(c) Key points on which the Panel seeks comment from market participants**  The Panel is particularly interested in public comment on:   * the fundamental concept of treating a person's long equity derivative interests and voting power interests together as a Combined Holding when considering whether or not unacceptable circumstances exist; * the appropriate amount and nature of disclosure which is required in relation to equity derivatives, and the appropriate method and channel for that disclosure; * whether there should be any netting of a person's Combined Holding with any short equity derivative positions or short physical positions they hold; * whether the Panel should normally consider whether the writer of an equity derivative has hedged that derivative, the form of hedging, the knowledge of the holder of the equity derivative of that hedging (if any), or the purpose for which the equity derivative was entered into; * the appropriate disclosure of short physical positions and short equity derivative positions; * the appropriate treatment of equity derivatives in relation to beneficial ownership notices; * whether the fact that equity derivatives have been entered into in the context of a control transaction, should be of deciding importance in any decisions of the Panel; * the costs of compliance with the Panel's proposed guidance; and * whether the Panel's proposed guidance will have any adverse effect on the market for equity derivatives in non-control circumstances.   It is the Panel's policy to publish or otherwise make available all responses to formal consultation, unless respondents indicate that they do not consent. It is also the Panel's policy to publish a "Consultation Response" document after the consultation period setting out the main comments that the Panel has received and the reasons why the Panel has taken up, or not taken up, the comments or suggestions received.  Comments should be addressed to the Panel's Director and Counsel, Mr Nigel Morris and Mr Alan Shaw at: [takeovers@takeovers.gov.au](mailto:takeovers@takeovers.gov.au).   The draft Guidance Note is available on the [Panel](http://www.takeovers.gov.au/display.asp?ContentID=10" \t "_new) website. The Panel is also seeking comments on the draft Guidance Note by Friday 7 December 2007. | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%236) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007_files/spacer%281%29.gif | | |  | | --- | | **5.1 Court unwilling to reject members' application for access to company records where records may be important in subsequent proceedings**   (By Holly Edwards, Blake Dawson Waldron)   In the matter of Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd [2007] WASC 207, Supreme Court of Western Australia, Martin CJ, 3 September 2007    The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2007/september/2007wasc0207.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2007/september/2007wasc0207.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a)  Summary**   This was an application by Areva NC (Australia) Pty Ltd ("Areva"), as a member of Summit Resources Limited ("Summit"), for access to records of Summit and its subsidiary pursuant to sections 247A and 237 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) ("Act") ("First Proceedings").   Areva held 10.01 % of the issued capital in Summit Resources Limited ("Summit"). Summit and one of its subsidiaries were involved in legal proceedings that they wished to settle ("SRA Proceedings"); however, Areva wished to see the proceedings continue. When Summit and the other parties to the proceedings announced that they would settle, Areva issued separate proceedings seeking, inter alia, termination of the settlement agreement ("Second Proceedings").    Martin CJ granted Areva's application in all but one category of documents sought to be inspected, holding that the application was made in good faith and for a proper purpose because Areva needed the information in order to make its case in the Second Proceedings.   **(b)  Facts**     The facts of this case are lengthy but explanation of them is important in the context of the outcome.    Summit's subsidiary, Summit Resources (Australia) Pty Ltd ("SRA") was a party to a joint venture with Mount Isa Uranium Pty Ltd ("MIU"), a subsidiary of Valhalla Uranium Ltd ("Valhalla") which was successfully taken over by Paladin Resources Ltd ("Paladin") in October 2006. Prior to the takeover, Resolute Limited ("Resolute") owned the majority of capital in Valhalla.    In the meantime, in September 2006, SRA commenced the SRA Proceedings against MIU and Resolute for material breaches of the joint venture agreement. The agreement provided that in the event of such an unremedied breach, the non-defaulting party would be entitled to buy out the defaulting party's 50% interest in the joint venture for 85% of the value of the interest of the defaulting party.    Subsequently, in February 2007, Paladin announced a takeover bid for Summit. Certain events followed which are not relevant for the purposes of this note, but by May 2007, Areva had obtained a 10.01% stake in Summit. Subsequently, on 1 June 2007, Paladin announced the successful completion of the takeover of Summit, having acquired 81.82% of its issued capital. Importantly, therefore, Paladin now owned the companies on both sides of the joint venture (and hence both sides of the SRA Proceedings).   On 1 August 2007, Areva issued the First Proceedings (which are the subject of this note) seeking access to SRA and Summit's records pursuant to sections 247A and 237 of the Act 2001.   On 3 August 2007, the parties announced that they had entered into an agreement to settle the proceedings and a memorandum of consent signed by the parties to the SRA Proceedings was lodged with the court proposing to make orders that the action be dismissed. Shortly after, Areva advised the court that it would seek injunctive relief restraining the extraction of orders dismissing or discontinuing the SRA Proceedings.   Then, on 6 August 2007, Areva commenced the Second Proceedings seeking leave to intervene in the SRA Proceedings pursuant to section 237 of the Act and to restrain SRA and MIU from entering into any settlement arrangement without its consent. Areva also sought orders to terminate the agreement to settle the SRA Proceedings between SRA and MIU.   In the First Proceedings, Areva relied on section 247A in respect of access to Summit's books and records, given that Areva was a member of Summit. In relation to the application for access to SRA's records, Areva relied on section 247A(3), as it had sought leave to intervene in the SRA Proceedings under section 237 and was therefore entitled to apply under section 247A.   Areva sought access to the following five categories of documents:   1. documents containing legal advice given to Summit and/or SRA as to the merits of the SRA Proceedings. 2. documents containing any consideration by Summit or SRA, and their boards and committees, of (inter alia) legal advice as to the merits of the SRA Proceedings and other factors in the decision making process in arriving at a decision to enter into a settlement agreement of the SRA Proceedings. 3. documents containing instructions given to or matters considered by Summit's legal counsel in relation to preparation of legal advice. 4. documents discovered in the SRA Proceedings (including by non-parties) which are or copies of which are in SRA's solicitors possession. 5. correspondence passing between any combination of Summit, SRA, MIU and Paladin in relation to the SRA Proceedings.   In its arguments, Summit and SRA argued that Areva's application to intervene under section 237 would not succeed and therefore the application under section 247A could not be in the requisite good faith and for a proper purpose. Summit and SRA contended:   1. that Areva would not be able to overcome the rebuttable presumption in section 237(3) that the grant of leave is not in the best interests of the company; and 2. that the settlement between the parties pursuant to the SRA Proceedings had already successfully discharged SRA's claims against Resolute and MIU.   **(c)  Decision**    The court found as follows:   1. In response to Summit and SRA's first contention, the court reasoned: ". as one of the purposes for which access to books and records may be granted under section 247A is for assessing and advancing an application under section 237, it would be quite wrong to deny an applicant access because of a conclusion that the application under section 237 had no reasonably prospect of success, unless it was clear beyond argument.". For this reason, the court held that SRA and Summit's submissions in relation to the rebuttable presumption under section 237(3) could be "readily dismissed" because the documents sought were integral to the decision to settle the SRA Proceedings and that it was "impossible to say that those documents could not affect the assessment of the strength of Areva's application under section 237". 2. In response to Summit and SRA's second contention, the court was less certain because if the SRA proceedings had been discharged and released, it could not be said that Areva's application to intervene could be in the best interest of SRA.  However, Areva argued that if such a contention was used to argue for the futility of its application under section 237, based on the information garnered from access to the books and records, it might counter the argument by seeking injunctive relief under section 1324 to restrain MIU and Resolute (as beneficiaries of the settlement agreement) from relying on that agreement due to a breach of section 208 of the Act. Section 208 controls the circumstances in which a public company may give a financial benefit to a related party (in this case, the financial benefit would be the settlement between MIU and Summit, which, due to their common parent (Paladin) would be deemed to be related).   After lengthy reasoning the court held, again, that because the documents sought by Areva could bear upon Areva's assessment of whether Summit had breached section 208, it was not appropriate to allow the application to be defeated    Ultimately, Martin CJ was satisfied that Areva's application was made in good faith and for a proper purpose and accordingly allowed Areva access to the first 4 categories of documents, questioning the breadth of the fifth category.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h5)  **5.2 ASIC officers safer from tort of malicious prosecution**   (By Cherie Canning, Mallesons Stephen Jaques)   Chapel Road Pty Ltd v Australian Securities and Investments Commission [2007] NSWSC 975, Supreme Court of New South Wales, Howie J, 31 August 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc975.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc975.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   This case considers the appropriateness of applying the tort of malicious prosecution to a decision of an Australian Securities & Investments Commission ("ASIC") delegate to revoke a securities dealer's licence under section 187 of the Corporations Law (now repealed). The AAT set aside the delegate's decision to revoke the licence and instead directed that the licence be reinstated with additional conditions attached. The three key points made were that:   * the decision by the ASIC delegate to revoke the licence was not a "proceeding" for the purposes of the tort of malicious prosecution; * the tort of malicious prosecution is available to a company if it suffers injury as a result of proceedings brought against it; and * a decision to reinstate a licence with extra conditions was not sufficient to establish that the proceedings were terminated in Chapel Road's favour, a necessary element to establish the tort.   The case also considers the importance of ASIC providing an opportunity to meet the case made against the company. Whilst the failure to provide a hearing before ASIC's delegate would not, without more, be sufficient to render the decision of ASIC to revoke the licence invalid or unauthorised, it was a relevant consideration in the court holding that an arguable case of misfeasance in public office was made out.   **(b) Facts**    Chapel Road held a securities dealer's licence subject to nine conditions. It had been granted that licence in 1996. In September 2000, ASIC became concerned, as a result of surveillance and other material that Chapel Road was in breach of the conditions of the licence.     On 27 November 2000, ASIC gave Chapel Road notice under section 837 of the Corporations Law stating that it was concerned that the company had breached some of the conditions attached to its licence. The notice provided Chapel Road with the date for a hearing to take place before a delegate of ASIC in order to determine whether any action should be taken in respect of the licence. It also gave notice of the company's right to appear, give evidence and make submissions at the hearing. The date appointed for the hearing was 21 December 2000. Those proceedings were adjourned to enable the material relied upon by ASIC to be given to the company and then arrangements were to be made for the matter to be continued by either evidence at a hearing or written submissions. There was some misunderstanding, and Chapel Road supplied written submissions to ASIC without taking the opportunity to have the hearing reconvened.   On 26 April 2001, ASIC's delegate determined that Chapel Road's licence should be revoked acting on his view that the company would not conduct its business efficiently, honestly and fairly.   Chapel Road sought a review of the decision by way of appeal to the Administrative Appeals Tribunal ("AAT"). The Tribunal set aside the decision to revoke the licence and remitted the matter back to ASIC with the direction that Chapel Road's securities dealer's licence be reinstated subject to appropriate conditions.   Chapel Road brought a claim against ASIC for malicious prosecution and misfeasance in public office, seeking damages amounting to $5,700,00.00 for loss of business as a result of the action taken by ASIC and $180,000 for expenses incurred in defending itself before ASIC and the AAT.    Associate Justice Harrison found that the claims brought against ASIC were hopeless and struck out the statement of claim. Chapel Road appealed this decision.   **(c) Decision**    **(i) Malicious prosecution**   At first instance the Associate Justice made the following finding in dismissing the malicious prosecution claim:   * It was arguable that the tort of malicious prosecution was applicable to administrative decisions, so this was not a basis to dismiss the claim for malicious prosecution at an interlocutory stage. * It was arguable that the decision by the AAT involved a "favourable termination of the prosecution" in the company's favour, so this was not a basis to dismiss the claim for malicious prosecution. * It was, however, not open for a company to maintain such a claim or to be eligible to the types of damages available in tort of malicious prosecution, and so the claim was hopeless.   All these findings were dealt with on appeal; it was held that the claim of malicious prosecution was correctly struck out, but on a different basis to that at first instance.   **(ii) The nature of the proceedings to which the tort relates**   The appeal in relation to the claim for malicious prosecution was disallowed on the basis it was not a proceeding for the purpose of the tort.   There was no dispute that on the present law a claim based upon malicious prosecution does not arise from administrative proceedings. Despite this, at first instance, the fact that these facts related to an ASIC delegate's decision to revoke a dealer's licence under section 826(1) of the Corporations Law were not held to be a basis for striking out the claim. At first instance, the Associate Justice found there was some suggestion that the law might develop to allow the tort to apply to administrative decisions and consequently the development of the law "should not be stifled at an interlocutory stage" by striking out the claim on this basis.    Howie J was critical of the reasoning not to dismiss the claim on the basis that the tort of malicious prosecution might one day extend to administrative decisions. He found that for this reasoning to be valid there had to be some "reasonable possibility" that, even though the established law did not permit the plaintiff's action at the present time, there might, within the life of the proceedings, be a change to that effect. In these circumstances, he found no evidence that this was the case. Moreover, he could see no "reasonable prospect in the foreseeable future" that the law would change to such a degree as to permit a claim of malicious prosecution to be brought against a decision such as was made against ASIC under the provisions of the Corporations Law.   The issue was also raised at the appeal as to whether the decision made by the ASIC delegate could be considered to be a proceeding. Howie J did not accept that these circumstances fell within the traditional concept of a proceeding for the purposes of the tort of malicious prosecution. Howie J supported the traditional concept of a proceeding as the 'invocation of jurisdiction of the court by process other than a writ' (Herbert Berry Associates Ltd v Inland Revenue Commission [1978] 1 All ER 161 or an application by a suitor to a court in its civil jurisdiction for its intervention or action (Cheney v Spooner (1929) 41 CLR 532). Notwithstanding that, the company in the circumstances before the court, was entitled to have a hearing in relation to the decision and to give evidence before the decision maker. There was no compulsion on the company to attend or to take action in respect of the decision being made.    **(iii) Standing of the plaintiff**   At first instance, the claim for malicious prosecution was struck out on the basis that it was not open for a company to maintain such a claim or to be eligible to the types of damages available under the tort of malicious prosecution.   On appeal, it was held that there was "no good reason why in policy or principle a company cannot seek damages for malicious prosecution if it suffers injury as a result of proceedings brought against it for some breach of the Corporations Law or otherwise." Accordingly, this was not a basis upon which the claim could be struck out.   **(iv) Favourable termination of the proceedings**   To successfully bring a claim for malicious prosecution, it must be established that the proceedings were terminated in the plaintiff's favour. Howie J held by analogy to criminal proceedings that, by the AAT directing the securities licence be reinstated subject to appropriate conditions, the conviction was confirmed but the sentence varied. Accordingly, it could not be argued that the proceedings before ASIC were terminated favourably to Chapel Road, given that in effect the terms of the decision found that at least some of the allegations brought by ASIC justified some change in the terms of the licence so as to impose more obligations than had previously been the case.   **(v) Misfeasance in public office**   Chapel Road also appealed on the grounds that the claim of misfeasance in public office was wrongly struck out. The issue was whether, on the pleadings, there was an invalid or an unauthorised act by ASIC that would support this cause of action. At first instance, her Honour found that there was none and that ASIC had acted in accordance with the power vested in it by the relevant provisions of the Corporations Law.    On appeal, it was held that the Associate Justice did not properly deal with the claim for misfeasance in public office. The Associate Justice interpreted this claim as relating to a lack of procedural fairness due to the absence of a hearing. On appeal, it was held that the allegation really related to a lack of procedural fairness on the basis that the result of the proceedings had been contrived at by ASIC in the manner in which the whole of the investigation and procedure had been conducted and that ASIC acted in that way in order to harm the company by depriving it of its licence so that it could not operate its business. Relevant factors were that no hearing was convened for Chapel Road to respond to ASIC's case and ASIC commissioned three compliance reports in respect of the company's business in March 2000, August 2000 and November 2000 which were withheld from the company until 21 December 2000.    With difficulty, as the pleadings were poorly drafted, the court held that an arguable case of misfeasance in public office was made out, although there would likely be real difficulties in proving the allegation. The statement of claim was struck out, but Chapel Road was given leave to replead the cause of action in misfeasance in public office.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h5)  **5.3 Can the power to make asset preservation orders be implied from the powers conferred under section 1323 of the Corporations Act?**   (By Justin Fox and Chrystal Dare, Corrs Chambers Westgarth)   ASIC v Oliver Banovec (No 2) [2007] NSWSC 961, New South Wales Supreme Court, White J, 31 August 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc961.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc961.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**   ASIC was carrying out investigations into possible breaches of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) by the defendant, Oliver Banovec, in his role as director of Capital Securitisation Ltd ("CSL"). ASIC sought asset preservation orders and an order restraining the defendant from coming within 100 metres of an Australian point of overseas departure under subsection 1323(1) of the Corporations Act. White J held that subsection 1323(1) does not confer the implied powers necessary to make the orders sought by ASIC.   **(b) Facts**     The defendant in this case, Oliver Banovec, was a director of CSL, a company being wound up. ASIC was investigating whether the defendant breached the financial services provisions set out in Chapter 7 of the Corporations Act, the fundraising provisions set out in Chapter 6 of the Corporations Act, or his director's duties. In addition, ASIC's investigation sought to determine whether the defendant engaged in false or misleading conduct in relation to raising funds from lenders to or investors in CSL.     ASIC sought orders under section 1323(1) of the Corporations Act, that the defendant be restrained from:   * dealing or disposing with moneys held for clients, or property acquired from moneys received by him from clients; * dealing with or disposing of any of his assets other than to pay ordinary living expenses up to $3,000 per week or costs reasonably incurred; and * coming within 100 metres of an Australian point of overseas departure.   Subsections 1323(1)(d) to (k) of the Corporations Act set out specific orders which can be made by the court where an investigation is being carried out under the Corporations Act in relation to an act or omission by the defendant that may constitute a contravention of the Act and the court considers it necessary or desirable to make one of those orders for the purpose of protecting the interests of a person to whom the defendant may be liable to make monetary compensation, or to account for financial products or other property. On 16 May 2007 in Australian Securities & Investments Commission v Oliver Banovec [2007] NSWSC 610, White J made certain limited orders in respect of the defendant but raised doubts as to whether the court has power under section 1323(1) to grant the more expansive orders sought by ASIC above.   **(c) Decision**     The court noted that the orders sought by ASIC do not fall within the express terms of the orders which the court is empowered to make under subsections 1323(1)(d)-(k).   In submitting that the court did have power to grant the orders requested, ASIC noted that the power conferred under subsection 1323(1)(h) to appoint a receiver and therefore to interfere with a relevant person's property was a greater power than the asset preservation orders sought. ASIC submitted that the grant of the greater power imported the grant of the lesser. ASIC emphasised that the purpose of the express powers granted in paragraphs (d)-(k) of section 1323 of the Corporations Act is to protect aggrieved persons from being left without any form of recompense. ASIC therefore submitted that the express powers should be understood to set the outside limits of the power, giving rise to an implied ancillary or incidental power to make orders preventing the dissipation of assets within the jurisdiction. ASIC also maintained that if the express powers set out in subsection 1323(1) were not accompanied by asset preservation orders in this case, the purpose of the section would be undermined.    ASIC further submitted that the courts have, for many years, granted asset preservation relief in section 1323 proceedings.  Examples drawn upon included: ASIC v Burke [2000] NSWSC 694, ASIC v Adler (2001) 38 ACSR 266, ASIC v Rajnoch [2003] QSC 46, ASIC v Michalik (2004) 211 ALR 285, and ASIC v Burnard [2006] NSWSC 611.   The defendant, however, submitted that the legislature had set out clear parameters of section 1323 by drafting detailed provisions in paragraphs (d) to (k). In addition, counsel for the defendant flagged the possibility of section 1323 operating oppressively if non-express powers were to be imported.      White J agreed with ASIC that in the aforementioned cases of Australian Securities and Investments Commission v Burnard and Australian Securities and Investments Commission v Rajnoch it was assumed that section 1323 "empowered the court to make an asset preservation order to restrain a relevant person from dealing with his or her assets within the jurisdiction.   In addition, White J held that where there is an express conferral of power by a statute, an implication will usually arise that the power to do that which might fairly be regarded as incidental to, or consequential upon, what is expressly authorised is also conferred. In ascertaining what might fairly be regarded as incidental to or consequential upon the express powers granted in subsection 1323(1), the section should be read in light of its overriding purpose: to secure the interests of aggrieved persons that the property of relevant persons is not dissipated or removed until their claims are determined.     White J felt however that the orders requested by ASIC were not merely incidental to powers already conferred in subsections 1323(1)(d)-(k). Instead, White J concluded that allowing ASIC's orders would require the implication of a power to give effect to the overall purpose of section 1323, not to give effect to the purpose of express powers therein.     White J understood ASIC's contention to be that Parliament had inadvertently failed to deal with the possibility of dissipation of assets in the jurisdiction, consideration of which is necessary to fulfil the purpose of the section in securing the interests of aggrieved persons.   In responding to the suggestion that the court should infer the power to make the requested orders on the basis of Parliamentary oversight, White J drew on the three conditions expressed by Lord Diplock in Wentworth Securities Ltd v Jones [1980] AC 74.  That is, in order for the necessary power to be imputed into the section, the "mischief" that the Act sought to remedy must be clear, it must be apparent that those drafting the section had unintentionally overlooked the issue, and it must be possible to determine with certainty the additional words which should have originally been included by those drafting the section and approved by Parliament. White J held that, despite the purpose of the provision being clear, any inadvertence on the part of those drafting the section is not evident. Nor is certainty as to which terms might have been inserted to confer the relevant power to make an order prohibiting or restricting a relevant person's dealing with his or her assets in the jurisdiction.   In addition, White J held that the power under subsection 1323(1)(k) does not allow the order sought by ASIC preventing the defendant from coming within a specified distance of an Australian point of departure. White J found that while subsection 1323(1)(k) confers the power to prohibit a relevant person from leaving the jurisdiction, it should not limit a person's right to travel within the jurisdiction, albeit in the vicinity of a point of departure.    White J also held that the court's inherent jurisdiction under section 23 of the [Supreme Court Act 1970 No. 52 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3748" \t "_new) should not be extended to the making of an asset preservation order in the circumstances of this case where frustration or abuse of the court's process is not evident.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h5)  **5.4 Time limits for company administrations**  (By Adrian Poon, Blake Dawson Waldron)   Hayes, in the matter of Estate Property Group Limited (Administrators Appointed) [2007] FCA 1329, Federal Court of Australia, Gyles J, 29 August 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/august/2007fca1329.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/august/2007fca1329.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**   On 15 June 2007 the court made orders extending the convening period for the meeting of creditors required to be held under section 439A of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) (Act) to midnight 23 July 2007 in relation to a number of companies of the Estate Property Group (Group), together with other ancillary orders on the application of the administrators of the companies in the Group (Administrators).    On 12 June 2007, in a related application concerning Australian Capital Reserve Limited (Administrators Appointed) (ACR), the court made orders extending the "decision period" provided for by section 441A(1)(b) of the Act to the last day of the convening period for a number of companies in the Group (Australian Capital Reserve Limited (Administrators Appointed) v High Tower Investments Pty Limited (Administrators Appointed); in the matter of High Tower Investments Pty Limited (Administrators Appointed) [2007] FCA 1028).   On 13 July 2007 the convening period for the second meeting of creditors of those companies was further extended to midnight on 31 August 2007, pursuant to section 447A(1) of the Act, which provides the court with discretionary powers to make orders in relation to company administrations.   In its reasons for these decisions, the court considered the Parliamentary intention of maintaining tight time limits in company administrations and canvassed the key recommendations from the Parliamentary Joint Committee on Corporations and Financial Services Report, 'Corporate Insolvency Laws: a Stocktake', June 2004 (Joint Committee Report), the Corporations and Markets Advisory Committee Report, 'Rehabilitating large and complex enterprises in financial difficulties', October 2004 (CAMAC Report), and the Explanatory Memorandum to the [Corporations Amendment (Insolvency) Bill 2007](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=96414" \t "_new) (Explanatory Memorandum).   **(b) Facts**   The Administrators of the Group had principal responsibility for the preparation of proposals in relation to various companies which may be divided into three groups:  (i) Estate Constructions of Australia Pty Limited ACN 083 789 137 (Administrators Appointed), GC Condo Pty Limited (Administrators Appointed) ACN 123 133 013,  which are the construction companies; (ii) Mayshine Pty Limited (Administrators Appointed) ACN 065 856 144, Sam Pogson Constructions Pty Limited (Administrators Appointed) ACN 050 288 394 and Seajazz Pty Limited (Administrators Appointed) ACN 069 288 204, known as the Mayshine companies; and (iii) the remaining 21 companies within the Group known as the EPG subsidiaries.   **(i) The construction companies**   In relation to the construction companies, the Administrators proposed to arrange for a deed of company arrangement that would enable the construction companies to come out of voluntary administration and be sold to a third party and, thus, maintain its builder's licences.   **(ii) The Mayshine companies**   The Mayshine companies are the ultimate holding companies for the EPG subsidiaries and the construction companies, and are owned by the directors of the Group.  They are not borrowers from ACR. At the time of the hearing, the Administrators had not had an opportunity to properly investigate those companies to determine a recommendation to creditors.   **(iii) EPG subsidiaries**   Within the EPG subsidiaries, there are 15 entities which have developments which are either completed, in the process of being developed or own properties which have not yet been developed.  There are six subsidiaries which do not carry on business, have no external creditors and are classified as dormant.  The Administrators proposed that a deed of company arrangement be put forward to cover the EPG subsidiaries and it was envisaged that there would be a pooling arrangement.   **(iv) Situation as at the time of hearing**   The Administrators had taken advice from a property agent on a property by property basis as to the current status of each property and the options available for realisation of them.  After negotiations with each of the first mortgagee lenders and the Administrators of ACR, a strategy had been agreed on a property by property basis.  Interim funding had been arranged in relation to major project construction work.  There had been a confidential initial approach to the Administrators by a substantial company prior to the hearing that had the potential to affect the recommendation to creditors.   **(c) Decision**    In its decision, the court considered the key recommendations of the Joint Committee Report, the CAMAC Report and the Explanatory Memorandum.   **(i) Joint Committee Report**   Chapter 5 of the Joint Committee Report compared the voluntary administration procedures of the Australian regime against the United States Chapter 11 procedure.  The Joint Committee preferred the voluntary administration procedures  and noted that "whilst both regimes impose a moratorium on creditors' claims, the voluntary administration regime places tighter timeframes to minimise the inconvenience and prejudice to creditors through the abridgement of their propriety rights and rights accrued under freedom of contract".   In Chapter 6, the Joint Committee contemplated the rights of creditors including the provisions concerning creditors' meetings. The Joint Committee considered submissions that the timeframe for the second meeting limited the ability of the administrator to carry out a proper investigation of the company's affairs, having noted the court's power to extend the convening period under section 439A(6) and pursuant to section 447A of the Act.  The Joint Committee recommended that "the period for holding the second meeting of creditors be extended to 25 business days with a new convening period of 20 business days. The adjournment period is to remain at 60 days".  **(ii) CAMAC Report**  The court gave consideration to the CAMAC Report, which recommended that "the periods for holding the first and major meetings of creditors should be incrementally increased (namely, for the first meeting within 8 business days, and for the major meeting within 25 business days, of the appointment of the administrator), and the administrator should be permitted to hold the major meeting before the end of the convening period."  The CAMAC Report also recommended that "the court should have a specific power, on application by the administrator, to override the statutory timetable and to substitute a specific and comprehensive timetable for a particular administration".  **(iii) Explanatory Memorandum**  The court then considered the Explanatory Memorandum, which observed that "[t]he setting of tight time frames and milestones for completion of the various tasks in an administration is an important feature of the voluntary administration procedure."  The Explanatory Memorandum noted that on the one hand, it is beneficial for stakeholders that the process be conducted promptly as it avoids the delays, abuses and expense that may occur if a much longer or restricted time frame is allowed.  However, it also noted that on the other hand, a limited extension of the period of time for holding the statutory meetings may increase creditors' opportunities to participate, and allow administrators more time to conduct an examination of the company's financial circumstances and consider the best options for its future.  **(iv) Orders**   The court granted the order for further extension of the convening period of the second creditors meeting.  It noted the importance of the flexibility provided by section 447A of the Act, in light of the key recommendations of the Joint Committee Report, the CAMAC Report and the Explanatory Memorandum.  The court held that there was a strong case for a further extension, principally the amount of work that had been done, the real possibility of deeds of company arrangement being proposed, the support of secured lenders including the administrators of ACR and the lack of opposition following wide dissemination of the proposals.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h5)  **5.5 Schemes of arrangement: fairness and proper purpose**  (By Tom McGregor, Mallesons Stephen Jaques)   Re Mincom Ltd [No 3] [2007] QSC 207, Supreme Court of Queensland, Fryberg J, 22 August 2007   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2007/august/2007qsc207.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2007/august/2007qsc207.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 analysed the court's discretionary powers in relation to approval of schemes of arrangement for the acquisition of shares in a company pursuant to section 411(4)(b) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) (the Act).  The most significant implications arising from this decision include:   * The court's general discretion to approve an arrangement under section 411(4)(b) will be based on the fairness of the scheme and whether it has been proposed for a proper purpose. * An arrangement is likely to be fair to members in circumstances where consideration is offered at a premium to the current share price, is endorsed by independent experts and overwhelmingly supported by outgoing shareholders at a meeting of the members. * An intention to avoid the operation of any provision of Ch 6 of the Act may be considered for the purposes of determining whether a scheme has been proposed for a proper purpose, even if ASIC has issued a statement of no objection to the scheme proceeding. * A scheme implemented to achieve certainty of timing and avoid potential offer period extensions arising under section 650C of the Act can amount to an intent to avoid Ch 6. * However, such a purpose will not be improper and will not taint scheme approval provided the scheme makes commercial sense, its terms are fair to shareholders and has received their support, and the risk of serious adverse consequences to any member is minimal.   **(b) Facts**     Mincom Ltd (Mincom) was an unlisted public company.  Until March 2007, its constitution imposed considerable restrictions on the transferability of its shares which caused Mincom's share price to be valued at a price much lower than it would otherwise have been had the shares been freely transferable.  Mincom's history involved various unsuccessful attempts by its directors to create a situation of liquidity, including a failed initial public offering.     Mincom since proposed to enter into a scheme of arrangement with EAM Software Finance Pty Ltd (EAM) whereby EAM would acquire 100% of the share capital in Mincom (Scheme).  Under the arrangement, the shareholders of Mincom would receive $8.77 cash consideration, representing a premium of 188% on the weighted average share price.   Pursuant to section 411(1), the court authorised the distribution of a Scheme explanatory statement (Statement) and ordered the convening of a members' meeting to consider the Scheme proposal.  A second court order authorised the distribution of a supplementary Statement.  At the members' meeting, over 98% of all votes cast approved the Scheme.    At a second hearing, Mincom applied to the court to approve the Scheme.  ASIC produced a written statement to the court stating that it had no objection to the Scheme.  This note reviews Fryberg J's discretionary considerations in approving the Scheme at this hearing.    **(c) Decision**     **(i) Failure to register Scheme booklet prior to dispatch: section 412(6)**   It was alleged that Mincom breached section 412(6) of the Act.  Section 412(6) prescribes that a party to a scheme of arrangement must not send out an explanatory statement to affected parties unless the statement is first registered with ASIC.     Mincom dispatched its Statement to its members immediately following court approval, being at a time after the closure of ASIC offices and prior to registration of the Statement.     The court found that although Mincom's actions breached section 412(6), it did not have the effect of invalidating the dispatch.  Non-compliance amounted to a procedural irregularity within the meaning of section 1322(1)(b) of the Act.  Although deliberate, there was no evidence that any prejudice was suffered from the irregularity and no moral turpitude attached to it.   **(ii) Discretion to authorise scheme of arrangement: section 411(4)(b)**   In addition to obtaining member approval for a scheme of arrangement, section 411(4)(b) of the Act also requires that the scheme be approved by the court.  It was observed in Re Permanent Trustee Co Ltd [2002] NSWSC 1177 that there is no exhaustive list of criteria of which the court must be satisfied before granting approval of a scheme.  However, it is necessary to assess any arrangement as a whole to determine if its provisions are fair and whether it has been proposed for an improper purpose.   **(iii) Fairness of consideration**   Given the attractive premium to be paid to Mincom shareholders under the Scheme and the undervaluation of Mincom's historical share price, the court found that the offer was prima facie fair.  This determination was supported by an independent assessment which concluded that the Scheme was in the best interests of shareholders.  In addition, the court noted:  when properly informed shareholders vote to support a cash offer in such overwhelming numbers, there is very little scope for a court to determine that the arrangement embodying the offer is fundamentally unfair.  As such, it was not necessary for the court to satisfy itself that no better scheme could have been devised, but merely that no superior offer was proposed.  Mincom's history involved various failed attempts by the directors to create mechanisms by which members could realise the true value of their shares.  The Scheme provided a fair means by which this end could legitimately be achieved.   **(iv) Fairness to shareholder-borrowers**   A clause of the Scheme was also questioned for its unfair effect on shareholder-borrowers.  This particular clause operated such that each shareholder warranted that their transferred securities would be free from all encumbrances (Relevant Provision).       The court examined the Relevant Provision and found that while it was commercially commonsense to protect the position of the purchaser, it could potentially trigger a breach of a shareholder's loan agreement with a financier.  However, it was found that there was no practical way to build into the Scheme any mechanism to protect shareholders in the wide variety of circumstances which might govern their borrowings.  Such concerns, it was found, had been substantially dealt with by disclosure to shareholders in the supplementary Statement.  In practical terms, the Relevant Provision did not create any additional liability but instead extended the range of persons who could claim in respect of an existing liability.     Accordingly, the court resolved that the Relevant Provision was not "onerous, unreasonable nor calculated to catapult unsuspecting shareholders into a state of breach of warranty."   **(v) Scheme proposed for improper purpose: relevance**   Under section 411(17) of the Act, the court must not approve a scheme unless:   * satisfied that the scheme has not been proposed for the purpose of enabling someone to avoid the operation of any one of the provisions of Ch 6 of the Act (Avoiding Purpose); or * ASIC has issued a statement that it has no objection to the scheme proceeding.   According to Re Advance Bank Australia Ltd (1997) 138 FLR 281, satisfaction of one of the above conditions precludes the court from withholding approval under the other.  In Mincom's case, ASIC provided a statement of no objection to the Scheme.  As such, the court was not obliged to withhold approval under section 411(17) even if satisfied that the Scheme was proposed for an Avoiding Purpose.    However, the court determined that the existence of an Avoiding Purpose may still be taken into account in the exercise of its general discretion under section 411(4)(b).  This is particularly the case where ASIC's decision to issue a statement of no objection is not based on whether an Avoiding Purpose exists.  Indeed, ASIC's own policy statement states that:  the basic question ASIC will consider is whether shareholders will be adversely affected by the takeover, not whether the purpose of the scheme is to avoid making the acquisition under Ch 6.  The court proceeded on this basis and found that it is sufficient if any one of those proposing the arrangement (being either Mincom or EAM) is involved in the Avoiding Purpose.  Relying on Re ACM Gold Ltd (1992) 107 ALR 359, it was noted that the Avoiding Purpose need not be the exclusive or dominant purpose for entering into an arrangement, provided it amounts to a significant or substantial purpose.    **(vi) Evidence of improper purpose**   Evidence from Mincom and EAM suggested that a Ch 5 scheme of arrangement was adopted in preference to a Ch 6 takeover for a variety of reasons.  Principally, these reasons included that a scheme provided a comparatively certain and slightly shorter timetable, was easier to negotiate with financiers and was an agreed mechanism more likely to be approved by Mincom shareholders.   Of the parties' multiplicity of purposes, the court characterised the main purpose of adopting a scheme over a takeover as being centred around efficiency and certainty of timing.  Whereas under section 650C of the Act a Ch 6 takeover bidder may extend the offer period at any time before the end of the period, an equivalent mechanism is not available under a Ch 5 scheme of arrangement.  In this regard, Fryberg J stated:  "On the face of things, a purpose of both companies in selecting an arrangement rather than a takeover was to avoid the operation of that section (650C)."   In response, EAM cited Re International Goldfields Ltd [2003] WASC 86 which related to a scheme chosen (in favour of a takeover) for its greater level of certainty.  The court in that case accepted that there existed rational and legitimate commercial reasons for adopting the proposed scheme and there was no reason to conclude that the arrangement was proposed for the purpose of avoiding the operation of Ch 6.  However, the court found that in contrast to Re International Goldfields Ltd where no particular provision of Ch 6 was identified as one which might be the subject of an Avoiding Purpose, Mincom and EAM's evidence suggested an overt intent to avoid the uncertainty of offer period extensions arising under section 650C.   **(vii) Evaluation of the purpose**  The court found that Mincom's and EAM's purpose was to achieve certainty of timing and efficiencies through the avoidance of section 650C.  In this respect, this was a significant motivating factor for the parties and amounted to an Avoiding Purpose.     Regardless, the court determined that the prima facie existence of an Avoiding Purpose was not a critical factor to the exercise of its discretion under section 411(4)(b).  Indeed, even if the Scheme was proposed to enable EAM to avoid the operation of one or more of the provisions of Ch 6, any public interest in discouraging such conduct was far outweighed by the matters which supported the application.  In this regard, those matters supporting the Scheme included that:   * the Scheme made commercial sense; * it was fair and reasonable as between the shareholders and had received their overwhelming support; * the risk of serious adverse consequences to any shareholder was relatively low; and * ASIC had produced a statement that it had no objection to the arrangement.   The order of the court was that the Scheme be endorsed subject to the amendments sought.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h5)  **5.6 Are section 266(4) or section 1322(4)(d) of the Corporations Act available to extend the time to further lodge notice of a charge?**  (By Kathryn Finlayson, Minter Ellison)   Community Life Limited v Kilmory Developments Pty Limited [2007] NSWSC 943, Supreme Court of New South Wales, Hammerschlag J, 16 August 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc943.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc943.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**   Section 266(4) was not available as there was no failure to lodge a notice in respect of a charge.     Section 1322(4)(d) was not available for two reasons:   * the section presupposed that the act had not occurred or had occurred late when in fact the notification of the charge had occurred within time; and * the substance of the plaintiff's claim was that it wished to eradicate the effect of it having given notice of the discharge and the section could not bring about that result.   **(b) Facts**    Under a loan facility agreement dated 6 June 2006, the plaintiff lent $3,000,000 to McLean Property Investments Pty Ltd.  The loan was due to be repaid on 6 August 2006 but the agreement was subsequently varied to extend the time for repayment.     As part of the variation of the agreement, the plaintiff took a fixed and floating charge over the defendant's assets on 24 October 2006.  That charge was registered with the Australian Securities and Investments Commission as required by section 263(1) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) (Act) and was entered on the Australian Register of Company Charges on 25 October 2006.   On 20 November 2006, an agent of the defendant requested the plaintiff to release the charge on the basis that the defendant would pay the plaintiff $190,000 in cash and provide the plaintiff with a second mortgage over a property it owned at Point Piper.    On 22 November 2006, the defendant banked $40,000 into the plaintiff's bank account.   On 24 November 2006, the defendant granted the plaintiff a mortgage over the Point Piper property and the plaintiff lodged a caveat pending obtaining consent of the first mortgagee to the registration of the mortgage.    On 27 November 2007, the plaintiff lodged a notification of discharge of the charge with the Australian Securities and Investments Commission on the prescribed Form 312.   Neither the balance of the $190,000 nor the loan have been paid.  McLean Property Investments Pty Ltd has had a liquidator appointed.   The main issue before the Supreme Court was whether section 266(4) or section 1322(4)(d) of the Act were available to the plaintiff to extend the time to further lodge notice of a charge.   In the alternative, the plaintiff claimed that the Register could be rectified by the charge being re-registered under either section 274 or section 1322(4)(b) of the Act.   **(c) Decision**    His Honour Justice Hammerschlag held that section 266(4) was not available to assist the plaintiff as there was no failure to lodge a notice in respect of a charge.     His Honour considered but did not decide whether section 1322(4) had any operation in relation to an application to extend the time within which to notify a charge given the presence in the Act of section 266(4), a provision which dealt specifically with that subject.  Although Justice Hammerschlag doubted that section 1322(4) would be available to the plaintiff where section 266(4) did not assist, his Honour proceeded on the basis that the section would be available if its requirements were met.     Justice Hammerschlag considered that the requirements of section 1322(4)(d) were not met for two reasons.  First, the section presupposed that the act had not occurred or had occurred late.  In fact, the notification of the charge had occurred within time.  Second, the substance of the plaintiff's claim was that it wished to eradicate the effect of it having given notice of the discharge and the section could not bring about that result.    His Honour also indicated that, even if section 1322(4)(d) was available, he would decline to grant the relief sought as the proper characterisation of what had occurred between the parties was that there was an agreement between the parties which was fully performed by the plaintiff but only partly performed by the defendant.  In those circumstances, the requirements of section 1322(6)(c) were not satisfied as any re-registration of the charge could not be said to be without substantial injustice to any person.   In relation to the plaintiff's alternative claims, Justice Hammerschlag considered that the circumstances of the matter were such that the plaintiff was precluded from seeking rectification of the Register.  His Honour was not satisfied that, even if either section 274 or section 1322(4)(b) was available to the plaintiff, it would be just and equitable or that there was an omission or misstatement in the Register.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h5)  **5.7 Option exercised after insolvency can still give rise to set-off**   (By Kristy Zander, Senior Associate, Clayton Utz)   JLF Bakeries Pty Limited (In Liquidation) v Baker's Delight Holdings Limited, [2007] NSWSC 894, Supreme Court of New South Wales, White J, 15 August 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc894.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc894.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**   Baker's Delight was entitled to set-off an amount payable by it as a result of the exercise of an option to purchase an insolvent franchisee's property, against amounts owing to it by the insolvent franchisee.  Set-off was available notwithstanding that the exercise of the option did not occur until after the franchisee entered into voluntary administration.   **(b) Facts**   The plaintiff was a franchisee of a Baker's Delight bakery franchise.  Under the franchise agreement, Baker's Delight was entitled to exercise an option to purchase the franchise's fixtures, fittings, plant and equipment ("Fittings"), if the franchise agreement was terminated.  If the option was exercised, ownership of the Fittings would immediately pass to Baker's Delight, whilst the full purchase price was not payable for a further 60 days.   The franchisee went into voluntary administration and thereafter creditors' voluntary liquidation.  Two days after the appointment of the voluntary administrator, Baker's Delight terminated the franchise agreement and shortly thereafter exercised its option to purchase the Fittings.   Baker's Delight was a substantial creditor of the franchisee.  Baker's Delight sought to set-off the amount owed by it for the Fittings against the debt owed to it by the franchisee.  The debt owed to Baker's Delight was significantly larger than the amount owed by Baker's Delight for the Fittings.   Section 553C of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) ("Act") provides for the set-off of mutual debts, credits and dealings between an insolvent company and a creditor.  The "relevant date" for determining the existence of mutual debts and credits capable of set-off was, in this case, the date of appointment of the voluntary administrator to the franchisee.   The question for consideration was whether Baker's Delight was entitled to set off the amount owed by it for the Fittings against the pre-administration debt, in circumstances where the option to purchase the Fittings was not exercised until after the commencement of the voluntary administration (and thus after the "relevant date" for the purpose of section 553C of the Act).   **(c) Decision**    The court held that Baker's Delight was entitled to set off the amount owed by it for the Fittings against the pre-administration debt owed to it by the franchisee, pursuant to section 553C of the Act.   **(i) Existence of liability at the relevant date**   The option granted to Baker's Delight to purchase the Fittings, contained in the franchise agreement, was characterised by the court as a conditional contract, rather than an irrevocable offer.  That is, the option was characterised as an agreement by the franchisee to sell the Fittings to Baker's Delight if two conditions were satisfied: the termination of the franchise agreement and notice of exercise of the option by Baker's Delight.     The effect of this characterisation of the option was that the conditional contract was held to have been entered into, and a contingent debt to have arisen, upon entry into the franchise agreement by the parties.   The court held that, at the relevant date, there existed a contingent liability on the part of Baker's Delight to pay whatever price was ultimately determined to be payable for the Fittings.  The existence of that contingent liability at the relevant date meant that it could be set off against the debt owed by the franchisee to Baker's Delight, pursuant to section 553C of the Act (following Hiley v People's Prudential Assurance Co Limited (In Liquidation) (1938) 60 CLR 468).   **(ii) Notice of insolvency**   The franchisee submitted, pursuant to section 553C(2) of the Act, that Baker's Delight was not entitled to claim the benefit of a set-off because Baker's Delight had notice of the franchisee's insolvency at the time it received credit from the franchisee.  The franchisee claimed that Baker's Delight "received credit" when it exercised the option, because the purchase price for the Fittings was not payable for a further 60 days.  At that time, to the knowledge of Baker's Delight, the franchisee had entered into voluntary administration and had ceased trading.   The court held that the time that Baker's Delight exercised the option was not "the time of receiving credit" within the meaning of section 553C(2) of the Act.  Rather, credit was given by the franchisee and received by Baker's Delight at the time of entry into the franchise agreement, although that credit was given and received contingently on the termination of the franchise agreement and exercise of the option.  At the time of entry into the franchise agreement, Baker's Delight did not have notice of the franchisee's insolvency.   In reaching that conclusion, his Honour applied the reasoning in Old Style Confections Pty Limited v Microbyte Investments Pty Limited (In Liquidation) [1995] 2 VR 457 and Shirlaw v Lewis (1993) 10 ACSR 288.   **(iii) Purposive construction of section 553C**   In constructing section 553C, his Honour had regard to the purpose of the section, namely to avoid the injustice of a situation where a liquidator can demand payment in full from a creditor although the creditor will not receive payment of the larger debt owed to it, arising from the same dealings.  Having regard to that purpose, his Honour held that section 553C should be given its widest possible scope.  His Honour also noted that the purpose of the limitation in section 553C(2) is to exclude a right of set-off where a creditor had notice of the company's insolvency or where it manipulated the right of set-off, after notice of insolvency, to avoid payment.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h5)  **5.8 Freezing orders obtained against directors of an insolvent company being investigated by ASIC**  (By Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth)  In the matter of ASIC v Krecichwost [2007] NSWSC 948, New South Wales Supreme Court, McDougall J, 14 August 2007   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc948.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc948.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a)  Summary**   This case involved an application by ASIC under section 1323 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) (Act) for the appointment of receivers, or alternatively freezing orders, to preserve the assets of two directors of an insolvent company.  The two directors were, at the time of the application, the subject of investigations in relation to possible insolvent trading by ASIC.  The court, in attempting to balance all parties considerations, made the requested freezing orders on the basis that those orders were a less intrusive means of protecting the persons aggrieved by the company's insolvency.     **(b) Facts**   Fincorp Group Holdings Pty Limited (Fincorp) collapsed in March 2007 and administrators were appointed.  Total losses were estimated at about $114 million, with thousands of people losing all or half of their investments.     At the time of the application, ASIC investigations were underway in relation into a number of matters involving Fincorp, including the possibility of insolvent trading since mid 2006.  It was alleged that since the time of possible insolvency, Fincorp continued to raised funds from the public to the amount of $110 million.  During the hearing, the court was advised of the administrators' preliminary assessment that there was a possible claim against the directors (and shadow directors) of Fincorp for insolvent trading.  The investigations were only in the initial stages and it would take some time to fully understand the complex nature of Fincorp's affairs.  Of particular interest to the matters before the court was the limited evidence that the directors may have transferred their interests in property to their wives.     **(c) Decision**   Section 1323 of the Act gives the court the discretionary power to prohibit payment or transfer of money, financial products or other property, or alternatively make an order appointing a receiver.  The discretionary consideration is whether the order is "necessary or desirable" to protect the interests of an aggrieved person.  Relevantly, in this case, an aggrieved person would be persons who suffered loss through the collapse of Fincorp.    The operation of section 1323 is enlivened in circumstances where an investigation is being carried out by ASIC, or a prosecution, civil proceedings or investigation has been commenced under the Act.  Accordingly, McDougall J found that it could arise even absent strong evidence of dissipation of assets and a reasonably persuasive case against the director concerned.     However, his Honour acknowledged that these would usually be important discretionary factors for the court to take into consideration.  They would need to be balanced against ASIC's public interest role to investigate Australia's financial system.   McDougall J recognized the intrusive nature of the orders available under section 1323, in particular the appointment of receivers.  His Honour highlighted that the legislature intended for drastic remedies to be available to protect the interests of aggrieved persons and that the "necessary or desirable" aspect of the discretion required looking to the needs of those persons, rather than the drastic nature of the remedy.   In reaching his decision, McDougall J was satisfied by the evidence before him that the general circumstances made it desirable, in the interests of aggrieved persons, to make an order under section 1323, even though he acknowledged that the risk of disposal of assets was low.  The decision was influenced by the relatively early stage of the investigations into a complex collapse in conjunction with the short duration for which the order was sought.   Although section 1323 does not expressly authorize a freezing order over assets, McDougall J accepted that the court had jurisdiction to make such an order on the basis that a freezing order is deemed an "alternative or lesser order" to the appointment of a receiver.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h5)  **5.9 The termination of deeds of company arrangements under section 445D of the Corporations Act**  (By Trent Duffield, DLA Phillips Fox)  Mondello Farms Pty Ltd v Annatom Pty Ltd (subject to deed of company arrangement) [2007] SASC 296, Supreme Court of South Australia, Layton J, 10 August 2007   The full text of this judgement is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/august/2007sasc296.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/august/2007sasc296.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   The Supreme Court of South Australia found that the plaintiff ("Mondello") was a creditor of Annatom by way of an interim costs order that had been issued by the court in a breach of contract dispute.  Other creditors that had entered into a deed of company arrangement had been misled by not being informed of Mondello's status as a creditor and the breach of contract litigation between Mondello and Annatom that was ongoing.  The court held that effect could not be given to the deed of company arrangement without injustice.   **(b) Facts**   Annatom was subject to a deed of company arrangement ("the Deed") to which Mondello was not a party. Mondello claimed to been a creditor of Annatom by reason that an interim costs order had been issued in favour of Mondello against Annatom concerning proceedings that Mondello had instituted against Annatom for alleged breach of contract ("the Mondello litigation").    Mondello further claimed that it was a contingent creditor pending the final outcome of those proceedings.   Mondello sought termination of the Deed under section 445D of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) ("the Act") claiming that the creditors of Annatom that were party to the Deed had been misled at a creditors' meeting by not being advised of the costs order in favour of Mondello and that, by not having reference to the Mondello litigation after having been made aware of it subsequent to the meeting, the Administrator's section 439A(4) Report contained material omissions.    Mondello claimed that effect could not be given to the Deed without injustice or undue delay.   **(c) Decision**   **(i) Was Mondello a creditor?**   In the judgment, Layton J cited Olsson J in Powell v Fryer (2001) 159 FLR 433 holding that a "debt is simply an obligation of one party to pay a sum of money to another. The obligation may be present, absolute, or contingent".   Layton J determined that it was reasonable to conclude that continuing to engage in litigation and becoming liable to pay adverse costs orders, when there were reasonable grounds to suspect that Annatom would not be able to meet such obligations was "incurring a debt" for the purposes of section 588G(1) of the Act.  Therefore, Mondello had status as a creditor.   **(ii) Is information false or misleading under section 445D(1)(a) and (b)?**   In determining whether information or an omission is false or misleading under section 445D an objective test is to be applied.  Layton J confirmed that it is not relevant if information did not actually mislead or deceive anyone and it is also not relevant whether or not anyone intended the information to be false or misleading.     His Honour held that whether or not information was false or misleading must be judged at the time of the hearing and not on the basis of information available at the time of giving the information.    **(iii) Were the creditors' party to the Deed mislead under section 445D?**   Layton J determined that representatives of Annatom had misled the Administrator and therefore the creditors by not informing them of the Mondello litigation at the creditors meeting.  His Honour further determined that information which was received by the Administrator subsequent to the meeting should have been passed on the creditors and that this failure to pass on information led to the creditors being mislead.    Layton J held that the Mondello litigation was reasonably expected to be material to a sufficient number of creditors to the Deed and would affect their decision to enter the Deed.  His Honour emphasised in his judgment that it was not necessary for the information or omission to be material to all creditors.    **(iv) The role of the Administrator**   Layton J noted that in some circumstances, in discharging their duties, an Administrator may be required to make certain inquiries beyond their statutory duties to investigate prescribed under section 438A of the Act.  Whilst it was acknowledged that the Administrator had very little funds available with which to undertake a full investigation in the first instance, once it became aware of the Modello litigation (however so it became aware), it had an obligation to investigate the nature and scope of that litigation.     Layton J considered that the obligation to investigate extended to certain loan arrangements that had been entered into between Annatom and a number of the creditors that were party to the deed, some of whom were related companies.  Given that these loan arrangements may not have been at arms length and they had a material impact on the availability of funds for distribution to other creditors, the Administrator was obliged to investigate them.  The omission in the Administrator's Report concerning the loan arrangements (and their terms) between the related entities was a material omission and therefore a breach of section 445D(1)(c).    **(v) Orders**   Layton J held that the deed should be terminated for the various reasons set out in his judgment.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h5)  **5.10 Best endeavours, delegation of responsibility, negligence and damages in underwriting and sponsoring an IPO**  (By Chris Munro, Freehills)   OzEcom v Hudson Investment Group [2007] NSWSC 719, New South Wales Supreme Court, McDougall J, 3 August 2007 The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc719.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc719.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**  Hudson Investment agreed to underwrite an initial public offering (IPO) of shares in OzEcom. In doing so, Hudson Investment agreed to use its best endeavours to undertake the listing of OzEcom and also achieve the spread of shareholders required by the ASX Listing Rules. Hudson Investment enlisted its subsidiary, Hudson Securities, to act as sponsoring broker because it had the requisite licence.  The IPO did not raise the amount of funds desired by OzEcom nor achieve the spread required by the Listing Rules.  McDougall J held that Hudson Investment breached its obligation to use best endeavours to secure the spread of shareholders. It was also held that Hudson Securities breached its duty of care owed to OzEcom.  OzEcom was deemed entitled to pursue a claim for judgment for damages, to be assessed in respect of wasted expenses incurred in reliance upon Hudson Investment's contractual obligations or as referable to Hudson Securities' breach of duty of care. Each of Hudson Investment and Hudson Securities were held liable for one half of any damages to be awarded.   **(b) Facts**   OzEcom wished to raise $10m by way of an IPO. It engaged Hudson Investment as underwriter. Hudson Investment mandated its subsidiary, Hudson Securities, to act as broker.  OzEcom and Hudson Investment entered into an underwriting agreement. Hudson Investment agreed to use its best endeavours to procure the minimum number of shareholder spread as required by the Listing Rules, and also to subscribe at an agreed price for all shares not taken up by the public at the closing date of the IPO. This obligation to subscribe for the shortfall shares was conditional on OzEcom presenting Hudson Investment with a shortfall notice, as well as a closing certificate, approved by all directors of OzEcom and signed by at least 2 directors.   The shortfall notice and closing certificate had to be presented by OzEcom to Hudson Investment by 10am one business day after the Closing Date for the offer in order to crystallise Hudson Investment's obligation to underwrite the offer.  The closing date, as specified in the underwriting agreement, for the offer was fixed by reference to the Registration Date, that being the last day for registration of the prospectus by ASIC. OzEcom could vary the timetable for the offer by giving written notice to Hudson Investment.  Subscriptions for the offer fell well short of the capital raising sought by OzEcom. The closing date of the offer was determined by McDougall J to be 6 September 1999.  However, each of OzEcom, Hudson Investment and Hudson Securities arguably proceeded to act as though the offer remained open to the public up to at least 27 September 1999.  A shortfall notice and closing certificate were not presented to Hudson Investment until 30 September 1999.  **(c) Decision**  **(i) Was there an agreed extension of time to the closing date under the underwriting agreement?**  OzEcom relied on both correspondence and conversations to support a case of ad hoc agreements to extend the closing date and therefore keep the IPO open.    It was conceded that the parties conducted their affairs on the basis that Hudson Investment's underwriting obligations were in force beyond the closing date; however it was very difficult to spell out any agreement to that effect. McDougall J held that it did not appear that the parties sufficiently turned their mind to the extension of the closing dDate with respect to the underwriting agreement, and therefore there was no 'extension agreement' supported by the facts.  **(ii) Could OzEcom rely on estoppel by representation to support the extension of the closing date?**  McDougall J held there was no evidence of reliance on any representation made by Hudson Investment. The only evidence relating to reliance on a representation came from Ms Sylvester, to whom the alleged representation was not made directly.  **(iii) Did Hudson Investment waive the requirement that the presentation of the shortfall notice and closing certificate be within one business day of the Closing Date?**  As outlined above, McDougall J considered the closing date to be 6 September 1999. It was held that, once time expired without the delivery of a shortfall notice and closing certificate, the underwriting obligation simply lapsed, rendering Hudson Investment unable to waive the requirement. Further, the closing certificate presented to Hudson Investment was not approved by the board in the manner required by the underwriting agreement. McDougall J concluded that Hudson Investment did not waive the requirement that it be presented with a closing certificate in the correct form by accepting delivery of it.   **(iv) Is it a sufficient use of best endeavours if the delegator believes that the delegate has the capacity and will to do what is required to satisfy the obligation?**  Hudson Investment, as the party bound to use best endeavours to secure the shareholder spread, delegated the relevant task to Hudson Securities. McDougall J was inclined to believe that, where a particular obligation is cast on a party to a contract, that party cannot simply rely on the fact of delegation to satisfy that obligation. However, he also considered that where it was known that the party accepting the obligation did not have the relevant licence to perform the obligation and that it proposed to delegate the performance of the obligation, different considerations may arise. Nevertheless, as a director of Hudson Investment, Mr Sutton, was personally involved in activities undertaken by Hudson Securities, McDougall J felt there was no need to determine the issue in this case.  **(v) Did Hudson Investment use its best endeavours to secure the shareholder spread?**  McDougall J outlined the following as applicable principles to the analysis of 'best endeavours':   * An obligation to use best endeavours to achieve an outcome is neither an unqualified obligation to achieve that outcome nor a warranty that it will be achieved; * The content of the obligation to use 'best endeavours' must be measured having regard to the contract as a whole and to the factual context in which the best endeavours fall to be exerted; * In ascertaining whether best endeavours have been exerted, the court should have regard to the qualifications, abilities and responsibilities of the person obliged to exert them; * Stipulation of an obligation to use 'best endeavours' necessarily carries with it an understanding that the outcome, towards the achievement of which the best endeavours are to be directed, may not in fact be achieved.   As McDougall J did not support the argument that Hudson Investment could delegate its obligation to use best endeavours to Hudson Securities, his Honour grouped the actions of Hudson Investment and Hudson Securities together. McDougall J determined that Hudson Investment did not comply with its obligation to use best endeavours to achieve the requisite spread, for the following reasons:   * there was no evidence of any systematic process of planning or management on the part of Hudson Securities to promote and sell the IPO; * there was no evidence that Hudson Securities or Hudson Investment followed up, in any detailed way, a list of prospective investors given to it by OzEcom, nor references in that list to other brokers as prospective investors; * there was no evidence of any attempts made by advisers within Hudson Securities to promote the IPO to their individual clients; and * Hudson Investment rejected the offer of assistance from a subunderwriter.   **(vi) Did Hudson Securities owe OzEcom a duty of care? If so, what was the scope of that duty? Did Hudson Securities breach its duty of care?**  McDougall J held that Hudson Securities owed OzEcom a duty of care for the following reasons:   * Hudson Securities assumed the responsibility for the performance of Hudson Investment's obligations in relation to the spread; * OzEcom (and Hudson Investment) knew that Hudson Securities would do so; * OzEcom relied on Hudson Securities' assumption of responsibility; and * Hudson Securities knew that OzEcom would so rely on it.   As the assumption of responsibility was a key factor in the conclusion that Hudson Securities owed OzEcom a duty of care, McDougall J assessed the scope of the duty owed by reference to the responsibility assumed. It was therefore determined that Hudson Securities was required to use its best endeavours to achieve the shareholder spread.  For the same reasons McDougall J held that Hudson Investment did not use its best endeavours to secure the requisite spread of shareholders, Hudson Securities was found to have breached the duty of care it owed to OzEcom.  **(vii) Damages**  OzEcom put its claim for damages 3 different ways. Firstly, it argued that it should receive the loss of the full amount of the capital raising. Secondly, it argued it should receive the shortfall from the offer, and thirdly, it argued that it should receive the wasted expenses of the capital raising.   McDougall J, citing Adelaide Petroleum NL v Poisedon Ltd (1990) 98 ALR 431, rejected the first two heads of damages on the basis that the failure to raise capital did not of itself result in a loss to the company of the capital sum foregone. OzEcom would have had a claim for the loss of use of that capital, however this was not pleaded.  With respect to the third head of damages pleaded, McDougall J relied on the decision of McRae v Commonwealth Disposals Commission (1951) 84 CLR 377 to conclude that the wasted expenditure should be recoverable to the extent it was incurred on the faith of Hudson Investment's promise to use its best endeavours to achieve the necessary spread. In the case of Hudson Securities, the claim would be limited by reference to the date of inception of the duty of care.  McDougall reserved judgment on the amount of wasted expenditure claimable, leaving it to OzEcom to determine whether it wished to pursue a claim based on his decision.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h5)  **5.11 Affidavits and exhibits in applications to set aside statutory demands**   (By Chris Brown, Clayton Utz)  Tatlers.com.au Pty Ltd v Davis [2007] NSWSC 835, Supreme Court of New South Wales, White J, 3 August 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc835.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc835.htm" \t "_new) or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   This was a section 459G application to set aside a statutory demand.  The statutory demand related to the unpaid balance of a judgment debt owed jointly and severally by the plaintiff company and its sole director, Ms Fletcher.   The court had to consider several issues.  Firstly, the court found that the company's failure to serve the exhibits to the supporting affidavit within the 21 day period was not fatal to the application.  It was held that the requirement to serve a supporting affidavit did not extend to requiring the exhibits to the affidavit to be served within the 21 day period.   Secondly, the court was asked to determine whether the creditor's failure to file and serve an accompanying affidavit with the statutory demand was grounds to set aside the statutory demand.  The court stated that the company could not rely on this ground as it had failed to raise it in the affidavit accompanying the application and had failed to exhibit the statutory demand to the accompanying affidavit.   Finally, the company claimed the existence of off-setting claims resulting from debts owed by the creditor to the company and a separate debt owed to Ms Fletcher individually.  The court held that the company's debt to the company was a valid off-setting claim.  However, the company could not rely on the debt owed to Ms Fletcher as an off-setting amount as she was not a party to the proceeding.   **(b) Facts**   The defendant creditor served a statutory demand on the plaintiff company in relation to the unpaid balance of a judgment debt.  The judgment debt was owed jointly and severally by the company and its sole director, Ms Fletcher.  The company applied to set aside the statutory demand pursuant to section 459G of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) ("the Act").   The company had paid over half of the judgment debt but left an unpaid balance equal to the costs incurred by the company in an earlier proceeding against the creditor plus the costs incurred by Ms Fletcher in a proceeding involving her and the creditor.  The company submitted that if the statutory demand was not set aside, the costs awarded in Ms Fletcher and the company's favour should be set-off against the debt the subject of the statutory demand so as to reduce the amount of the statutory demand.   The application to set aside the statutory demand and the accompanying affidavit were filed and served within the 21 day period prescribed by section 459G(3) of the Act.  However, the exhibits to the affidavit were served on the creditor after the 21 day period had expired.  **(c) Decision**   The issues to be decided by the court were as follows:   * whether the application to set aside the statutory demand had been improperly brought due to the exhibits to the supporting affidavit not being served on the defendant within 21 days of the service of the statutory demand; * whether the statutory demand should be set aside because it was not accompanied by an affidavit; and * whether there was a valid offsetting claim in favour of the plaintiff in regards to the costs owed by the defendant to both the plaintiff and the sole director.   Each of these issues is discussed further below.   **(i) Failure to serve exhibits**   Section 459G(3) states that a copy of the application to set aside the statutory demand and a copy of the supporting affidavit are to be served on the creditor within 21 days of service of the statutory demand.  The creditor, relying on Kortz Ltd v Data Acquisition Pty Ltd (2006) 155 FCR 556, argued that because section 459G(3) requires any exhibits to the affidavit to be served within 21 days, the company's failure to serve the exhibits within the 21 day period should result in the application being found to be invalid.   The court disagreed with the decision in Kortz and held that the reference to "affidavit" in section 459G does not extend to exhibits to an affidavit.  Whilst the court acknowledged that a defendant to a section 459G application is entitled to understand the case to which it must respond, that could be addressed by ordinary pre-trial procedures to ensure procedural fairness and it is not, in the court's view, the purpose of section 459G that the defendant be apprised within the 21 day period of the material relied upon by the plaintiff.  It was held that allowing exhibits to the supporting affidavit to be served after the expiry of the 21 day period is not at odds with the purpose of section 459G and, in any event, the court stated that there was "nothing ambiguous about the word "affidavit" in section 459G(3) to be resolved by recourse to legislative purpose".   The court highlighted that it is well recognised that a plaintiff is entitled to file and serve further affidavit material in support of the grounds raised in the initial affidavit accompanying the application (see Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund (1986) 70 FCR 452).  The supporting affidavit essentially takes the form of a pleading and whilst new grounds cannot be later raised, the grounds relied upon in the supporting affidavit can be the subject of further affidavits filed after the expiry of the 21 day period.   **(ii) No accompanying affidavit to the statutory demand**   Section 459E requires that a statutory demand is accompanied by an affidavit which verifies the debt, unless the debt is a judgment debt.  Whilst the subject debt in this case was a judgment debt, it was for the unpaid balance of the judgment rather than the full amount.  The plaintiff submitted that the statutory demand should be set aside due to the failure of the creditor to file and serve an affidavit with the statutory demand.  The company relied on Anderson Formrite Pty Ltd v CASC Hire Pty Ltd (2005) 147 FCR 379, in which the Federal Court of Australia held that in circumstances where the statutory demand is issued for an amount that is different from the judgment debt, the creditor cannot rely on section 459E(3) and therefore an affidavit must accompany the statutory demand.   The court refused to consider this ground for setting aside the statutory demand as the company had failed to raise the ground in the affidavit accompanying the application.  It had also failed to exhibit the statutory demand to the affidavit filed in support of the application.     The company submitted that because the creditor was aware of the terms of the statutory demand and the fact that no affidavit accompanied the statutory demand, an inference could be made that it was open for the company to pursue the argument that the statutory demand should be set aside due to the absence of an accompanying affidavit.   The court rejected this submission and referred to the principle established in Graywinter that a ground to be relied upon by a plaintiff in an application to set aside a statutory demand must be raised in the supporting affidavit.  As the ground was not raised by the company in the supporting affidavit and the statutory demand was not referred to in or exhibited to the supporting affidavit, the company could not rely on it at the hearing of the application.   **(iii) Offsetting debts owed to company and director**   The company argued that it was entitled to set-off the costs owed by the creditor to Ms Fletcher even though the company was not a party to the proceedings in which it was ordered that Ms Fletcher's costs be paid by the creditor.  Whilst Ms Fletcher and the company were jointly and severally liable to pay the judgment debt which was the subject of the statutory demand, the debt owed to Ms Fletcher by the creditor was owed to her alone and she was not a party to the application to set aside the statutory demand.   The court stated that "one joint and several obligor who is sued alone cannot raise a set-off to which his or her co-obligor is entitled".  The primary reason for this is that the "rights of contribution between the co-obligors cannot be resolved".  If, for instance, the company had indemnified Ms Fletcher against any liability in relation to the judgment debt, it would be unjust to allow the company to rely on her personal off-setting claim.  Ms Fletcher would lose her right to collect the costs awarded to her and would presumably have to turn to the company for compensation.  Accordingly, the company was denied this off-setting claim.   The further off-setting claim, in relation to the costs owed to the company by the creditor, was allowed.  The amount of the statutory demand was adjusted accordingly.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h5)  **5.12 Setting aside statutory demand on basis of section 459J(1) of the Corporations Act**   (By Pablo Fernandez, DLA Phillips Fox) Joadja Whiskey v Abraham [2007] NSWSC 860, New South Wales Supreme Court, Hammerschlag J, 26 July 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/july/2007nswsc860.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/july/2007nswsc860.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**  Joadja Whiskey Co Pty Ltd (Joadja) brought proceedings under one of sections 459H(1)(a), 459J(1)(a) or 459J(1)(b) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) ("the Act") to set aside a statutory demand served on it by Yael Abraham. The Demand related to a judgment debt against Joadja and another company in favour of Ms Abraham. The Demand was served against both companies, which the court held was not acceptable as section 459E(1) only allows for service on a single company. As the Demand was incorrectly served, this would have caused substantial injustice to Joadja if it were not set aside.  Accordingly, Hammerschlag J ordered that the Demand be set aside.   **(b) Facts**   Joadja brought proceedings under one of sections 459H(1)(a), 459J(1)(a) or 459J(1)(b) of the Act seeking an order to set aside a statutory demand ("Demand") made on it by Ms Yael Abraham.    The Demand was addressed to both Jasmman Pty Ltd ("Jasmman") and Joadja claiming a debt of $22,500 plus interest.   The debt the subject of the Demand flowed from the judgment Ms Abraham obtained against Jasmman and Joadja in a suit for unfair dismissal in the Industrial Relations Commission of NSW.    Although it was clear that both Jasmman and Joadja were the parties being sued, the cover page of the judgment of the Commission reflected the sole respondent as being Jasmman.   After the expiry of the 21 day period allowed for payment of the demand, the Commissioner published a second judgment correcting the initial judgment and stating that the 'Respondent' was both Jasmman and Joadja.    **(c) Decision**    **(i) Section 459H(1)(a) - Genuine dispute**   Joadja submitted that there was a genuine dispute about the existence of the debt (section 459H(1)(a)) because judgment was not given against Joadja (or at least, it was unclear whether judgment was so given).   Hammerschlag J observed that there are two well established principles:   1. Rule 38 of the Industrial Relations Commission Rules (1996) (NSW), known as the 'slip rule', allows corrections to be made to the original judgment or order which corrections are treated as being effective as from the date of the original judgment or order. Therefore, the original judgment was to be treated as having been made against both Jasmman and Joadja together. 2. Where there is a debt which is the subject of a judgment of a court of competent jurisdiction, there cannot be a genuine dispute between the parties with respect to it within the meaning of that term in section 459H of the Act.   On this basis, his Honour concluded that there was no genuine dispute about the existence of the debt as contemplated by section 459H(1)(a).    **(ii) Section 459J - Setting aside demand on other grounds**   Hammerschlag J noted that the court's discretion under section 459J(1)(b) is a wide one.   The terms of the original judgment were unclear, and to an ordinary reader would have appeared more likely to have been against Jasmman. This was sufficient for the Demand to be set aside under section459J(1)(b).   Furthermore, his Honour observed that the Demand was addressed to both Joadja and Jasmman. Under section 459E(1) of the Act a person may serve on a company a demand.  The prescribed form for doing so (Form 509H) makes no provision for a demand to be addressed to more than one company.    Hammerschlag J then considered section 23 of the [Acts Interpretation Act 1901 No. 2 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "_new), which provides:  "In any Act unless the contrary intention appears: (a)      . (b)      words in a singular number include the plural and words in the plural  number include the singular"   His Honour held that section 459E(1) of the Act and the prescribed form (Form 509H) show a contrary intention and it is therefore not permissible for a single statutory demand to be made on more than one company. Following the relevant authorities, if the section were read to allow plural recipients, a statutory demand could be addressed to a multiplicity of debtors even though they were not jointly liable.    His Honour therefore held that this would cause substantial injustice within the meaning of section 459J(1)(a) of the Act, unless the Demand was set aside.  **(iii) Defects in the Demand**   The Demand contained a number of defects in relation to the interest claimed. Hammerschlag J considered that these defects in themselves were sufficient to warrant setting aside the demand.   The Demand was set aside. In light of Joadja's conduct in relation to the matter, his Honour made no order as to costs.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h5)  **5.13 Misuse of company funds leads to breaches of directors' duties**  (By Luke Raffin, Freehills)   Australian Securities and Investments Commission v Warrenmang Limited [2007] FCA 973, Federal Court of Australia, Gordon J, 29 June 2007  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fca973.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fca973.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**   By misusing Warrenmang Limited's funds ("Warrenmnang"), Robert Graeme Pritchard breached his duties as a director of the company by failing to:   * exercise a proper degree of care and diligence; * act in good faith in the best interests of Warrenmang and act for a proper purpose; and * refrain from improperly using his position to gain a personal advantage or to cause detriment to the company.   **(b) Facts**    On 5 December 2003, the company undertook an initial public offering ("IPO") of shares. However, Warrenmang was unable to raise the minimum subscription and the company was not listed. Although more than $2.5 million was paid to Warrenmang by 404 subscribers for approximately 7.34 million shares, some of the investors were not repaid their subscription monies. This was a contravention of sections 722 and 723 of the Corporations Act.    At least $2,206,082.10 was received by Warrenmang as part of the IPO.    On 19 January 2004, Pritchard (who was then the sole signatory of the Warrenmang Accounts) transferred almost $600,000 from the Warrenmang Accounts into a personal account held by Pritchard. Over the next two days, $291,885.75 was withdrawn from that personal account and used partly to fund the purchase of a house in Toorak in Pritchard's name.   **(c) Decision**    **(i) Breach of directors' duties**    Her Honour found that the "identity of interest" between the directors and shareholders meant that the requirement to prevent self-interested dealing was "acute" because:   * Warrenmang was registered as an unlisted public company on 1 September 2003 with Pritchard holding 20 million of 20.82 million issued shares; * although the company had three directors, Pritchard was at all times the person in charge of Warrenmang's day to day activities, including the maintenance of its financial records - he was its controlling mind; * Warrenmang raised substantial funds from hundreds of subscribers as part of its IPO; and * the subscription monies were received by Warrenmang and deposited into the Warrenmang Accounts to which Mr Pritchard was the sole signatory.   These circumstances impacted considerably on the content of the duty to exercise reasonable care and diligence that Pritchard owed to Warrenmang.   Pritchard failed to ensure that Warrenmang kept the subscription monies separately and to ensure that the company returned the subscription monies received from subscribers as soon as practicable. Furthermore, he as sole signatory to the Warrenmang Accounts permitted Warrenmang to pay $300,000 of those subscription monies to him for his own personal benefit to assist with the purchase of a family home. Gordon J found that this conduct was "inexcusable" and "deliberate and [Pritchard] knew it was not in the interests of Warrenmang".   Pritchard's contravention of section 180(1) was "founded on jeopardy to the interests of Warrenmang and, in the circumstances of the case, also on jeopardy to the interests of investors as potential creditors".    Moreover, Pritchard did not exercise his powers and discharge his duties in good faith in the best interests of Warrenmang and for a proper purpose. He "abused his power, he permitted his personal interests and those of Warrenmang to be placed in conflict and he misappropriated a portion of trust monies for himself". Pritchard abused his position for his own advantage to the detriment of Warrenmang.    Her Honour emphasised that every breach by a company of the Act does not necessarily give rise to a breach of the directors' duties provisions.   **(ii) The Federal Court's power to grant declarations**    Although her Honour canvassed the complexities relating to the civil and criminal process provisions in the Corporations Act, particularly the possibility that ASIC may impede subsequent criminal proceedings by first pursuing and securing a declaration of contravention (without seeking a pecuniary penalty order) under section 13137E of the Act, her Honour deemed it "neither necessary nor appropriate to explore these issues in the present case".   **(iii) Orders**   Pursuant to section 1317E of the Act, her Honour made a declaration of contravention that Pritchard contravened sections 180, 181 and 182 in that:   * he caused Warrenmang to contravene section 722 by failing to cause the company to hold the application money on trust failing and to return that application money as soon as practicable; and * he caused Warrenmang to contravene section 723 by failing to cause the company to refund the application money after the shares were not issued and he authorised payment of $300,000 of that money to himself and used that money for his own personal benefit.   There was no order as to costs.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h5) | |  |  | | --- | |  |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Contributions** |  |  | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007_files/spacer%281%29.gif | | |  | | --- | | 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](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007.htm%23h1) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007_files/spacer%281%29.gif |

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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007_files/spacer.gif | We welcome users' suggestions for improvement to this [service](mailto:helpdesk.asiapac@saiglobal.com).   |  | | --- | | **DISCLAIMER** This email alert is not intended to be and is not a complete or definitive statement of the law on the relevant subject matter. No person should take any action or refrain from taking any action in reliance upon the contents of this alert without first obtaining advice from a qualified practitioner. SAI Global expressly disclaims liability for any loss or damage suffered howsoever caused whether due to negligence or otherwise arising from the use of this information. For further information or if you have received this notice in error or believe that the email has been forwarded to you in breach of our licence terms, please notify SAI Global immediately by telephone on 03 9278 1555 or email [helpdesk.asiapac@saiglobal.com](mailto:helpdesk.asiapac@saiglobal.com). | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20121%20September%202007_files/spacer.gif |
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