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Recent Corporate Law Decisions](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#4)  [4.1 Application for order to inspect books of a company, to decide whether to commence proceedings against directors and officers of the company](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#041)   [4.2 Application by director/shareholder for access to the books of the company: Is access for the purpose of lobbying proxy holders a proper purpose?](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#042) [4.3 Interpretation of section 536 of the Corporations Act 2001 - Supervision of liquidators](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#043) [4.4 Administrator remuneration given priority over fixed charges](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#044)  [4.5 Winding up storm: Protecting the interests of creditors and the public](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#045)  [4.6 Creditors' trusts considered by court](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#046)  [4.7 The oppression provisions of the Corporations Act 2001 (Cth) - Finding an appropriate remedy](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#047)  [4.8 An analysis of the requirements of a partnership](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#048)  [4.9 A liquidator in a members voluntary winding up may go behind a judgment debt](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#049)  [4.10 Intentions and expert opinion may affect price sensitivity and disclosure obligations](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#410)  [4.11 The ability of a bank to protect its interests is not always unlimited](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#411)  [4.12 Court widens category of registrable instruments relating to charges](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#412)  [4.13 Voluntary administration: Extension of the convening period for a second meeting of creditors](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#413)  [4.14 Delaware Supreme Court clarifies Revlon standard and rejects challenges to sale process](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%285%29.htm#414) |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **1. Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%232) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%28566_files/spacer%281%29.gif | | |  | | --- | | **1.1 Proposals to reform executive remuneration**  On 20 April 2009, The Policy Exchange, a London policy institute, published a set of proposals to address the issue of executive compensation, and how the build-up of risk within the banking and financial services system that has led to the current financial crisis can be avoided in the future. The proposals are aimed at removing an over-reliance on common equity based schemes, which, according to the Policy Exchange, fail to address the different requirements of executives and shareholders.  The proposals include:   * introducing redeemable convertible preference shares to remuneration packages rather than common equity. The aim is to provide a balanced incentive: they pay a fixed annual dividend, and are not as volatile as underlying equity. Pure cash bonuses with no deferred component incentivise short term thinking. Pure equity does not tie rewards closely enough to individual performance according to the Policy Exchange; and * requiring shareholder approval for remuneration advisers and their fees.   The proposals are available on the [Policy Exchange](http://www.policyexchange.org.uk/" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.2 Audit of laws impacting on directors' liability**  On 17 April 2009, Corporate Law Minister Senator Nick Sherry announced that the Commonwealth will conduct an audit of its laws that impact on the issue of company director liability and will do so against the principles developed by the Council of Australian Governments (COAG).  COAG referred a set of principles to the Ministerial Council for Corporations and tasked the Commonwealth, State and Territory members of the Ministerial Council to assess the principles and conduct such an audit.  The COAG principles state:   * where companies contravene statutory requirements, liability should be imposed in the first instance on the company itself; * personal criminal liability of a corporate officer for the misconduct of the corporation should generally be limited to situations where the officer encourages or assists the commission of the offence (accessorial liability); and * in exceptional circumstances, where there is a public policy need to go beyond the ordinary principles of accessorial liability, a form of deemed liability could be imposed on a corporate officer only using a "designated officer" approach (for minor offences) or a "modified accessorial" approach (for more serious offences).   The Commonwealth aims to conduct the audit in the second half of 2009.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.3 Supervisory guidance for assessing banks' financial instrument fair value practices**  On 15 April 2009, the Bank for International Settlements (BIS) published a paper titled "Supervisory guidance for assessing banks' financial instrument for value practices". The application of fair value accounting to a wider range of financial instruments, together with experiences from the recent market turmoil, have emphasised the critical importance of robust risk management and control processes around fair value measurements. Moreover, given the significance of fair value measurements for regulatory capital adequacy and internal bank risk management it is equally important that supervisors assess the soundness of banks' valuation practices through the Pillar 2 supervisory review process under the Basel II Framework.  The paper provides guidance to banks and banking supervisors to strengthen valuation processes for financial instruments. The principles promote strong governance processes around valuations; the use of reliable inputs and diverse information sources; the articulation and communication of valuation uncertainty to internal and external stakeholders; the allocation of sufficient banking and supervisory resources to the valuation process; independent verification and validation processes; consistency in valuation practices for risk management and reporting purposes, where possible; and strong supervisory oversight around bank valuation practices.   The consultation paper is available on the [BIS](http://www.bis.org/publ/bcbs153.pdf?noframes=1" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.4 CEBS consults on high-level principles for risk management**  On 8 April 2009, the Committee of European Banking Supervisors (CEBS) started a public consultation on its proposed high-level principles for risk management. The consultation is open to all interested parties, including supervised institutions and other market participants.  In response to the G-20 Declaration and Action Plan published in November 2008, which called for strengthening banks' risk management practices, CEBS has conducted an analysis of its existing risk management guidelines, with the objective of identifying gaps in coverage and other areas where updates to the guidelines would be desirable.  The aim is to enhance and consolidate previously separate presentations and guidelines on risk management in a comprehensive guidebook. To this end, high-level principles for risk management are provided that are intended to be used by both institutions and supervisors in the supervisory review framework under Pillar 2 and may also form the basis of future CEBS guidelines on specific topics.  The high-level principles address governance and risk culture, risk appetite and risk tolerance, the role of Chief Risk Officer and the risk management function, risk models and integration of risk management areas, and new product approval policies and processes.  The consultation period runs until 10 July 2009.  The consultation paper is available on the [CEBS](https://www.c-ebs.org/getdoc/0861a22e-0eb8-4449-9b3a-f4b1959267c7/CP24_High-level-principles-for-risk-management.aspx" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.5 SEC seeks comments on short sale price test and circuit breaker restrictions**  On 8 April 2008, the US Securities and Exchange Commission (SEC) voted unanimously to seek public comment on whether short sale price restrictions or circuit breaker restrictions should be imposed and whether such measures would help promote market stability and restore investor confidence. In June 2007, the SEC voted to eliminate price restrictions.  The Commission decided to re-evaluate the issue due to extreme market conditions and the resulting deterioration in investor confidence.  The Commission voted to propose two approaches to restrictions on short selling. One would apply on a market wide and permanent basis, while the other would apply only to a particular security during severe market declines in that security.  **(a) Market-wide - permanent approach**   * Proposed Modified Uptick Rule: A market-wide short sale price test based on the national best bid (a proposed modified uptick rule). * Proposed Uptick Rule: A market-wide short sale price test based on the last sale price or tick (a proposed uptick rule).   **(b) Security-specific - temporary approach**  Circuit Breaker: A circuit breaker that would either:   * Ban short selling in a particular security for the remainder of the day if there is a severe decline in price in that security (a proposed circuit breaker halt rule); * Impose a short sale price test based on the national best bid in a particular security for the remainder of the day if there is a severe decline in price in that security (a proposed circuit breaker modified uptick rule); or * Impose a short sale price test based on the last sale price in a particular security for the remainder of the day if there is a severe decline in price in that security (a proposed circuit breaker uptick rule).   In addition, the Commission proposed amendments to Regulation SHO to require that a broker-dealer mark a sell order "short exempt" if the seller is relying on an exception to a short sale price test restriction or a circuit breaker rule.  **Background**  In 2004, the Commission initiated a year-long pilot that eliminated short sale price test restrictions from approximately one-third of the largest stocks. The purpose of the pilot was to study how the removal of such short sale price test restrictions impacted the market for those subject securities.  Short sale data was made publicly available during this pilot to allow the public and Commission staff to study the effects of eliminating short sale price test restrictions. Third-party researchers analyzed the publicly available data and presented their findings in a public Roundtable discussion in September 2006.  The Commission staff also studied the pilot data extensively and made its findings available in draft form in September 2006, and final form in February 2007.  At the time the SEC acted in 2007, there were two different types of price tests in place, covering significant numbers of securities. The Nasdaq "bid" test, which was based on the national best bid, covered approximately 2,900 Nasdaq securities in 2005 (or 44 million short sales). The SEC's former uptick tests (former Rule 10a-1), based on the last sale price, and covered approximately 4,000 exchange-listed securities (or 68 million short sales). In July 2008, when the restrictions were no longer in place, the SEC issued an emergency order imposing borrowing and delivery requirements on short sales of the equity securities of certain financial institutions. And in September 2008, the SEC issued another emergency order prohibiting short selling in the publicly traded securities of certain financial institutions.  Further information is available on the [SEC](http://www.sec.gov/" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.6 RBA/ASIC report on central counterparty requirements**  On 7 April 2009, Corporate Law Minister Senator Nick Sherry released the Reserve Bank of Australia (RBA) and Australian Securities and Investments Commission (ASIC) Review of Participation Requirement for Central Counterparties.  The Review has found that there is a strong in-principle case for the Australian Clearing House (ACH), a subsidiary of the Australian Securities Exchange (ASX), to set minimum capital levels, and although there is no single answer as to what level the minimum should be set at the Review noted that over the medium term it does not see a case that alternative arrangements would be unambiguously superior to those proposed by ACH.  In relation to the timing of further increases in minimum capital the Review found that recent market developments, particularly in the Australian third-party clearing market, mean the original timetable for capital increases should be reassessed and a more gradual implementation is recommended, with an increase to $5 million by mid-2010 and then to $10 million at some stage thereafter.  In response to concerns raised by smaller market participants about a planned subsequent increase in core minimum capital to $10 million by January 2010, Mr Sherry requested that the Review provide advice on what was an appropriate core liquid capital requirement for participants in Australia's licensed clearing facilities. Mr Sherry commissioned the Review on 11 December, 2008 and received the Review report on 13 March, 2009.  After reaching $5 million minimum in mid-2010, the ASX has indicated its intention to then reach a $10 million minimum at a later date, likely in January 2012, the date being subject to standard regulatory clearance processes and prevailing market circumstances.  The Review also contains several initiatives the RBA suggests might be implemented by ACH to enhance compliance with the RBA's Financial Stability Standard for Central Counterparties, including conducting an analysis of whether, in the light of the global financial crisis, there is a longer-term case for considering other additional risk controls.  The review is available on the [RBA](http://www.rba.gov.au/PaymentsSystem/StdClearingSettlement/RevParReqCenCou/rprcc_032009.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.7 Executive pay inquiry releases issues paper**  On 7 April 2009, the Productivity Commission (PC) released an issues paper and details about the conduct of its inquiry into Executive Remuneration in Australia.  The Commission is calling for submissions by 29 May 2009 and will hold an initial round of public hearings starting 16 June 2009. It proposes to release a draft report with preliminary findings in late September to elicit feedback through further submissions and a second round of public hearings.  The final report will be provided to the Government on 19 December 2009.  The main topics in the issues paper are:   * trends in director and executive remuneration in Australia and internationally; * the existing framework for the oversight, accountability and transparency of director and executive remuneration practices; * mechanisms to better align the interests of boards and executives with those of shareholders and the wider community; and * the international responses to remuneration issues arising from the global financial crisis.   The issues paper is available on the [PC](http://www.pc.gov.au/__data/assets/pdf_file/0003/87375/executive-remuneration-issues.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.8 Risk of slowdown in the European financial integration process**  In its third Report on Financial Integration in Europe published on 6 April 2009, the European Central Bank (ECB) signals that there is a risk that the financial integration process in Europe will slow down as a result of the financial and economic crisis. This year's report focuses on the impact of the financial crisis on the financial integration process. It notes that while significant progress in European financial integration has been made over a longer period of time, signs of retrenchment within national borders have recently emerged in certain financial market segments.  Financial integration is of key importance for the European Single Market and the ECB. First, it facilitates the smooth implementation of monetary policy and the balanced transmission of its effects throughout the euro area. It also contributes to financial stability by creating larger, more liquid and competitive markets which offer increased possibilities for risk diversification. Finally, financial integration fosters economic growth and welfare because it is beneficial to the further development and efficiency of the financial system. For all these reasons, the ECB considers that vigilance should be exercised to avoid a slowdown, or even reversal, of the financial integration process in Europe.  This year's report also covers aspects of financial development. Financial integration and financial development are normally complementary and mutually reinforcing: integration fosters financial development by enhancing the competitive stimulus, and financial development helps to overcome frictions and cross-border barriers that prevent full integration. However, the ongoing crisis also shows that financial innovation can at times be implemented in ways that reduce transparency and lead to excessive risk-taking, ultimately harming financial integration. One example of this is the pursuit of certain types of securitisation through the creation of sizeable off-balance sheet structures.  The report consists of three main chapters. The first assesses the state of financial integration in the euro area based on a set of statistical indicators developed by the ECB. The second includes thematic sections (Special Features) containing an in-depth assessment of three selected topics.   * The first Special Feature deals with the impact of the financial crisis on euro area financial integration. Some market segments are more affected than others: in unsecured money markets and government bond markets, in particular, liquidity risk and credit risk concerns have increased sharply, notably across borders. Conversely, traditional retail banking business with foreign clients has not been greatly affected so far. * The second Special Feature looks at the role of institutional investors in financial integration. Investment funds, insurance corporations and pension funds make an important contribution to European financial integration through the geographical diversification of their investment portfolios. According to the latest available data (third quarter of 2008) their portfolio allocation strategies across the euro area do not seem to have been greatly affected by the financial crisis as yet, but their overall assets under management have shrunk. * The third Special Feature deals with the financing of small and medium-sized enterprises and young innovative companies, which make an important contribution to employment and growth in Europe. These companies typically face greater financing constraints and costs than other firms, which may hamper innovation and growth. Access to finance by such companies could be facilitated by improving the structure of credit markets, further developing the European venture capital industry and avoiding distortions in tax or regulatory measures. It is particularly important that sound firms of this type benefit from continued access to cost-effective financing despite the financial turbulence.   The last chapter of the report provides an overview of the main Eurosystem activities in the field of financial integration in 2008.  The report is available on the [ECB](http://www.ecb.europa.eu/home/html/index.en.html" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.9 APRA consults on conflicts of interest guide for superannuation funds**  On 3 April 2009, the Australian Prudential Regulation Authority (APRA) released for public consultation draft guidance on managing conflicts of interest for APRA-supervised superannuation trustees (known as Registrable Superannuation Entity (RSE) licensees).  A discussion paper and draft Prudential Practice Guide 521 Conflicts of interest (SPG 521) have been prepared following earlier consultation with relevant government agencies and superannuation industry associations. APRA now seeks to consult more widely on this draft guide.  The draft SPG 521 complements guidance provided by the Australian Securities and Investments Commission to Australian Financial Services Licence (AFSL) holders by focussing on the governance of the RSE licensee, including those that do not hold an AFSL.  The guide is available on the [APRA](http://www.apra.gov.au/Policy/consultation-management-conflicts-interest-RSE-licensees-April-2009.cfm" \t "_new) website.  APRA will be releasing further superannuation prudential practice guides shortly as part of a review of existing guidance notes and circulars and the consideration of new issues. Topics to be covered include use of reserves in super funds, risk management, adequacy of resources, and fitness and propriety.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.10 US CEO pay**  According to the Wall Street Journal of 3 April 2009, the rise of CEO pay reversed in 2008 as shrinking profits led to smaller bonuses.  The median salaries and bonuses for the chief executives of 200 large US companies fell 8.5% to US$2.24 million, according to an analysis for The Wall Street Journal by Hay Group, a management consulting firm. The analysis examined proxy statements for companies with more than US$5 billion in annual revenue. Including the value of stock, stock options and other long-term incentives, total direct compensation for the CEOs dropped 3.4% to a median of US$7.56 million. The decline was the first in seven years and only the second drop since the Journal began tracking CEO pay in 1989.  While median CEO salaries grew 4.5%, bonuses fell 10.9% as profits decreased by a median 5.8%.  CEO compensation decreased more sharply at banks and brokerages. Median annual cash compensation for CEOs in the financial industry fell 43%, to US$976,000. Total direct compensation fell 14.2%, to a median US$7.6 million.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.11 Credit conditions sharpen focus on counterparty risk, insolvency**  On 2 April 2009, the CME Group, the world's largest derivatives exchange released results from its second annual Global Foreign Exchange (FX) Market Study of both cash and exchange-traded FX products, reinforcing indications that credit constraints have led to an increased focus on counterparty and systemic risks. A year after the first Global FX Market Study, the 2009 edition also provides confirmation that changing priorities among traders, toward better market access and lower costs related to bid-offer spreads, are driving demand in electronic trading.  At the time the survey was conducted (September 2008), traders revealed changing priorities when assessing their concerns in troubled markets. The Global FX Market Study showed the following:   * Banks cite counterparty risk as their biggest worry when supplying e-pricing, up to 84% from 72% last year. Worries about settlement risk dropped from 64% to 52%, while only 16% regarded latency as a concern, down from 19% in 2007 - a continuing trend; and * When assessing systemic risk, a liquidity crunch remained topmost worry at 43%. But tellingly, insolvency emerged as of nearly equal concern, up from 15% a year ago to 35% immediately prior to the Lehman Brothers insolvency. Correspondingly, worries regarding macro-economic problems fell from 30% to 14%; major e-systems failure dropped from 26% to 13% ; and back office/settlement limitations retreated from 26% to 12%.   In relation to trends identified in the previous year's Global Foreign Exchange Market Study, the following points were notable:   * Buy-side respondents displayed a greater need for cross-product risk management opportunities with money markets again most likely to be traded alongside FX, but increased growth in trading of other asset classes alongside FX. Seventy percent of Real Money investors cite money markets as their leading cross-product asset class, on a par with 2007, followed by Fixed Income at 65% (up from 35%). Highly Active investors showed growth across all cross-product activities, with money markets up from 73% to 83%; fixed income up from 53% to 61%; equities up from 41% to 54%, and interest rates up from 28% to 40%. * For the second year, difficulty in realizing absolute returns through FX investment strategies drove investors away from dedicated FX funds and towards hedging/overlay risk management strategies. Dedicated FX funds declined 30% to four percent for Real Money investors and 27% to 15% for Active managers. Correspondingly, Real Money investors' focus on hedging and overlay strategies rose 51% to 82%, while Active Investors' 73% was 44%above last year's figure. * Continuing the trend toward a greater uptake of electronic trading, the 2007 survey's prediction of an 80% proportion of cash trades conducted electronically by 2010 has already been achieved. The acceleration is driven by banks that now conduct 85% of their trades electronically (up from 76%in 2007), whereas Real Money investors remained stable at 72% and Highly Active investors at 70%.   The survey is available on the [CME Group](http://cmegroup.com/trading/fx/global-fx-survey" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.12 G20 - strengthening the financial system**  On 2 April 2009, the leaders of the G20 nations issued a statement setting out the points of action agreed to stabilise the world economy.   The following action was agreed for reforming the regulatory framework of the financial sector:   * New Financial Stability Board with a strengthened mandate; * Extension of regulation and oversight to all systemically important financial institutions, including, for the first time, systemically important hedge funds; * Implementation of the Financial Stability Forum's (FSF) principles on pay and compensation and support of sustainable compensation schemes Improvement of quality, quantity, and international consistency of capital in the banking system; * Action against non-cooperative jurisdictions, including tax havens; * A single set of high-quality global accounting standards; and * Extension of regulatory oversight and registration to credit rating agencies.   The leaders' statement is available on the [G20](http://www.g20.org/Documents/g20_communique_020409.pdf" \t "_new) website.  The declaration on strengthening the financial system is available on the [G20](http://www.g20.org/Documents/Fin_Deps_Fin_Reg_Annex_020409_-_1615_final.pdf" \t "_new) website.  The declaration on delivering resources through international financial institutions is available on the [G20](http://www.g20.org/Documents/Fin_Deps_IFI_Annex_Draft_02_04_09_-__1615_Clean.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.13 Financial Stability Forum issues recommendations and principles to strengthen financial systems**  On 2 April 2009, the Financial Stability Forum (FSF) issued reports covering:   * Recommendations for addressing procyclicality in the financial system; * Principles for sound compensation practices; and * Principles for cross-border cooperation on crisis management.   The Forum also published an update on the implementation of the recommendations contained in the FSF's April 2008 "Report on Enhancing Market and Institutional Resilience".  **(a) Addressing procyclicality in the financial system**  The present crisis has demonstrated the disruptive effects of procyclicality - mutually reinforcing interactions between the financial and real sectors of the economy that tend to amplify business cycle fluctuations and cause or exacerbate financial instability. Addressing procyclicality in the financial system is an essential component of strengthening the macroprudential orientation of regulatory and supervisory frameworks.  The recommendations set out in the report mitigate mechanisms that amplify procyclicality in both good and bad times. They encompass a mix of quantitative/rules-based and discretionary measures that are interrelated and reinforce one another. They will be implemented over time once conditions in financial markets return to normal.  The recommendations are in the following three areas:  **The bank capital framework**: These recommendations were developed with the Basel Committee on Banking Supervision (BCBS) and are intended to mitigate the risk that the regulatory capital framework amplifies the transmission of shocks between the financial and real sectors. They include the development of countercyclical capital buffers and a supplementary non-risk based measure to contain bank leverage. An integrated package of measures covering the recommendations will be issued for consultation before the end of 2009.  **Bank loan loss provisions**: These recommendations reflect the view that earlier recognition of loan losses could have dampened cyclical moves in the current crisis, and that earlier identification of and provisioning for credit losses are consistent both with financial statement users' needs for transparency regarding changes in credit trends and with prudential objectives of safety and soundness. Recommended accounting and capital measures seek to achieve these objectives while encouraging sound provisioning practices and enhancing their transparency. The recommended measures result from dialogue among regulators, supervisors and accounting standard setters.  **Leverage and valuation**: These recommendations, which were developed with the Committee on the Global Financial System (CGFS), are intended to reduce procyclicality that has arisen from the interaction of leverage, funding mismatches and fair value accounting. They call on regulators and supervisors to obtain a clear and comprehensive picture of aggregate leverage and liquidity, and to use quantitative indicators and/or constraints on leverage and margins as macroprudential tools for supervisory purposes. Accounting standard setters are encouraged to improve approaches to valuation and financial instruments, in cooperation with prudential supervisors, so as to dampen adverse dynamics potentially associated with fair value accounting. The FSF will monitor the implementation of these recommendations and continue to examine aspects of procyclicality in the system.  **(b) Principles for sound compensation practices**  The Principles require compensation practices in the financial industry to align employees' incentives with the long-term profitability of the firm. The Principles call for effective governance of compensation, and for compensation to be adjusted for all types of risk, to be symmetric with risk outcomes, and to be sensitive to the time horizon of risks. Implementation by firms will be reinforced through supervisory examinations at the national level.  The Principles are intended to apply to all significant financial institutions but are especially critical for large, systemically important firms. Authorities expect evidence of material progress in the implementation of the Principles by the 2009 remuneration round. Full implementation should proceed as rapidly as possible and be sustained. Authorities, working through the FSF, will ensure coordination and consistency of approaches across jurisdictions.  **(c) Principles for cross-border cooperation on crisis management**  Through these Principles, relevant authorities, including supervisory agencies, central banks and finance ministries, commit to cooperate both in making advanced preparations for dealing with financial crises and in managing them.   The principles also commit national authorities from relevant countries to meet regularly alongside core supervisory colleges to consider together the specific issues and barriers to coordinated action that may arise in handling severe stress at specific firms, to share information where necessary and possible, and to ensure that firms develop adequate contingency plans. The FSF will act as a clearinghouse for experiences in information sharing and contingency planning for the benefit of all its members.  **(d) Update on the implementation of the April 2008 FSF recommendations**  The update on progress in implementing the recommendations of the April 2008 "Report on Enhancing Market and Institutional Resilience" covers actions in five areas: (i) strengthening capital, liquidity and risk management in the financial system; (ii) enhancing transparency and valuation; (iii) changing the role and uses of credit ratings; (iv) strengthening the authorities' responsiveness to risks; and (v) putting in place robust arrangements for dealing with stress in the financial system.  The report summarises progress since October 2008, when the FSF published a follow-up report reviewing progress until then. The FSF notes that implementation progress since October 2008 has been extensive. In particular:   * Banking supervisors have published proposals for improving risk capture under Basel II, especially with regard to credit-related risks in the trading book. They have also published revised capital charges for liquidity commitments to off-balance sheet entities and for the re-securitised instruments. * The BCBS published in January 2009 the standards for firm-wide risk management that supervisors will assess under Pillar 2 of the capital framework. * Central counterparty clearing for over-the-counter credit derivatives has been launched in the US and in Europe. * Consistent guidance has been issued by the International Accounting Standards Board (IASB) and the US Financial Accounting Standards Board (FASB) for fair valuation when markets are illiquid, and for the transfer of assets between valuation categories in rare circumstances. The IASB has also proposed revised standards for the consolidation and disclosure of off-balance sheet entities and related exposures. The IASB finalised in March 2009 an amendment to IFRS 7 setting forth enhancements to required risk and valuation disclosures for financial activities, including for complex financial instruments. * The 2008 revisions of the International Organization of Securities Commissions (IOSCO) Code of Conduct Fundamentals for Credit Rating Agencies have been substantially implemented by several rating agencies including the three largest ones. IOSCO has also developed a model examination module to be used by the authorities that regulate and inspect credit rating agencies. * Supervisory colleges have been established for most of the financial institutions identified by the FSF and many of them held face-to-face meetings by end-2008. * The International Association of Deposit Insurers and the BCBS issued in March a set of Core Principles for Effective Deposit Insurance Systems.   The FSF brings together national authorities responsible for financial stability in significant international financial centres, international financial institutions, sector-specific international groupings of regulators and supervisors, and committees of central bank experts. It was established by the G7 Finance Ministers and Central Bank Governors in 1999 to promote international financial stability through enhanced information exchange and international cooperation in financial market supervision and surveillance. The FSF decided in March 2009 to expand its membership to all G20 countries, as well as Spain and the European Commission.  The document "Recommendations for Addressing Procyclicality in the Financial System" is available on the [FSF website](http://www.fsforum.org/publications/r_0904a.pdf" \t "_new).   The document "Principles for Sound Compensation Practices" is available on the [FSF website](http://www.fsforum.org/publications/r_0904b.pdf" \t "_new).  The document "Principles for Cross-border Cooperation on Crisis Management" is available on the [FSF website](http://www.fsforum.org/publications/r_0904c.pdf" \t "_new).  The "Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience" is available on the [FSF website](http://www.fsforum.org/publications/r_0804.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.14 Insurance risk management response to the financial crisis**  On 1 April 2009, the Chief Risk Officer (CRO) Forum published the paper "Insurance risk management response to the financial crisis".  This paper summarises the CRO Forum's views on the key elements of effective risk management, the differences between insurance and banks' approach to risk management, and the importance of economic-based group supervision for cross-border (re)insurers. The paper covers five major themes which the CRO Forum considers to be necessary responses to the crisis:   * Integrated risk governance; * Risk models; * Liquidity risk management; * Valuation and risk disclosure; and * Group supervision.   The paper is available on [CRO](http://www.croforum.org/home.ecp" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.15 Initiatives in response to the crisis by the Basel Committee**  On 30 March 2009, Mr Nout Wellink, Chairman of the Basel Committee on Banking Supervision highlighted steps the Basel Committee is taking to strengthen the global regulation of the banking sector.  Mr Wellink, speaking before the European Parliament's Committee on Economic and Monetary Affairs, noted that "supervisors must have a comprehensive strategy to deal with the crisis and the associated impact on banks. This is essential if we are to restore stability to our financial systems and economies."  The Basel Committee's current and planned initiatives are intended to produce a more robust supervisory and regulatory framework for the banking sector.  These efforts, which also are in support of the initiatives and recommendations of the Financial Stability Forum and the G20 leaders, include:   * better coverage of banks' risk exposures, including for trading book, securitisation, and derivative activities; * more and higher quality capital to back these exposures; * countercyclical capital buffers and provisions that can be built up in good times and drawn down in stress; * the introduction of a non-risk based measure to supplement Basel II and help contain leverage in the banking system; * higher liquidity buffers; * stronger risk management and governance standards; * more regulatory focus on system-wide or "macroprudential" supervision; and * greater transparency about the risk in banks' portfolios.   The speech is available on the [BIS](http://www.bis.org/review/r090330a.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.16 IOPS invites public comment on draft guidelines for supervisory intervention, enforcement and sanctions**  On 30 March 2009, the International Organisation of Pension Supervisors (IOPS) invited public comment on draft guidelines for supervisory intervention, enforcement and sanctions.  Due to the crucial role of the private pension systems within the financial markets, and their increasing importance as a source of retirement income for individuals, the effective supervision of pension funds is becoming more important.  The objectives of pension supervision include protecting the interests of pension fund members and beneficiaries, safeguarding the stability of the pension industry and contributing to the stability of the financial system as a whole. To achieve these objectives, supervisory authorities need not only to have adequate supervisory methods but also to be able to enforce regulations and require pension funds to take remedial action when necessary. The question of whether, when and how to intervene in the operation of pension funds is of crucial importance if the objectives of supervision are to be met.  The guidelines are intended to reflect international good practice regarding the powers which are needed by supervisory authorities in relation to intervening, applying sanctions and enforcing action in regards to the pension entities they oversee, and how these powers should be used in order to maximise benefits and minimise costs. These guidelines build on the IOPS "Principles of Private Pension Supervision", and draw on the OECD "Core Principles of Occupational Pension Regulation", the IAIS "Insurance Core Principles and Methodology" as well as IAIS guidance papers, and IOSCO's "Objectives and Principles of Securities Regulation". Although these guidelines serve as a benchmark reference, the question of how to best apply them in practice should take into account country-specific conditions and circumstances.  The deadline for comments is 5 May 2009.  The guidelines are available on the [IOPS](http://www.iopsweb.org/dataoecd/51/9/42465054.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.17 US Treasury outlines framework for regulatory reform**  On 26 March 2009, the US Treasury published its framework for regulatory reform of the financial system. According to the US Treasury, the crisis of the past 18 months has exposed critical gaps and weaknesses in the US financial regulatory system. As risks built up, internal risk management systems, rating agencies and regulators simply did not understand or address critical behaviours until they had already resulted in catastrophic losses.  There are four broad components of comprehensive regulatory reform:   1. **Addressing systemic risk**: This crisis - and the cases of firms like Lehman Brothers and AIG - has made clear that certain large, interconnected firms and markets need to be under a more consistent and more conservative regulatory regime. 2. **Protecting consumers and investors**: It is crucial that when households make choices to invest their savings there are clear rules that prevent manipulation and abuse. While outright fraud like that perpetrated by Bernie Madoff is already illegal, these cases highlight the need to strengthen enforcement and improve transparency for all investors. Lax regulation also left too many households exposed to deception and abuse when taking out home mortgage loans. 3. **Eliminating gaps in the US regulatory structure**: The regulatory structure must assign clear authority, resources, and accountability for each of its key functions. 4. **Fostering international coordination**: To keep pace with increasingly global markets, international rules for financial regulation must be consistent with the high standards to be implemented in the United States.  Additionally, a new, three-pronged initiative to address prudential supervision, tax havens, and money laundering issues in weakly-regulated jurisdictions will be launched.   In relation to the first component of regulatory reform - systemic risk - the following reforms are proposed:   1. A single independent regulator with responsibility over systemically important firms and critical payment and settlement systems. 2. Higher standards on capital and risk management for systemically important firms. 3. Registration of all hedge fund advisers with assets under management above a moderate threshold. 4. A comprehensive framework of oversight, protections and disclosure for the OTC derivatives market. 5. New requirements for money market funds to reduce the risk of rapid withdrawals.   Further information is available on the [US Department of the Treasury](http://www.ustreas.gov/press/releases/tg72.htm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.18 CEIOPS releases its first set of consultation papers on solvency II level 2 implementing measures**  Following a decision on 26 March 2009, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) released for consultation its first set of Advice on Solvency II - Level 2 implementing measures.  CEIOPS has initiated the consultation procedure in response to the European Commission's request for fully consulted advice on Level 2 implementing measures and its recommendation to develop Level 3 guidance on certain areas to foster supervisory convergence.  The Consultation Papers deal with a large number of Pillar I, Pillar II and Pillar III issues, which have been developed on the basis of the general approach on the Solvency II Directive proposal as adopted by the ECOFIN Council on 2 December 2008.  CEIOPS will finalise the papers for submission to the European Commission, taking into account the comments received, the lessons learned from the crisis, and the adopted Directive text.  Further information is available on the [CEIOPS](http://www.ceiops.eu/" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.19 EFRAG and European national standard-setters publish discussion paper on performance reporting**  On 25 March 2009, the European Financial Reporting Advisory Group (EFRAG) and the national standard-setters of Denmark, France, Germany, Italy, Poland, Spain, Sweden and the UK issued a discussion paper under the PAAinE initiative that explores and encourages debate on some key performance reporting issues.  Performance reporting is a fundamental issue for users of financial statements.  When users pick up a set of financial statements, they are primarily interested in what those statements tell them about financial performance. This has implications for all aspects of accounting, including the way gains and losses are displayed (or presented) in those financial statements.  Although the IASB and FASB have an active project on Financial Statement Presentation and have issued a Discussion Paper on the subject recently, there are a number of fundamental issues about the presentation of financial performance information that that discussion paper does not address.  Those issues include:   * should the net income line be retained? * (if it should be retained), what should the basis be for determining whether something is within net income or outside net income? * what role should recycling have in performance reporting?   The PAAinE discussion paper "Performance Reporting: A European Discussion Paper" explores those issues. It notes that performance is a complex, multi-faceted notion that cannot be encompassed in one or a few numbers.  Nevertheless both preparers and users want some key performance reporting lines to convey headline numbers and to provide a starting point for analysis. It is therefore important that items of income, expense, gains and losses are disaggregated, grouped and aggregated in a way that ensures that the most useful key lines are presented. The paper notes that whether recycling is needed also depends on the aggregation/disaggregation model used. The final chapters of the paper discuss various disaggregation models.  The discussion paper is available on the [EFRAG](http://www.efrag.org/files/ProjectDocuments/PAAinE%20-%20Performance%20Reporting%20MARCH%202009/March%202009%20European%20Discussion%20Paper%20on%20Performance%20Reporting.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.20 IASB and FASB announce further steps in response to global financial crisis**  On 24 March 2009, the International Accounting Standards Board (IASB) and the Financial Accounting Standards Board (FASB) announced further steps in response to the global financial crisis.  Building on work underway, the two boards have agreed to work jointly and expeditiously towards common standards that deal with off balance sheet activity and the accounting for financial instruments. They will also work towards analysing loan loss accounting within the financial instruments project.  These steps reaffirm a commitment to a joint approach to the financial crisis and to the overall goal of seeking convergence between International Financial Reporting Standards (IFRSs) and US generally accepted accounting principles (GAAP) described by a Memorandum of Understanding (MoU) first published in 2006 and updated in 2008.  The boards will work together towards common standards by developing the IASB projects on consolidation and derecognition as joint projects once the FASB has completed its short-term amendments to its existing standards. Furthermore, the boards have agreed to issue proposals to replace their respective financial instruments standards with a common standard in a matter of months. As part of this project the boards will examine loan loss accounting, including the incurred and expected loss models.  The boards have also discussed projects on financial statement presentation, fair value measurement, financial instruments with the characteristics of equity and the conceptual framework.  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/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.21 Executive remuneration: European Forum sets out best practices**  On 24 March 2009, the European Corporate Governance Forum, which examines best practices in Member States in the field of corporate governance, issued a public statement concerning the main principles that should govern the remuneration of executive directors. The Forum considers that Member States should ensure that these principles are incorporated in the national corporate governance codes and suggests that the Commission should issue a recommendation to this end. Furthermore, it suggests that a directive would be appropriate to ensure that listed companies disclose their remuneration policy and the pay of individual directors.  The Forum, while acknowledging that the determination of the pay structure and the levels should be left to companies and shareholders, advocates that certain best practices should be respected.  Examples of the best practices that the Forum lists in its statement are:   * that the level of variable pay should be reasonable in relation to total pay level; * that variable pay should be linked to factors that represent real growth of the company and real creation of wealth for the company and its shareholders; * that shares granted to executive directors under long-term incentive plans should vest only after a period during which performance conditions are met; and * that severance pay for executive directors should be restricted to two years of annual remuneration and should not be paid if the termination is for poor performance.   The text of the Forum's statement and additional information on the Forum's work is available on the [EC](http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.22 National Association of Corporate Directors launches campaign to strengthen corporate governance**  On 24 March 2009, the National Association of Corporate Directors (NACD) launched "America's Challenge for Corporate Directors: Renew Commitment to Corporate Governance and Oversight Excellence", a nationwide campaign challenging every corporate board and individual director to restore public and investor confidence in publicly traded companies by strengthening corporate governance and oversight of America's corporations.  The campaign urges boards to:   * embrace NACD's "Key Agreed Principles to Strengthen Corporate Governance for Publicly Traded Companies" and use them as a framework for assessing board practices and as a tool that can be adapted to each board's specific needs; * assess the board's practices with an emphasis in four critical areas: executive compensation, risk oversight, corporate strategy and transparency; * commit to continuous director education and knowledge exchange around the Key Agreed Principles and around leading practices and emerging issues that have been identified by NACD's White Paper Series; and * provide greater transparency by annually sharing board progress on these commitments   Further information is available on the [NACD](https://secure.nacdonline.org/source/members/whitepages/about.cfm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.23 ASA reviews stance on executive remuneration**  On 23 March 2009, the Australian Shareholders' Association (ASA) released its new policy on executive remuneration.  Amongst the enhancements, the ASA will require that long-term incentives are not paid to executives unless they have met performance criteria over at least four consecutive years. The policy requires executives to hold a meaningful portion of any incentive earned in company shares for at least another two years, even if they leave the position.  The policy is available on the [ASA](http://www.asa.asn.au/PolicyStatements/ExecutiveRemunerationPolicy.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.24 IOSCO consults on regulatory approach to short selling**  On 23 March 2009, the International Organization of Securities Commissions' (IOSCO) Technical Committee published a consultation report titled "Regulation of Short Selling" prepared by its Task Force on Short Selling (Task Force), which contains proposed principles designed to help develop a more consistent international approach to the regulation of short selling. The Task Force was established by the Technical Committee in November 2008 in response to concerns regarding the impact short selling was having in the extreme market conditions created by the financial crisis. The Task Force's aims were to work to eliminate gaps between the different regulatory approaches to naked short selling whilst minimising any adverse impact on legitimate activities, such as securities lending and hedging, which are critical to capital formation and reducing market volatility.  The report recommends that effective regulation of short selling should be based on the following four principles:   1. Short selling activities should be subject to appropriate controls to reduce or minimise the potential risks that could affect the orderly and efficient functioning and stability of financial markets; 2. Short selling should be subject to a reporting regime that provides timely information to the market or to market authorities; 3. Short selling should be subject to an effective compliance and enforcement system; and 4. Short selling regulation should allow appropriate exceptions for certain types of transactions for efficient market functioning and development.   **Recommendations**  The report outlines the minimum that regulators should do in order to support each of the four principles.  **The First Principle** - appropriate controls to reduce or minimise the potential risks that could affect the orderly and efficient functioning and stability of financial markets. In order to reduce or minimise the potential risks from short selling, regulators should have an effective discipline for the settlement of short selling transactions. As a minimum requirement this should impose strict settlement (such as compulsory buy-in) of failed trades.  **The Second Principle** - a reporting regime that provides timely information to the market or to market authorities. In order to achieve this enhanced level of transparency regarding short selling activity, jurisdictions should consider some form of reporting of short selling information to the market or to market authorities.  **The Third Principle** - an effective compliance and enforcement system.  This is essential for an effective short selling regulatory regime. Regulators should:   * monitor and inspect settlement failures regularly; * consider whether they are able to extend the power to require information from parties suspected of breach, beyond the scope of licensed or registered persons if they lack such power; * establish a mechanism to analyse the information obtained from the reporting of short positions and/or flagging of short sales to identify potential market abuses and systemic risk; and * review whether their existing cross-border information sharing arrangements are sufficient to facilitate cross-border investigation.   **The Fourth Principle** - allow appropriate exceptions for certain types of transactions for efficient market functioning and development. It is necessary that there is flexibility in short selling regulation in order to allow market transactions that are desirable for efficient market functioning and development. Therefore regulatory authorities should at a minimum clearly define the exempted activities and the manner in which these exemptions should be reported.  The consultation report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD289.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.25 IOSCO publishes hedge funds oversight recommendations**  On 19 March 2009, the International Organization of Securities Commissions' (IOSCO) Technical Committee published a consultation paper - Hedge Funds Oversight: Consultation Report - containing preliminary findings and recommended regulatory approaches to mitigate risks associated with the trading and traditional lack of transparency of hedge funds.  The report was prepared by the Technical Committee's Task Force on Unregulated Financial Entities (Task Force), which is among those established in November 2008 and is co-chaired by the Consob of Italy and the Financial Services Authority of the UK, to support the initiatives undertaken by the G-20 to restore global growth and achieve much needed reforms in the world's financial systems in the wake of the financial crisis. The preliminary findings and recommendations of the Task Force have been presented to the G-20 Working Group on Enhancing Sound Regulation and Strengthening Transparency and to the Financial Stability Forum.  The Task Force report discusses the regulatory issues presented by hedge funds, in particular focusing on the recent financial crisis, issues around systemic risk, and regulatory issues regarding conduct of business.  The consultation report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD288.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.26 Reforms to strengthen US money market funds and the money market**  On 18 March 2009, the US Investment Company Institute announced that its Board of Governors has received a report from the Money Market Working Group and has unanimously endorsed the Group's recommendations concerning new regulatory and oversight standards for money market funds.  Among other changes, the recommendations would for the first time require money market funds to meet new mandated daily and weekly minimum liquidity standards. The Money Market Working Group also recommends tightening the portfolio maturity limits currently applicable to money market funds and raising credit quality standards.  **Recommendations**  The Working Group's recommendations are designed to strengthen and preserve the unique attributes of money market funds: safety, liquidity, and the convenience of a stable $1.00 net asset value (NAV). The new standards and regulations will ensure that money market funds are better positioned to sustain prolonged and extreme redemption pressures and that mechanisms are in place to ensure that all shareholders are treated fairly if a fund sees its NAV fall below $1.00. The report includes a number of recommendations that will:   * For the first time, impose daily and weekly minimum liquidity requirements and require regular testing of the fund's individual portfolio holdings and shareholder base. * Tighten the portfolio maturity limit currently applicable to money market funds and add a new portfolio maturity limit. * Raise the credit quality standards under which money market funds operate. This would be accomplished by requiring a "new products" or similar committee to review and approve new structures prior to investment, encouraging advisers to follow "best practices" for determining minimal credit risks, requiring advisers to designate the credit rating agencies their funds will follow to encourage competition among the rating agencies to achieve this designation, and prohibiting investments in "Second Tier Securities". * Address "client risk" by encouraging money market fund advisers to adopt "know your client" procedures and requiring them for the first time to disclose client concentrations and the potential risks, if any, posed by a fund with a strongly concentrated client base. * Enhance risk disclosure for investors and the market and require monthly website disclosure of a money market fund's portfolio holdings. * Assure that, when a money market fund proves unable to maintain a stable $1.00 NAV, all of its shareholders are treated fairly. For this purpose, a money market fund's board of directors would be authorized to temporarily suspend redemptions and purchases of fund shares under certain situations, and to permanently suspend redemptions for funds preparing to liquidate in order to ensure that all shareholders are treated fairly. * Enhance government oversight of the money market by developing a reporting regime so that regulators will have access to better information about all institutional investors in the money market, including money market funds, and encouraging the SEC staff to monitor higher-than-peer performance of money market funds. * Increase investor understanding of money market funds and address market confusion about money market participants that appear to be-but are not- money market funds.   The report is available on the [ICI](http://www.ici.org/pdf/ppr_09_mmwg.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.27 FSA publishes consultation paper on remuneration**  In March 2009, the UK Financial Services Authority (FSA) published a consultation paper (CP) which formally consults on whether to incorporate its Code of practice on remuneration into the Handbook and its application to large banks and broker dealers.  The Code has a general requirement that "a firm must establish, implement and maintain remuneration policies, procedures and practices that are consistent with and promote effective risk management". This would become a Handbook rule.  The CP will also propose that the Code's remaining ten principles are put into the Handbook to help guide firms on the evidence the FSA will focus on when assessing compliance.  The Code's rules and evidential provisions would apply to certain FSA authorised large banks and broker dealers, defined as follows:  FSA authorised banks and building societies which meet either or both of these criteria:   * Consolidated regulatory capital in the UK banking entities in excess of £1 billion. * Part of an international financial group whose regulatory capital is in excess of £20 billion or the equivalent amount in another currency.   FSA authorised investment firms (BIPRU "730k" firms) which meet either or both of these criteria:   * Consolidated regulatory capital in the UK authorised entity in excess of £750 million or its equivalent amount in a foreign currency. * Part of an international financial group whose total shareholder equity is  in excess of £5 billion or its equivalent amount in a foreign currency.   These criteria will extend the Code to about 45 of the largest banks, building societies and broker dealers operating in the UK.  The CP is also inviting discussion on the idea that the Code should be applied to all other FSA-authorised firms.  The consultation paper is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/CP/2009/09_10.shtml" \t "_new) website.  The draft code is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Other_publications/Miscellaneous/2009/cop_remun.shtml" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.28 FSA publishes review of global banking regulation**  In March 2009, the UK Financial Services Authority (FSA) published the Turner Review of global banking regulation.  Lord Turner, chairman of the FSA, was asked by the Chancellor of the Exchequer to review the events that led to the financial crisis and to recommend reforms.  The Review identifies three underlying causes of the crisis - macro-economic imbalances, financial innovation of little social value and important deficiencies in key bank capital and liquidity regulations.  These were underpinned by an exaggerated faith in rational and self-correcting markets.   It stresses the importance of regulation and supervision being based on a system-wide "macro-prudential" approach rather than focussing solely on specific firms.  It recommends:   * Fundamental changes to bank capital and liquidity regulations and to bank published accounts; * More and higher quality bank capital, with several times as much capital required to support risky trading activity; * Counter-cyclical capital buffers, building up in good economic times so that they can be drawn on in downturns, and reflected in published account estimates of future potential losses; * A central role for much tighter regulation of liquidity; * Regulation of "shadow banking" activities on the basis of economic substance not legal form: increased reporting requirements for unregulated financial institutions such as hedge funds, and regulator powers to extend capital regulation; * Regulation of credit rating agencies to limit conflicts of interest and inappropriate application of rating techniques; * National and international action to ensure that remuneration policies are designed to discourage excessive risk-taking; * Major changes in the FSA's supervisory approach, building on the existing Supervisory Enhancement Programme (SEP), with a focus on business strategies and system wide risks, rather than internal processes and structures; and * Major reforms in the regulation of the European banking market, combining a new European regulatory authority and increased national powers to constrain risky cross-border activity.   The Turner Review distinguishes between those areas where the FSA has already taken action, those where the FSA can proceed nationally, and those where international agreement needs to be achieved. It also recognises that there may be alternative specific ways to achieve the essential objectives of effective regulation.  In addition the Review highlights areas where it is premature to recommend specific action, but where wide-ranging options need to be debated. These include product regulation in retail (e.g. mortgage) and wholesale (e.g. CDS) markets.  Published alongside the Review is an FSA discussion paper (DP) which sets out more detail on specific policy proposals. As the current crisis arose in the banking, investment banking and "shadow banking" sectors, most of these proposals focus on these sectors. Possible implications for some other sectors are however identified.  The Turner Review is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Corporate/turner/index.shtml" \t "_new) website.  The discussion paper is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/DP/2009/09_02.shtml" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.29 Research report - personal insolvency trends**  The Centre for Corporate Law and Securities Regulation at the University of Melbourne has published a new research report titled "Trends in Personal Insolvency in Australia", authored by Professor Ian Ramsay and Cameron Sim. Personal insolvency includes bankruptcy, debt agreements and personal insolvency agreements under the [Bankruptcy Act 1966 No. 33 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "default).  The authors examine data on the number of personal insolvencies for the period 1990 to 2008 and on the characteristics of personal insolvents for the period 1997 to 2008. Key findings include: (1) a significant increase (261%) in the number of personal insolvents over the time period studied - far exceeding the increase in population; (2) changes over time in the reasons for this increase (for example, increases in excessive use of credit, ill health, and gambling or other speculation leading to personal insolvency); (3) significant changes in the characteristics of personal insolvents (for example, bankrupts are now older and have more dependants).  The authors find evidence that personal insolvency in Australia is becoming more of a middle class phenomenon. Personal insolvents are increasingly coming from higher status occupations; have increasing levels of personal income and household income; and have increasing asset and property ownership levels.  The research report is available on the [SSRN](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1367445" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1)  **1.30 Research report - broad based employee share ownership in Australian listed companies**  The Centre for Corporate Law and Securities Regulation at the University of Melbourne has published a new research report titled "Broad based employee share ownership in Australia".  The research report presents findings from a survey of employee share ownership practice in Australian listed companies. The research focused on broad-based employee share ownership plans (ESOPs): that is, plans that are open to a majority of employees within the company. The purpose of the study was fourfold: (1) to inform public policy debate on the issue of employee share ownership through providing, for the first time, a detailed account of employee share plan practice in Australian listed companies; (2) to examine how, if at all, the regulatory framework in taxation and corporate law is impacting upon the decision by companies to implement ESOPs and the design of their plans; (3) to obtain company views on the adequacy of the current regulatory framework; and (4) to test a range of hypotheses as to the determinants of ESOPs in the Australian context.  Key findings as to company practice include: (1) approximately 57% of companies responding to the survey had at least one broad-based employee share ownership plan; (2) significantly more companies reported having a broad-based plan than a narrow-based plan: that is, a plan that is only open to executives; (3) the three most popular reasons for implementing a plan were "showing employees the company values them"; "sharing financial success with employees"; and "aligning employee interests with shareholder interests"; (4) over three quarters of companies that have a broad-based plan have adopted their plan since 2000; (5) the most common type of broad-based ESOP was a plan structured to take advantage of the tax exemption in Division 13A of the Income Tax Assessment Act.  Three structural characteristics were found to have a significant and positive association with the presence of an employee share ownership plan. These were the presence of a centralised human resource function; company growth over the preceding 12 months (measured by the number of employees); and the composition of the workforce (the proportion of full-time to part-time and casual employees). The authors also find that companies with broad-based ESOPs were significantly more likely to have structures for communicating directly with employees.  The research report is available on the [SSRN](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374702" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%233) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%28566_files/spacer%281%29.gif | | |  | | --- | | **2.1 Term deposits: ASIC releases an investor and consumer guide and announces a review**  On 16 April 2009, the Australian Securities and Investments Commission (ASIC) released an investor and consumer guide on term deposits to help investors and consumers get the best out of their term deposits. ASIC is also announcing that it will be conducting a "health check" in the form of a marketing and disclosure review of the term deposit market.  Term deposits have experienced significant growth, with total term deposits in Authorised Deposit-taking Institutions (ADIs) growing by 39% from June 2007 to September 2008. ASIC estimates that total term deposits in ADIs now exceed $500 billion. This makes them one of the most used investments by investors and consumers.  ASIC will update the investor and consumer guide based on the findings of the review and issue additional guidance as necessary.  The guide is available on the [FIDO](http://www.fido.gov.au/termdeposits" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h2)  **2.2 ASIC and ASX act to protect retail investors of partly paid securities**  On 6 April 2009, the Australian Securities and Investments Commission (ASIC) and the Australian Securities Exchange (ASX) announced they have agreed that ASX will implement changes to its market rules relating to partly paid securities and instalment receipts "Partly Paid Securities".  The proposed amendments are aimed at improving disclosure for retail investors to ensure they are adequately aware of potential liabilities when making investment decisions.  ASIC is aware that a number of securities quoted on the ASX are partly paid securities with future obligations to contribute further capital. Therefore ASIC believes that the enhanced investor protection embodied in this new measure helps address current market concerns.  The specific operating rule changes agreed to are:   1. A new definition of "Partly Paid Security" is to be included in the Definitions section of the market rules. 2. A new requirement for market participants and retail clients to enter into a Partly Paid Security Client Agreement prior to the retail client buying Partly Paid Securities for the first time.   The new market rules do not apply to no liability (NL) companies, as NL companies do not have a contractual right to recover calls on the unpaid issue price of their shares; the shareholder has the option of paying the call or forfeiting the shares.  ASIC and ASX have been in direct contact with several market participants to ensure that they have contacted their clients with current orders to buy Partly Paid Securities and communicated their potential obligations to them.  The new rules are effective from 1 May 2009.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%234) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%28566_files/spacer%281%29.gif | | |  | | --- | | **3.1 Rule amendment - ASTC Settlement Rules: Close out requirement**  On 30 March 2009 ASTC amended its settlement rules to require Settlement Participants who enter the Batch Settlement process with a net short position to close out settlement shortfalls if the settlement shortfall remains after the completion of Batch Settlement two business days later (generally on T+5), by purchasing or borrowing the shares required to complete the settlement.  This is part of a number of initiatives designed to enhance settlement risk management.  The close-out requirement will complement the increased economic disincentives imposed through the recently introduced new delay fail regime, by providing a means to guarantee that settlement delays have an end date.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h3)  **3.2 Update on changes to core capital requirements**  ACH has announced that it will extend the timetable for implementation of increases to minimum core capital requirements for ACH Participants as follows:   * Increase in minimum core capital requirements to $5 million effective 1 July 2010; and * Increase in minimum core capital requirements to $10 million effective 1 January 2012.   Further information is available on the [ASX](http://www.asx.com.au/" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h3)  **3.3 Rule amendment - CHESS Release 7.0 - Stock lending and RBA changes to the Financial Stability Standards**  ASTC Participants and CHESS System Vendors have been advised that an effective date of 5 October 2009 has been scheduled for CHESS Release 7.0.  The Business and Technical Description Overview for CHESS Release 7.0 has also been announced.  The key driver of CHESS Release 7.0 is a variation of the Reserve Bank of Australia's Financial Stability Standards for Securities Settlement Facilities requiring additional disclosure of settlement information by ASTC.  The release will deliver CHESS enhancements to support ASTC's compliance with its regulatory obligations and measures to reduce settlement risk.  Enhancements to improve both investor and participant communications also feature in the release.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h3)  **3.4 Rule amendment-ASX Market Rules-Trading party paid securities**  ASX has announced that its Market Rules will be amended to require ASX Market Participants to alert retail clients of the need to inform themselves of the rights and obligations associated with trading party paid securities.  Specifically, Market Participants will be required to obtain from retail clients a signed agreement that there clients are aware they have a responsibility to obtain and read a copy of a prospectus, product disclosure statement or information memorandum produced by the product issuer when they are entering into a transaction to buy a party paid security for the first time.  The new rules will reinforce existing provisions of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) applying to brokers that require disclosure of risks associated with the trading of financial products.  The new rules will take effect from 1 May 2009. This development is also discussed in item 2.2 above.  Further information is available on the [ASX](http://www.asx.com.au/about/pdf/mr060409_partly_paid_newrule.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h3)  **3.5 Working paper - The value proposition of central counterparty clearing houses**  CCP12, the global association of central counterparties has published a working paper entitled The Value Proposition of Central Counterparty Clearing Houses.  The paper explains the role of counterparty clearing houses (CCPs) and the significant contribution they make to the efficiency of financial markets, cutting the average costs of trading and increasing the profitability of their users. It also explains the role of CCPs in providing risk mitigation, a role that has been vital during the global financial crisis.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h3)  **3.6 ASX group monthly activity report**  The March report is available on the [ASX](http://www.asx.com.au/about/pdf/ma060409_monthly_activity_report_mar09.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h3)  **3.7 ASX market supervision quarterly group activity report**  The ASX Group Monthly Activity Report - March 2009 is available on the [ASX](http://www.asx.com.au/about/pdf/ma060409_asxms_q3fy09_activity_report.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Corporate Law Decisions** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h7) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%28566_files/spacer%281%29.gif | | |  | | --- | | **4.1 Application for order to inspect books of a company to decide whether to commence proceedings against directors and officers of the company**  (By Megan Trethowan, Blake Dawson)  *Style Limited, in the matter of Merim Pty Ltd v Style Limited* [2009] FCA 314, Federal Court of Australia, Justice Goldberg, 2 April 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/april/2009fca314.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/april/2009fca314.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 247A of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) allows a court to authorise a member of a company, or another person on behalf of the member, to inspect the books of the company upon application by the member. The court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.  The primary issue for determination in this case was whether the applicant, Merim Pty Ltd (Merim) was acting in good faith and whether the inspection it sought was to be made for a proper purpose. Justice Goldberg was satisfied that Merim's primary or dominant purpose in making the s. 247A application was to investigate whether to commence proceedings against directors and officers of Style Limited (Style), in relation to various financial representations. As such, Justice Goldberg considered it inconsequential that the inspection may have had the dual purpose of assisting Merim in its attempts to gain control of Style.  Justice Goldberg granted the order authorising inspection of Style's books, subject to the limitation that any information obtained during such inspection was only be used for the purpose of considering whether to commence proceedings against the directors and officers of Style.  As a secondary issue, Justice Goldberg held that the s. 247A meaning of "books" encompassed the insurance policies of Style's directors and officers. Justice Goldberg held that the insurance policies were relevant to Merim's determination of whether to bring proceedings.  **(b) Facts**  Merim made an application for an order authorising its sole director, Mr Yunghanns, and his nominated financial and legal advisors, to inspect and make copies of the books of Style, pursuant to s. 247A of the Act. Merim's application was based on Mr Yunghanns' concern that Style had misled its members and the market regarding its financial performance through various ASX announcements.  On 9 March 2007, Style made an announcement to the ASX that it was looking into the feasibility of investing in bamboo plantations in China.  On 4 July 2007, Style announced to the ASX that the first bamboo plantation was secured and that the company had raised $10 million through the issue of convertible notes for that plantation.  Between July 2007 and January 2008, Style made further announcements to the ASX in relation to its financial forecast. Style's announcements suggested that its revenue and earnings before interest, taxation, depreciation and amortisation (EBITDA) would continue to rise in the upcoming financial year.  However, in February 2008, the bamboo plantation was decimated by an ice storm, prompting Style to exit from the project. This coincided with a general downturn in Style's revenue for the year ended 30 June 2008, despite early encouraging forecasts.  On 31 July 2008, Style announced to the ASX its financial results for the fourth 2007/2008 financial quarter. Unlike previous quarterly statements, the results did not disclose Style's revenue, EBITDA or profits or loss.  Mr Yunghanns responded to these events by sending numerous emails and letters to representatives of Style, requesting financial information. This included requests for information as to how money from the capital raising was applied, how other working capital was consumed, and how projected revenue and earnings forecasts were made. Mr Yunghanns expressed his concern that Style had misled its members and the market regarding its financial performance. Dissatisfied with the responses he received from Style, Mr Yunghanns requisitioned a general meeting of shareholders. A formal application was also made by Merim, for an order to inspect the books of Style, pursuant to s. 247A of the Act.  Merim stated that the purpose of its application was to investigate whether the directors and officers of Style had exercised their powers in accordance with their statutory and fiduciary duties.  Style argued that Merim's real purpose in applying to inspect its books was to assist Merim in its ongoing attempts to gain control of Style, and therefore, the application should be refused. Style also argued that Merim was not entitled to use s. 247A to look behind the management decisions of Style.  **(c) Decision**  **(i) Good faith and proper purpose**  Justice Goldberg accepted Merim's stated purpose for seeking inspection of Style's books and allowed the application. Justice Goldberg considered that there were no reasons to reject Mr Yunghanns' evidence as to his stated purpose, having regard to the sequence of communications between Mr Yunghanns and Style, given that he was not cross examined.  Justice Goldberg was of the view that Style's concern in relation to Merim's ongoing takeover attempts did not impeach upon Mr Yunghanns' stated purpose, as Merim had acquired a financial or economic interest in Style through the issue of convertible notes to Merim by Style.  Justice Goldberg held that provided the primary or dominant purpose for which the inspection was sought was in good faith and for a proper purpose, any subsidiary purpose or benefit was not relevant.  According to Justice Goldberg, Merim did more than demonstrate that it was dissatisfied with Style's management decisions. Merim raised specific queries as to how funds of Style had been deployed and where the proceeds of the capital raising had been used. Merim identified a "case for investigation" and was not given a satisfactory answer from Style. Justice Goldberg also considered the sudden decline of Style's financial position and Style's decision not to report on revenue, EBITDA or forecasts for the fourth 2007/2008 financial quarter in the same manner as earlier reports, as matters that Merim as a shareholder ought to be informed of by Style.  **(ii) Inspection of directors and officers' insurance policies**  In considering whether the meaning of "books" in s. 247A included directors and officers' insurance policies held by Style, Justice Goldberg noted that neither party had been able to refer to any case law considering the issue. However, Justice Goldberg did consider that the rationale underlying section 247A (insofar as the purpose of inspection is to consider whether to commence legal proceedings against directors) is to enable a shareholder who has identified a "case for investigation" to determine whether their case has any prospects.  Justice Goldberg held that the insurance policies of Style's directors and officers were relevant to Merim's s. 247A application because they would inform Merim's decision as to whether it should bring proceedings against any directors or officers of Style. On this basis, Justice Goldberg considered it appropriate to accept that "books" in s. 247A includes directors and officers' insurance policies.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h4)  **4.2 Application by director/shareholder for access to the books of the company: Is access for the purpose of lobbying proxy holders a proper purpose?**  (By Sabrina Ng and Katrina Sleiman, Corrs Chambers Westgarth)  *Jervois Mining Limited, in the matter of Campbell v Jervois Mining Limited* [2009] FCA 316, Federal Court of Australia, Goldberg J, 31 March 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/march/2009fca316.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/march/2009fca316.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 applicant, a director and shareholder of the respondent company, Jervois Mining Limited (the Company), made an application for access to documents forming part of the "books" of the Company pursuant to: (a) common law principles; (b) s. 247A of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act); and (c) s. 198F(1) of the Act.  One of the purposes for which access was sought was the lobbying of shareholders who had given proxies for an upcoming extraordinary general meeting (EGM) called by the applicant and 123 other shareholders.  However, that purpose was not a matter which Goldberg J considered "abuses the confidence reposed in [the applicant]" or materially injures the Company.  As Goldberg J was satisfied that the applicant was acting in good faith and that access was sought for a proper purpose, orders were made for access to the books of the Company pursuant to common law principles and s. 247A of the Act.  **(b) Facts**  The applicant made an application for an order that he be authorised to inspect and make copies of the following documents of the Company which form part of the "books" of the Company: (a) the share register; (b) all documents relevant to the issuing of shares by the Company since the calling of an EGM of the Company scheduled for 2 April 2009; and (c) all documents relevant to the appointment of proxies to act at the EGM.  The applicant also sought an ancillary order that the Company make the books available for inspection by providing him with a new password to access those parts of the books of the Company that are maintained by Computershare Limited (Computershare) and otherwise by providing the books in hard copy at the offices of the Company.  One of the issues which concerned the applicant related to resolutions of the board of directors of the Company to issue further shares in the capital of the Company. At a board meeting held on 12 December 2008, it was resolved to give approval to a director of the Company to seek new funds through the placement of shares up to 300,000,000 shares, at a price not less than 80% of the current market price at the time of placement.  On 6 January 2009, the Company announced to the ASX a capital raising being a non-renounceable rights issue to shareholders on a one for five basis at an issue price of $0.004. On 6 February 2009, 124 shareholders in the Company, including the applicant, delivered a request to the Company pursuant to s. 249D of the Act, requesting an EGM to consider resolutions to be proposed at the meeting for the removal of the current board of directors other than the applicant, and the appointment of new directors.  Subsequently, a resolution was proposed to be put at that EGM that the applicant be removed as a director.  There were subsequent board meetings, at some of which the applicant was present, where the board passed resolutions to make further rights issues of shares to shareholders and also to allot shares.  The applicant was concerned that the later issue of shares by the Company was not in its best interests and was made for an improper purpose, namely to provide extra voting rights under an arrangement or understanding with the recipient of those shares to defeat the motion removing the current directors (except for the applicant) at the EGM.  **(c) Decision**  The application for access to the books of the Company was made pursuant to: (a) common law principles; (b) s. 247A of the Act; and (c) s. 198F(1) of the Act.  Justice Goldberg referred to the long established common law principle that a director of a company has a right to inspect the company's records.  However, Goldberg J stated that what may be in issue is whether there is an absolute right of access to the company's records, or whether that, in a given case, the court has a discretion to determine whether or not a director should be permitted to have such access.  The applicant's counsel submitted that one of the purposes for which access was sought was the lobbying of shareholders who had given proxies.  However, that  purpose was not a matter which Goldberg J considered "abuses the confidence reposed in him" or materially injures the Company.  Justice Goldberg accepted that the applicant had raised serious issues which are not fanciful or specious in relation to the issue and allotment of shares since the beginning of February 2009, and after the EGM was called.  His Honour was satisfied that the applicant should be entitled to have access to, and should be allowed to inspect, all the records of the Company held by Computershare and also the records of the Company that relate to the share issues.  Justice Goldberg was not satisfied that by having access to those records and inspecting them the applicant was acting, or would be about to act, in breach of his fiduciary duty to the Company and intended to aid that process by inspecting the books.  In relation to s. 198F of the Act, Goldberg J did not consider that there was any basis upon which the applicant would be entitled to have access to, or inspect, the books of the Company pursuant to that section. That right to inspect books is conditioned upon a director wishing to do so for the purposes of a legal proceeding to which the director is a party, or that the director proposes in good faith to bring, or that the director has reason to believe will be brought against him or her.  None of those categories applied in the present case.  Turning to s. 247A of the Act, Goldberg J considered that the applicant must satisfy the court that he is entitled to inspect the books because the information sought relates to matters that he as a shareholder ought to be informed of by the Company.  His Honour stated that provided the applicant's primary or dominant purpose for which the inspection is sought is a proper purpose, a subsidiary purpose for some other benefit is not relevant.  As emerged from the correspondence between the parties, and as the applicant's counsel submitted, as well as the purpose relating to the allotment of shares, he also had a purpose of lobbying proxy holders as being the reason for which he sought access.  Justice Goldberg held that such a purpose is a purpose which is personal to him in the sense that he is concerned to ensure that he is not removed as a director from the board.  However, what is a proper purpose for the purposes of s. 247A(1) is not constrained by a desire to be acting in the interests of the Company.  Justice Goldberg was prepared to accept that the lobbying of proxy holders was a significant purpose of the applicant in seeking access to the Company's books.  In other words, his Honour was prepared to accept that there was a doubt as to whether the applicant's primary or dominant purpose related to the issues arising out of the allotment of shares.  However, Goldberg J considered that it can be a proper purpose for a member of the Company to seek access to proxies, even though he also has another role as a director of the Company, to determine whether he should take any, and if so what, action in support of his aim to remain on the board of directors. Again, borrowing from the doctrine in relation to the common law principles, his Honour held that purpose is not to abuse the confidence reposed in the applicant as a director or materially injure the Company.  Accordingly, Goldberg J was satisfied that the purposes identified by the applicant, including the lobbying of proxy holders, was a proper purpose for the purposes of s. 247A of the Act.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h4)  **4.3 Interpretation of section 536 of the Corporations Act 2001 - Supervision of liquidators**  (By Sara Mirabella, DLA Phillips Fox)  *Hall v Poolman* [2009] NSWCA 64, New South Wales Court of Appeal, Spigelman CJ, Hodgson JA, Austin J, 31 March 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/march/2009nswca64.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/march/2009nswca64.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 analysis of the proper construction of s. 536 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) and whether the trial judge, Justice Palmer, had properly invoked that provision in making his order that an inquiry be conducted into the liquidators conduct.  The appeal also raised important issues about the circumstances in which it may be proper for a liquidator to embark upon and prosecute recovery proceedings with the assistance of a litigation funder, in circumstances where there is really no prospect of any worthwhile recoupment for creditors.  **(b) Facts**  The liquidators of two companies in voluntary winding up commenced legal proceedings against two directors (Mr Poolman and Mr Irving).  Approval from the Committee of Inspection was obtained to enter a funding agreement between the liquidators and a litigation funder, even after the liquidators disclosed that any returns to creditors from the proceedings would be very low.  The liquidators were successful in the proceedings.  In the course of defending the action the directors argued that they should not be held liable when the bulk of the proceeds of the litigation would go to the liquidators and litigation funders, with negligible returns to the creditors (relying on s. 1317S and s. 1318 of the Act).  While rejecting this argument Palmer J did consider that there was evidence before him which warranted further inquiry into the actions of the liquidators, and therefore he ordered an inquiry pursuant to ss. 536(1)(a), 536(1)(b) and 536(3) of the Act.  The liquidators appealed this decision to order an inquiry.  The application for leave to appeal and the appeal itself were heard concurrently.  The appeal proceeded without a contradictor.  ASIC was invited to appear because the case raised important questions about the scope of s. 536 of the Act but declined without providing reasons.  Their Honours described this decision as "regrettable".  **(c) Decision**  Leave to appeal was granted and the order made by his Honour Justice Palmer was set aside.  The matters relied upon by Palmer J as justifying an order for an inquiry were, on the whole, concerns that should support an order for further investigation.  However, the Court of Appeal did find that Palmer J erred in two respects, but that he may well have reached the same conclusion had those matters been correctly addressed.  The Court of Appeal elected not to re-examine its discretion under s. 536 primarily because the initial proceedings had been settled (and therefore the purpose of the inquiry envisaged by Palmer J no longer existed) and because ASIC did not take up the invitation to appear in the proceedings.  The Court of Appeal made various findings in relation to the interpretation of s. 536 of the Act, some of which are discussed below.  **(i) Were litigation funding and lack of benefit to creditors relevant to Mr Irving's defence?**  Palmer J rejected Mr Irving's submission that the unlikelihood of any dividend to creditors was relevant to his defence under ss. 1317S and 1318 of the Act.  His Honours noted that Palmer J considered the factors raised by the minority in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, but that he ultimately followed the majority decision: the outcome being that it will not be an abuse of process if liquidators engage litigation funders and it turns out that the return to creditors is very small or nothing at all.  **(ii) The liquidators' conduct and the grounds for an inquiry**  Palmer J was concerned about the possibility that the creditors would not receive any or any significant returns from the proceedings, and also that the liquidators' costs of the proceedings were in the order of $2 million.  Palmer J was of the opinion that if the liquidators had acted improperly then the Court could correct that impropriety by the granting of a costs limiting order.  It was for these purposes that His Honour ordered the inquiry under ss. 536(1)(a), 536(1)(b) and 536(c) of the Act.  In interpreting s. 536 the Court of Appeal considered the principles established by relevant case law that have a bearing on the exercise of the court's discretion to order an inquiry.  **(iii) The "prima facie case" submission**  The applicants submitted that the court could not order an inquiry unless the court is satisfied that there is a "prima facie" case of failure to perform duties or observe requirements (relying on *Burns Philp Investments Pty Ltd v Dickens* (1993) 11 ACLC 272).  However, the Court of Appeal preferred the observations made in *Leslie v Hennessy* [2001] FCA 371 and found that an applicant only has to demonstrate something about the liquidator's performance of duties or observance of requirements that is a "sufficient basis" for making an order for inquiry.  **(iv) The court's supervisory role over the conduct of liquidators**  The earlier proceedings involved a voluntary winding up and as such the liquidators were not officers of the court, as would be the case if the liquidators were appointed in a compulsory winding up.  The Court of Appeal found however that where there is a statutory authority extending to liquidators (such as under s. 536), there should be no lesser degree of supervision of liquidators by virtue of the fact that they are not court-appointed liquidators.  **(v) The appellants' jurisdictional contentions**  The appellants' argued that the matters relied upon by Palmer J to justify ordering an inquiry under s. 536 of the Act were not capable, as a matter of law, of providing a foundation for such an order.  The Court of Appeal held that the findings of fact upon which Palmer J relied were capable of supporting the conclusion that his Honour reached.  In particular their Honours made reference Palmer J's findings regarding:   * The extent and cost of litigation; * The lack of balance or proportionality between the liquidators' costs of $2 million and a possible maximum recovery of $6 million; * The fact that the proceedings would produce, at best, only a token benefit to creditors, and the possibility that the proceedings may have been commenced and prosecuted for the benefit of the liquidators and the funder rather than for the benefit of creditors; and * The fact that one of the liquidators gave evidence expressing discomfort about the amount of costs.   In interpreting s. 536(1)(b) the majority (Spigelman CJ dissenting) held that this section does not require that the complaint be a formal initiation of an inquiry: "All that is needed. is that there be criticism expressed to the court, in any context, with respect to the conduct of a liquidator connected to performance of the liquidator's duties" [at 97].  In this case it was senior counsel for Mr Irving who made a submission that "the proceedings were a moneymaking exercise for the litigation funder, the liquidators and the lawyers, rather than seeking to compensate creditors in any meaningful way'"[at 91] which constituted the complaint for the purposes of s. 536(1)(b).  **(vi) Did the exercise of the jurisdiction to order an inquiry miscarry?**  Here the court had to decide whether Palmer J's reasons for ordering an inquiry were deficient in any way.  After reviewing the case law the court held that in determining whether Palmer J's decision was "deficient" they needed to consider "whether he acted on a wrong principle, took into account extraneous or irrelevant matters, mistook the facts, failed to take into account a material matter, or his decision was unreasonable or plainly unjust" [at 114].  The court held that while in most respects Palmer J's reasons for ordering the inquiry were not deficient he did fail to take into account the public interest that would be served in bringing directors to account for allowing the company to trade whilst insolvent, even in circumstances where any amount recovered in the proceedings would be absorbed by costs and expenses and would not benefit creditors.  **(vii) Can liquidators bring and pursue recovery proceedings where the return to creditors is negligible and only the professionals and the funder will benefit?**  The Court of Appeal [at 150] held that, if:   * liquidators had incurred costs in preliminary investigations and in creditors' meetings, and * they consider that the prospective benefits to creditors justify further investigation in which they will incur more costs and expenses, and * there are then no assets, in the absence of litigation, to pay the costs already incurred,   then the liquidators may legitimately, in accordance with their duties, pursue litigation with the aid of a litigation funder even where the likelihood of recovery for unsecured creditors may be little or none.  Some provisos to the above proposition were outlined [at 151]:   * the pre-litigation costs must have been either necessary or reasonably considered to be justified because of the prospective benefits to creditors; * the litigation costs themselves must have been reasonably incurred and proportionate to the prospective benefits (including not only possible direct benefits to creditors but also the benefits derived through the reimbursement of the liquidator's fees and expenses); and * the litigation funding agreement must not be on manifestly unreasonable terms.   **(viii) Should the liquidators have applied for directions before entering the litigation funding agreement?**  Palmer J said that a liquidator proposing to enter into a litigation funding agreement should apply to the court for directions "as a matter of course" however the Court of Appeal held that there is no obligation upon liquidators to do this and that his Honour erred in this regard.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h4)  **4.4 Administrator remuneration given priority over fixed charges**  (By Gerard O'Shaughnessy, Mallesons Stephen Jaques)  *Coad v Wellness Pursuit Pty Ltd (in liq)* [2009] WASCA 68, Supreme Court of Western Australia, Court of Appeal, Wheeler, Pullin and Buss JJA, 31 March 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2009/march/2009wasca68.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2009/march/2009wasca68.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 of the Court of Appeal of the Supreme Court of Western Australia has confirmed that administrators have an equitable right of indemnity for expenses and remuneration for work done in preserving and realising a company's assets.  Notably, the Court also concluded that this equitable right may rank higher than a subsisting fixed charge in circumstances where it would be unconscientious for a chargor to assert priority without properly remunerating the administrator.  **(b) Facts**  On 7 July 2006, the appellant, Coad, was appointed as voluntary administrator of a health club business by Vie Inspiree Pty Ltd (the Company).  At the time of Coad's appointment, the Company's assets were subject to three registered charges.  The respondent, Wellness Pursuit Pty Ltd (in liq) (Wellness), held the third ranking charge which was partly fixed and partly floating over the Company's present and future assets and undertakings (the Third Charge).  Wellness was entitled to appoint a receiver and manager under this charge, however it elected not to do so in the knowledge that Coad had been appointed as voluntary administrator.  On 14 July 2006, Coad administered the sale of the health club business and its related assets.  The proceeds were used to discharge the first and second ranking charges, however the balance was insufficient to cover both the Third Charge and Coad's expenses and remuneration.  In the first instance, Master Sanderson found that, as Wellness held a fixed charge, its interest in the balance of the sale proceeds had priority over any right of indemnity of Coad for his expenses and remuneration.  Coad appealed.  **(c) Decision**  The appeal, heard by Wheeler, Pullin and Buss JJA, was allowed after the court concluded that:   * An administrator has a right of indemnity for expenses and remuneration which ranks higher than subsisting fixed charges in circumstances where it would be unconscientious for the chargors to assert priority without properly remunerating the administrator; and * In this case, Coad was entitled to a higher ranking interest as he had provided an "incontrovertible benefit" to Wellness.   **(i) Priority of an administrator's right of indemnity**  Although administrators are entitled to a statutory lien securing their right of indemnity for expenses and remuneration, this right of indemnity only has priority over unsecured debts and debts secured by a floating charge on company property.  In this instance, the Third Charge took priority over Coad's statutory lien as it was (at least partly) fixed.  However, the court affirmed existing authority that an administrator may also have an equitable right of indemnity which can be secured by an equitable lien attaching to assets realised during the administration.  The court also referred to the judgment of Barrett J in *Hamilton v Donovan Oates Hannaford Mortgage Corp Ltd* [2007] NSWSC 10 which was relied upon by Master Sanderson in the first instance.  Barrett J stated that equity will not give priority to an administrator's equitable lien which is higher than the priority accorded to its statutory counterpart.  However, the Court rejected this statement on the basis that an administrator's equitable lien is distinct from, and has not been excluded by, the statutory regime.  Therefore, if Parliament did not intend to exclude an administrator's equitable lien, it is unlikely that Parliament would have intended that it be subject to the priority provisions applicable to statutory liens.  The court ultimately concluded that administrators are entitled to an equitable lien securing a right of indemnity for expenses and remuneration for work done in preserving and realising a company's assets.  Furthermore, this lien will have priority over subsisting fixed charges where it would be unconscientious for chargors to assert priority without properly remunerating the administrator.  **(ii) Factors giving rise to priority**  In the current case, if Coad had not preserved and realised the assets, it would have been necessary for another party to have done so.  Furthermore, the costs of that other party's work would have been discharged out of the sale proceeds in priority to the Third Charge.  Therefore, in avoiding those costs, Coad had provided an "incontrovertible benefit" to Wellness and the holders of the first and second ranking charges.  As such, it would be unconscientious for Wellness to have had the benefit of Coad's work in preserving and realising the relevant assets without providing for the proper remuneration of his services for the following reasons:   * Wellness knew Coad was acting as administrator of the health club business and consented (or at least acquiesced) to him doing so; * Wellness was entitled to, but elected not to, appoint a receiver under its charge; and * Wellness had received an incontrovertible benefit as a result of Coad's services.   The appeal was allowed such that Coad was entitled to an equitable lien securing a right of indemnity for his expenses and remuneration in priority to the Third Charge.  **(d) Implications**  This decision confirms that an administrator has an equitable right of indemnity for expenses and remuneration for work done in preserving and realising a company's assets.  Furthermore, this equitable right may rank higher than subsisting fixed charges in circumstances where it would be unconscientious for chargors to assert priority without properly remunerating the administrator.  Therefore, the decision may have a number of implications for current and future holders of fixed charges:   * First, the risk profile of transactions involving fixed charges may need to be reassessed given the increased possibility that such charges may be subordinated to an administrator's right of indemnity; and * Secondly, there is a greater imperative for charge holders to take an active interest in who is appointed as administrator to ensure that their interests are considered during the realisation of assets.   [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h4)  **4.5 Winding up storm: Protecting the interests of creditors and the public**  (By Cecilia Mehl, Freehills)  *Australian Securities and Investments Commission, in the matter of Storm Financial Limited (Receivers and Managers Appointed)(Administrators Appointed) v Storm Financial Limited (receivers and Managers Appointed) (Administrators Appointed)* [2009] FCA 269, Federal Court of Australia, Logan J, 26 March 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/march/2009fca269.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/march/2009fca269.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 Australian Securities and Investments Commission (ASIC) applied to the Federal Court seeking the winding up of Storm Financial Limited (Storm). ASIC applied on two alternative grounds:   * that Storm was insolvent; and * that it was just and equitable for Storm to be wound up, rather than continuing in administration.   Storm's two key directors, Mr and Mrs Cassimatis opposed the application on the basis that Storm's creditors would be in a stronger financial position if Storm were allowed to continue in administration.  ASIC was ultimately successful on both grounds.  Justice Logan ordered that:   * ASIC be granted leave to apply to the court for an order that Storm be wound up in insolvency; * Storm be wound up in insolvency and on the just and equitable ground under s. 461(1)(k) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act); * Storm's administrators be appointed as liquidators; and * Mr and Mrs Cassimatis' application to have ASIC's winding up proceedings adjourned, be dismissed.   **(b) Facts**  Incorporated in May 1994 and operating primarily out of Townsville, Storm was a financial planning firm. For most of the relevant period, Storm was operated by six directors, four of whom resigned in December 2008. On 23 December 2008, Mrs Cassimatis' sister was appointed as Storm's third director in order for Storm to comply with the statutory minimum number of directors.  Storm's audited financial report for the year ended 30 June 2008 indicated that the company was in a strong position, and the auditors did not include any adverse comments. Importantly, the auditors noted in their report that the audit "did not involve an analysis of the prudence of business decisions made by directors or management".  On 8 January 2009, having declined into insolvency, Storm appointed voluntary administrators. One week later, on 15 January 2009, Storm was placed into receivership by the Commonwealth Bank of Australia (CBA), a secured creditor with a total claim of $27,094,547. In addition to the CBA debt, claims against Storm's assets, totalling $43,470,526.38, were made by other creditors.  A creditors' meeting was originally scheduled to occur on 23 March 2009. On 16 March 2009, a document prepared by Mr and Mrs Cassimatis and published on a website maintained by the couple, came to ASIC's attention. The document, "A Simple English explanation of the DOCA" (the Memorandum), contained statements that, in ASIC's view, were misleading. On 19 March 2009, following its review of the Memorandum and other information published by Mr and Mrs Cassimatis, ASIC filed a winding up application, with the court's leave. In response to ASIC's application, the court adjourned the creditors' meeting until 30 March 2009.  **(c) Decision**  **(i) Grounds for applications**  ASIC sought the winding up of Storm on two alternative grounds. The first was on the basis of insolvency (under ss. 459A and 459P(1)(f) of the Act) and the second was on the basis that it would be "just and equitable" for Storm to be wound up (under s. 461(1)(k) of the Act). In particular, ASIC sought:   * leave to begin the winding up proceeding in reliance on the ground of insolvency (leave was not required in respect of the "just and equitable" ground); * that the court appoint the administrators jointly and severally as liquidators of Storm pursuant to section 472 of the Act; * that the meeting of creditors scheduled for 23 March be adjourned; * that Mr and Mrs Cassimatis immediately remove the Memorandum from their website, replace it with a court-approved notice correcting the misleading nature of the Memorandum and forward the court-approved notice to each of Storm's creditors; and * liberty to apply.   In response, Mr and Mrs Cassimatis applied to the court for:   * relief in respect of alleged deficiencies in the report to creditors prepared by the administrators; * and adjournment of the hearing of the winding up application to enable the creditors' meeting to proceed as scheduled on 23 March 2009.   **(ii) Questions for the court**  Justice Logan dealt briefly with the question of whether leave should be granted to ASIC in respect of the insolvency ground. He stated that he was satisfied that a prima facie case of insolvency existed and that s. 459P(3) of the Act was therefore satisfied, enabling ASIC to bring its application on both grounds.  Accordingly, the court turned to the question of whether the application should be adjourned pursuant to s. 440A(2) of the Act, which required the court to adjourn the application if the court is satisfied that it would be in the interests of creditors for the company to continue under administration rather than be wound up.  Section 440A(2) states that the party opposing the winding up application bears the onus of satisfying the court that it is in the best interests of creditors that the company continue in administration.  **(iii) Reasoning and conclusion**  Having considered submissions from ASIC and Mr and Mrs Cassimatis, Justice Logan held that he was not satisfied that Storm should continue in administration as requested by Mr and Mrs Cassimatis. He ordered that Storm be wound up in insolvency, as to continue in administration would not offer creditors the most favourable monetary return. He also ordered that Storm be wound up under the "just and equitable" ground, as this outcome was in the public interest.  In reaching his conclusion, Justice Logan considered, among other things, the following factors:   * Storm was not trading and had no realistic prospect of resuming its former business; * the administrators, in their report, clearly stated that the DOCA did not offer the prospect of a better return for creditors; * Mr and Mrs Cassimatis failed to satisfy the court pursuant to s. 440A(2) that the company should continue under administration. Rather, they submitted that it was "unclear" whether administration under the DOCA or winding up offered the superior return to creditors; * ASIC indicated that it intended to seek orders terminating the DOCA under s. 445D of the Act, presumably in reliance on the grounds contained in paragraph 445(1)(f), being that the DOCA was contrary to the interests of creditors as a whole, and this would further prolong the administration; and * there is an overwhelming public interest in particular matters being investigated, specifically: whether the actions of the directors were appropriate, whether the investments recommended to clients were appropriate and whether the fund managers managing client investments acted appropriately, and while they cannot be investigated in the context of an administration, these matters can and should all be investigated in the context of a liquidation.   Justice Logan commented that Storm had failed "spectacularly". That it did so in the context of a large and sustained drop in the Australian share market did not, in his opinion, excuse the failure or detract from the need for the company to be wound up. Rather, it emphasised that need.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h4)  **4.6 Creditors' trusts considered by court**  (By Stephen Magee)  *Parkview Constructions Pty Ltd v Tayeh* [2009] NSWSC 186, Supreme Court of New South Wales, Barrett J, 24 March 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/march/2009nswsc186.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/march/2009nswsc186.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  A disgruntled creditor could not have a creditors' trust terminated, because termination was beyond the statutory power of the court.  The creditors' trust had been established under a deed of company arrangement, and the deed of company arrangement had terminated upon commencement of the trust. This meant that the statutory power to terminate deeds of company arrangement was no longer available to the court.  **(b) Facts**  A creditors' trust is a spin-out from voluntary administration. Rather than setting up a system for compromise and payment of creditors within the confines of a deed of company arrangement (DOCA), a creditors' trust establishes a mechanism outside a DOCA. Essentially, it involves the establishment of a standalone trust fund for the payment of creditors; the creditors' claims against the company are extinguished and replaced by a claim against the trust fund. This immediately frees the company from its debts (as opposed to a DOCA, under which the company would remain indebted to its creditors until the DOCA had run its course).  Although they operate separately from a DOCA, creditors' trusts are initiated through a DOCA. Once the trust is established, the DOCA usually terminates.  The creditors of Sydney Civil Excavation agreed to a DOCA which would establish a creditors' trust. The creditors' trust was duly established.  One creditor applied to the court for a s. 445D order to terminate the DOCA (and hence the creditors' trust).  **(c) Decision**  **(i) A terminated DOCA cannot be terminated**  Sydney Civil Excavation relied on s. 445C(c) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default):  "A deed of company arrangement terminates when: . If the deed specifies circumstances in which it is to terminate - those circumstances exist".  In this case, the DOCA said that it would terminate once the creditors' trust was established.  The court agreed with Sydney Civil Excavation, and held that it could not terminate a DOCA which had already ceased to be.  The creditor then asking for an order terminating the DOCA ab initio, under s. 447A, but the court said that it was too late to change its argument:  "The only case Parkview ever foreshadowed, regarding termination of the deed of company arrangement, was a case based squarely on s 445D(1).  It was to the meeting of that case that Sydney Civil's submissions were directed.  It was not open to Parkview to shift in submissions in reply to some new case based on s 447A."  In obiter, the court expressed considerable doubt about whether s. 447A would actually have allowed an order to void the DOCA *ab initio*.  **(ii) Creditors' trusts in general**  In obiter, the court expressed strong misgivings about creditors' trusts, largely because they replace creditors' statutory rights and protections with private law rights and remedies. It issued a warning to administrators who propose a creditors' trust that they "bear a heavy burden of explaining to creditors the implications of the shift from a regime incorporating a court administered scheme of creditor protection to one in which creditors become passive trust beneficiaries".   The court also raised concerns about creditors' trusts at a public policy level:  "[I]t is a matter for concern, at a public policy level, that the protective aspects of Part 5.3A in relation to deeds of company arrangement, including the role of the court, can be and have been avoided by the creation through a deed of company arrangement of a parallel but essentially unregulated regime of administration."  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h4)  **4.7 The oppression provisions of the Corporations Act 2001- Finding an appropriate remedy**  (By Charlotte Ryan, Blake Dawson)  *Re Hollen Australia Pty Ltd* [2009] VSC 95, Supreme Court of Victoria, Robson J, 23 March 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/march/2009vsc95.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/march/2009vsc95.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  This case concerns an appeal from a decision of an Associate Judge.  By way of background, Mr Holt and Mr Burnside were the sole directors of Hollen Australia Pty Ltd.  Following the breakdown of their relationship and the ensuing collapse in the management of the company, the parties sought court intervention.  Holt (in his capacity as a member) argued that he had suffered oppression on various grounds sufficient to invoke s. 232 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  Burnside, on the other hand, sought the winding-up of the company pursuant to s. 461(k). At first instance, the Associate Judge ordered the winding-up of Hollen, finding this remedy to do justice to both parties. He qualified his decision by instructing the appointed liquidator to make certain adjustments in order to deal with any compensatory relief to which Holt was entitled. It was further ordered that Burnside pay 70% of Holt's costs and that Hollen cover Burnside's costs in the winding-up proceedings.  Holt appealed this decision, arguing that the Associate Judge erred in finding certain acts by Burnside insufficient to constitute oppression. Holt argued that should leave to appeal be granted, the appeal should be heard instanter, whereas Burnside contended that the Court of Appeal would be the most appropriate forum.  On appeal, Robson J was satisfied that Holt had sufficient grounds on which to appeal the earlier decision. He found that a hearing de novo to be heard instanter was appropriate in the circumstance. Robson J agreed with the decisions of the Associate Judge regarding the acts that did and did not constitute oppression, but reversed the winding-up decision, instead ordering Burnside to purchase Holt's shares in the company.  **(b) Facts**  Holt argued that there were numerous grounds on which he had been oppressed in his capacity as a member of Hollen. These were:   * Diversion of business from Hollen by Burnside to a third-party controlled by Burnside; * Outsourcing from Hollen to a third-party, to the gain of Burnside's son and daughter-in-law; * Relocation of one part of Hollen's business to Burnside's property; * Payment of a directors loan by Burnside to himself but not to Holt; * Payment of Hollen's money by Burnside to purchase a car; * Payment of Hollen's money by Burnside to repair a shed on his property; * Exclusion by Burnside of Holt from management; * Burnside's exclusive relations with a prominent UK client of Hollen; and * Burnside's establishment of a bank account without Holt's knowledge.   Holt also submitted that the following grounds were incorrectly deemed by the Associate Judge not to constitute oppression:   * Payment of Hollen's money by Burnside for his own superannuation entitlements ($490,000) without the approval of Holt; * Burnside's opening of a competing business; and * Burnside's refusal to pay a dividend to members, despite prior agreement to the contrary.   It was further submitted by Holt that a winding-up order would be financially advantageous to Burnside, potentially allowing him to purchase the business for much less than its worth.  Additionally, Burnside's relationships with clients and staff would be a deterrent to any potential purchaser.  **(c) Decision**  Robson J agreed with the Associate Judge in respect of the acts undertaken by Burnside that were found to constitute oppression.  In considering the three additional grounds, he referred to recent analogous case law.  While diverting business from the company to a third-party in which the oppressor had an interest but the applicant did not may constitute oppression, this case was distinguishable in that Burnside did not commence the third-party business at the expense of Hollen, but rather because Hollen was not prepared to do so. No evidence was led to suggest that Hollen was being treated unfairly or achieving other than a satisfactory return for the benefits and advantages it was providing to the third-party. While such conduct may have been in breach of Burnside's duties as a director, for the purposes of s. 232, the conduct was not "commercially unfair".  Similarly, whilst acknowledging that there are occasions in which paying unreasonably high remuneration to directors can be oppressive, in this case, the payments were not unreasonable given the work undertaken by Burnside. It was also held that in circumstances where the parties are in deadlock and the payment of the dividend required the agreement of the parties, the refusal by one party to pay was not unfair, nor did it constitute oppression.  In this way, the judgment of the Associate Judge was upheld insofar as the various grounds of oppression were considered. Robson J agreed that Burnside should pay 70% of Holt's costs, given that the consideration of the unsuccessful grounds on which oppression was alleged took up a substantial amount of the hearing.  However, Robson J was ultimately of the view that the Associate Judge was in error in his decision regarding a final remedy. Robson J explained that generally speaking, there are two objectives in granting remedies for oppression; to bring an end to the oppressive conduct and to compensate the injured party for the injury done to him or her by the oppressive conduct.  The Associate Judge failed to give sufficient weight to the desirability of compensating Holt for the injury suffered by the oppression.  In determining an appropriate remedy, Robson J agreed with Holt's submission in that the value of the business to Burnside was in excess of what it might be to a third-party and that winding-up should only be viewed as an appropriate remedy in extreme cases. The just and equitable remedy in this case was to take the mid-point between the net value of the assets of the company and have Burnside pay Holt for his share.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h4)  **4.8 An analysis of the requirements of a partnership**  (By Sara Mirabella, DLA Phillips Fox)  *Momentum Productions Pty Limited v Lewarne* [2009] FCAFC 30, Federal Court, Full Court, Spender, Jessup and Middleton JJ, 19 March 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/march/2009fcafc30.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/march/2009fcafc30.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 analysis of the surrounding circumstances and communications between various parties to determine whether their relationship was one of partnership, as defined in ss. 1 and 2 of the [Partnership Act (55 Vic. No. 12) 1892 No. 12 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=5850" \t "default) (Act), among other relevant matters.  **(b) Facts**  Mr Scotts wanted to purchase a hotel business, using his company Momentum Productions Pty Limited (Momentum) as the purchase vehicle.  He entered into a contract for the purchase of the hotel business for $1.7m but was unable to raise the necessary funds.  Requiring an additional $400,000 he approached his brother and Richard Lewarne (the respondent) with a proposal that they should take up "equity" in the business.  The brother was to contribute $100,000 and the respondent $300,000.  In return for this investment "into the business", the respondent was to receive "a 15% share of the equity of the pub and 15% of the profits" for his contribution.  The purchase of the business was financed by vendor finance ($200,000) and by a loan from the Commonwealth Bank ($1.53m).  The $300,000 was paid by the respondent, at the request of Mr Scotts, via a bank cheque made out to Westpac. Mr Scotts used the $300,000 to discharge a mortgage over a property owned by his mother. He then transferred the registered title from his mother to himself and used this property to contribute to the security for the bank loan made to Momentum.  About a year after the purchase of the hotel business the respondent expressed concerns about his investment and the management of the hotel, and sought to extract himself from the business.  He argued that various representations made by Mr Scotts for the purpose of obtaining the respondent's equity participation in the hotel business were misleading or deceptive.  At trial, it was held that a partnership existed between the three men and Momentum, and various orders that were generally favourable to the respondent were also made.  Mr Scotts and Momentum (the appellants) appealed this decision on various grounds.  One of the key issues on appeal was the nature of the agreement pursuant to which the money was paid, and the nature of the relationship between the respondent and Mr Scotts and/or Momentum - in particular, whether the relationship was one of partnership or something else (e.g. an incorporated joint venture).  **(c) Decision**  On appeal the court upheld the decision of the single judge, finding that the relationship of the equity holders in the hotel business was one of partnership.  Their Honours did however decide that Momentum was not a party to that partnership.  Among other matters, Mr Scotts was held to have breached his fiduciary duty by using the respondent's $300,000 to discharge the mortgage over his mother's home.  **(i) Facts relevant to the business structure issue**  Mr Scotts made various representations to the respondent to the effect that he had sufficient money to cover the purchase price but required the extra money from the respondent to assist in funding the working capital.  He also said that he would run the business on behalf of his brother and the respondent and would consult with both of them about any major decisions, although he would have the final say.  An "Outline Agreement" between Mr Scotts and the Respondent was sent to the respondent by Mr Scotts.  A week or so later Mr Scotts sent to the respondent a "Heads of Agreement" between Mr Scotts/Momentum and the respondent.  The respondent sought legal advice and referred to the arrangement as one of partnership whereby he (and Mr Scotts' brother) would be silent partners and Mr Scotts would be responsible for day to day operations.  The respondent specifically did not want to become a director of Momentum, but only "a shareholder", on the basis that assuming office as a director would expose him to greater potential liability should Momentum have any "skeletons in the closet".  A draft shareholders' agreement was prepared but never finalised.  **(ii) Business models contended for by the appellants**  The appellants' primary contention was that the respondent entered into a contract to purchase from Mr Scotts 15% of the share capital of Momentum for $300,000.  The fact that Momentum had only two shares on issue made this contention unlikely.  The appellants also argued that the Heads of Agreement gave rise to a contract whereby the respondent purchased a share in the profits of Momentum.  The trial judge held that there was no evidence that the respondent accepted the terms of the Heads of Agreement.  On appeal, the court held that even if it was assumed that the provisions in the Heads of Agreement were the terms of the contract between the parties, such terms were not inconsistent with the contract being one of partnership.  The conclusion to be drawn was that the respondent acquired a share in the capital of the business (subject to the finding that the agreement was one of partnership being upheld).  **(iii) Analysis of whether there was a partnership**  After referring to the statutory definition of a partnership and the rules for determining a partnership in s. 1(1) and s. 2(1) of the Act, the court held that there was clearly a business being carried on for profit, the issue being whether the respondent was carrying on that business in common with Mr Scotts and/or Momentum.  Among other submissions considered and rejected by the court, the appellants submitted that "mutuality" was essential in any contract of partnership but was lacking in this case because: (a) the parties were not conducting the business as agents for each other; (b) they had not agreed to share in the losses of the business; (c) the obligations of the respondent and Mr Scotts under the agreement between them were asymmetrical in that the respondent's only obligation was to contribute money, while Mr Scotts had no obligations because all the obligations in relation to the conduct of the business were imposed upon Momentum; (d) the respondent had no right to partake in the management of the venture; and (e) the respondent had no say on the matter of the admission of the new equity participants in the business.  The court held:   * Whether a partnership exists must be determined by reference to sections 1 and 2 of the Act and the authorities relied on by the appellants did not require proof of agency over and above the matters to which s. 1(1) of the Act refers.  Ultimately, the conduct and communications of the parties showed an intention that Mr Scotts would act as agent for them all, and that each party to the agreement would have rights and obligations to each other under the agreement. * The fact that the respondent did not want to be a director of Momentum was not sufficient evidence to suggest that he did not want to share in the losses of the business. * It is not uncommon for partners to make contributions which differ both in kind and in quantum.  This was a case where the respondent and Mr Scotts' brother were to be silent partners after having contributed capital. * It was clearly established that Mr Scotts would consult with his brother and the respondent on strategic decisions but that he would have the final say (as is commonly the case for a party having an 80% equity share). * The fact that the respondent had no say as to the admission of any new equity participants in the business was in no way inconsistent with the agreement being one of partnership and may simply have reflected the respondent's minority stake in the business.   Overall, the court held that the communications between the parties (Mr Scotts, his brother and the respondent) supported the conclusion that they intended their relationship to be one of partnership.  **(iv) The position of Momentum**  The trial judge found that Momentum was a party to the partnership.  The difficulty with this finding was that it was very unlikely that Mr Scotts would have intended to be in partnership with his own service company, and also that there was no specification as to the respective equity shares of Momentum and Mr Scotts.  The facts suggested that there was a partnership between Mr Scotts, his brother and the respondent and that Momentum was simply used as the corporate vehicle through which they carried on the hotel business (the company holding legal title on trust for the partnership).  As such the appeal was upheld to the extent necessary to vary the trial judge's declaration that Momentum was also a partner.  **(v) Mr Scotts' obligations regarding the respondent's contribution of $300,000**  Mr Scotts argued that he had not been in breach of his fiduciary duties by using the respondent's $300,000 to discharge the mortgage, on the basis that those transactions were for the benefit of the hotel business.  This was rejected by the court.  Among other matters, the court rejected Mr Scotts' argument that the respondent's action was, or was analogous to, an action on a debt allegedly owing to him from the partnership.  Rather, it was in the nature of a suit by a person beneficially entitled to hold a fiduciary accountable for his breach of duty.  Mr Scotts was ordered to account to the partnership for the sum of $300,000 plus interest ($416,276.71) and a further ground of appeal relating to the trial judge's assessment of damages under the [Trade Practices Act 1974 No. 51 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "default) was also rejected.  The appellants were ordered to pay the respondent's costs.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h4)  **4.9 A liquidator in a members voluntary winding up may go behind a judgment debt**  (By Kathryn Finlayson, Minter Ellison)  *Ilhan v Cvitanovic* [2009] NSWSC 160, New South Wales Supreme Court, Barrett J, 18 March 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/march/2009nswsc160.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/march/2009nswsc160.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  A liquidator may go behind a proof of debt to determine whether there is a true liability.   The circumstances that the winding up is a members voluntary winding up and that the debt sought to be proved is a judgment debt do not, of themselves and without more, preclude rejection of a proof of debt.  **(b) Facts**  In 2006, the plaintiffs purchased from HR MD Pty Limited (formerly Hartrez Pty Limited) two air-conditioning units for their home.  The units were delivered and installed but disputes about their quality arose.  The plaintiffs commenced proceedings against Hartrez in the Consumer, Trader and Tenancy Tribunal.  On 21 March 2007, without hearing the merits of the application, the Tribunal ordered that Hartrez pay the plaintiffs $8,135.00.  On 28 March 2007, the Registrar of the Tribunal issued a certified copy of the order which the plaintiffs then filed in the registry of the Local Court at North Sydney.  Upon filing, the order operated as a judgment of the Local Court by force of s. 51(3) of the [Consumer, Trader and Tenancy Tribunal Act 2001 No. 82 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=59108" \t "default).  On 30 November 2007, the defendant was appointed as liquidator of Hartrez upon a members voluntary winding up.  The plaintiffs lodged with the defendant a proof of debt dated 18 December 2007 for $9,607.48 (the amount of the judgment debt plus associated costs and interest).  The proof of debt was rejected by the defendant on 22 August 2008.  On 5 September 2008, the plaintiffs filed an application under s. 1321 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Corporations Act) for an order that the proof of debt be admitted.  On 9 March 2009, his Honour Justice Barrett ordered that the following question be separately determined:  "Whether it is open to the defendant to reject the plaintiffs' proof of debt in the winding up of HR MD Pty Limited based on a judgment debt in circumstances where the company is in the course of members voluntary winding up".  **(c) Decision**  Justice Barrett answered the separate question as follows:  "The circumstances that the winding up is a members voluntary winding up and that the debt sought to be proved is a judgment debt do not, of themselves and without more, preclude rejection by the defendant of the plaintiffs' proof of debt".  His Honour did not accept the plaintiffs' contention that in a members voluntary winding up the liquidator must take a judgment debt as he finds it and cannot seek to go behind the judgment, even where it may be liable to be set aside. Justice Barrett noted that the essential characteristics of the scheme for dealing with the assets of a company do not differ between a compulsory or a voluntary winding up.  His Honour also noted that although the rule allowing the circumstances behind a judgment to be examined to determine whether there is in truth a liability is today regarded as a rule of bankruptcy, it had its origins in equity and may be regarded as reflecting an equitable principle applying generally to cases in which an estate falls to be administered for the benefit of persons interested in it.  In his Honour's view, s. 553 of the Corporations Act (which lays down a general rule that in the winding up of an insolvent company the same rules are to be observed with regard to debts provable as are in force for the time being under the [Bankruptcy Act 1966 No. 33 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "default)) does not cause the rule allowing a trustee to go behind a judgment to apply in the winding up of an insolvent company and was irrelevant and inoperative in relation to the matter before the court.  Accordingly, Justice Barrett held that the rule allowing the circumstances behind a judgment to be examined to determine whether there is a true liability may be applicable to a solvent winding up such as a members voluntary winding up.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h4)  **4.10 Intentions and expert opinion may affect price sensitivity and disclosure obligations**  (By Graham Bannerman, Freehills)  *Jubilee Mines NL v Riley* [2009] WASCA 62, Supreme Court of Western Australia, Court of Appeal, Martin CJ, McLure JA, Le Miere AJA, 18 March 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2009/march/2009wasca62.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2009/march/2009wasca62.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**  Kim Riley (Riley) claimed damages against Jubilee Mines NL (Jubilee) under section 1005 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Corporations Act). Riley argued that Jubilee failed to disclose price-sensitive information under s. 1001A(2) of the Corporations Act and rule 3A(1) of the [ASX Listing Rules](http://www.asx.com.au/supervision/rules_guidance/listing_rules1.htm" \t "_new). The information in question related to the 1994 results of exploratory drilling on Jubilee's tenement, which indicated that further exploratory drilling for nickel may be appropriate. As a former shareholder, Riley claimed that timely disclosure would have influenced him to retain his shares in Jubilee, and later sell them at a much higher price. At first instance, Riley was successful and was awarded $1,856,000 in damages and $1,005,133.33 in interest, plus costs.  On appeal, Jubilee successfully argued that:   * if Jubilee had disclosed the information, it also would have been required to disclose that it had neither the means nor intention of conducting further exploratory drilling; and * the information, which properly included Jubilee's drilling intentions, did not meet the threshold for price sensitivity.   Accordingly, Jubilee had not breached its continuous disclosure obligations.  **(b) Facts**  **(i) Jubilee's activities in 1994**  In 1994, Jubilee Mines NL (Jubilee) was engaged in gold exploration on the McFarlanes Find tenement in Western Australia. Mr William Crossley (Crossley), the managing director, and Mr John Cooke (Cooke), a geologist, had the day to day management of the company. Jubilee's focus at the time was gold exploration, and it had very limited cash resources.  **(ii) Accidental drilling on McFarlanes Find**  McFarlanes Find shared a boundary with a tenement held by Western Mining Corporation (WMC). Due to discrepancies between the plans held by the Department of Mines and Energy and the actual co-ordinates of the tenements, WMC inadvertently conducted exploratory drilling on McFarlanes Find. Once the discrepancy was discovered, WMC sent the results of the accidental drilling on McFarlanes Find (Drilling Results) to Jubilee.  **(iii) Jubilee's reaction to the drilling results**  The Drilling Results showed nickel deposits on McFarlanes Find, and that there was the potential for further exploratory drilling. However, Cooke determined that in spite of the potential indicated by the Drilling Results, further exploratory drilling would not be appropriate given Jubilee's focus on gold and its limited cash resources. Cooke told Crossley of his views, and Crossley determined that the information in the Drilling Results was neither of interest nor significance to Jubilee. The Drilling Results were not disclosed to the market.  At first instance, the Master found that Cooke in fact did not appreciate the true significance of the Drilling Results, and that finding was not challenged on appeal.  **(iv) Changes to Jubilee's board and subsequent disclosure**  In 1996, following changes in the composition of Jubilee's board, WMC initiated discussions with Jubilee regarding the Drilling Results, and provided Jubilee with both cross-sections of the Drilling Results, and its interpretation of their significance. On the business day following that meeting, Jubilee made an announcement to the ASX disclosing both the Drilling Results, and an intention to undertake further exploratory drilling on McFarlanes Find. Following the announcement, Jubilee's share price jumped significantly.  **(c) Decision**  While all judges allowed the appeal, two separate sets of reasons were handed down. Martin CJ, with whom Le Miere AJA agreed, delivered the majority judgment. McLure JA gave her own set of reasons.  **(i) The test for price sensitivity under the Listing Rules and Corporations Law**  In determining whether the Drilling Results should have been disclosed, the court looked at the tests for price sensitivity under both the Listing Rules and the Corporations Act. Under both ss. 1001A(2) and rule 3A(1), the relevant test was whether a reasonable person would expect the information to have a material effect on the price or value of the securities. However, all the judges accepted that the test under s. 1001A(2) was, in effect, supplanted by s. 1001D of the Corporations Act, which was analogous to a "deeming provision" to be applied in assessing price sensitivity. Accordingly, a reasonable person would expect information to have a material effect on price or value if that information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell those securities.  Noting a lack of authority on the issue, the two judgments differed on whether the deeming provision under s. 1001D could also supplant the test in rule 3A(1), and consequently disagreed on the test to be applied in assessing price sensitivity under the Listing Rules.  Looking to the history of continuous disclosure legislation in Australia, Martin CJ found that the legislative intent behind the relevant sections of the Corporations Act was to build on and strengthen the ASX Listing Rules. The clear sentiment in the structure of the two regimes was to ensure that they were consistent, and an unduly constrained and technical approach should be rejected. Accordingly, the deeming provision in s. 1001D of the Corporations Act was applicable in assessing price sensitivity under the Listing Rules. For McLure JA, on the other hand, substantive differences between the provisions of the Listing Rules and the Corporations Act meant that the deeming provision in s. 1001D did not supplant the "material effect on price or value" test in the Listing Rules.  **(ii) Price sensitive information may include expert opinion and intentions**  Both the Chief Justice and McLure JA upheld the appeal on the ground that the Drilling Results were not sufficiently price sensitive to trigger disclosure obligations given Jubilee's circumstances, namely:   * Jubilee's focus on exploration for gold; * Cooke's opinion that the Drilling Results were of little commercial significance; * Jubilee's intention not to conduct further exploratory drilling; and * in any event, the lack of available funds to conduct further exploratory drilling.   Crucially, all the judges agreed that it may be necessary to go beyond what was termed "core information" in discharging continuous disclosure obligations. In particular, McLure JA stressed that where price sensitivity depends upon the company having an expert assessment of core information and business decisions are made based on that expert assessment, the disclosure of only the core information may be misleading.  Martin CJ found that, in the circumstances, in order to avoid misleading the market, Jubilee would have been required also to disclose the fact that it did not intend to conduct further drilling. Accordingly, an announcement of the Drilling Results, properly including the drilling intentions, would not have influenced a hypothetical investor to trade in Jubilee's securities, and the information was not relevantly price sensitive. Jubilee had no obligation to announce the Drilling Results until it altered its position and decided to undertake further exploratory drilling.  McLure JA, on the other hand, was not persuaded that the focus on gold exploration and the lack of funds for further exploration were relevant in assessing price sensitivity. Her Honour concluded that an expert opinion on the Drilling Results should have been and in fact was part of the information of which Jubilee was aware in assessing the price sensitivity. Given Cooke's honest and reasonable expert opinion that the Drilling Results were of little commercial significance, the information was not price sensitive and consequently Jubilee had not breached its disclosure obligations.  Further, for McLure JA, had Jubilee had been aware of the true significance of the Drilling Results, then prima facie, drilling intentions were part of the mix of relevant information on which to assess price sensitivity. In principle, however, Jubilee could not rely on its intention in relation to drilling (based, as it was, on a failure to appreciate the true significance of the Drilling Results) to prevent a disclosure obligation from arising.  All the judges agreed that market practice was irrelevant in determining the ambit of the information that must be disclosed to the ASX.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h4)  **4.11 The ability of a bank to protect its interests is not always unlimited**  (By Zoe Leyland, Mallesons Stephen Jaques)  *Suncorp-Metway Ltd v Bellairs* [2009] NSWSC 135, New South Wales Supreme Court, Rothman J, 12 March 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/march/2009nswsc135.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/march/2009nswsc135.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 decision concerned an application by the plaintiff, Suncorp-Metway Limited (Suncorp), for possession of property for which it was a mortgagee following default by the defendants.  While the defendants did not challenge the possession orders sought by Suncorp, the defendants sought relief from various other orders on the basis that the loan agreement was unjust within the meaning of the [Contracts Review Act 1980 No. 16 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=10771" \t "default).  Rothman J agreed that the loan agreement was unjust as it:   * imposed conditions that Suncorp knew were impossible for the defendants to fulfil; * contained terms and conditions significantly different from those under which finance was initially offered; * did not represent a negotiated outcome; and * contained further conditions not reasonably necessary for the protection of Suncorp's interests.   The decision, particularly where it applies, is a warning to lending institutions that their ability to contract so as to insulate themselves from default is not absolute.  Lenders should be aware that they may not be able to impose conditions on borrowers which are not reasonably necessary for the protection of their interests.  This may prove alarming for lenders given the current economic climate.  Lending institutions should be prudent when drafting conditions precedent and ought to consider whether, on the material provided to them, those conditions are capable of being satisfied.  Lenders should also take care when renegotiating terms of an offer of finance so as not to be seen to be abusing their bargaining power.  **(b) Facts**  The defendants, Mr Bellairs and Mr Pike, entered into a loan agreement with Suncorp for $535,000 in order to purchase, as equal partners, the land and business known as the Valleyview Nursery.  Suncorp was initially informed by Mr Bellairs, on behalf of the defendants, that the defendants required an interest-only loan due to concerns about their ability to reduce the principal in the early years of the loan.  Mr Bellairs testified that the defendants wished to ensure that there was sufficient cash flow to "build the Nursery business up".  Suncorp sent to the defendants an indicative proposal for a borrowing of $490,000 on an interest-only basis.  The defendants completed the loan application form seeking a loan of $535,000.  The loan was approved for internal purposes. The internal approval memorandum stated that the loan was to be interest-only for a period of two years, with the possibility of a further interest-only period, and that the valuation of the Nursery was to be based on land and buildings only.  An offer of finance on these terms was sent to the defendants.  A condition precedent stipulated that there be a valuation of the Nursery from a bank-approved valuer of not less than $675,000.  The defendants were not informed at any point that the valuation was to be conducted without regard to the value of the business.  On 15 September 2003, the defendants executed the offer of finance.  The valuation without reference to the value of the business resulted in a shortfall of security which Suncorp remedied by requiring the defendants to make a reduction of principal in the first 12 months.  The defendants subsequently executed the revised offer which included the same conditions precedent as the initial offer. Mr Bellairs attested that he had no choice but to accept given that the contracts for the sale of the property and business had already been executed.  The defendants were not able to meet the required repayments as a consequence of cash flow issues.  The defendants did, however, make repayments of approximately $95,000 in the first two years.  Had the loan been interest-only, the defendants would have repaid all interest owing for that period and some reduction in principal would have occurred.  In early 2005, Mr Pike wished to sell his share due to ill health.  The proposed sale was subject to refinancing of the original acquisition.  Suncorp, however, did not allow the differential to be charged to an increased credit card limit on a card issued through it.  As a consequence, the sale and refinancing did not occur.  In March 2006, Suncorp commenced enforcement proceedings.  **(c) Decision**  **(i) Reasoning**  Rothman J concluded that the loan agreement was unjust within the meaning of s. 7(1) of the Contracts Review Act 1980 (NSW).  In order to come within that section, the terms of the contract must, by their own operation or by the circumstances which gave rise to them, be "contrary to the ordinary standards of fair play".  The terms and conditions of the loan agreement were significantly different from those contained in the initial offer, which involved an interest-only loan.  The agreement, moreover, did not represent a negotiated outcome, thus reflecting the material inequality of bargaining power between the parties.  Furthermore, Suncorp was aware or ought to have been aware, that the initial offer contained conditions which were impossible for the defendants to fulfil.  Suncorp had accepted that the price paid for the land and business represented fair market value yet imposed a condition that the value of the land and buildings (without the value of the business) be equal to the purchase price.  It was also apparent from internal memorandums that Suncorp was aware that the imposition of a requirement to reduce principal would be likely to cause the defendants financial difficulty in the start-up phase of their business.  Rothman J determined that the reduction of principal requirement was not reasonably necessary for the protection of Suncorp's legitimate interests.  Rothman J was influenced by the fact that the loan/value ratio was 72%.  The contract was therefore unjust as a result of both its terms and the circumstances in which it was made.  **(ii) Remedy**  Rothman J ordered a stay on the writ of possession for a period of six months to allow the defendants to regularise their affairs.  Suncorp was ordered to remit to the defendants all higher rates of interest, imposed as a result of default, from the inception of the loan to the date of judgment.  Any fees payable on account of non-compliance with the loan were also to be excluded from the determination of the total sum owed by the defendants.  Rothman J explicitly rejected Suncorp's argument that the defendants ought to have breached the contracts for the sale of the land and business, executed after the initial offer of finance, so as to have mitigated their losses.  **(d) Note**  The Contracts Review Act 1980 (NSW) applied here as the Nursery was a horticultural undertaking and, by definition, a farming undertaking and was thus excluded from the trade or business carve out within s. 6(2).  The Contracts Review Act 1980 (NSW) applies only in New South Wales.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h4)  **4.12 Court widens category of registrable instruments relating to charges**  (By Mallesons Stephen Jaques)  *Re Octaviar Ltd; Re Octaviar Administration Pty Ltd* [2009] QSC 37, McMurdo J, 6 March 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/march/2009qsc37.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/march/2009qsc37.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)  The Queensland Supreme Court decision in *Re Octaviar Ltd; Re Octaviar Administration Pty Ltd* [2009] QSC 37 is widely regarded as surprising because it appears to cut across current market practice.  The decision is likely to be appealed, but pending resolution, serious questions have been raised about the scope of the moneys (and/or obligations) secured by certain registered charges, particularly those where the secured moneys or obligations are defined by reference to moneys or obligations owing under designated specific documents external to the charge (i.e. as opposed to "all moneys" or "all obligations" charges).  **(a) The facts**  The case involved, as relevant, a charge given by a guarantor, Octaviar Ltd (the Charge) to a lender, Fortress Credit Corporation (Australia) II Pty Ltd (Fortress), which secured money due, owing or payable under or in relation to a "Transaction Document". The term "Transaction Document", in turn, was defined in the related Facility Agreement between Fortress, the borrower and Octaviar (and another guarantor) to mean certain specifically identified documents, and (through a specific designation process) "each other document which the Lender and the Borrower or a Security Provider agree in writing is a Transaction Document for the purposes of [the Facility] Agreement". On 22 January 2008, Octaviar Ltd and the borrower agreed with Fortress that Octaviar Ltd's liability under another guarantee not otherwise connected with the Facility Agreement should also be secured by the Charge, and agreed that it was a "Transaction Document" for the purposes of the Facility Agreement (the 22 January Agreement). The Public Trustee of Queensland, as trustee for certain noteholders of Octaviar Ltd, argued, among other things, that the 22 January Agreement was a variation of the charge for the purposes of s. 268(2) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) and ought to have been registered as such.  **(b) The decision**  The Court held that the 22 January Agreement did indeed constitute a "variation in the terms of the charge having the effect of increasing the amount of the debt or increasing the liabilities . secured by the charge", as contemplated by s. 268(2)(a) of the Act, and so a notice in relation to it should have been lodged with ASIC within 45 days. As no such notice was lodged, s. 266(3) of the Act rendered the Charge void to the extent that it purported to secure the amount of the increase in debt or liability.  **(c) Implications**  The decision has potentially far-reaching implications for charges that secure liabilities by reference to money or obligations owing under designated specific documents outside the charge (as opposed to non-specific "all moneys" or "all obligations" charges). At the very least, it means that documents not specifically identified in the charge but added into the ambit of the secured obligations by a later "variation" via a designation mechanism need to be separately notified to ASIC as a variation under s. 268(2) of the Act.  But it may go wider than this. There are suggestions in the judgment that even those documents which are specifically identified and in existence at the date of the charge might need to be registered with the charge under s. 263(1)(c) as the "instruments" which "created or evidenced" the charge (despite the Facility Agreement not being lodged with the Charge, no decision was made on this point in Octaviar because ASIC had issued a certificate in respect of initial registration and the court held that the "conclusive evidence" rule in s. 272(4) applied).  This aspect of the decision would seem also potentially to capture arrangements where documents containing liabilities to be secured are specifically identified as being within the "secured money" (or equivalent) definition in the charge but are not executed until some later time, as well as documents not so identified but brought into the secured obligations net by any kind of "designation notice" style procedure at a later time, where they have the effect of increasing the amount of the debt or the liabilities (present or prospective) secured by the charge. It is fair to say that it is not common market practice to lodge notices in relation to those documents at present.  **(d) What should you do as a chargor or chargee?**  As mentioned, the case is likely to be appealed. In the meantime, it is recommended that those who granted or who enjoy the benefit of charges registered at ASIC take the following actions:   * Conduct a review of all such charges, whether prepared internally or by external counsel, to identify those where the "secured money" (or equivalent) definition is of the "specific document" type including those which contain a designation mechanism (i.e. as opposed to the non specific "all moneys" type). * In relation to each of those charges, identify all of the documents which would be within the ambit of the "secured money" (or equivalent) definition, whether executed before, at the same time as or after the charge (which, in the case of the latter, have the effect of increasing the amount of the debt or the liabilities (present or prospective) secured by the charge), and which have not been the subject of a lodgement with ASIC under Part 2K of the Act. * Where those documents were in existence before the charge was executed, or were executed at the same time as the charge, then (assuming the charge has been registered) consider whether s. 272(4) applies or whether those documents should now be lodged and registered. * Where those documents were executed after the charge, then (assuming the charge has been registered): * consider lodging, or procuring the lodgement of, a notification (ASIC Form 311B) in respect of those document(s) for each charge. If in respect of any such document, it is less than 45 days after the date of the "variation", the matter is resolved by such lodgement, but if it is later, then lodgment will at least set time running for the six month "cure" period implied by s. 266(3) of the Act; and * where it is later than 45 days after the date of the "variation", consider also applying to the Court for an extension of the 45 day registration period under s. 266(4) of the Act. * In relation to pending transactions where the charge has not yet been executed, consider converting any proposed "secured money" (or equivalent) definitions which are of the "specific document" type to a non specific "all moneys" type. If that is not possible, consider carefully whether you need to lodge all of the "specific documents" with the ASIC Form 309 on initial registration of the charge (noting that, of course, all those documents then become a matter of public record).   [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h4)  **4.13 Voluntary administration: Extension of the convening period for a second meeting of creditors**  (By Laura Keily and Haley Aprile, Corrs Chambers Westgarth)  *Lombe re Australian Discount Retail Pty Ltd* [2009] NSWSC 110, Supreme Court of New South Wales, Barrett J, 3 March 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/march/2009nswsc110.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/march/2009nswsc110.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  This case concerned an application by the administrators of Australian Discount Retail Pty Limited and 38 wholly-owned subsidiaries (the ADR Group) for a substantial extension of the convening period of the second meeting of creditors under Part 5.3A of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act).  The court had previously made an order effecting a short extension of time pursuant to s. 439A(6) of the Act.  The question to be determined was whether there was good cause for departing from the time limits set down by the Act for the convening of such a meeting.  That is, would the extension of time maximise the chances of the company or as much as possible of its business continuing in existence, or if continuation was not possible, to achieve a better return for creditors and members than would result from an immediate winding up.  Barrett J held that due to the particular circumstances of the case, the interests of creditors would be best served by granting the extension of the convening period, rather than forcing the meeting to occur at an early date.  His Honour further held that the proper statutory basis for effecting the extension is s. 447A of the Act, as it is unclear whether the amendments to s. 439A, as provided for in the [Corporations Amendment (Insolvency) Act 2007 No/ 132 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=98069" \t "default) (the Amendment), allow several extensions to be granted under s. 439A(6).  **(b) Facts**  Administrators were appointed to the ADR Group on 20 January 2009.  On 16 February 2009 the administrators obtained a short extension of the convening period for the second meeting of creditors until 9 March 2009. The administrators then sought a further extension until 18 August 2009. This added up to a total extension of six months.  On the same day the administrators were appointed, secured creditors appointed receivers of the assets and undertakings of the companies.  The receivers undertook to sell the assets and undertakings as a going concern, believing this would achieve a better outcome for creditors than would result from selling the property in parts. For example, the sale of the ADR Group as a going concern would likely result in most of the 10,000 employees of the ADR Group being retained, as well as enabling suppliers and other contractors to continue to do business with the new owner.  The receivers supported the application for an extension of the convening period.  One of the receivers deposed that a large number of persons had expressed interest in the sale of the ADR Group and a number had submitted non-binding indicative offers.  The receivers expected a successful bidder to be chosen and to have entered into a sale and purchase agreement around the end of March 2009.  After this, the successful bidder would require a considerable period of time within which to make arrangements with lessors of the premises of the 39 companies.  Accordingly, a substantial extension of the convening period was required.  **(c) Decision**  **(i) Extension of the convening period**  Barrett J began by noting that the approach to be taken in such applications is for the time limits set down by the Act to be adhered to, unless good cause is shown.  The good cause must be such as to promote the objects of Part 5.3A as stated in s. 435A. Therefore, the ability to maximise the chances of the company or as much as possible of its business to continue in existence, must be weighed against the expectation that voluntary administration will be effected quickly, so that there is a speedy resolution of creditors' positions.  Here, each of the 39 companies in the ADR Group had a committee of creditors, 38 of which had unanimously resolved to support the application for an extension of the convening period.  Further, his Honour felt it would be counterproductive for the administrators to be compelled to convene the second meeting too quickly, as such a meeting is best held at a time when it is possible to give creditors definitive financial information that will assist them in their decision-making.  Barrett J held that creditors' decision-making would be made more difficult and complicated if they were compelled to make a decision about their company's future based on speculation about the possibility of a going concern sale.  Further time for the formulation and digestion of recommendations based on established realities would avoid the possibility of what might be a premature decision in favour of winding up as the only practically available option. In this case, although the creditors would not be left waiting unduly, the creditors were content for additional time to be taken to achieve a more certain and hopefully profitable outcome.  For these reasons, his Honour held that the interests of creditors would be best served by granting the extension sought by the administrators.  **(ii) Statutory basis for effecting the extension of the convening period**  His Honour stated that the court's power of extension under s. 439A(6) had previously been exercised in this matter and a number of cases held that s. 439A(6) permits only one extension of the convening period to be made.  In one such case, *Re Henry Walker Eltin Group Ltd* [2005] FCA 984, Hely J referred to cases in which a second extension was made pursuant to s. 447A - *Re Western National Earthmoving Corporation Pty Ltd* (1997) 141 FLR 121 and *Re Envirostar Energy Ltd* [2002] NSWSC 1246.  However, Barrett J noted that these cases had all been decided before the introduction of the Amendment.  The Amendment allows an extension of the convening period to be made at any time if the court believes it would be in the best interests of the creditors.  Barrett J found that while it is unclear whether the amended form of s. 439A(6) allows subsequent extensions of the convening period to be made, it is likely that the Amendment was only intended to allow a second meeting to be held outside the convening period because of technical defects discovered after a meeting had been held.  Therefore, his Honour expressed doubt about whether the Amendment created a general jurisdiction to make multiple extensions under s. 439A(6), although he did not decide the matter. Section 447A (which permits the court to make any such order it thinks appropriate about how Part 5.3A operates in relation to a particular company) may be used to allow for subsequent extensions (according to the cases).  His Honour preferred to rely on s. 447A and held that the proper statutory basis for effecting the extension was s. 447A. His Honour was satisfied that it was in the best interests of creditors that the convening period be so extended.  Barrett J also allowed an order under s. 447A to enable the administrators to hold the second meeting at any time during the extended period, or within five business days after its end, rather than strictly in accordance with s. 439A(2).  Section 439A(2) provides that the meeting must be held within five business days before or after the end of the convening period.  His Honour stated this order would allow the administrators to bring the meeting on promptly, should a sale be completed earlier than expected, without having to wait for the end of the extended period.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h4)  **4.14 Delaware Supreme Court clarifies Revlon standard and rejects challenges to sale process**  (By Jonathon Redwood, Victorian Bar)  *Lyondell Chemical Company v Ryan*, Supreme Court of the State of Delaware, CA No 3176, 25 March 2009, judgment revised 16 April 2009  The full text of this judgment is available at:  [http://www.courts.delaware.gov/opinions/(yfcbraec5eoituaekhk0uneo)/download.aspx?ID=119350](http://www.courts.delaware.gov/opinions/%28yfcbraec5eoituaekhk0uneo%29/download.aspx?ID=119350" \t "_new)  On 25 March 2009, in another significant decision (*Lyondell Chemical Corp. v Ryan*) siding with directors in the current turbulent economic climate, Delaware's highest court emphatically rejected a shareholder class action seeking to impugn board members for allegedly failing in their Revlon duties and duties of good faith by not taking sufficient action to prepare for an impending offer and not considering a market check before entering into a merger agreement. The Court affirmed the board's significant latitude and discretion in managing a sale process.  The case concerned a post-merger claim by shareholders against directors for breaching their duty of loyalty by failing to act in good faith in conducting a sale process for Lyondell Chemical Co. Specifically, upon the filing of a Schedule 13D by an affiliate of the eventual merger partner, it was contended that the company was "in play". A Schedule 13D is required to be filed with the Securities and Exchange Commission by any person acquiring a 5% or greater beneficial interest in the equity securities of a company. The Schedule 13D must disclose any intentions to acquire control of the company.  The shareholders argued that once the company was "in play" the directors had a duty to actively solicit competing acquisition proposals. Instead, the directors apparently took no action to prepare for a possible acquisition proposal. A merger agreement with the Schedule 13D filer was eventually negotiated in less than a week, during which time the directors met for only seven hours to consider the matter. They did not conduct a limited market check or solicit competing superior proposals.  At first instance, the Court of Chancery decided that "unexplained inaction" permits a reasonable inference that the directors may have consciously disregarded their fiduciary duties. It expressed concern about the speed with which the merger agreement was consummated, the directors' failure to negotiate better terms, and their failure to seek potentially superior bids. The Court referred to the directors' "two months of slothful indifference despite knowing the company was in play". It held the directors may have breached their fiduciary duty of good faith and denied summary judgment to the directors.  On appeal, the Delaware Supreme Court reversed the lower court ruling and ordered summary judgment in favour of the directors, ruling that the board had essentially done nothing wrong during the period subsequent to the Schedule 13D filing or the week following the merger proposal.  The decision concerned the so-called Revlon duty, named after *Revlon Inc v MacAndrews & Forbes Holdings Inc* 506 A 2d 173 (Del 1986) where the Delaware Supreme Court said that an enhanced judicial review applied to directors in transactions involving a "sale" of control of the corporation.  In such a case "the directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the shareholders at a sale of the company".  Significantly, the Court rejected the view that Revlon duties are triggered simply because a company is "in play". Rather, Revlon duties only arose when the directors choose to begin negotiating the sale of the company. A board has no duties under Revlon to seek the "best price" in a sale or other business combination transaction simply because a stockholder or other potential bidder tries to put the company "in play".  The court stressed that Revlon did not create new fiduciary duties, but that the board must perform its fiduciary duties in the service of a specific objective: maximising the sale price of the enterprise. The standard required no single "blueprint" (or exclusive list of blueprints) that a board must adhere to in structuring and responding to an acquisition proposal. Failure to conduct a pre-signing market check is entirely consistent with Revlon duties, which can be satisfied by other means, such as an appropriate fiduciary-out in the merger agreement.  The claim for breach of fiduciary duty was based on the higher standard of breach of loyalty - not breach of duty of care - because the directors had the benefit of a charter exculpatory provision for breach of duty of care. By operation of s. 102(b)(7) of the Delaware General Corporate Law, however, companies cannot exculpate directors from personal liability for violations of fiduciary law predicated on a breach of the duty of loyalty or actions or omissions not in good faith.  The Court held that breach of the duty of loyalty to act in good faith requires "conscious disregard" of "known duties". The Court concluded that "[i]n the transactional context, [an] extreme set of facts [is] required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties".  Along with *Citibank* (noted in [Corporate Law Bulletin No.139 of March 2009](http://research.lawlex.com.au/news.asp?id=6692&sp=1" \t "_new)), *Lyondell* highlights the extreme difficulty of demonstrating breach of a duty of loyalty in the takeover context, even in the current challenging economic environment. Delaware courts remain very deferential to directorial decision-making and will not conduct overly critical hindsight review of business decisions made in the takeover context.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Contributions** |  |  | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%28566_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/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20(5).htm%23h1) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20140%20April%202009%20%28566_files/spacer%281%29.gif |

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