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We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** |  | | |  | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  |  | | |  | | |  | | --- | | **1.1 Seminar - Melbourne and Sydney -The James Hardie Case - A timely reminder to consider your D&O Cover and Deeds of Indemnity, Insurance and Access**   The Supreme Court decision that James Hardie directors and officers were in breach of their duties resulting in the imposition of substantial banning orders and financial penalties, coupled with the court's decision not to exonerate them, is a timely reminder that directors and officers should periodically review their D&O Insurance and Deeds of Indemnity, Insurance & Access.   * Does your D&O Insurance comply with the requirements of your Deeds of Indemnity, Insurance and Access? If not, which of them has to change? * Does your D&O Insurance provide cover for legal representation at investigations and inquiries and criminal prosecution defence costs, involving ASIC, ASX, APRA or other commissions, tribunals and regulatory agencies? * Will you be able to retain solicitors and Counsel of your choice? * If ASIC launches proceedings for breach of duty - as it did against all James Hardie directors, the company secretary/general counsel and CFO, or if shareholders or others bring claims to recover losses - who will pay your civil defence costs? * Does the insurance cover pecuniary penalties, compensation orders, and the regulatory agency's legal costs? * Indemnity, Insurance & Access Deeds: - what protection is it reasonable to expect? - what are your rights and obligations? - is your deed up to date and compliant with your Constitution and the Corporations Act?   Speakers for the seminars are: **David Abell** (Melbourne seminar), Senior Manager, Australia and New Zealand Banking Group Ltd; **Craig Claughton** (Sydney seminar), NSW Manager - FINPRO, Marsh Pty Ltd; **David Gerber** (Sydney seminar), Senior Associate, Clayton Utz; **Fred Hawke** (Melbourne seminar), Partner, Clayton Utz; **Peter Mann** (Sydney seminar), Partner, Clayton Utz; **Nancy Milne** (Sydney seminar), Consultant, Clayton Utz; **Charles Rosedale** (Melbourne seminar), Partner, Clayton Utz; **Paul Smyth** (Melbourne seminar), National D&O Manager, Aon Insurance Brokers.   The seminar is convened by Professor Ian Ramsay, Director of the Centre for Corporation Law & Securities Regulation at The University of Melbourne.     The seminar is being held in Sydney on 5 November 2009 and Melbourne on 11 November 2009, 5.30pm to 7.15pm.    Further information is available on the [CCLSR](http://cclsr.law.unimelb.edu.au/go/news/index.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.2 IOSCO consults on auditor transparency, communication and ownership structures**    On 18 September 2009, the International Organization of Securities Commissions (IOSCO) Technical Committee launched three related consultation reports prepared by its Task Force on audit services on the transparency of firms that audit public companies, auditor communications, and exploration of non-professional ownership structures for audit firms.   The Technical Committee is seeking input from investors, audit oversight authorities, industry and other relevant stakeholders on these three reports. The closing date for responses is 1 December 2009.    **(a) Transparency of firms that audit public companies**    In the first paper, the Task Force explores whether enhancing the transparency of audit firms' governance, audit quality indicators and audited financial statements could maintain and improve audit quality and the availability and delivery of audit services.    The paper considers the benefits and possible disadvantages of enhanced transparency, while also examining alternative methods of achieving enhanced transparency and ways in which to mitigate any potential limitations arising from increased transparency.   **(b) Auditor communications**    In order to address concerns about the effectiveness of the standard audit report in communicating important information about the audit and audit process, the second paper considers whether changes to the standard audit report or additional auditor communications are warranted to meet investor information needs. The consultation paper:   * highlights the evolution of the audit report; * describes perceived shortcomings of the report observed by others; * identifies possible solutions to these issues proffered by others; and * notes possible advantages and disadvantages of such solutions.   **(c) Exploration of non-professional ownership structures for audit firms**    The third paper focuses on the impact of audit firm ownership restrictions on concentration in the market for auditing large issuers, but the Task Force recognizes that the ultimate strategy for reducing concentration may need to address several barriers to entry (and any related solutions) together.    The paper describes the current state of audit firm concentration in the market for auditing large public companies, including its impact on the availability of audit services. The paper explores the potential benefits for audit service availability of removing ownership restrictions and discusses the adverse impact that removing ownership restrictions may have on audit firm competence, professionalism, independence, and audit quality. The paper also considers the pros and cons of authorizing alternative forms of audit firm ownership and governance.    The consultation report titled 'Transparency of Firms that Audit Public Companies; Auditor Communications' is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD302.pdf" \t "_new) website.    The consultation report titled 'Auditor Communications' is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD303.pdf" \t "_new) website.   The consultation report titled 'Exploration of Non-Professional Ownership Structures for Audit Firms' is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD304.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.3 AIMA publishes revised guide to sound practices for hedge fund administrators**   On 18 September 2009, the Alternative Investment Managers Association (AIMA) published a revised "Guide to Sound Practices for Hedge Fund Administrators". The guide has been revised to reflect various industry developments in areas such as valuations, tax and anti-money laundering since the original version was published in September 2004. In particular, the new guide includes key extracts from the AIMA "Guide to Sound Practices for Hedge Fund Valuation".   It is noted in the revised guide that since the release of the first guide in 2004, the hedge fund industry has grown massively in size and scale. Even allowing for the 2008/09 financial crisis, assets have increased from US$820 billion at the time of the first guide to US$1.4 trillion - an increase of 76% - and the number of funds has grown by 47% to almost 9,000. Such rapid expansion has had inevitable and substantial impact on those who service the funds, particularly administrators. There has been an increased development of new financial instruments, more complex fund structures and a shift in the source of assets away from private investors and toward institutional investors, including pension funds. Increasingly, hedge fund investors seek weekly and daily net asset value information on funds.    The revised guide is on the [AIMA](http://www.aima.org/filemanager/root/site_assets/sound_practice_guidelines/aima_guide_to_sound_practices_for_hedge_fund_administrators_september_2009.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.4 SEC votes on measures to further strengthen oversight of credit rating agencies**   On 17 September 2009, the US Securities and Exchange Commission (SEC) voted unanimously to take several rulemaking actions to bolster oversight of credit ratings agencies by enhancing disclosure and improving the quality of credit ratings.   Credit rating agencies are organizations that rate the creditworthiness of a company or a financial product, such as a debt security or money market instrument. In particular, the Commission voted to adopt or propose measures intended to improve the quality of credit ratings by requiring greater disclosure, fostering competition, helping to address conflicts of interest, shedding light on rating shopping, and promoting accountability.    In 2006, Congress passed the Credit Rating Agency Reform Act that provided the SEC with authority to impose registration, recordkeeping, and reporting rules on credit rating agencies registered as Nationally Recognized Statistical Rating Organizations (NRSRO). Currently, ten credit rating agencies are registered with the Commission as NRSROs.   The Commission:   * Adopted rules to provide greater information concerning ratings histories - and to enable competing credit rating agencies to offer unsolicited ratings for structured finance products, by granting them access to the necessary underlying data for structured products. * Proposed amendments that would seek to strengthen compliance programs through requiring annual compliance reports and enhance disclosure of potential sources of revenue-related conflicts. * Adopted amendments to the Commission's rules and forms to remove certain references to credit ratings by nationally recognized statistical rating organizations. * Reopened the public comment period to allow further comment on Commission proposals to eliminate references to NRSRO credit ratings from certain other rules and forms. * Proposed new rules that would require disclosure of information including what a credit rating covers and any material limitations on the scope of the rating and whether any "preliminary ratings" were obtained from other rating agencies - in other words, whether there was "ratings shopping." * Voted to seek public comment on whether to amend Commission rules to subject NRSROs to liability when a rating is used in connection with a registered offering by eliminating a current provision that exempts NRSROs from being treated as experts when their ratings are used that way.   The SEC fact sheet about credit rating agencies is available on the [SEC](http://www.sec.gov/news/press/2009/2009-200-factsheet.htm" \t "_new) website.   The rules and forms affected by SEC actions are available on the [SEC](http://www.sec.gov/news/press/2009/2009-200-rulesformsaffected.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.5 Report and recommendations of the cross-border bank resolution group issued by the Basel Committee**   On 17 September 2009, the Basel Committee on Banking Supervision issued for consultation the 'Report and Recommendations of the Cross-border Bank Resolution Group'.   Building on the lessons of the crisis and a series of case studies, the report sets out ten recommendations to improve the resolution of a failing financial institution that has cross-border activities. The recommendations fall into three categories:   * **Strengthening national resolution powers and their cross-border implementation.** National authorities need to have powers to intervene sufficiently early and to ensure the continuity of critical functions. * **Firm-specific contingency planning.** Banks, as well as key home and host authorities, should develop practical and credible plans to promote resiliency in periods of severe financial distress and to facilitate a rapid resolution should that be necessary. The plans should ensure access to relevant information in a crisis and assist authorities' evaluation of resolution options. One of the main lessons from the crisis was that the enormous complexity of corporate structure makes resolutions difficult, costly and unpredictable. * **Reducing contagion.** Risk mitigation through mechanisms such as netting arrangements, collateralisation practices and the use of regulated central counterparties should be strengthened to limit the impact on the market of a bank failure.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.6 Transparency of structured finance products**   On 16 September 2009, the Technical Committee (TC) of the International Organization of Securities Commissions (IOSCO) published a consultation report titled 'Transparency of Structured Finance Products'. The report examines the viability of a secondary market reporting system for structured finance products (SFPs), with a particular focus on the nature of the market and its participants as well as on the potential benefits and drawbacks of such a regime, in light of the crisis in financial markets.  In undertaking this task, the TC solicited information from a variety of sources from the financial services industry across several jurisdictions.   Views of market participants varied considerably. In general, buy-side participants are supportive of increased post-trade transparency for SFPs. They expressed the view that increased transparency would assist them in valuing these products, and in general lead to an improvement in price discovery and liquidity.    In contrast, sell-side participants raised concerns. One of their primary concerns is that the non-standardised, complex and illiquid nature of SFPs would make meaningful price comparability difficult or impossible. In their view, publishing details of distressed sales might even result in an increase in volatility, a loss of confidentiality and a further downturn of the market. They also raised concerns about the perceived high cost of implementing such a post-trade transparency regime.    The TC recognises that there are divergent views about the merits of requiring enhanced post-trade transparency for SFPs, but nevertheless believes that greater information on traded prices could be a valuable source of information for market participants. The TC therefore recommends that member jurisdictions consider enhancing post-trade transparency in their respective jurisdictions.  In the TC's view, it is appropriate for post-trade transparency regimes to be tailored to take into account the unique nature of the market and participants in each jurisdiction, and that each member jurisdiction is best placed to judge the appropriate time, scope and manner for enhancing post-trade transparency. In general, however, the TC believes that enhanced post-trade transparency should be provided in the most cost-effective way reasonably possible, but should at the same time seek to avoid a negative impact on efficiency and liquidity of markets. Moreover, it may be appropriate in some jurisdictions to introduce post-trade transparency via a step-by-step or phased-in approach.    In light of the above, the TC believes that, amongst other things, it would be appropriate for member jurisdictions to consider the following factors when seeking to develop a post-trade transparency regime for SFPs:   * The degree of liquidity or secondary market trading for a particular SFP; * The initial and outstanding amount of the issue; * Whether the SFP was publicly offered or offered via private placement; * Whether there is a broad investor base for the particular instrument; * The degree of standardisation of a particular SFP; * Costs of implementation of a post-trade transparency regime or costs of extending any existing post-trade transparency system to SFPs; * Any appropriate time delays in publishing trade information; * Whether to require the dissemination of trade-by-trade or aggregate trade information; and * Thresholds with respect to the disclosure of trade volumes and further measures to help ensure anonymity of the market participants.   The consultation paper is available on the [IOSCO](http://www.iosco.org/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.7 Financial Stability Board assessment of financial system risks and policy responses**   The Financial Stability Board (FSB) met on 15 September 2009. The FSB, which was re-established in April 2009 as the successor to the Financial Stability Forum (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 promotes international financial stability through enhanced information exchange and cooperation in financial supervision and surveillance.  **(a) Assessment of risks, vulnerabilities and responses**   The FSB reviewed the main risks facing the financial system and potential policy responses.    Despite welcome signs of movement toward normalisation of markets in recent months, fragilities remain and the supply of credit remains weak. Although many financial institutions have returned to profitability in recent quarters, this owes much to the extraordinary official measures to stabilise the system. It is important that firms retain these profits in order to rebuild capital to support lending after official support measures have been removed and prepare to meet future higher capital requirements. To these ends, banks need to take a combination of capital conservation measures, including actions to limit excessive dividend payments, share buybacks and compensation.  There is a risk that a revival of concerns about the sustainability of the recovery could trigger renewed banking sector strains and turbulence in asset markets. To address the current challenges, authorities will continue to foster the strengthening and transparency of balance sheets. Authorities will also work to rebuild securitisation markets, so that these markets can support sustainable credit growth while avoiding the excesses that characterised them in the lead-up to the crisis.   Other risk areas discussed by the FSB included: the market impact of rapidly rising government debt, risks related to the timing of exit strategies from current policies, and the challenges in maintaining an appropriate balance and pace of regulatory reform. Authorities in emerging economies are assessing policy challenges related to currency mismatches on sectoral balance sheets and instability in portfolio flows.  **(b) Progress in implementing reforms**   The Basel capital framework has been strengthened; accounting standards and practices enhanced; standards for risk management raised; bank disclosures of on- and off-balance sheet exposures improved; principles for sound compensation practices integrated into the supervisory framework; central counterparties for over-the-counter derivatives introduced; stronger oversight regimes for hedge funds and credit rating agencies developed; and supervisory coordination and cooperation improved.   **(c) Further work to improve financial regulation**   According to the FSB, much work remains to be done to implement the reform agenda in full. It is important that international policy development be completed and consistent national implementation follow.  **Strengthening the global capital framework:** Decisions have now been taken by supervisors that will lead to a comprehensive set of measures to strengthen the capital framework which would substantially raise the level and quality of capital and reduce procyclicality in the banking system. The reforms will set reasonable implementation windows to avoid impeding the recovery of the economy.  **Making global liquidity more robust:** The Basel Committee will publish by end-2009 specific proposals for a new minimum global liquidity standard.   **Reducing moral hazard and strengthening capacity for cross-border resolution:** The FSB is setting in train a work program to address the moral hazard risks and other challenges posed by systemically important institutions. This will build upon the work underway by the FSB's Cross-border Crisis Management Working Group and the Basel Committee's ongoing work on cross-border bank resolution.  **Strengthening accounting standards:** The FSB welcomed the steps taken by accounting standard setters to address weaknesses in existing standards and the enhanced dialogue between the International Accounting Standards Board, prudential authorities and market regulators on financial institution reporting issues. Members encouraged agreement on converged standards that would simplify and improve principles for valuation and provisioning and mitigate procyclicality by recognising credit losses at an earlier stage of the cycle.   **Improving compensation practices:** The FSB will set out specific implementation guidelines on the governance, structure and disclosure of compensation, which will limit the level of compensation in the light of the need to conserve capital and ensure that the structure and incentives are aligned with good risk management, in line with the FSB Principles for Sound Compensation Practices in financial institutions issued in April.  **Expanding oversight of the financial system:** The FSB reviewed the progress to implement consistent regulatory approaches to the registration, oversight and reporting requirements of hedge funds, and also the registration and oversight of credit rating agencies. The FSB also asked IOSCO to continue its work on the issues raised by unregulated markets and products.  **Strengthening the robustness of the OTC derivatives market:** The official sector will strengthen capital requirements to reflect the risks of over-the-counter (OTC) derivatives and further incentivize the move to central counterparties or organized exchanges. It will strengthen standards for central counterparties to address the issues specific to clearing OTC derivatives.   **Re-launching securitisation on a sound basis:** Regulatory and industry initiatives are underway to strengthen standards and market practices for securitisation, including standardising terms and structures, reducing complexity and enhancing transparency. The FSB noted that the official sector, through supervision of market participants and regulation of markets, must provide the framework that ensures discipline in the market as it revives.  **Adherence to international standards:** The FSB is developing a framework to strengthen adherence to international regulatory and supervisory standards. This framework will be used to promote a race to the top in standards implementation, with FSB members leading by example in disclosing their degree of compliance with these standards. The FSB will also use the framework to identify jurisdictions of concern with reference to prudential and regulatory standards relating to cooperation and information exchange, and develop a toolbox of measures to promote adherence.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.8 IOSCO publishes regulatory standards for funds of hedge funds**    On 14 September 2009, the International Organization of Securities Commissions (IOSCO) published 'Elements of International Regulatory Standards on Funds of Hedge Funds Related Issues Based on Best Market Practices' containing standards aimed at addressing regulatory issues of investor protection which have arisen due to the increased involvement of retail investors in hedge funds through funds of hedge funds.   A previous report, 'Funds of Hedge Funds-Final Report', published in June 2008 identified the particular areas of concern as:   * The methods by which funds of hedge funds' managers deal with liquidity risk; and * The nature and the conditions of the due diligence process used by funds of hedge funds' managers prior to and during investment.   Therefore IOSCO has developed the following proposals in these two areas:    **(a) Liquidity risk**    In dealing with liquidity risk, the fund of hedge funds' manager should:   * make reasonable enquiries in order to be in a position to consider if the fund of hedge funds' liquidity is consistent with that of the underlying hedge funds, particularly in order to meet redemptions; * prior to investing, and during the investments' lifetime, consider the liquidity of the types of the financial instruments held by the underlying hedge funds; * if introducing limited redemption arrangements, consider whether these are consistent with the fund of hedge funds' aims and objectives. Moreover, their operation should comply with the conditions defined in the proposals; and * before and during any investment, consider whether conflicts of interest may arise between any underlying hedge fund and any other relevant parties.   **(b) Due diligence processes**   Due diligence processes should be carried out prior to any investment being entered into and on a continuous basis following the commitment. They can be divided up into the following areas:   * Elements requiring constant monitoring and analysis by the funds of hedge funds' managers:  - establishing and implementing appropriate due diligence procedures for the purpose of investment into hedge funds, which are reviewed regularly;  - assessing the specific legal and regulatory requirements applicable in the hedge fund's jurisdiction; and  - carrying out appropriate due diligence on the underlying hedge fund whenever it is considered necessary. * Adequate resources, procedures and organizational structures necessary for the purpose of carrying out a proper and robust due diligence:  - documented and traceable procedure for selecting hedge funds;  - appropriately skilled staff and adequate technical resources to implement the due diligence procedures;  - the resources, procedures and organizational structure to deal with any anomalies identified by due diligence system, to take the necessary corrective action and confirm that all procedures are traceable and have been catalogued; * Regularly assess if selection procedures for eligible underlying hedge funds have been properly met, or not met, and to explain any deviations; and * Outsourcing due diligence:  - If a fund of hedge funds' manager wishes to authorize the outsourcing of any aspect of its due diligence it should:     - determine that any conflicts of interest are adequately addressed; and     - consider the extent that outsourcing of due diligence is consistent with the IOSCO Principles on Outsourcing of Financial Services for Market Intermediaries.   These standards form part of a larger body of work that IOSCO has been engaged in with regards to addressing the regulatory issues presented by hedge funds.   The report titled 'Elements of International Regulatory Standards on Funds of Hedge Funds Related Issues Based on Best Market Practices - Final Report' is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD305.pdf" \t "_new) website.   A previous report titled 'Funds of Hedge Funds-Final Report', published in June 2008 is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD276.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.9 Report on oversight of the Australian Securities and Investments Commission**  On 14 September 2009, the Parliamentary Joint Committee on Corporations and Financial Services published its report titled "Statutory Oversight of the Australian Securities and Investments Commission". The matters discussed in the report are:   * Short selling; * Market integrity; * Corporate collapses; * BrisConnections; * Mortgage fund and cash management trust redemptions; * Credit rating agencies; * PI insurance; * ASIC structure and budget; and * Investor education.   The report is available on the [Parliament of Australia](http://www.aph.gov.au/senate/committee/corporations_ctte/asic/index.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.10 APRA proposes enhanced liquidity requirements for ADIs**    On 11 September 2009, the Australian Prudential Regulation Authority (APRA) released for consultation proposals to enhance liquidity risk management by authorised deposit-taking institutions (ADIs).   APRA has undertaken a broad-ranging review of its current prudential framework for ADI liquidity risk management, set out in Prudential Standard APS 210 Liquidity. The review has taken into account financial market developments and changing ADI practices since the framework was introduced in 1998, lessons learned from the global financial crisis and recent international supervisory developments.   The proposed changes include:   * enhanced qualitative requirements consistent with the Principles for Sound Liquidity Risk Management and Supervision, issued by the Basel Committee on Banking Supervision in September 2008; * extending the 'going concern' cash flow projection requirement to all ADIs and lengthening the projection to at least 12 months; * strengthening the current APRA-defined stress testing to ensure ADIs meet a minimum acceptable level of resilience, which includes:  - lengthening the minimum survival horizon for the current APRA-defined 'name crisis' scenario from five business days to one month; and - an additional APRA-defined three-month 'market disruption' stress scenario; and * a standardised reporting framework for collecting regular liquidity data from ADIs, including the ability to access data at short notice in times of stress.   Subject to industry feedback and ongoing international supervisory developments, APRA will release a revised draft APS 210, an associated prudential practice guide (PPG), draft reporting standards and second-round draft reporting forms (including instructions) for further consultation early in 2010.   APRA intends to issue final standards and reporting forms in the first half of 2010, although this timetable may be amended as international initiatives in this area evolve. Transition arrangements will apply as appropriate.   The consultation package is available on the [APRA](http://www.apra.gov.au/policy" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.11 Overview of national measures adopted in the EU as a response to the financial/economic crisis**   On 9 September 2009, the European Commission published a summary of measures taken by EU countries as a response to the financial and economic crisis.  The summary is available on the [European Commission](http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/380&format=HTML&aged=0&language=EN&guiLanguage=en" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.12 World Bank doing business report**   A record 131 economies around the globe reformed business regulation in 2008-2009, according to the IFC-World Bank Doing Business 2010 report, published on 9 September 2009.    That is more than 70% of the 183 economies covered by the report - the largest share in any year since the annual report was first published in 2004. This progress came against the backdrop of a global economic crisis.   'Doing Business 2010: Reforming Through Difficult Times' recorded 287 reforms between June 2008 and May 2009, up 20% from the previous year.  Reformers around the world focused on making it easier to start and operate businesses, strengthening property rights, and improving commercial dispute resolution and bankruptcy procedures.   Singapore, a consistent reformer, is the top-ranked economy on the ease of doing business for the fourth year in a row, with New Zealand as runner-up. But most of the action occurred in developing economies. Two-thirds of the reforms recorded in the report were in low- and lower-middle-income economies. For the first time a Sub-Saharan African economy, Rwanda, is the world's top reformer of business regulation, making it easier to start businesses, register property, protect investors, trade across borders, and access credit.   Reformers were particularly active in Eastern Europe and Central Asia and the Middle East and North Africa. This year, there were four new reformers among the top ten:  Liberia, the United Arab Emirates, Tajikistan and Moldova. Others include Rwanda, Egypt, Belarus, the Former Yugoslav Republic of Macedonia, the Kyrgyz Republic, and Colombia. Colombia and Egypt have been top global reformers in four of the past seven years.    Doing Business analyzes regulations that apply to an economy's businesses during their life cycles, including start-up and operations, trading across borders, paying taxes, and closing a business. Doing Business does not measure all aspects of the business environment that matter to firms and investors. For example, it does not measure security, macroeconomic stability, corruption, skill level, or the strength of financial systems.   **Australia's ranking in Doing Business 2010**  Australia is ranked 9 out of 183 economies overall.   On particular matters, Australia's ranking is as follows:   * Ease of doing business - 9 * Starting a business - 3 * Dealing with construction permits - 62 * Employing workers - 1 * Registering property - 34 * Getting credit - 4 * Protecting investors - 57 * Paying taxes - 47 * Trading across borders - 27 * Enforcing contracts - 16 * Closing a business - 14   The methodology underpinning the above results is explained in the report on Australia which is available on the [Doing Business](http://www.doingbusiness.org/Documents/CountryProfiles/AUS.pdf" \t "_new) website.   The IFC-World Bank Doing Business 2010 report is available on the [Doing Business](http://www.doingbusiness.org" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.13 Share pledges by directors and controlling shareholders - reform recommended**   On 9 September 2009, the CFA Institute Centre for Financial Market Integrity (the CFA Institute Centre) published a paper reviewing the existing regulations on share pledges by directors and controlling shareholders of publicly listed companies. The issue of pledged shares is relevant as there have been several recent, high-profile cases in the Asia-Pacific region in which directors and/or shareholders pledged their shares to banks for margin loans; in several instances, pledged shares were sold to meet margin calls, leading to significant price declines and at times resulting in a change in control at the company.    The study reveals that disclosure rules for pledged shares and margin loans vary across the Asia-Pacific region. All markets require the disclosure of material, price-sensitive information; yet, the onus is on company directors to determine whether information is price sensitive and needs to be disclosed to the market. In the case of pledged shares, this can occur when the share price approaches trigger points whereby lenders can exercise their right to sell shares pledged for margin loans.    The CFA Institute Centre believes that listing rules which require directors to make judgment calls is inadequate given the number of small- and medium-sized companies that undertake the practice of share pledges for loans. The CFA Institute Centre recommends that there should be specific regulations for controlling shareholders and directors to disclose details of shares pledged on an event basis. There should also be disclosure of the shares owned by directors and shareholders as well as the percentage of shares owned to total issued capital.    The paper is available on the [CFA Institute](http://www.cfainstitute.org/centre/topics/comment/2009/pdf/20090904.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.14 Executive pay trends study**   Despite the turbulent economic conditions, senior executives at some of Australia's top listed companies received increased short term incentives, such as cash bonuses, in lieu of long term incentives for performance, according to Mercer's most recent ASX 200 Executive Remuneration Survey, which was published on 8 September 2009.  Mercer's analysis of pay for the top four reporting levels in some of the top ASX listed companies found that the average short term incentive (STI) payment for same incumbent executives (those who remained in the same job for the same period) was 14 per cent higher than what was paid out in 2008, but the average long term incentive (LTI), which refers to cash or share grants for performance over a longer period, was 11 per cent lower than in 2008.   The survey reported a 17 per cent decline in executives receiving LTI grants this year, with lower LTI values reflecting the decline in share prices. For those who received an LTI, their average STI bonus remained relatively unchanged against the previous year.   The survey also found that about one third (32%) of incumbent executives did not receive a pay rise at all, but those who did fared better than expected. The total average pay increase was 5.7 per cent.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.15 Reform of termination payments for directors and executives**   On 7 September 2009, the Australian Senate Economics Legislation Committee published its report on the [Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=107555" \t "Default).   In summary, the Bill:   * lowers the amount of a termination payment before shareholder approval is required. The threshold will be reduced from seven years' total remuneration to one year's base salary. The term 'base salary' will be defined in regulations; * in the case of listed companies, extends the existing provisions in the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (which currently apply only to directors) to include those who are named in the company's remuneration report; * prevents an individual who is to receive a retirement benefit from voting at a meeting of shareholders in relation to their own benefit (except in relation to proxies); * requires that any payments made without required approval must be repaid; and * increases penalties for payments made without approval.   These provisions will commence the day after Royal Assent, but will only apply in relation to contracts which are made, renewed or varied after commencement.   The Bill would establish four new regulation-making powers:   * the definition of 'base salary' (under section 9 of the Act); * a list of things to be specified as benefits (under section 200AB(1)); * a list of circumstances in which a benefit can be given in connection with retirement (under section 200A(1A)); and * cases where the restriction on voting by retirees or associates on their own termination payment does not apply (under section 200E(2C)).   The majority of the Committee recommended that the Senate pass the Bill. The Coalition members of the Committee recommended that legislation on termination payments should be postponed until the final report of the Productivity Commission into executive remuneration is received.   The report is available on the [Parliament of Australia](http://www.aph.gov.au/senate/committee/economics_ctte/termintation_payments_09/report/index.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.16 Group of Central Bank Governors' response to the global banking crisis**   On 7 September 2009, the Group of Central Bank Governors and Heads of Supervision, the oversight body of the Basel Committee on Banking Supervision, announced a comprehensive set of measures to strengthen the regulation, supervision and risk management of the banking sector.    The Central Bank Governors and Heads of Supervision reached agreement on the following key measures to strengthen the regulation of the banking sector:   * Raise the quality, consistency and transparency of the Tier 1 capital base. The predominant form of Tier 1 capital must be common shares and retained earnings. Appropriate principles will be developed for non-joint stock companies to ensure they hold comparable levels of high quality Tier 1 capital. Moreover, deductions and prudential filters will be harmonised internationally and generally applied at the level of common equity or its equivalent in the case of non-joint stock companies. Finally, all components of the capital base will be fully disclosed. * Introduce a leverage ratio as a supplementary measure to the Basel II risk-based framework with a view to migrating to a Pillar 1 treatment based on appropriate review and calibration. To ensure comparability, the details of the leverage ratio will be harmonised internationally, fully adjusting for differences in accounting. * Introduce a minimum global standard for funding liquidity that includes a stressed liquidity coverage ratio requirement, underpinned by a longer-term structural liquidity ratio. * Introduce a framework for countercyclical capital buffers above the minimum requirement. The framework will include capital conservation measures such as constraints on capital distributions. The Basel Committee will review an appropriate set of indicators, such as earnings and credit-based variables, as a way to condition the build up and release of capital buffers. In addition, the Committee will promote more forward-looking provisions based on expected losses. * Issue recommendations to reduce the systemic risk associated with the resolution of cross-border banks.   The Committee will also assess the need for a capital surcharge to mitigate the risk of systemic banks.    The Basel Committee will issue concrete proposals on these measures by the end of this year. It will carry out an impact assessment at the beginning of next year, with calibration of the new requirements to be completed by end-2010.    The Group of Governors and Heads of Supervision endorsed the following principles to guide supervisors in the transition to a higher level and quality of capital in the banking system:   * Building on the framework for countercyclical capital buffers, supervisors should require banks to strengthen their capital base through a combination of capital conservation measures, including actions to limit excessive dividend payments, share buybacks and compensation. * Compensation should be aligned with prudent risk-taking and long-term, sustainable performance, building on the Financial Stability Board sound compensation principles. * Banks will be required to move expeditiously to raise the level and quality of capital to the new standards, but in a manner that promotes stability of national banking systems and the broader economy.   Supervisors will ensure that the capital plans for the banks in their jurisdiction are consistent with these principles.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.17 APRA undertakes additional consultation on remuneration**    On 7 September 2009, the Australian Prudential Regulation Authority (APRA) released a second consultation package on remuneration for authorised deposit‑taking institutions (ADIs) and general and life insurance companies.  APRA received 51 submissions during the initial eight-week public consultation period earlier this year.  For the most part, submissions agreed that risks could arise through unsound remuneration practices at financial institutions and supported a principles-based framework to encourage alignment of remuneration practices with prudent risk-taking. As such, APRA is satisfied that the underlying principles of its remuneration proposals are appropriate.    This second package comprises a response paper to the submissions, together with revised draft versions of the relevant governance standards and an associated draft prudential practice guide (PPG).     APRA participated in the Financial Stability Board's (FSB) initiative on executive remuneration, which culminated in G20 endorsement in April this year of the FSB's 'Principles of Sound Compensation Practices'. On 5 September 2009 in London, the G20 Finance Ministers reiterated the need for clear and identifiable progress on these principles. APRA's proposals follow these principles and also address the Prime Minister's request in October 2008 that APRA consider linkages between remuneration practices and the capital adequacy requirements of regulated institutions.      APRA is seeking submissions on the revised draft standards and PPG by 2 October 2009. It is expected that the final prudential standards and associated PPG will be released in November 2009 and be effective from 1 April 2010.     The consultation package is available on the [APRA](http://www.apra.gov.au/policy" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.18 Reforms recommended for agribusiness managed investment schemes**    On 7 September 2009, Australian Parliamentary Joint Committee on Corporations and Financial Services Chairman, Bernie Ripoll MP, tabled the committee's report on its inquiry into agribusiness managed investment schemes (MIS).   The committee initiated this inquiry in response to the recent collapses of Timbercorp and Great Southern, which together affected more than 60,000 investors in managed investment schemes. However, the inquiry was not into the details of those collapses per se but into the structural features, the taxation treatment, the marketing and the performance of agribusiness MIS more generally.  The committee makes three recommendations for change in its report. The first relates to the potential for market distortions to be caused by the current tax deductibility arrangements applying to non-forestry MIS investment.  The committee believes that such distortions would be reduced if deductions for non forestry agribusiness MIS investment were only permitted to be offset against future taxable income from the same MIS and recommends that the government consider investigating and modeling the effects of amending the [Income Tax Assessment Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=5495" \t "Default) accordingly. This would not affect existing forestry MIS deduction arrangements.  The committee's second recommendation is that the government amend the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) to require the regulator, ASIC, to appoint a temporary Responsible Entity when a registered MIS becomes externally administered or a liquidator is appointed.  The committee's third recommendation is that ASIC require agribusiness MIS to disclose the qualifications and accreditation of third parties that provide expert opinion on likely scheme performance.  Mr Ripoll also foreshadowed further recommendations for change when the committee tables the report of its parallel inquiry into financial products and services in November this year.  The committee's report is available on the [Parliament of Australia](http://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/index.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.19 United Nations report on reform of the international monetary and financial system**   More effective regulation and supervision of financial market activity is indispensable to prevent a repeat of the current global financial and economic crisis, a United Nations Conference on Trade and Development (UNCTAD) report contends. But equally important is a reform of the international monetary and financial system aimed at reducing the scope for gains from currency speculation, and at avoiding large trade imbalances. The Trade and Development Report 2009 (TDR) titled "Responding to the Global Crisis" and "Climate Change Mitigation and Development", was released on 7 September 2009.   **(a) New financial instruments often provide little social benefit but can harm economic activity in the real sector**   Large parts of the financial markets have come to be entirely detached from "real" sector activities, the report contends. Securitization and other financial innovations have broken the relationship between lenders, particularly banks and borrowers. As pointed out by UNCTAD Secretary-General Supachai Panitchpakdi in his overview to the TDR, "[i]n the United States, the share of the financial industry in GDP grew from 5% to 8% between 1983 and 2007, while its share in total corporate profits rose from 7.5% to 40%".    Many of the new financial instruments have weakened the capacity of financial institutions to manage risk, and have favoured the development of a non-transparent, poorly regulated and undercapitalized shadow financial system, the TDR says. The contribution of those financial markets to social welfare is highly questionable. The report shows that more finance does not always lead to faster output growth; there is a threshold after which larger financial systems can have a negative effect on output growth.   Promoting proactive capital-account management could give countries sufficient flexibility to manage their domestic macroeconomic policies and improve their prospects for economic stability. This approach would help prevent volatile private capital flows from causing exchange-rate volatility and misalignments that can destabilize domestic financial systems. It also could help improve the reliability of price signals in domestic markets and improve the conditions for efficient resource allocation and dynamic investment.    **(b) Greater international stability requires an overhaul of the entire monetary and financial system**   The TDR 2009 also points to the weakness of an international reserve system that uses a national currency as a reserve asset. Such a system always depends on monetary policy decisions by the central bank that issues that currency, decisions that are taken according to national policy needs and preferences; they do not account for the needs of the international payments system and of the world economy. Another disadvantage of such a system is that at times of current account disequilibria it imposes the entire adjustment burden on deficit countries.    The report suggests that countries should adopt a system of managed flexible exchange rates. This system would target a real exchange rate that is consistent with a sustainable current-account position. Since the exchange rate is a variable always involving at least two currencies, there is a much better chance of achieving a stable pattern of exchange rates in a multilaterally agreed framework for exchange-rate management.    The report is available on the [UNCTAD](http://www.unctad.org/en/docs/tdr2009_en.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.20 Report on largest international pension funds**  Total assets of the world's largest 300 pension funds fell by 13% in 2008 to US$10.4 trillion, down by around US$1.5 trillion from last year's figure, according to Pensions & Investments and Watson Wyatt research, published on 7 September 2009. The P&I / Watson Wyatt global 300 ranking shows that despite last year's fall in assets, compound annual growth during the past five years is still around 10%. The region with the highest compound annual growth rate (CAGR) during this period is Asia-Pacific (19%) and the lowest is North America (4%), with Europe having a growth rate of 12%.  According to the research, the US remains the country with the largest share of pension fund assets accounting for 41%, although this has been eroded from 53% in 2003, due to a weak dollar and various significant developments around sovereign pension funds elsewhere. Japan has the second-largest market share on 19% (14% in 2007), largely because the Government Pension Investment Fund of Japan, which is still at the top of the ranking (a position it has held for the past six years) has assets of around US$1.3 trillion and maintains a conservative asset allocation. The Netherlands, UK and Canada have the third, fourth and fifth largest market share of 6%, 5% and 4% respectively. Since 2003, the US and UK combined have had a net loss of 32 funds from the ranking, while Australia has added 11 and Germany 7 without any falling out of the ranking, making them the top gaining countries.  The research shows that continuing high asset growth during the past five years has pushed the Asia-Pacific region ahead of Europe (US$2.5 trillion) for the first time with assets of around US$3 trillion, while the US remains top with US$4.7 trillion. During the same period, the other countries in the research combined almost doubled their assets to over US$300 billion. In 2008, Asia-Pacific was the only region to show any growth (11%).  The research shows that assets held by Taiwanese funds grew at the fastest rate during the five-year period to the end of 2008, 14% in US$ terms, followed by Australia on 13%. During the same period the top Danish, Japanese and Dutch funds grew at 12%, 10% and 9% respectively, in US$ terms.  In 2008, and in keeping with past trends, the top 20 funds performed better than the remaining funds, falling by only 4% compared to a decline of 13% by the rest of the funds. During the past five years, however, the top 20 funds have grown at 14% compared with 7% for the remaining funds and amount to US$4.2 trillion, constituting over 40% of global pension assets. Sovereign funds continue to feature strongly in the ranking with the 22 of them accounting for 27% of assets and totalling US$2.8 trillion. When added to public sector funds the total is 136, which accounts for 68% of assets in the research.  The full P&I / Watson Wyatt global 300 ranking and research is available on the [Watson Wyatt](http://www.watsonwyatt.com/europe/services/investment/media/PI-300-analysis-2008.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.21 Statement by G-20 Finance Ministers**    On 5 September 2009, Finance Ministers from the Group of 20 largest economies agreed to a global framework for bank capital rules, under which banks will face higher capital requirements, and agreed to guidelines on banker pay. The Finance Ministers issued a declaration affirming their commitment to strengthen the financial system to prevent the build-up of excessive risk and future crises and support sustainable growth. The Ministers noted there has been substantial progress in delivering what they termed a robust and comprehensive framework for global regulation and oversight. The Financial Stability Board (FSB) and the Global Forum on Transparency and Exchange of Information have expanded their mandate and membership. The regulatory bodies have agreed to more stringent capital requirements for risky trading activities, off-balance sheet items, and securitised products; they have developed proposals to address procyclicality, issued important principles on compensation and deposit insurance, and established over 30 supervisory colleges.   However, the Ministers stated that more needs to be done to maintain momentum, make the system more resilient and ensure a level playing field, including the following actions:  1.    Clear and identifiable progress in 2009 on delivering the following framework on corporate governance and compensation practices. This will prevent excessive short-term risk taking and mitigate systemic risk, on a globally consistent basis, building on and strengthening the application of the FSB principles:   * greater disclosure and transparency of the level and structure of remuneration for those whose actions have a material impact on risk taking; * global standards on pay structure, including on deferral, effective clawback, the relationship between fixed and variable remuneration, and guaranteed bonuses, to ensure compensation practices are aligned with long-term value creation and financial stability; and * corporate governance reforms to ensure appropriate board oversight of compensation and risk, including greater independence and accountability of board compensation committees.   The Ministers called on the FSB to report to the Pittsburgh G20 Summit (to be held later in September) with detailed specific proposals for developing this framework, which could be incorporated into supervisory measures, and closely monitoring its delivery. The Ministers also requested the FSB to explore possible approaches for limiting total variable remuneration in relation to risk and long-term performance. G20 governments will also explore ways to address non-adherence with the FSB principles.   2. Stronger regulation and oversight for systemically important firms, including: rapid progress on developing tougher prudential requirements to reflect the higher costs of their failure; a requirement on systemic firms to develop firm-specific contingency plans; the establishment of crisis management groups for major cross-border firms to strengthen international cooperation on resolution; and strengthening the legal framework for crisis intervention and winding down firms.   3. Rapid progress in developing stronger prudential regulation by: requiring banks to hold more and better quality capital once recovery is assured; introducing countercyclical buffers; developing a leverage ratio as an element of the Basel framework; an international set of minimum quantitative standards for high quality liquidity; continuing to improve risk capture in the Basel II framework; accelerating work to develop macro-prudential tools; and exploring the possible role of contingent capital. The Ministers called on banks to retain a greater proportion of current profits to build capital, where needed, to support lending.   4. Tackling non-cooperative jurisdictions (NCJs): delivering an effective program of peer review, capacity building and countermeasures to tackle NCJs that fail to meet regulatory standards, AML/CFT and tax information exchange standards; standing ready to use countermeasures against tax havens from March 2010; ensuring developing countries benefit from the new tax transparency, possibly including through a multilateral instrument; and calling on the FSB to report on criteria and compliance against regulatory standards by November 2009.   5. Consistent and coordinated implementation of international standards, including Basel II, to prevent the emergence of new risks and regulatory arbitrage, particularly with regard to Central Counterparties for credit derivatives, oversight of credit ratings agencies and hedge funds, and quantitative retention requirements for securitisations.   6. Convergence towards a single set of high-quality, global, independent accounting standards on financial instruments, loan-loss provisioning, off-balance sheet exposures and the impairment and valuation of financial assets.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.22 IOSCO issues final regulatory recommendations on securitisation and CDS market**    On 4 September 2009, the International Organization of Securities Commissions' (IOSCO) Technical Committee published 'Unregulated Financial Markets and Products - Final Report' (Final Report) prepared by its Task Force on Unregulated Financial Markets and Products (Task Force).    The Final Report recommends regulatory actions to assist financial market regulators in introducing greater transparency and oversight with respect to securitisation and credit default swaps (CDS) markets, and improving investor confidence, and the quality of these markets.    The Task Force was formed in November 2008 in response to G-20 calls for a review of the scope of financial markets and in particular unregulated financial market segments and products.    The final recommendations contained in the Final Report address issues of concern with respect to:   * securitised products, including asset-backed securities (ABS), asset-backed commercial paper (ABCP) and structured credit products such as collateralised debt obligations (CDOs), synthetic CDOs, and collateralised loan obligations (CLOs); and * CDS.   **(a) Securitisation**   **(i) Final recommendation 1 - Wrong incentives**   IOSCO recommends the following regulatory responses:    1. Consider requiring originators and/or sponsors to retain a long-term economic exposure to the securitisation in order to appropriately align interests in the securitisation value chain;    2. Require enhanced transparency through disclosure by issuers to investors of all verification and risk assurance practices that have been performed or undertaken by the underwriter, sponsor, and/or originator;    3. Require independence of service providers engaged by, or on behalf of, an issuer, where an opinion or service provided by a service provider may influence an investor's decision to acquire a securitised product; and    4. Require service providers to issuers to maintain the currency of reports, where appropriate, over the life of the securitised product.    **(ii) Final recommendation 2 - Inadequate risk management practices**   IOSCO recommends the following regulatory responses:    1. Provide regulatory support for improvements in disclosure by issuers to investors including initial and ongoing information about underlying asset pool performance. Disclosure should also include details of the creditworthiness of the person(s) with direct or indirect liability to the issuer;    2. Review investor suitability requirements as well as the definition of sophisticated investor in the relevant market and strengthen these requirements, as appropriate, in the context of the relevant market; and    3. Encourage the development of tools by investors to assist in understanding complex financial products.   **(iii) Final recommendation 3 - Regulatory structure and oversight issues**    IOSCO recommends that jurisdictions should assess the scope of their regulatory reach and consider which enhancements are needed to regulatory powers to support TC recommendations No. 1 and No. 2 in a manner promoting international coordination of regulation.    **(b) Credit default swaps**    **(i) Final recommendation 4 - Counterparty risk and lack of transparency**   IOSCO recommends the following regulatory responses:    1. Provide sufficient regulatory structure, where relevant, for the establishment of central counterparties (CCPs) to clear standardised CDS, including requirements to ensure:  (a) appropriate financial resources and risk management practices to minimise risk of CCP failure;  (b) CCPs make available transaction and market information that would inform the market and regulators; and  (c) cooperation with regulators;  2. Encourage financial institutions and market participants to work on standardising CDS contracts to facilitate CCP clearing;   3. The CPSS-IOSCO Recommendations for Central Counterparties should be updated and take into account issues arising from the central clearing of CDS;   4. Facilitate appropriate and timely disclosure of CDS data relating to price, volume and open-interest by market participants, electronic trading platforms, data providers and data warehouses;   5. Support efforts to facilitate information sharing and regulatory cooperation between IOSCO members and other supervisory bodies in relation to CDS market information and regulation; and   6. Encourage market participants' engagement in industry initiatives for operational efficiencies.   **(ii) Final recommendation 5 - Regulatory structure and oversight issues**   IOSCO recommends that jurisdictions should assess the scope of their regulatory reach and consider which enhancements to regulatory powers are needed to support TC recommendation No. 4 in a manner promoting international coordination of regulation.    IOSCO believes that the recommendations relating to CDS might be used, or tailored, to inform general recommendations for other unregulated financial markets and products, in particular, standardised and non-standardised OTC derivative products where such products may pose systemic risks to international finance markets or could contribute to restoring investor confidence. Further work in this area, taking account of industry initiatives, may be necessary.    The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD301.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.23 US Treasury proposes stronger capital and liquidity standards for banking firms**   On 3 September 2009, the US Treasury Department published a policy statement titled 'Principles for Reforming the US and International Regulatory Capital Framework for Banking Firms'. According to the Department, the global regulatory framework failed to prevent the build-up of risk in the financial system in the years leading up to the recent crisis. Major financial institutions around the world had reserves and capital buffers that were too low; used excessive amounts of leverage to finance their operations; and relied too much on unstable, short-term funding sources.  The resulting distress, failures, and government bailouts of these firms imposed unacceptable costs on individuals and businesses around the world. Going forward, global banking firms must be made subject to stronger regulatory capital and liquidity standards that are as uniform as possible across countries. The US Treasury Department proposes core principles that should guide reform of the international regulatory capital and liquidity framework to better protect the safety and soundness of individual banking firms and the stability of the global financial system and economy.   * Capital requirements should be designed to protect the stability of the financial system, not just the solvency of individual banking firms, including banks, bank holding companies, financial holding companies and large, interconnected firms. * Capital requirements for all banking firms should be increased, and capital requirements for financial firms that could pose a threat to overall financial stability should be higher than those for other banking firms. * The regulatory capital framework should put greater emphasis on higher quality forms of capital that enable banking firms to absorb losses and continue operating as going concerns. * The rules used to measure risks embedded in banks' portfolios and the capital required to protect against them must be improved. Risk-based capital requirements should be a function of the relative risk, including systemic risk, of a banking firm's exposures, and risk-based capital rules should better reflect a banking firm's current financial condition. * The procyclicality of the regulatory capital and accounting regimes should be reduced and consideration should be given to introducing countercyclical elements into the regulatory capital regime. * Banking firms should be subject to a simple, non-risk-based leverage constraint. * Banking firms should be subject to a conservative, explicit liquidity standard. * Stricter capital and liquidity requirements for the banking system should not be allowed to result in the re-emergence of an under-regulated non-bank financial sector that poses a threat to financial stability. * A comprehensive agreement on new international capital and liquidity standards should be reached by 31 December 2010 and should be implemented in national jurisdictions by 31 December 2012.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.24 SEC Inspector General's report regarding the Bernard Madoff fraud**   On 2 September 2009, the report of the the US Securities and Exchange Commission's Inspector General into the Bernard Madoff major fraud was published. The report makes clear that the SEC missed numerous opportunities to discover the fraud.  The report is available on the [SEC](http://www.sec.gov/news/speech/2009/spch090409mls.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.25 New Zealand Securities Commission review of corporate governance disclosures**   On 1 September 2009, the New Zealand Securities Commission published the findings of its latest review of corporate governance reporting.    The Commission found that many entities clearly disclosed:   * remuneration policies for directors and executives; * the independence, expertise and experience of board members; * processes for ensuring the quality and independence of external auditors; and * risk management policies and practices.   Areas where issuers can improve their disclosures relate to how boards:   * observe and foster high ethical standards, for example, compliance with a code of ethics; * build constructive relationships with shareholders; and * consider and respect the interests of stakeholders.   The Commission found that some issuers who are subsidiaries of overseas listed entities provided limited or no corporate governance disclosures. The Commission expects these issuers to improve their disclosures.  The review involved assessing annual report and website disclosures of 24 selected issuers against nine principles covering the core elements of good corporate governance.  The principles are set out in a corporate governance handbook for directors, executives and advisers, published by the Commission in 2004.   The Commission will publish a more detailed report of its findings after concluding its next review of disclosures.   Further information is available on the [New Zealand Securities Commission](http://www.seccom.govt.nz/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.26 APRA releases reporting standards for general insurance groups**    On 31 August 2009, the Australian Prudential Regulation Authority (APRA) released the final reporting standards that will apply to general insurance groups.   They follow separate consultation and finalisation of new prudential standards for insurance group supervision announced in December 2008, which became effective on 31 March this year. The completion of the new reporting standards enables the reporting requirements of the new prudential standards to take effect.  The foundation of APRA's approach to the supervision of general insurance groups is that the group as a whole should meet essentially the same minimum capital requirements as apply to individual general insurers. Being part of a wider insurance group can alter the risk profile of an individual insurer through financial and operational inter-relationships with other group members and through decisions and initiatives taken at group level.  The reporting standards contain the necessary forms and instructions relating to data that insurance groups must submit to APRA on a semi-annual basis. The 12 standards have been finalised following extensive consultation with the insurance industry over the past two years.  The requirements of the reporting standards will apply to all general insurance groups that have either an APRA-authorised general insurer or an APRA-authorised non-operating holding company (NOHC) as the parent entity of the group, and will take effect for the next reporting period.  The new reporting standards and their accompanying forms and instructions are available on the [APRA](http://www.apra.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.27 Superannuation review: issues paper on governance published**   On 25 August 2009, the Review Panel which is examining Australia's superannuation system called for submissions in response to the release of its 'Phase One: Governance - Issues Paper'.    Issues being considered in the Governance phase include: trustee knowledge, skills and training, conflicts in outsourcing, accountability to members and the composition of boards of trustees.     The issues paper is available on the [Super System Review](http://www.supersystemreview.gov.au/content/downloads/governance_issues_paper/governance_issues_paper.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1)  **1.28 Supervision of Australia's licensed markets to shift to ASIC**   On 24 August 2009, Australian Treasurer Wayne Swan MP and Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, announced changes to the supervision of Australia's financial markets.   The Government has decided to provide for the Australian Securities and Investments Commission (ASIC) to perform supervision of real-time trading on all of Australia's domestic licensed markets. This change will mean that ASIC will now be responsible for both supervision and enforcement of the laws against misconduct on Australia's financial markets.   The present arrangements require individual financial markets to self-supervise trading on their individual markets.   The changes will mean that ASIC will become responsible for supervising trading activities by broker participants which take place on a licensed financial market, while individual markets - such as the Australian Securities Exchange (ASX) - will retain responsibility for supervising the entities listed on them.   It is intended that legislation will be introduced into Parliament next year to give effect to this change, with ASIC to begin performing these functions in the third quarter of 2010.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  |  | | |  | | |  | | --- | | **2.1 ASIC releases responsible rumour handling proposals**  On 15 September 2009, the Australian Securities and Investments Commission (ASIC) released a consultation paper titled 'Responsible Handling of Rumours', outlining some proposed principles and guidelines designed to assist market participants in their dealing with market rumours.  ASIC believes these proposed guidelines will help lift standards of conduct across the market by providing AFS licensees with a better understanding of their responsibilities when handling rumours, whether they are positive or negative in nature and whether the market is rising or falling.  The focus of the paper is on responsible handling of rumours. The [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) prohibits making false or misleading statements and communicating material inside information. The guidelines in the paper supplement these provisions. They require AFS licensees to adopt policies to manage the circumstances where staff and representatives can pass on rumours, both internally and externally.  The paper covers proposed principles to assist AFS licensees when handling rumours. These include:   * a requirement to have written policies and procedures on handling rumours and a process for supervising compliance with these; * a requirement to have formal training for employees and representatives on the policies and procedures applicable to rumours; * a general prohibition on the origination of rumours; * a prohibition on the circulation of rumours, except where the rumour is in wide circulation and a judgement is formed that in the circumstances the rumour would not unduly distort the market; * a process for attempting to verify rumours; and * a requirement that a rumour must be described as such, if it is approved to be passed on, and must not be embellished.   ASIC is seeking the market's views on whether its proposed principles provide sufficient guidance for AFS licensees to exercise judgement in respect to identifying rumours and handling them.  The principles contained in the consultation paper will apply to stockbrokers, investment advisers and also investment managers. ASIC has a separate project reviewing practices for the handling of confidential information by listed entities and their advisers.  The consultation period ends on 9 November 2009.  The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp118.pdf/$file/cp118.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h2)  **2.2 ASIC seeks comment on credit rating use in disclosure documents**  On 10 September 2009, the Australian Securities and Investments Commission (ASIC) announced that it is seeking public comment on whether to withdraw current class order relief that allows issuers of investment products to cite credit ratings in disclosure documents without the consent of credit rating agencies.   Currently a class order provides relief from the requirement that an issuer must not cite a statement made by a person in a prospectus or PDS, unless the person has consented to that statement being included in the form and context in which it appears. The class order relief permits issuers to cite credit ratings from Standard & Poor's, Moody's Investor Service and Fitch Ratings in a prospectus or PDS without the consent of credit rating agencies themselves.   This class order has implications for the accountability of credit rating agencies to investors because liability for the content of prospectuses and PDSs only applies to persons who have consented to having their statements cited.   Consultation Paper 117 'Consent to quote credit ratings in disclosure documents and PDSs' will help guide ASIC's review of its class order relief to find an appropriate balance between:   * making credit ratings available to retail investors; * promoting the accountability of credit rating agencies to investors; and * giving credit rating agencies better control of the use of their ratings.   The consultation paper seeks to obtain more information about:   * how important credit ratings are to retail investors; * how common is the use of credit ratings in disclosure documents and advertising to retail investors; * how do credit rating agencies control the use of credit ratings; and * what are the practicalities and costs of requiring and giving consent to cite credit ratings in disclosure documents.   The consultation paper seeks the views of stakeholders, including from issuers and their advisers, credit rating agencies and organisations representing retail investors.   Submissions on the issues in the Consultation Paper close on Thursday 22 October 2009.   The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp117.pdf/$file/cp117.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h2)  **2.3 ASIC consults on responsible lending conduct obligations for credit licensees**  On 2 September 2009, the Australian Securities and Investments Commission (ASIC) released its policy proposals on implementing the responsible lending obligations for credit licensees. This is part of the extensive consultation process that ASIC is undertaking to implement the proposed National Consumer Credit Protection Program.  ASIC's Consultation Paper 115 'Responsible lending (CP 115)' explains how ASIC proposes to implement the responsible lending obligations as they apply to credit licensees.  Under the responsible lending obligations, licensees will have to conduct reasonable inquiries about a consumer and assess that a credit product is not unsuitable for the consumer before offering or providing the credit product.   **Background**   The [National Consumer Credit Protection Bill 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=107620" \t "Default) requires credit licensees to meet responsible lending conduct obligations. These obligations will apply to both credit providers (e.g. lenders, such as banks, credit unions and finance companies) and credit assistance providers (e.g. mortgage or finance brokers).   The key obligation is that credit licensees must not suggest, assist with or provide a credit product that is unsuitable for a consumer. Before a credit licensee suggests, assists with, or provides a new credit contract or lease to a consumer, the credit licensee must:   * make reasonable inquiries of the consumer about their financial situation and their requirements and objectives in relation to the credit contract; * based upon these inquiries, assess whether the credit product is unsuitable for the consumer and only proceed if the credit product is not unsuitable; and * give the consumer a copy of the assessment if requested.   ASIC will administer the responsible lending obligations to reduce the risk of consumers being offered loans that they cannot afford to repay or are otherwise clearly unsuitable for them. ASIC has formulated the proposals in CP 115 in light of this objective.  The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp115.pdf/$file/cp115.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  |  | | |  | | |  | | --- | | **3.1 Western Australia wheat futures and options**   On 7 September 2009, the Australian Securities Exchange (ASX) listed Western Australian Wheat (WAW) futures. The listing of the WAW contract follows a record level of grain market activity for the month of August, when more than 600,000 tonnes of Australian grain and oilseed futures contracts traded on ASX.   Since the liberalisation of Australian wheat exports from 1 July 2008, all participants within the wheat supply chain have sought an improved method to facilitate price discovery and manage price risk. The WAW futures contract, which is based on the Kwinana track market, will service the risk management and price discovery needs of all industry participants involved in the export of Australian milling wheat.   The WAW contract is a natural extension of the existing ASX Grain Futures and Options contract suite which services the grain and oilseed markets in Australia's eastern states. The existing Australian Milling Wheat (AMW) futures contract will continue to provide Australia's domestic market with a facility to manage market risk especially in times of drought or reduced supply.   Further information is available on the [ASX](http://www.asx.com.au/about/pdf/mr_070909_waw.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h3)  **3.2 Monthly market activity report**   On 3 September 2009, ASX released its monthly activity report for August 2009.   The report is available on the [ASX](http://www.asx.com.au/about/pdf/ma_030909_monthly_activity_aug09.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h3)  **3.3 Reforms to the supervision of Australia's financial markets**   On 24 August 2009, Treasury issued a media release regarding Government reforms to the supervision of Australia's financial markets. This release announced that the Australian Securities and Investments Commission (ASIC) will assume responsibility for the supervision of real-time trading on Australia's domestic licensed markets.   The change will mean that the supervision and enforcement of market participants currently performed by ASX and the independent Disciplinary Tribunal will become the responsibility of ASIC once the proposed legislation is passed by the third quarter of 2010.  Importantly, ASX will retain responsibility for the supervision of entities listed on the market it operates.   ASX has issued a Media Release noting that it believes the timeframe and next steps outlined by the Government are appropriate, and will work constructively with the Government and ASIC to implement the transfer of responsibilities.   ASX also notes that the Government has foreshadowed that this reform is a necessary step before any further consideration of outstanding market licence applications can take place beyond the third quarter of 2010.  Further information is available on the [ASX](http://www.asx.com.au/about/pdf/mr_240809_market_supervision_reforms.pdf" \t "_new) website.    [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h3)  **3.4 ASX Limited annual report**   On 20 August 2009, ASX released its full-year result for the year ending 30 June 2009. ASX Managing Director and CEO, Robert Elstone, said: "FY09 was a year of sound financial, operational and supervisory performance for the ASX group, given the unprecedented market volatility and uncertainty generated by the global financial crisis."   The 2009 annual report is available on the [ASX](http://www.asx.com.au/about/pdf/annual_report_2009.pdf" \t "_new) website.  The transcript of the media briefing is available on the [ASX](http://www.asx.com.au/about/pdf/asx_fy09_results_media_briefing_transcript.pdf" \t "_new) website.    The transcript of the analyst briefing is available on the [ASX](http://www.asx.com.au/about/pdf/asx_fy09_results_analyst_briefing_q_a_transcript.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h3)  **3.5 Miscellaneous Rule amendments - ASX Market Rules, ACH Clearing Rules and ASTC Settlement Rules**   On 19 August 2009 a series of amendments were made to the ASX Market Rules, ACH Clearing Rules and ASTC Settlement Rules. These amendments were largely corrections to typographical errors, cross references and formatting.   The ASX Circular, ACH participant notice and the ASTC participant bulletin are available on the [ASX](https://www.asxonline.com" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Corporate Law Decisions** |  |  | | |  | | |  | | --- | | **4.1 US court rejects settlement between SEC and Bank of America Corporation on the basis that shareholders would be punished twice**   Securities and Exchange Commission v Bank of America Corporation, 09 Civ 6829, United States District Court, Southern District of New York, Rakoff, USDJ, 14 September 2009   The full text of this judgment is available at:  [http://www1.nysd.uscourts.gov/cases/show.php?db=special&id=104](http://www1.nysd.uscourts.gov/cases/show.php?db=special&id=104" \t "_new)   **(a) Summary**   This recent judgment of the US District Court has been widely debated in the US. The court decided not to approve a proposed final consent judgment between the SEC and Bank of America whereby the Bank would pay a penalty of US$33 million for alleged false and misleading statements.   The judgment has important implications for regulators who choose to seek to have companies pay penalties in circumstances where the court finds that the result of the penalty is to further punish shareholders. The Wall Street Journal referred to the court's decision as "an unusual ruling that casts doubts about how the agency [the SEC] handles probes of major US companies."   **(b) Facts**   In a complaint filed with the US District Court on 3 August 2009, the United States Securities and Exchange Commission (SEC) alleged that the defendant Bank of America Corporation materially lied to its shareholders in the proxy statement of 3 November 2008 that solicited the shareholders' approval of the US$50 billion acquisition of Merrill Lynch & Co (Merrill). The SEC alleged that Bank of America "represented that Merrill had agreed not to pay year-end performance bonuses or other discretionary incentive compensation to its executives prior to the closing of the merger without Bank of America's consent [when] [i]n fact, contrary to the representation ... Bank of America had agreed that Merrill could pay up to US$5.8 billion - nearly 12% of the total consideration to be exchanged in the merger - in discretionary year-end and other bonuses to Merrill executives for 2008."   Also on 3 August 2009, the SEC sought the court's approval of a proposed final consent judgment by which Bank of America, without admitting or denying the accusations, would be enjoined from making future false statements in proxy solicitations and would pay to the SEC a fine of US$33 million.   **(c) Decision**   The court refused to approve the proposed final consent judgment. The court stated in relation to the proposed consent judgment:   ". the parties were proposing that the management of Bank of America - having allegedly hidden from the Bank's shareholders that as much as $5.8 billion of their money would be given as bonuses to the executives of Merrill who had run that company nearly into bankruptcy - would now settle the legal consequences of their lying by paying the SEC $33 million more of their shareholders' money. This proposal to have the victims of the violation pay an additional penalty for their own victimization was enough to give the Court pause."   The court observed that the test it is required to apply is whether the proposed consent judgment is within the bounds of fairness, reasonableness and adequacy - noting that the review by the court is highly deferential to the parties' proposal.   The court held that the proposed consent judgment was not fair "because it does not comport with the most elementary notions of justice and morality, in that it proposes that the shareholders who were the victims of the Bank's alleged misconduct now pay the penalty for that misconduct." The court also held that the proposed consent judgment was neither reasonable nor adequate. It was not reasonable because, among other things, it would close the case without the SEC adequately accounting for why it did not pursue charges against individuals allegedly responsible for the false and misleading statements by the Bank.   The court stated that the parties' submissions "leave the distinct impression that the proposed Consent Judgment was a contrivance designed to provide the SEC with the facade of enforcement and the management of the Bank with a quick resolution of an embarrassing inquiry - all at the expense of the sole alleged victims, the shareholders." The court also stated that "[t]he proposed Consent Judgment in this case suggests a rather cynical relationship between the parties: the SEC gets to claim that it is exposing wrongdoing on the part of the Bank of America in a high-profile merger; the Bank's management gets to claim that they have been coerced into an onerous settlement by overzealous regulators. And all this is done at the expense, not only of the shareholders, but also of the truth".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h5)  **4.2 Evidence of a contract of guarantee and the appropriateness of summary dismissal**  (By Jodene Chia, DLA Phillips Fox)   Palindrome Holdings Pty Ltd v Wass [2009] NSWSC 797, New South Wales Supreme Court, Davies J, 1 September 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/september/2009nswsc797.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/september/2009nswsc797.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   This was an application by Ian Phillip Wass (Defendant) regarding proceedings commenced by Palindrome Holdings Pty Limited (Plaintiff) on 7 June 2007, by a Statement of Claim. The application was primarily to:   * Dismiss the proceedings pursuant to Rule 13.4, [Uniform Civil Procedure Rules](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "Default) (UCPR), which allows proceedings to be dismissed on the basis that no reasonable cause of action is disclosed against the Defendant. * In the alternative to dismiss the proceedings pursuant to Rule 13.4, UCPR, dismiss the proceedings for want of due dispatch pursuant to Rule 12.7, UCPR.   The claim was for the payment by the Defendant, an alleged guarantor, of the sum of $530,910, together with interest.   The Defendant sought dismissal of the claim under Rule 13.4, UCPR, on two bases:   * First, that there was no evidence upon which a court could conclude, even at an interlocutory stage, that a guarantee of the kind alleged was ever entered into in relation to the promissory notes. * Secondly, if there was a guarantee, the limitation period expired on 12 August 2005 prior to the commencement of the proceedings.   As an alternative, the Defendant sought that the proceedings be dismissed for want of due dispatch which included the Plaintiff's failures to comply with court orders, some of which were not rectified by the time the application was heard.     The court held that the proceedings should not be dismissed on the basis that there was no reasonable prospect that a guarantee would be able to be proved. However, the court found that it was an appropriate case to make an order dismissing the proceedings pursuant to Rule 13.4, UCPR, on the basis that the limitation period for the commencement of the proceedings expired before the commencement of the proceedings, and therefore there was no reasonable cause of action within the meaning of that rule.   On this basis the court dismissed the proceedings and required that the Plaintiff pay the costs of the motion and the proceedings.   **(b) Facts**   A loan was sought by Aus Ag Resources Limited ("AAR") for its business operations in Queensland from International Alliance Insurances Limited ("IAIL").   IAIL offered to provide AAR a promissory note for $500,000 at an interest rate of 2% per month (First Promissory Note) but subject to personal guarantees being provided by two of the directors of AAR, namely, Clarence Stevens and the Defendant.   The First Promissory Note was signed by AAR in May 1999. The Plaintiff alleged that the First Promissory Note was also signed by Stevens and the Defendant as guarantors.   A second promissory note (Second Promissory Note) was later signed by Stevens and the Defendant underneath which was printed their title of "Director".  This note was for an amount of $530,910 at an interest rate of 2% per month on otherwise the same terms as the First Promissory Note.    It was further alleged by the Plaintiff that, by a letter from the Defendant dated 14 July 1999, Stevens and the Defendant confirmed their guarantees in respect of the Second Promissory Note.    AAR subsequently entered into administration and was ultimately placed into liquidation without having repaid the amounts in the promissory notes.  The right, title and interest in the First and Second Promissory Notes was assigned to the Plaintiff by deed dated 8 December 2006, and a subsequent claim for payment of the amount in the Second Promissory Note and any interest was made against the Defendant.     The history of proceedings leading up to the current application highlighted delays and non-compliance on the Plaintiff's part in relation to the prior orders and directions of the court. Amongst other things, the Plaintiff was not able to produce key documents to support its claim.   **(c) Decision**   **(i) Was there evidence of a guarantee?**   The Defendant submitted, amongst other things, that the Second Promissory Note was signed only by AAR since it made clear that the signatures of Stevens and the Defendant were the signatures of AAR's Directors.  Furthermore, it was submitted that it could be inferred that AAR alone signed the First Promissory Note in the same way.     Davies J considered the question as to whether documents signed by persons who are directors of a company should be held to bind them personally, as guarantors or in some other way. Applying *Clark Equipment Credit of Australia Ltd v Kiyose Holdings Pty Ltd & Others* (1989) 21 NSWLR 160, his Honour concluded that the execution clause in the Second Promissory Note, and the way it had been executed, pointed strongly against the signatures being the signatures of Stevens and the Defendant as guarantors or in any way binding them personally.   The Defendant also submitted that although the letter of 14 July 1999 said "the guarantors again confirm their obligations" that letter was only signed by AAR and not by the guarantors, and in any event it did not identify who the guarantors were nor what their obligations were.     In addressing this submission, his Honour noted that a guarantee ought to be able to be identified in clear terms, and concluded that although the current totality of the evidence would likely result in the Plaintiff failing to show that the Defendant entered into a guarantee of the Second Promissory Note, he could not dismiss the proceedings on the basis that there was no reasonable prospect that a guarantee would be able to be proved.   **(ii) Was the claim statute barred?**   The Defendant relied on several grounds to establish that the relevant limitation period had expired, primarily that the liability of the guarantor and the cause of action against the guarantor arose on the default of the principal debtor, being 12 August 1999 in the case of the Second Promissory Note.   Davies J concurred with this submission, considering in this case that the guarantor's liability arose on the failure to pay, or the breach, by the principal debtor with no demand necessary from the creditor. Therefore, any guarantee established to have been given by the Defendant would have become due and payable on the date of default under the Second Promissory Note.    His Honour concluded that this was an appropriate case to make an order dismissing the proceedings pursuant to Rule 13.4 UCPR on the basis that the limitation period for the commencement of the proceedings expired before the commencement of the proceedings and therefore there was no reasonable cause of action within the meaning of that rule.   **(iii) Want of due dispatch**   In light of Davies J's conclusion that it was appropriate that the matter be dismissed on the above basis, it was not strictly necessary to consider the alternative basis of want of due dispatch. However, to address the possibility that his Honour was incorrect on the first point, his Honour also addressed this claim.   Davies J held that as unacceptable as the delays and other failures were on the Plaintiff's part, it was not an appropriate matter to dismiss for want of due dispatch and that the case warranted that the proceedings should go to trial to ensure that the Plaintiff had a last chance to comply with directions and orders made to bring the proceedings to a final hearing, consistent with section 56, [Civil Procedure Act 2005](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=85461" \t "Default).   Accordingly, his Honour dismissed the proceedings and required that the Plaintiff pay the costs of the motion and the proceedings.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h5)  **4.3 Creditor subrogation to an insolvent trustee's right of indemnity against trust assets and termination or avoidance of a deed of company administration**   (By Benjamin Copeland, Blake Dawson)   Lerinda Pty Ltd v Laertes Investments Pty Ltd as Trustee for the Ap-Pack Deveney Unit Trust [2009] QSC 251, Supreme Court of Queensland, McMurdo J, 28 August 2009    The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/august/2009qsc251.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/august/2009qsc251.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 a Deed of Company Arrangement (the "DOCA") in relation to the respondent company, Laetes Investments Pty Ltd, which was the insolvent trustee for the Ap-Pac Deveney Unit Trust (the "Trust").   The applicant sought to have the DOCA terminated on the basis that:   * it was unfairly prejudicial to the applicant because, absent the DOCA, the applicant would be subrogated to the respondent's right of indemnity against the Trust assets; and * the administrators of the respondent (the "Administrators") had mislead creditors in the administrators' report prior to creditors voting on the DOCA.   McMurdo J discussed subrogation and made a finding of law that subrogation was not available as a remedy to the applicant.  McMurdo J also made findings of fact that the applicant had not established the other grounds on which it contended that the DOCA should be terminated, being misleading statements by the Administrator.   **(b) Facts**  The respondent had carried on a business as a fruit and vegetable wholesaler as trustee of the Trust, and all assets and liabilities were held and incurred as trustee of the Trust.   The respondent ceased trading in November 2008 (by which point it was insolvent) and the directors appointed the Administrators a week later. The DOCA was executed by the respondent, creditors of the respondent and the Administrators on 20 January 2009.   The applicant was one of the respondent's suppliers and creditors. The applicant sought to be subrogated to the respondent's right of indemnity against the Trust assets, and in particular, to the trustee's right of exoneration, in order to have the Trust property applied in satisfaction of the respondent's liability.   The applicant also sought to have the DOCA terminated on the basis that it was unfairly prejudicial to the applicant (a ground for termination under section 445D(1)) on the basis that absent the DOCA, the applicant would be paid in full by being subrogated to the respondent's position.   The applicant also claimed that part of the administrators' report was false or misleading and that creditors were misinformed because:   * the report had stated that the respondent's right of indemnity was to be exercised for all creditors, that particular companies to which the respondent had made loans were not "associated entities" within the meaning of section 50AAA of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and that the directors of those companies had stated that the companies did not have assets from which to repay the debts; * the directors of the respondent were personally liable for making loans to companies associated with the beneficiaries of the Trust when the respondent was or may have been insolvent and the administrators had not investigated companies associated with the directors and the prospect of recovering funds from the directors by recourse to their interests in those companies; * one of the other creditors, Opalbay Pty Ltd, was to obtain a benefit not available to other creditors; and * the DOCA improperly treated the assets of the Trust as the assets of the respondent.   **(c) Decision**    **(i) Subrogation**   McMurdo J commented on a trustee's charge or right of lien over the whole range of trust assets except for those, if any, which under the terms of the trust deed may not be used for the carrying on of the business, and that a creditor of the trust may be subrogated to the trustee's rights of indemnity and in particular to the abovementioned lien or charge. McMurdo also commented that subrogation is a remedy, not a cause of action.   Subrogation raised the question of how the applicant could gain advantage over other creditors of the respondent, where debts owing to the applicant were incurred in circumstances no different from those of the other creditors.     The difference, according to the applicant, was that the applicant had taken steps to enforce its 'right' of subrogation whereas the other creditors had not. McMurdo J stated that there was no principle or authority to support this position taken by the applicant, and that there was no basis for granting subrogation to the applicant, to the detriment of the other creditors, where those creditors had not engaged in any conduct that would disentitle them from the same remedy. McMurdo J referred to the general equitable principle that requires distribution of company property in winding-up to proceed on the basis of equality of creditors of equal degree.    McMurdo J concluded that the first ground for terminating the DOCA, on the basis that it precluded the subrogation of the applicant, as such, failed. McMurdo J similarly found that the administrator did not misinform creditors by stating that the respondent's right of indemnity was to be exercised for all creditors.   **(ii) Other grounds for termination of the DOCA**   McMurdo J found that the other grounds for the termination of the DOCA also failed on the basis of findings of fact, as follows:   * he found that the administrators were correct in stating that the entities to which the respondent had made loans were not "associated entities" and that the companies did not have assets from which to repay the debts; * there was no basis demonstrated for criticising the information given to creditors in relation to the ability to satisfy insolvent trading claims against the directors; * creditors were aware that Opalbay Pty Ltd was to receive a benefit not available to other creditors in the form of a "business arrangement" in exchange for not claiming under the DOCA and therefore had an incentive to vote in favour of the DOCA; and * the DOCA did not incorrectly attribute assets of the Trust to the trustee in its reference to "property of the company", because it defined property to include "any legal or equitable estate or interest ... in real or personal property of any description and includes a thing in action." The limited way in which property was defined was consistent with the limited nature of the company's property in the trust assets.   McMurdo J concluded that the DOCA was apparently advantageous to the creditors and that according to the administrators' report it was in their interest to vote for the DOCA and nothing to the contrary had been established by the applicant.  McMurdo J also stated that the DOCA had been substantially performed.  McMurdo J ordered that the application to terminate the DOCA be dismissed.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h5)  **4.4 Section 260-5 notices issued after commencement of a creditors' voluntary winding-up are void**   (By Laura Hawes, Clayton Utz)   Bruton Holdings Pty Limited (in liquidation) v Commissioner of Taxation [2009] HCA 32, High Court of Australia, French CJ, Gummow, Hayne, Heydon and Bell JJ, 26 August 2009   The full text of the judgment is available at:   [http://cclsr.law.unimelb.edu.au/judgments/states/high/2009/august/2009hca32.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2009/august/2009hca32.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 in Bruton Holdings confirms that section 260-5 Notices served after the commencement of a voluntary winding-up of a company in relation to assets of that company are void.   **(b) Facts**  Bruton Holdings Pty Limited (in liquidation) ("Bruton Holdings") was the trustee of the Bruton Educational Trust ("Trust"). The relevant sequence of events is as follows.  On 23 June 2006, Bruton Holdings commenced proceedings challenging a decision by the Commissioner of Taxation ("Commissioner") to refuse Bruton Holdings' earlier application for endorsement as a tax-exempt charity ("Appeal").  On 28 February 2007, Bruton Holdings:   * was placed into voluntary administration by its sole director; * ceased to be trustee of the Trust; and * deposited $450,000 into its solicitors' trust account to cover costs and disbursement in connection with the Appeal ("Trust Monies").   In March 2007, the Commissioner issued a Notice of Assessment to Bruton Holdings for a tax debt in the amount of $7,715,873.73 for the year ending 30 June 2004.    On 30 April 2007, the creditors of Bruton Holdings resolved that the voluntary administration end and that the company be wound up. The liquidation was deemed to commence on 28 February 2007 pursuant to section 513C of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act") and the two Administrators were appointed as joint Liquidators.   On 8 May 2007, the Commissioner served a notice under section 260-5 of Schedule 1 to the [Taxation Administration Act 1953 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6441" \t "Default) ("Taxation Administration Act") on Bruton Holdings' lawyers seeking payment of the Trust Monies ("Notice").   Section 260-5 of the Taxation Administration Act permits the Commissioner to serve notice on a third party who 'owes or may later owe' money to a taxpayer requiring direct payment of the debt to the Commissioner, up to the amount of the taxpayer's tax-related liability.  Section 500(1) of the Act provides:        "any attachment, sequestration, distress or execution put in force against the property of [a] company after the passing of [a] resolution for voluntary winding up is void".  Bruton Holdings applied to the Federal Court seeking, inter alia, a declaration that the Notice was void.  The primary judge allowed the application on the basis that:   * Bruton Holdings continued to be entitled to call for the Trust Monies notwithstanding the fact that it had ceased to be trustee, simply because, as between it and its solicitors, it was the party who had deposited them. * Bruton Holdings had a "right of exoneration" out of Trust Monies (as to this, the Full Federal Court later considered, on appeal, that the primary judge presumably had in mind payment or reimbursement of any moneys owed by Bruton Holdings to its solicitors in connection with the Appeal, to the Commissioner by way of tax liability or liability for costs incurred in the Appeal or to the other creditors). * the claim to exoneration was "property" as defined in section 9 of the Act and that the Notice was a form of attachment upon such property and therefore avoided by section 500 of the Act.   The Commissioner appealed the decision to the Full Federal Court.     The Full Federal Court upheld the appeal and considered that, in light of the decisions in *Commissioner of Taxation v Donnelly* (1989) FCA 399 ("Donnelly") and *Macquarie Health Corporation Ltd v Commissioner of Taxation* (1999) FCA 1819, a notice issued pursuant to section 260-5 of the Taxation Administration Act was not an attachment for the purposes of section 500 of the Act. The Court said that section 500 of the Act was limited to attachments involving a court process (also called curial attachments) and that the Notice was valid because it was a non-curial attachment.  The Liquidators appealed that decision to the High Court, seeking the restoration of the orders of the primary judge.  **(c) Decision**   The primary question before the High Court was whether the Notice fell within the meaning of attachment contained in section 500 of the Act.    The High Court held that the Notice was an "attachment" for the purposes of section 500 of the Act and void.    The court arrived at its decision based upon the following grounds.   There is a specific tax collection and recovery scheme set out in section 260-45 of Schedule 1 to the Taxation Administration Act, so the Commissioner's general powers under section 260-5 are also not available if a court order for winding-up is made.    The legislative history of section 500(1) of the Act gave no indication or reason in that section or Chapter 5 of the Act which restricted the meaning of the expression 'any attachment' to curial attachments.    A section 260-5 Notice is an 'attachment' because of the following indicia:   * it imposes an obligation to pay the debt to the Commissioner; * it renders it unlawful for the debtor to pay the creditor; * it invalidates any attempted assignment by the creditor after receipt of the notice; and * it gives the Commissioner the sole right to discharge the debtor and to sue the debtor upon non-payment.   The court found that the Full Federal Court had incorrectly applied Donnelly in drawing an analogy between section 500 of the Act and section 118 of the [Bankruptcy Act 1966 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "Default).     The court said that, in Donnelly certain features of section 118 of the Bankruptcy Act 1966 (Cth) (which was held to be confined to attachments by curial order and did not extend to non-curial charges) were found to be absent in section 500 of the Act and they included:   * the history of section 118 of the Bankruptcy Act 1966 (Cth) indicated that it was confined to curial attachments because when the provision was introduced it included a reference to a creditor who had 'instituted proceedings to attach a debt'; * section 118 of the Bankruptcy Act 1966 (Cth) links attachments with executions against property and proceedings to enforce a charge, all of which are court procedures to enforce judgments; and * the amount to be paid to the trustee under section 118 of the Bankruptcy Act 1966 (Cth) is to be reduced by the taxed costs of the execution or attachment.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h5)  **4.5 Court exercises discretion to allow compulsory acquisition under section 661A(3) of the Corporations Act**   (By Robert Kelly, Mallesons Stephen Jaques)   Re Sylvania Resources Limited [2009] FCA 955, Federal Court of Australia, Barker J, 25 August 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/august/2009fca955.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/august/2009fca955.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 bidding company announced an offer to acquire all the fully paid ordinary shares in a target company.  At the time the bid closed, the bidder had acquired an 89.86% interest in the target, leaving it short of the 90% threshold required for compulsory acquisition to take place under section 661A(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"). However, there were a large number of acceptances on the final day of the bid period, the extent of which the bidder became aware of only after the close of the bid.   The bidder applied to the Federal Court for orders under section 1322(4)(d) of the Act (which enables the court to extend the period for doing something under the Act), to extend the offer period, and section 661A(3) of the Act (which allows the court to order compulsory acquisition where the 90% threshold has not been met). The court found that the former section did not apply, but that the latter was appropriate to the circumstances of the case.     As the first case to consider the construction of section 661A(3), this case is notable for the extent to which it favours a wide and liberal interpretation of that section, holding that the section is appropriate to be used in cases where the bidder's relevant interest is at the margins of the 90% threshold.   **(b) Facts**   Sylvania Resources Limited ("Sylvania") announced an offer to acquire all of the fully paid ordinary shares in Great Australian Resources Ltd ("GAU").  The bidder's statement said that the offer would close on 11 August 2009 at 5pm.   On 10 August 2009, the day before the offer was scheduled to close, Sylvania's relevant interest in GAU had grown to 71.03%. On 11 August 2009, the day the offer was scheduled to close, there was a large number of acceptances. Sylvania's relevant interest in GAU increased to 89.82%. On 12 August 2009, Sylvania announced to the ASX that the offer had closed at 5pm on 11 August 2009 and that, as Sylvania did not have a relevant interest in GAU of 90%, compulsory acquisition under section 661A(1) of the Corporations Act would not proceed.   Sylvania claimed that at no time during the course of 11 August 2009 did the directors of Sylvania receive any indication that such a large level of acceptances had been received and that, if the directors had been informed in advance of closing time of the increase in the relevant interest to 89.82%, they would have taken steps to extend the time for acceptance of the GAU offer before the closing of the bid. Sylvania also claimed that its directors had received an email on the afternoon of 12 August 2009 stating that there was an additional acceptance of 50,000 shares which should have been processed on 11 August 2009, bringing Sylvania's total interest to 89.86% at closing time.     Sylvania also claimed that the directors had been informed on 12 August 2009 that a GAU shareholder who had accepted for 100,000 shares had been notified that his offer was defective and not processed. In addition the directors were aware of acceptances for an additional 847,750 shares that were lodged after 5pm on 11 August 2009.   Sylvania applied to the Federal Court for orders under section 1322(4)(d) of the Act, to extend the period for acceptance of the GAU offer. In the alternative, it applied for orders under section 661A(3) of the Act, which provides that a bidder with a relevant interest below the 90% threshold "may compulsorily acquire securities in the bid class with the approval of the court". GAU consented to both applications. ASIC, pursuant to section 1330 of the Act, intervened in the proceedings, expressing concern over the application made under section 1322(4).   **(c) Decision**    Barker J refused the application for orders under section 1322(4), but allowed the application under section 661A(3), for the reasons set out below.   **(i) Application under section 1322(4)**   Section 1322(4)(d) allows a court to make any orders extending the period for doing any act, matter or thing or instituting or taking any proceeding under the Act (including an order extending a period where the period concerned ended before the application for the order was made). Barker J found that the exercise of the power under section 1322(4) involves a two step process.  The court must first determine whether it is appropriate in the circumstances to make an order extending a relevant period and then, secondly, address the question raised by section 1322(6) of whether any substantial injustice has been or is likely to be caused to any person by the making of such an order.   Although Sylvania contended that this was a case of a missed opportunity to extend the offer period, given the lapse in information available to its directors, Barker J found that it was not a case where the court's discretion under section 1322(4) was enlivened.   In coming to this decision, it was an important factor that Sylvania had taken no steps prior to the end of the offer period to seek an extension.  In *Blaze Asset Pty Ltd v Target Energy Ltd* [2009] FCA 698, where orders had been made under section 1322(4)(d) to extend an offer period, the market had been informed that the offer period had been extended and the irregularity related to posting material to ASIC rather than lodging it with ASIC.   Although it was true that Sylvania did not know of the final level of acceptances until the end of the offer period, Barker J considered that this would be the case for many bids.  Given that it is also not unusual for there to be a relatively high level of acceptances in the final stages of a bid, a bidder must be prepared to act appropriately and quickly as circumstances develop.  It would be inappropriate for a court to step in to remedy the lack of business or commercial judgement of the bidder to provide a further opportunity to extend the offer period.  For the court to intervene after the event in such circumstances would introduce unnecessary uncertainty into the market, contrary to the purposes of the Act.   **(ii) Application under section 661A(3)**  Barker J then turned to the application under section 661A(3).  Due to the fact that Sylvania, at the close of the bid, had acquired only 89.96% of the shares issued in GAU, it did not meet the 90% threshold for compulsory acquisition under section 661A(1).  However, section 661A(3) allows for a Court to make orders ordering compulsory acquisition where this threshold has not been met.   Barker J found that there was no authority providing guidance on the exercise of the court's power under section 661A(3).  He then took a purposive approach to the construction of the power stating at paragraph 54 that it "should be exercised having regarded to the apparent purposes of the approval power created by the Parliament, its statutory context, and the general objects and purposes of the Act."   The Explanatory Memorandum to the Bill introducing section 661A(3) stated that the power would "give additional flexibility" to the compulsory acquisition procedure and "remove some of the arbitrariness of the 90% threshold, particularly at the margin".  It also indicated that the exercise of the power should not be confined to cases where shareholders cannot be traced.  Further, High Court authority, in relation to the interpretation of similar powers given to ASIC under the defunct Corporations Law, indicated that such powers should not be interpreted or construed by reference to a presumption that such a legislative provision is not intended to interfere with vested proprietary rights.  These points considered, Barker J found that the section should be given a wide and liberal interpretation.   Turning to the facts at hand, Barker J held that this was a case where the power should be exercised.  Considering the acceptances at the close of the offer, this was a case "at the margins".  The plaintiff fell short by 0.14% from being in a position to act under section 661A(1). This marginal factor was sufficient in itself to permit the court to exercise its power under section 661A(3), subject to any militating or disentitling factors.  Barker J also noted that if late acceptances were taken into account, the plaintiff's relevant interest increased to 90.59% which was relevant as it showed that there was growing support for the takeover.   Given that there was no particular evidence of any contentious event or circumstance involving minority shareholders which would militate against the exercise of the approval power in this case, Barker J allowed the application.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h5)  **4.6 Setting aside statutory demands: Providing security before the demand is served**   (By Steven Grant, Minter Ellison)   Accordent Pty Ltd v RMBL Investments Ltd [2009] SASC 248, Supreme Court of South Australia, Full Court, Doyle CJ, Bleby and Kelly JJ, 21 August 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2009/august/2009sasc248.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2009/august/2009sasc248.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 case considers the circumstances in which a statutory demand may be set aside on the application of a creditor. In particular, the Court considers whether compliance with a statutory demand can be considered when such an application is made and if so, whether compliance must occur after the statutory demand is served on the creditor.  **(b) Facts**   The appellant, Accordent Pty Ltd (Accordent) appealed the decision of a Judge of the Supreme Court of South Australia in which Gray J dismissed an appeal against the decision by a Master, refusing to set aside a statutory demand served on Accordent by the respondent, RMBL Investments Ltd (RMBL) under section 459E of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (all section references are references to the Corporations Act). Section 459E provides that a person may serve a demand on a company requiring the company to pay a specific debt, or the total amount of two or more debts, or to secure or compound for that amount or total to the creditor's reasonable satisfaction, within 21 days after the demand is served on the company. A company who claims to have complied with a statutory demand may apply to the Court under section 459G for an order to set it aside on that basis.   In August 2005, RMBL entered into a loan agreement with Accordent under which RMBL advanced a total of $12,408,000 secured by, among other things, a mortgage by Accordent in favour of RMBL over property known as Windsor Park Shopping Centre (the Centre). On 26 February 2008, RMBL gave to Accordent notice of default under the loan agreement relating to a failure to pay interest, at which time the whole amount of the loan became due and RMBL entered into possession of the Centre as mortgagee. On 11 September 2008, RMBL offered the Centre for sale by auction, exercising its powers as mortgagee. The highest bid, which was not accepted, was $11,750,000. On 12 September 2008, RMBL served a statutory demand on Accordent relating to the debt of $12,408,000, not including interest and costs that may have been payable to RMBL under the agreement.   The Full Court of the Supreme Court of South Australia, constituted by Doyle CJ, Bleby and Kelly JJ, granted permission to appeal the decision of Gray J not to set aside the statutory demand on the grounds that Gray J erred in failing to find that:   * the amount of the debt had been secured to RMBL's reasonable satisfaction within 21 days after the demand was served on Accordent; and * the fact and value of the security held by RMBL before the demand was issued, and still held by RMBL at the time of the appeal, amounted to some other reason why the demand should be set aside pursuant to section 459J(1)(b).  Section 459J(1) provides that on an application under section 459G, the Court may by order set aside the demand if it is satisfied that (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or (b) there is some other reason why the demand should be set aside.   **(c) Decision**   The judgment of the court was delivered by Doyle CJ with whom Bleby and Kelly JJ agreed.   **(i) Whether the debt had been secured**   Doyle CJ noted that the first ground raised two questions:   * Can a debtor who claims to have complied with a statutory demand apply to the court under section 459G for an order setting aside the demand on that basis?  Or, must the debtor wait until the creditor applies under section 459P for the debtor to be wound up in insolvency, relying on presumed insolvency by application of section 459C(2)(a) arising from a failure to comply with a statutory demand, and then deny that the debtor has failed to comply with the statutory demand? * Can a debtor on whom a statutory demand is served rely on security provided by the debtor to the creditor before the demand is served, to obtain a finding for the purposes of section 459F that the debtor has not failed to comply with the demand, or can a debtor only rely on security provided after the demand is served?   **Can a debtor who claims to have complied with a statutory demand apply to the court under section 459G for an order setting aside the demand on that basis?**   Under section 459F(1), the issue of failure to comply with the statutory demand arises, strictly, 'at the end of the period for compliance with a statutory demand'. If an application is made under section 459G for an order setting aside the statutory demand, the period for compliance with the statutory demand will end 'seven days after the application under section 459G is finally determined or otherwise disposed of' or when the court orders (section 459F(2)). Accordingly, if an application is made to set aside a statutory demand, the court will not be able to determine the question of compliance with the demand as at the expiry of the period for compliance.   Doyle CJ further noted that if the question of compliance can be raised under section 459G, then the failure to raise the question of compliance will mean that section 459S is engaged whereby the debtor will be restricted (in the absence of leave) from raising the issue of compliance on an application to wind up the debtor. Such a result would be inconsistent with section 459C(2)(a) which suggests that failure to comply with a demand is an issue to be decided on a winding up application.   Observing that an application to set aside a statutory demand is to be dealt with expeditiously, Doyle CJ noted that an application under section 459G is not an appropriate vehicle for the Court to embark upon potentially difficult questions relating to the valuation of property which is the subject of security held by the creditor who makes the demand, where that security is said to establish compliance with the demand.  Doyle CJ considered that a winding up application would be a more appropriate vehicle for the Court to consider disputed questions as to the value of security held by a creditor.   On this basis Doyle CJ favoured the conclusion that compliance with the demand was not an issue to be decided on an application to set aside a statutory demand under sections 459G and 459J, but can only arise on an application for winding up, if and when the creditor relies upon the statutory presumption of insolvency under section 459C(2)(a).  However, Doyle CJ did not decide the issue given the decision reached by the Court on the second question.   **Can a debtor rely on security provided before the demand is served, to obtain a finding for the purposes of section 459F that the debtor has not failed to comply with the demand?**   Doyle CJ concluded that, even if compliance with a demand is an issue to be decided under sections 459G and 459J(1)(b), the debtor must prove that it provided security to the creditor's reasonable satisfaction after service of the demand.     Whilst acknowledging that section 459E(2)(c) could conceivably, as Accordent submitted, be read as requiring compliance with the demand within a period that ends 21 days after the demand is served, but begins before service of the demand, Doyle CJ found that was not the apparent meaning of the words used.  Under that section, demand is made for payment, security or compounding.  Doyle CJ noted that if the debtor claims that it has paid or compounded for the amount of the debt before the demand is served, such a claim would support an argument that the debt no longer exists, rather than an argument that the debtor had complied with the demand.  As securing the debt is treated in the same way as payment and compounding, a demand for security also suggests that the reference is to an event after the service of the demand.   Whilst a secured creditor can sue for the amount of the debt (assuming there is a covenant to pay), and can recover judgment, regardless of the fact that the creditor holds security, Doyle CJ acknowledged that there may be reasons why a creditor making a statutory demand does not choose to resort to security that it holds.  For instance, the security may not be readily saleable, it may not be sufficient to cover the debt or there may be reasons why the creditor legitimately proposes to seek a winding up of the debtor.   On this basis, Doyle CJ concluded that Accordent was unable to prove compliance with the statutory demand.   **Whether the security amounted to some other reason why the demand should be set aside under section 459J(1)(b)**   Doyle CJ distinguished the second ground from the first on the basis that it was not an argument that the demand had been complied with, but that the security provided before the demand was served was itself a reason for setting the demand aside under section 459J(1)(b).   Noting that section 459J(1)(b) confers a wide power, counsel for Accordent submitted that given the value of the property over which RMBL held security exceeded the amount of the debt being the subject of the demand, or at least the substantiated amount of the demand:   * it was unjust to require a debtor of a secured creditor to provide further security; * it was unjust to require the debtor to wait until winding up proceedings are instituted before the debtor could rely on the fact that security has been provided; and * Accordent would in due course be able to establish compliance with the demand, and so should be able to have the demand set aside at that stage.   Whilst acknowledging that the power conferred by section 459J(1)(b) had been treated as a broad power, Doyle CJ considered the concept of an abuse of process is only relevant to an application to set aside a statutory demand by way of analogy.  As such, Doyle CJ observed that a court considering an application under section 459J(1)(b) must be careful not to allow the ordinary incidents of the service of a statutory demand, which may sometimes seem to operate harshly, to become a basis for setting aside a statutory demand.  However, the concept of abuse of process is relevant when considering an application by the creditor to wind up the debtor, provided the court recognises the manner in which the statutory regime relating to statutory demands operates.  In any case, Doyle CJ concluded that the concept of impropriety of purpose may be relevant to the application of section 459J(1)(b), whereby the question was whether Gray J should have found that there was good reason why the demand should be set aside for the purposes of section 459J(1)(b).   On this point, Doyle CJ was not persuaded that Gray J erred in finding that the matters posed by counsel for Accordent did not amount to a reason for setting the demand aside under section 459J(1)(b) on the following bases:   * no impropriety, in a general sense, on the part of RMBL had been asserted; * on the very limited evidence, one could not say that Gray J erred in failing to find that the security already provided to and held by RMBL clearly exceeded the amount of its debt or the amount of the substantiated amount of the claim; and * Gray J did not err in failing to hold that the security was of such value that it was unfair to allow the demand to stand, or in failing to hold that RMBL was misusing the statutory demand procedure.  As noted above, there is no reason why, in general, a secured creditor should not be entitled to avail itself of the statutory demand procedure.   **(iii) Orders**   The court granted permission to appeal on the second ground, but dismissed the appeal.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h5)  **4.7 Unfair preference payment: a debtor/creditor relationship able to be established through an indirect payment**  (By Chloe Johns, Mallesons Stephen Jaques)   Burness (as liquidator of Denward Lane Pty Ltd) (in liq) v Supaproducts Pty Ltd [2009] FCA 893, Federal Court of Australia, Gordon J, 18 August 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/august/[2009]%20fca%20893%20.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/august/%5B2009%5D%20fca%20893%20.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 highlights the indirect manner in which a preferential payment can be received from an insolvent debtor. It also demonstrates the commercial approach that the court will take to a business dealing in determining the meaning of "reasonable".   This case concerned three payments received by Supaproducts Pty Ltd ("the Defendant") for debts owed by Denward Lane Pty Ltd ("Denward Lane") during a period that Denward Lane was trading while insolvent. These payments were made by a third party called Pre Cast Panels Pty Ltd ("Pre Cast Panels").  Paul Burness ("the Liquidator"), who was appointed liquidator of Denward Lane, brought proceedings to recover these payments from the Defendant, claiming that they were unfair preference payments made in an insolvent transaction according to sections 588FA and 588FC of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act").   Justice Gordon held that the first payment made was an unfair preference, even though it was paid by Pre Cast Panels.  Her Honour concluded that a debtor/creditor relationship still existed between Denward Lane and the Defendant because Denward Lane authorised Pre Cast Panels to make the payments without providing consideration. The second and third payments were not preferential payments because at the time the payments were made there was no debtor/creditor relationship.   However, her Honour accepted that the Defendant did not suspect insolvency, nor would a reasonable person in the Defendant's position have suspected insolvency.  This resulted in the Defendant having a defence under section 588FG(2), which enabled it to retain the preferential payment.   **(b) Facts**   The Defendant sold and hired out building hardware to builders. For approximately eight years, up until 23 June 2005, the Defendant regularly supplied building hardware to Denward Lane.   The Defendant and Denward Lane used a running account in their business dealings. Throughout the eight year commercial relationship, Denward Lane would post date the cheques that were provided to the Defendant, as was common practice in the building industry.  These cheques frequently bounced.  However, at no time did a bounced cheque bounce a second time.   By November 2004, Denward Lane's trading account had increased to $182,841.02. In mid-December 2004, the director of the Defendant, Mr Messina, imposed a credit limit of $100,000 on Denward Lane.  Denward Lane reduced its account to this amount by the end of January 2005.   In June 2005, a director of Denward Lane, Stephen Smith, told Mr Messina that another company called Pre Cast Panels, of which Mr Smith was also a director, would be set up to continue Denward Lane's business.  On 10 June 2005, the Defendant received a payment from Pre Cast Panel for an invoice received by Denward Lane ("the first payment").   On 23 June 2005, Mr Smith informed Mr Messina that Denward Lane had ceased to operate and that Pre Cast Panels had taken over the business. The Defendant transferred the balance owed by the Denward Lane account to a Pre Cast Panels account. The Defendant then received payments from Pre Cast Panels on 28 June 2005 ("the second payment") and 12 July 2005 ("the third payment").   On 13 July 2005, Denward Lane was wound up and the Liquidator appointed.  Denward Lane was declared to be insolvent during the period that these three payments were made. The Liquidator commenced proceedings to recover these payments from the Defendant, claiming that they were unfair preferential payments.   **(c) Decision**   Justice Gordon dismissed the application, deciding that while the first payment was an unfair preference payment and an insolvent transaction within the meaning of sections 588FA and 588FC of the Act, the Defendant had a defence under section 588FG(2). Her Honour held that the second and third payments were not unfair preference payments. Therefore, none of the payments was able to be recovered by the Liquidator.   **(i) The first payment was an unfair preference payment made in an insolvent transaction: sections 588FA and 588FC**   Section 588FA(1) of the Act provides that there must be a debtor/creditor relationship between the insolvent company and the company that receives the payment in issue when a preference is given to a company. Justice Gordon considered whether the payment made by a third party (Pre Cast Panels) and not the debtor (Denward Lane) fell within the meaning of this section.   Her Honour noted the case of *Re Emanuel (No 14) Pty Ltd (in liq)*; *Macks v Blacklaw & Shadforth Pty Ltd* (1997) 147 ALR 281, which concluded that "a course of dealing initiated by [Denward Lane] that is intended to, and does, extinguish [the Defendant's] debt can in its totality be a transaction . notwithstanding that the achievement of that end can only be realised through the participation of a third party [Pre Cast Panels] in a particular dealing within the overall transaction, being a particular dealing to which [Denward Lane] is not a party".   On the facts in the present case, Pre Cast Panels discharged the debt at the request of, or with the acceptance of, Denward Lane. Accordingly, her Honour concluded that Denward Lane did authorise the payment made by Pre Cast Panels, and that this resulted in a finding that the payment was made to the Defendant as required under section 588FA(1)(a) of the Act.   Justice Gordon then determined that the payment did fall within the meaning of "preferential" in section 588FA(1)(b) of the Act, because there was no evidence that Denward Lane provided any consideration to Pre Cast Panels in exchange for its payment of Denward Lane's debt. Additionally, if the Defendant had to prove its debt in the winding up of Denward Lane, the Defendant would have received less than the amount of the first payment.   **(ii) The second and third payments were not unfair preference payments**   Justice Gordon held that at the time of the second payment and the third payment, no debtor/creditor relationship existed, because the ledgers of the Defendant showed that the Denward Lane debt had been taken over by Pre Cast Panel. This relationship requirement is a precondition to the operation of section 588FA of the Act, and due to its absence, the second and third payments were not unfair preference payments.   **(iii) There was an applicable defence under section 588FG(2)**   Justice Gordon noted that case law defines the relevant concept of "suspecting" insolvency as "more than idle wondering, but a positive feeling of actual apprehension or mistrust without sufficient evidence".   Her Honour held that neither the Defendant, nor a reasonable person in its circumstances, would have had reasonable grounds for suspecting that Denward Lane was insolvent. This meant that the defence under section 588FG(2)(b)(i) and (ii) applied.  The reasons for this conclusion were as follows:   * The Defendant continued to offer a credit limit of $100,000 to Denward Lane on payment terms of 30 days. It would be unlikely that they would have done this if they suspected insolvency. * The Defendant only offered credit to certain customers, namely those that it felt were capable of discharging their debts. * Mr Messina never accepted that the debt could not be repaid. * The Liquidator made a reasonable submission on the relevance of the size of the credit account, and the failure to reduce that level of debt in a timely fashion would make a reasonable person suspect insolvency.  However, Gordon J highlighted the commercial nature of the relationship, and noted that the Defendant considered the hire relationship with Denward Lane profitable, which it had been so for eight years, and that the Defendant thought that it would remain so in the future. * The fact that the Defendant received post-dated cheques, some of which bounced, was not indicative of insolvency, because these occurrences were not uncommon in the building and construction industry.  This was further supported by the fact that Denward Lane promptly covered the payment of the dishonoured cheques.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h5)  **4.8 Guidance for liquidators in the winding up of a company - directions given under section 479(3) of the Corporations Act**  (By Dylan Burke, DLA Phillips Fox)   Re Mento Developments (Aust) Pty Ltd [2009] VSC 343, Supreme Court of Victoria, Robson J, 17 August 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/august/2009vsc343.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/august/2009vsc343.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 was concerned with two issues: first, the principles to be applied in considering an application by a liquidator seeking directions in the winding up of a company, and secondly, the principles to be applied in considering the question of the capacity in which an entity enters into a transaction.   In considering the application by the liquidator seeking directions in the winding up of Mento Developments (Aust) Pty Ltd (Mento Developments), Robson J considered the circumstances in which a liquidator may seek directions under section 479(3) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Robson J held that a liquidator may seek directions in a similar manner to the way in which a trustee may apply for judicial advice under section 63 of the [Trustee Act 1925 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "Default). In doing so, his Honour applied the principles outlined by the High Court of Australia in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 (St Petka Inc v Petar).   In considering the issue of the capacity in which a company enters into a transaction, Robson J held that it is a matter to be determined objectively and not on the basis of subjective intentions of the parties.  His Honour also noted that there is no presumption that a company is acting in any capacity other than on its own behalf when contracting with another party, unless the circumstances of the case establish that the company entered into a transaction in some other capacity. In doing so, Robson J favoured the approach of Eames J in *Re Interwest Hotels Pty Ltd (in liq)* (1993) 12 ACSR 78.   **(b)  Facts**   The court appointed liquidator of Mento Developments, Giuseppe Rambaldi, sought directions in the winding up of Mento Developments. Mento Developments was the trustee of four trusts: the Weeroona St Unit Trust (WSUT), the Mento Developments Trust (MDT), the Simmons Investment Trust and the Rovada Downs Trust.   The WSUT owned land on which farming activities were conducted by Mento Developments as trustee of the MDT. Mento Developments also conducted an accounting practice as trustee for the MDT.   The trust assets of the MDT included plant and machinery used on the farming properties, motor vehicles for both the farm and the accounting practice, and furniture and fittings for the accounting practice. The trust assets of the WSUT included the land on which the farming activities were conducted.   On 26 August 2003, Mento Developments was replaced by Wixart Pty Ltd as the trustee of the four trusts.   Mento Developments was wound up in insolvency by an order made on 27 July 2005 on the application of Rexwell Pty Ltd (Rexwell). The claim by Rexwell arose out of a guarantee given in respect of a joint venture agreement dated 20 March 1998 between, inter alia, Mento Developments and Rexwell. It was unclear on the terms of the guarantee and the negotiations preceding the execution of the guarantee whether the guarantee was given by Mento Developments in its own capacity or in its capacity as trustee of certain of the trusts.  **(c)  Decision**   In making its application seeking directions of the Court with respect to the winding up of Mento Developments, the liquidator sought answers to the following questions: First, was Mento Developments the trustee of the WSUT and the MDT at the time it executed the guarantee in favour of Rexwell?   Secondly, and depending on the answer to the above, did Mento Developments execute the guarantee in its own capacity or in its capacity as trustee of the WSUT and/or the MDT?   Thirdly, did Mento Developments own the farming properties in its own right or in its capacity as trustee of the WSUT?   The issue of ownership of the farming properties did not receive detailed consideration by Robson J. However, the first two issues were discussed at length.  **(i)   What direction (if any) can be given to liquidators under section 479(3) of the Corporations Act?**  Robson J favoured the approach of the plurality (Gummow ACJ, Kirby, Hayne and Heydon JJ) in St Petra Inc v Petar, which concerned judicial advice given under section 63 of the Trustee Act. The plurality in St Petra Inc v Petar held that in order to bring an application seeking judicial advice under section 63, a trustee must be able to point to the existence of a question relating to the management or administration of the trust property or a question relating to the interpretation of the trust instrument. In doing so, the plurality emphasised the purpose of judicial advice under section 63 as providing a cheap and simple process by which a trustee may receive personal protection in administration of the trust property.    This judicial advice resolves doubts about whether it is proper for a trustee to incur costs and expenses of prosecuting or defending litigation, and in doing so, protects the interests of the trust, as the interests of the trust will not be subordinated to the trustee's fear of personal liability for costs.   Quoting extensively from the judgment of the plurality in St Petra Inc v Petar, Robson J held that:   * The liquidator was entitled to seek directions on the winding up even though the issue about which directions are sought may be or become an adversarial issue in other proceedings. * The direction or advice is to be directed to advising the liquidator on whether he or she is justified in conducting the winding up in a certain way. The direction or advice is not concerned with deciding disputes between competing parties. * The direction or advice should not seek to resolve an issue between competing parties but the fact that the advice may tend to foreclose an issue in other disputed proceedings is not of special significance in the court exercising its discretion to give private advice to the liquidator. * Where a liquidator seeks advice on an issue which may be contested between competing parties, the court should be alert to not going further than is necessary to give the advice sought. * It is unnecessary for a court to limit the range of matters about which the liquidator may seek directions.   **(ii)       In what capacity has a company acted?**   Robson J then considered the capacity in which Mento Developments executed the guarantee. Following the decision of Eames J in *Re Interwest Hotels Pty Ltd*, his Honour observed that:   * The question of the capacity in which a company executes an instrument is a matter to be determined objectively by reference to all circumstances in the case, and not on the basis of the subjective intentions of the parties. * There is no presumption that a company is acting in any capacity other than on its own behalf in contracting with another party. There is therefore no rule that a company is, without more, to be presumed to be acting in a capacity other than its personal right when contracting with another party. * Where a company is known to have only acted in the past in its capacity as trustee, and in claiming to act in its own right gives a worthless guarantee, that company faces an evidential burden in order to establish that the other party accepted that the company was acting in its own capacity.   The evidence before Robson J comprised letters exchanged during negotiation of the terms of the guarantee, and the oral evidence of the sole director of Mento Developments, a director of Rexwell and his solicitor. The difficulty in this case was that the negotiations took place 11 years prior to the proceedings, and therefore, the memory of all concerned was 'hazy'. As a result, more emphasis was placed on the written evidence at hand, in which MDT was noted as one of the parties providing a guarantee. However, there was no such reference to WSUT, nor was there any evidence brought to suggest that WSUT was to provide a guarantee.  **(iii)     Conclusion**   Based on the evidence, Robson J directed that the liquidator was justified in conducting the winding up of Mento Developments on the basis that:   * Mento Developments was the trustee of the WSUT and the MDT when it executed the relevant guarantee; * Mento Developments executed the relevant guarantee in its capacity as trustee of the MDT, but did not do so in its capacity as trustee of the WSUT; and * Mento Developments owned the farming properties as trustee of the WSUT.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h5)  **4.9 Application under section 450E of the Corporations Act to dispense with the need to include the words "subject to deed of company arrangement" after the company name for a company under voluntary administration**   (By Meng-xi Hu, Blake Dawson)   De Vries re TMPL Pty Ltd [2009] NSWSC 818, New South Wales Supreme Court, Barrett J, 14 August 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/august/2009nswsc818.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/august/2009nswsc818.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**   TMPL Pty Ltd ("TMPL") was put into voluntary administration and entered into a deed of company arrangement ("DOCA"). The administrators of TMPL applied for relief under section 450E(2) of the Act to dispense with the need to include the words "subject to deed of company arrangement" after the company name in all public documents and negotiable instruments as required under that section.     Section 450E(5) states that this relief cannot be granted if it would pose a risk to creditors (including prospective creditors) of the company. Barrett J held that, even if there was no risk to creditors, section 450E required the applicant to establish a positive case that the granting of the dispensation would be beneficial to the interests of the company as a whole.  Although he found that relief would not pose a risk to creditors on the facts at hand, he was not satisfied that dispensation would be beneficial to TMPL (as opposed to its director or associate bodies).  He noted that any adverse impact on the interests of the director and/or related entities were not relevant considerations for an application under this provision.  The application was dismissed.                            **(b) Facts**    TMPL was an investment and service company. As a result of a significant adverse tax assessment (against which TMPL intends to appeal), its sole director, Mr De Vries, put TMPL into voluntary administration and TMPL entered into a DOCA on 1 July 2009. TMPL was to be in a "semi-dormant" state for the period of the DOCA, with trading to be suspended and its only activities being those related to the tax appeal.   The administrators of TMPL (Mr David Solomon and Mr De Vries) applied to the court under section 450E(2) to dispense with the need to include the phrase "subject to DOCA" after the name of the company in every public document and negotiable instrument. Section 450E(2) imposes this obligation unless leave from the court is obtained. Section 450E(5) provides that this relief can only be granted if the court "is satisfied that the granting of leave will not result in any significant risk to the interests of the company's creditors (including contingent or prospective creditors) as a whole".   **(c) Decision**    **(i) Rationale of section 450E**   Barrett J noted that the current wording of section 450E (effective since 31 December 2007) is based on Recommendation 33 of a report of the Corporations and Markets Advisory Committee (CAMAC). That report stated that while the section 450E(2) requirements were intended to protect prospective creditors, the inclusion of the words may have "adverse impacts on a company's goodwill and reputation, which in turn affects the company's ability to continue trading, impinge on the rescue of the business and ultimately reduce the amount available to creditors." Accordingly, exemptions from its application may be required in certain circumstances to benefit the company and ultimately its creditors, such as where the deed administrator had received the money to be paid to creditors but there remain unresolved disputes relating to proofs of debts.                                                                        Barrett J noted that the fulfilment of section 450E(5) was only a "trigger" for the court's discretion so that even if the court was satisfied that the granting of leave would not prejudice current or prospective creditors, it is under no obligation to grant the relief. He held that section 450E requires a "positive case" to be made showing that the interests of the company would be "positively serviced in some identifiable and relevant way" through the granting of leave.   **(ii)  Application to the facts**   Barrett J accepted that TMPL would only operate as a non-trading investment and service vehicle during the period of the DOCA and therefore would "not incur any debts or liabilities to third party creditors" during this time. Accordingly he was satisfied that there would be no risk to current or prospective creditors for the purpose of section 450E(5).   Despite this conclusion, Barrett J noted that dispensation was not "necessary or desirable" from TMPL's perspective. As TMPL would only have dealings with those who were already aware of the DOCA during the period of its administration, there would be no further adverse effect on its goodwill or reputation through inclusion of the words after its name. Furthermore, the inclusion of the phrase would not curtail trade as there was to be little or no trading during this period.   The applicants had contended that the inclusion of the phrase would have a negative impact on the personal reputation of Mr De Vries, his family members and their associated entities.  Barrett J dismissed this argument, stating that "personal interests of the directors (and those of his family and associated interests) are divorced from the welfare of the company itself" and were not relevant interests to be considered under an application for leave under section 450E(2).    Barrett J held that no positive case for the grant of the relief under section 450E(2) had been shown and accordingly dismissed the application.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h5)  **4.10 An unreasonable director-related transaction under section 588FDA of the Corporations Act**    (By Michelle Batsas and Laura Keily, Corrs Chambers Westgarth)   Slaven v Menegazzo [2009] ACTSC 94, Supreme Court of the Australian Capital Territory, Mansfield J, 14 August 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/act/2009/august/2009actsc94.htm](http://cclsr.law.unimelb.edu.au/judgments/states/act/2009/august/2009actsc94.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**   In this case Michael Edward Slaven (the Liquidator), liquidator for R & R Nominees Pty Ltd (the Company), sought a declaration that a sale of land contract made on 4 August 2006 (the Contract) between the vendor Company and the purchaser Clinton Menegazzo (Menegazzo) was void.     The Liquidator made an application under section 588FF of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) seeking to have the Contract declared void, on the basis that the Contract was an unreasonable director-related transaction for the purposes of section 588FDA of the Act.    The court declared that the Contract was void on the basis that it was an unreasonable director-related transaction as it would be expected that a reasonable person in the Company's circumstances would not have entered into the transaction.     **(b) Facts**    John Menegazzo and Raymond Schofield were the shareholders and directors of the Company. The Company sold the property to Menegazzo (John's son) for $425,000, but the Contract contained unusual terms as to payment of the purchase price. The purchase price of $425,000 was to be satisfied by the payment of $40,000 to John Menegazzo (paid in cash on 4 August 2006) and by the release of his parents' indebtedness to him of $130,000. No deposit was payable. The $40,000 was supposed to be paid at settlement but Menegazzo paid it when the Contract was signed, as his father indicated he otherwise would not sign the Contract.     John Menegazzo signed the Contract as a director of the Company, not in his personal capacity. The completion date was "21 days after notice of registration of Strata Plan", which occurred only on 17 July 2007.  Completion never occurred.    The Company was a trustee company for the R & J Development Trust, of which the director's family trusts were beneficiaries. At the time of the Contract, the Company was in the process of completing the construction of a development comprising ten units, with a projected net profit of $971,903.00.  This amount would be available for distribution to the unit holders.     The distribution from the sale of the development was anticipated to be $458,951.50 each to the Schofield interests and the Menegazzo interests. However, the property was sold on the understanding between the directors, not formally recorded, that the price would be deducted from the Menegazzo interests' share of profit from the development.   Menegazzo took possession of the property soon after construction was completed, and added tiling, carpeting and blinds at a total cost of $5,398.  The Company was not required to install such fixtures, but Menegazzo was not obliged to install them either. The property was also used briefly as a display unit and rented for a few weeks during the holiday season, with the rent received given to John Menegazzo. Otherwise, since November 2006, Menegazzo generally occupied the property and exclusively occupied it since July 2008. He did not paid rent.  In February 2007 Menegazzo paid stamp duty of $14,619.00. Following registration of the Strata Plan on 17 July 2007, Menegazzo sought to complete the settlement of the property, without the intention of paying any money.  However the relationship had broken down between the directors and between Menegazzo's parents. The sales of the other units in the development were greatly delayed, and when sold they did not realise the previously anticipated revenue.     On 25 July 2008 the Company was wound up, not for insolvency but because of the breakdown in the relationship of its directors. The Liquidator received a claim on behalf of Menegazzo to complete the Contract.  After investigation he declined to do so and sought to have the Contract declared void on the basis that it was an unreasonable director-related transaction.  The Liquidator was in possession of proofs of debt from creditors of the Company which exceeded its assets (namely cash at the bank).   **(c) Decision**    The test for an unreasonable director-related transaction is set out in section 588FDA(1) of the Act. The critical question for the Court was whether paragraph 588FDA(1)(c) was satisfied as paragraphs 1(a) and 1(b) were clearly satisfied.  Section 588FDA(1)(c) provides that a transaction of a company is an unreasonable director-related transaction of the Company if it may be expected that a reasonable person in the Company's circumstances would not have entered into the transaction, having regard to the factors left out in sub-paragraph (i) to (iv).   The court made the following assessment of the sub-paragraphs of paragraph 1(c):   **(i) The benefits (if any) to the company of entering into the transaction**   The benefits to the Company were negligible.  It contracted to sell the property which was considered to be valued at $425,000, for no real benefit to the Company.  It was to have received no payment at settlement. There was no legal obligation that John Menegazzo, upon receipt of the $40,000, was to pay that sum to the benefit of the Company, and that sum was paid at the time of the Contract, not settlement. There was nothing to suggest it was paid to the Company.  In addition, there was nothing to indicate that the repayment of the $130,000 loan was for the purposes of the Company.     The only possible benefit to the Company was the obligation undertaken by Menegazzo, on settlement, to rent the property at a market rent, however there was no obligation on John Menegazzo to pay the received rent to the Company, and therefore there was no benefit to the Company anyway. The Contract did not oblige Menegazzo to undertake any improvements or to make the property available for a display unit, or arrange for the letting of the property for holiday rentals. Even though Menegazzo did those things, he was not obliged to and therefore did not convey those benefits to the Company for the purposes of subparagraph (1)(c)(i).   **(ii) The detriment to the company of entering into the transaction**   The detriment to the Company of entering into the transaction was plain. The company disposed of a significant asset, to the benefit of John and Jill Menegazzo and possibly to Menegazzo, but for no real consideration to itself. In effect, it gave away a valuable asset.   **(iii) The respective benefits to other parties to the transaction of entering into it**   The transaction enabled Menegazzo to recover from his parents the indebtedness of $130,000, and correspondingly they were to be released from that indebtedness. John Menegazzo received $40,000. Although he spent money on the fit out, Menegazzo occupied the property rent free for most of the time since the Contract was executed, so the Company received no benefit from these actions.     **(iv) Any other relevant matters**   Underlying the transaction was the expectation of the Company that the development would be realised and provide a significant surplus of profits to the directors' families through their respective family trust structures that were set up.  There was no reason to expect, at the time of the Contract, that those estimates would not come to pass in the relatively near future. However that revenue was not assured.  There were substantial outstanding liabilities, in particular the secured liability to the bank.     Bearing these factors in mind, the court concluded that a reasonable person in these circumstances would not have entered into the Contract. An order was made under section 588FF(1)(h) of the Act, declaring the Contract void at the time it was made.  As the Contract was an unreasonable director-related transaction, it was voidable under section 588FE(6A) of the Act because it was within four years of the relation-back day, that is four years from the date of the winding up of the Company on 25 July 2008.     The court made an order under section 588FF(4) of the Act for the purpose of recovering, for the benefit of the creditors of the Company, the difference between the total value of the benefits provided by the Company under the transaction, and the value (if any) that it may be expected that a reasonable person in the Company's circumstances would have provided having regard to the matters referred to in section 588FDA(1)(c). The value of the benefits provided by the Company under the transaction was the value of the property, in effect its purchase price.     The court did not think it was necessary to make an order compensating Menegazzo for what he had spent on the property. He had lived rent free in the property and could recover the $130,000 loan amount and the $40,000 paid to his father as debts owed.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h5)  **4.11 Reinstatement of a company under section 601AH(2)**  (By Mark Cessario and Nadya Marokakis, Corrs Chambers Westgarth)   Blazai Pty Ltd v Gateway Development (St Marys) Pty Ltd [2009] NSWSC 800, New South Wales Supreme Court, Tamberlin AJ, 12 August 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/august/2009nswsc800.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/august/2009nswsc800.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**   Blazai Pty Limited ("Blazai") sought an order under section 601AH(2) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act") to reinstate the registration of Gateway Development (St Marys) Pty Limited ("Gateway"). The purpose of this application was to enable Blazai to wind up Gateway under section 461(1)(k) of the Act and to enable proceedings to be taken against a deemed director, Justin Palasty.    Blazai submitted that it was a "person aggrieved" by the deregistration of Gateway because it was deprived of its right to pursue Mr Palasty for breach of the director's duty to prevent insolvent trading.  Further Blazai emphasised the administrative nature of the circumstances in which Gateway came to be deregistered, namely a mere failure to lodge a return and that no meaningful prejudice to any party would be caused by Gateway's reinstatement.   In considering whether the application should be granted, Tamberlin AJ held that Blazai was a "person aggrieved" as required by the Act however he could not be satisfied that it was just that Gateway's registration be reinstated.  His Honour explained that Blazai's lengthy delay in pursuing its alleged rights, the contingent and speculative nature of the proceedings against Mr Palasty and the prejudice likely to arise on the part of Mr Palasty having regard to the lapse of time, was sufficiently clear to make the application for reinstatement unjust. As such the application was dismissed.   **(b) Facts**   Gateway entered into a contract for sale of land with Blazai on 3 August 2001. On 15 August 2002, which was the date of completion, Blazai served a notice to complete on Gateway requiring completion on 29 January 2002. On 23 January 2002, Gateway served a notice of termination on Blazai who treated the notice as a repudiation of the contract and indicated that it would seek damages.     On 23 March 2005, Blazai wrote to the Australian Securities and Investments Commission ("ASIC") notifying it that it was compiling the necessary documents to institute proceedings against Gateway, noting that proceedings must take place prior to August 2007 (being the date on which the limitation period for the action against Gateway expired). The letter stated that, according to Tony Loiero, a principal of Blazai, it was understood that Gateway had a financial obligation in respect of the contract for sale of land on 3 August 2001 in the order of $1.2 million and that Mr Loiero believed Gateway may consider a voluntary deregistration process to evade the obligation.    On 15 January 2006, Gateway was deregistered by ASIC. On 22 September 2007, Blazai wrote to ASIC stating that it had become aware that Gateway had become deregistered and requesting ASIC to reinstate the registration of the defendant. This request was rejected by ASIC on 8 October 2007.   On 5 November 2008 Blazai began proceedings in the Supreme Court to reinstate Gateway.    **(c) Decision**   Section 601AH(2) of the Act provides that the court may make an order that ASIC reinstate the registration of a company if (a) an application for reinstatement is made to the court by a person aggrieved by the deregistration or a former liquidator of the company; and (b) the court is satisfied that it is just that the company's registration be reinstated.   In considering the application to reinstate, Tamberlin AJ found no difficulty in identifying Blazai as a "person aggrieved" according to section 601AH(2).  The real contention was whether the reinstatement of Gateway would be just.    Referring to the judgement of Goldberg J in *Promnitz v Australian Securities and Investments Commission* [2004] FCA 22, Tamberlin AJ noted that a number of matters ought to be taken into account when determining whether an application to reinstate is just, namely:   * the circumstances in which the company came to be deregistered; * the future activities of the company if an order be made; and * whether any particular person is likely to be prejudiced by the reinstatement.   In assessing these matters and the circumstances of the present case, Tamberlin AJ could not be satisfied that the reinstatement of Gateway was just. He explained firstly that the lengthy delay of Blazai in pursuing its alleged rights had not been satisfactorily explained.  Gateway had been deregistered almost four and a half years after the time when the debt relating to the contract for sale was due, however Blazai remained inactive during the entire six year limitation period.   Secondly, Tamberlin AJ stated that Blazai's case again Mr Palasty was one which would involve examining the conduct, records and activities of Mr Palasty and the way the company was conducted more than eight years ago. His Honour stated that "records may no longer exist, witnesses may be unavailable or recollections are likely to have faded." Tamberlin AJ explained that this uncertainty in relation to records, witnesses and other evidentiary material was likely to be unjust towards Mr Palasty if proceedings were to be commenced against him.   As a consequence of the lengthy passage of time in which no action was taken by Blazai, Tamberlin AJ held that it would be "unjust and unfairly prejudicial to now subject Mr Palasty to legal proceedings in circumstances where Blazai has neglected to act in a timely and reasonable way". Tamberlin AJ said that this lapse in time significantly undermines the policy behind the [Limitation Act 1969 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4062" \t "Default) which is meant to impart a sense of certainty in relation to a person's exposure to liability.    On the basis of these considerations, Tamberlin AJ held that it would be unjust to reinstate the registration of Gateway and dismissed the application.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h5)  **4.12 The power of the court to approve and alter a scheme of arrangement**   (By Andrew Honigman, Freehills)   In the matter of Opes Prime Stockbroking Limited (No 2) [2009] FCA 864, Federal Court of Australia, Finkelstein J, 4 August 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/august/2009fca864.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/august/2009fca864.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**   Finkelstein J of the Federal Court approved the schemes of arrangement between each Opes Group company and its creditors under section 411(6) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act). The schemes were proposed after creditors resolved to have the Opes Group companies wound up.    In making this order, Finkelstein J considered the court's power to approve and alter a scheme under section 411(6), determining (at [17]) that the 'court could remove an unreasonable or unfair provision in a scheme . provided what remains is, substantially speaking, the scheme to which the members or creditors . agreed.'    After reconciling potentially 'troubling aspects of the proposed schemes', Finkelstein J found the terms of the scheme reasonable in all the circumstances. Significantly, Finkelstein J was swayed by the large number of sophisticated and informed creditors who supported the schemes at the creditors' meetings.    **(b) Facts**   Opes Prime Stockbroking Limited (OPSL) and Leveraged Capital Pty Ltd (Leveraged Capital), both stockbroking businesses, provided finance for their client's share trading activities in exchange for their clients agreeing to transfer title to their securities (an arrangement know as "securities lending"). In order to secure the necessary finance, OPSL and Leveraged Capital would on-lend these securities to financiers. The principal financiers being Australia and New Zealand Banking Group Limited (ANZ) and Merrill Lynch. Hawkswood Investments Pty Ltd (Hawkswood), an investment vehicle for OPSL, and Opes Prime Group Limited (OPGL), a holding company for the Opes Group (consisting of OPSL, Leveraged Capital, Hawkswood and OPGL) were joined to the proceedings.   Following the 2007 stock market crash, clients sought to retrieve their securities from OPSL and Leveraged Capital. In the vast majority of cases, OPSL and Leveraged Capital no longer held those securities, nor did they have the requisite funds to purchase the securities on the open-market. As a result, by March 2008, the companies in the Opes Group had become insolvent, with liquidators appointed after creditors resolved to have the companies wound up.    Following the collapse, a number of proceedings were instituted by clients against companies in the Opes Group, as well as its principal financers, ANZ and Merrill Lynch (claims estimated to total approximately $630 million). In light of the pending litigation, liquidators sought to promote schemes of arrangement between each company in the Opes Group and its creditors. Under the proposed schemes, ANZ and Merrill Lynch were to contribute $253 million towards a scheme fund to be distributed between unsecured creditors (with $11.5 million allotted to litigation funders and those creditors who had commenced litigation). In exchange, the schemes' creditors were to release (and indemnify) all claims against Opes Group companies, ANZ and Merrill Lynch.    **(c) Decision**   **(i) Section 411(6) of the Corporations Act**   At meetings of the companies' creditors, convened with the leave of the court, the schemes of arrangement between each Opes Group company and its creditors were agreed to by substantial majorities. Application was made to Finkelstein J to approve these schemes under section 411(6) of the Corporations Act.    Section 411(6) of the Corporations Act provides that the court may approve a scheme of arrangement subject to such alterations as it thinks fit. In considering the court's power under this section, Finkelstein J held (at [17]):  'there is no doubt that the court could remove an unreasonable or unfair provision in a scheme if the inclusion of that provision might warrant withholding approval, provided what remains is, substantially speaking, the scheme to which the members or creditors, as the case may be, agreed.'    Finkelstein J accepted evidence that if potentially 'troubling aspects of the proposed schemes' (discussed below) had been removed, the schemes may have been defeated at the creditors' meetings. As a result, Finkelstein J found that the court would be unable to make any such amendments and rather would be required to determine whether the provisions of the schemes, as they were agreed to at the creditors' meetings, were 'so unfair that they should not be approved' (at [19]).   **(ii) Specific aspects of the schemes of arrangement**   In considering the court's discretion under section 411(6), Finkelstein J indentified the following potentially 'troubling aspects of the proposed schemes'(at [12]):   * the distribution of $11.5 million otherwise than to the unsecured creditors (potentially a departure from the pari passu rule); and * the terms of the release and indemnity deed to be executed on behalf of the schemes' creditors.   Counsel for creditors opposing the schemes argued that the provision of $11.5 million ($3.5 million to litigation funders and $8 million to cover the legal costs incurred by creditors who had instigated litigation) amounted to a departure from the statutory regime for the distribution of assets in a winding up (ie the pari passu rule).    Finkelstein J held that the provision of the $11.5 million sum was not a true departure from the pari passu rule. The money in the scheme fund would not technically form part of the liquidator's assets, as it had been provided by ANZ and Merrill Lynch in the absence of a certain claim. Notwithstanding this characterisation of ANZ and Merrill Lynch's contribution, Finkelstein J felt the provision of the $11.5 million sum was reasonable in all the circumstances as:   * $11.5 million was only a very small proportion of the funds available for distribution amongst the schemes' creditors; * the schemes required creditors who had commenced litigation to discontinue proceedings without an order to costs; and * the action of litigation funders may have contributed to the decision of ANZ and Merrill Lynch to provide such a significant contribution to the scheme fund.   The release and indemnity deed, which forms part of the proposed schemes of arrangement, provides that each creditor must indemnify the released parties against any loss or liability resulting from an Opes Group related claim. The cap is limited to (a) the amount actually received by the creditor under the scheme plus (b) the proceeds received by a creditor in respect of any third party claims (i.e. claims brought by creditors against financial advisers). Although expressing concern at the potential for the indemnity to extend to proceeds received by creditors in claims against third parties, Finkelstein J felt that the mere presence of the indemnity would be unlikely to act as a bar against third party claims, and thus would likely have little practical application.    **(iii) General comments**   In electing to approve the schemes of arrangement, Finkelstein J was swayed by the large number of creditors who supported the schemes at the creditors' meetings. Although acknowledging (at [27]) he would not 'defer to the views of the creditors in a clear case of unfairness or if a scheme were patently unreasonable', Finkelstein J felt that given the sophistication of the creditors, this was a 'very good example of a scheme the reasonableness of which is best judged by the creditors'.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h5)  **4.13 Release of third party claims under schemes of arrangement**    (By Andrew Honigman, Freehills)   In the matter of Opes Prime Stockbroking Limited [2009] FCA 813, Federal Court of Australia, Finkelstein J, 3 August 2009    The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/august/2009fca813.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/august/2009fca813.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**  Finkelstein J of the Federal Court granted leave under section 411(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) for meetings of classes of creditors to be convened to consider proposed schemes of arrangement between Opes Group companies and their creditors. The schemes were proposed after creditors resolved to have the Opes Group companies wound up.    Significantly, in making this order, Finkelstein J determined that a scheme of arrangement was capable of barring claims against third parties, as well as the scheme company, provided there was a 'sufficient nexus between the release and the relationship between the creditor and the scheme company'. Finkelstein J's findings emphasise the potential for schemes of arrangement to provide a flexible tool to resolve disputes arising out of corporate insolvencies.    **(b) Facts**     Opes Prime Stockbroking Limited (OPSL) and Leveraged Capital Pty Ltd (Leveraged Capital), both stockbroking businesses, provided finance for their client's share trading activities in exchange for their clients agreeing to transfer title to their securities (an arrangement know as "securities lending"). In order to secure the necessary finance, OPSL and Leveraged Capital would on-lend these securities to financiers. The principal financiers being Australia and New Zealand Banking Group Limited (ANZ) and Merrill Lynch. Hawkswood Investments Pty Ltd (Hawkswood), an investment vehicle for OPSL, and Opes Prime Group Limited (OPGL), a holding company for the Opes Group (consisting of OPSL, Leveraged Capital, Hawkswood and OPGL) were joined to the proceedings.   Following the 2007 stock market crash, clients sought to retrieve their securities from OPSL and Leveraged Capital. In the vast majority of cases, OPSL and Leveraged Capital no longer held those securities, nor did they have the requisite funds to purchase the securities on the open-market. As a result, by March 2008, the companies in the Opes Group had become insolvent, with liquidators appointed after creditors resolved to have the companies wound up.    Following the collapse, a number of proceedings were instituted by clients against companies in the Opes Group, as well as its principal financers, ANZ and Merrill Lynch (claims estimated to total approximately $630 million). In light of the pending litigation, liquidators sought to promote schemes of arrangement between each company in the Opes Group and its creditors. Under the proposed schemes, ANZ and Merrill Lynch were to contribute $253 million towards a scheme fund to be distributed between unsecured creditors. In exchange, the schemes' creditors were to release all claims against Opes Group companies, ANZ and Merrill Lynch. To simplify the process, the schemes provided that all undertakings, assets and liabilities of each scheme company (other than OPGL), as well as ANZ and Merrill Lynch's contribution, were to be transferred to OPGL, in effect pooling the assets and liabilities of the Opes Group.    **(c) Decision**  The liquidators sought leave from the Federal Court under section 411(1) of the Corporations Act to convene meetings of creditors to consider proposed schemes of arrangement between each Opes Group company and its creditors (convening application). The schemes of arrangement considered 'several important issues of principle' and as such, leave to appear at the convening application was granted to ANZ, Merrill Lynch, the Australian Securities and Investments Commission (ASIC), creditors and the liquidators.   **(i) Can a scheme of arrangement bar a claim against a third party?**  The proposed schemes of arrangement sought to bar scheme creditors from pursuing claims against ANZ and Merrill Lynch - third parties to the schemes. As such, it was necessary for Finkelstein J, in considering whether to convene the meetings of scheme creditors under section 411(1) of the Corporations Act, to determine whether a scheme is capable of providing a release for a third party. For this to be the case, a scheme containing such a provision would need to come within the words of section 411(1), namely 'a compromise or arrangement . between a ... [company] and its creditors or any class of them'. In considering this, Finkelstein J found that two questions need to be answered:   * did barring a claim amount to a "compromise" or "arrangement"? And, if so; * was barring a claim a compromise or arrangement between the company and its creditors? i.e. can a scheme of arrangement bar claims against third parties?   Finkelstein J noted that the terms "compromise" or "arrangement" were not defined in the Corporations Act and thus it was necessary to look to the common law to ascertain their meaning. It was submitted by counsel for unsecured creditors opposing the schemes, that the release amounted to a confiscation of creditors' property and therefore was not an "arrangement" for the purposes of section 411(1) (citing a line of authority most recently applied in *Re NFU Development Trust Ltd* [1972] 1 WLR 1548). Finkelstein J (at [33]) rejected this submission, observing that ANZ and Merrill Lynch had contributed a large sum of money to be rid of claims by liquidators and creditors, and thus what was proposed under the schemes 'is not a confiscation of property . but a true compromise of the claims against the banks'.   After careful consideration of the conflicting case law in the area and the purposes of section 411 of the Corporations Act, Finkelstein J determined that a scheme of arrangement is capable of barring claims against third parties. In reaching this conclusion, Finkelstein J chose not to follow *Re Buildmat (Australia) Pty Ltd and the Companies Act* (1981) 5 ACLR 689, the only Australian authority directly on point. (In that case, the court had held that a scheme which released the debt owed by a company did not discharge the guarantee). Rather, in recognising the importance for section 411 to have a flexible operation, Finkelstein J was swayed by the "pro-release approach" adopted subsequently in the UK, Singapore, Canada and the US.    Finkelstein J held (at [55]) that 'provided there is a sufficient nexus between a release and the relationship between the creditor and the scheme company, the scheme can validly incorporate the release'. On the facts, Finkelstein J found that a sufficient nexus existed by virtue of the overlapping nature of the creditors' claims against the Opes Group companies and ANZ and Merrill Lynch, the interlocking nature of these claims and the fact that, without the release of the third parties, none of the claims would be compromised.    In reaching this conclusion, Finkelstein J rejected an argument that section 411 of the Corporations Act is unconstitutional on the grounds that it permits the acquisition of property otherwise than on just terms, in contravention of section 51(xxxi) of the Constitution. Although acknowledging that a third party release, being the extinguishment of a common law right, is an acquisition of property for the purposes of section 51(xxxi), Finkelstein J found that that section will only have application where the impugned law is properly characterised as a law with respect to the acquisition of property (of which section 411 is not).    **(ii) Other features of the schemes of arrangement**  In considering other features of the proposed schemes, Finkelstein J held that "trade creditors" and "client creditors" formed separate classes and thus separate scheme meetings would need to be convened for each of these classes of creditors. Finkelstein J found that the release provided for in the schemes would deprive "client creditors" and not "trade creditors" of the ability to pursue causes of action to fully indemnify their losses and thus the two groups did not have sufficient rights in common to form a single class.   Finally, Finkelstein J held that it was permissible to pool the assets and liabilities of the Opes Group into OPGL without a meeting of members of each company in the Opes Group. Finkelstein J held that members of the Opes Group companies would have no interest in such a transfer, as the companies were in the process of being wound up, with the companies' assets insufficient to satisfy creditors in full (*Re Tea Corporation Ltd* [1904] 1 Ch 12).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/145%20September%202009.htm%23h5)  **4.14 Is a director of a corporate director of company A, a de facto director of company A?**  (By Kylie Shedden, Clayton Utz)   Holland v Commissioners for Her Majesty's Revenue and Customs [2009] EWCA Civ 625, Supreme Court of Judicature Court of Appeal of England and Wales (Civil Division), Lord Justices Ward, Rimer and Elias, 2 July 2009   The full text of this judgment is available at:  [http://www.bailii.org/ew/cases/EWCA/Civ/2009/625.html](http://www.bailii.org/ew/cases/EWCA/Civ/2009/625.html" \t "_new)    **(a) Summary**   In order to avoid paying higher corporate tax, Mr and Mrs Holland restructured their company group.  Mr and Mrs Holland were both directors of Paycheck (Directors Services) Limited (Paycheck Directors), which was the sole corporate director of 42 trading companies.  A flaw in the corporate restructure resulted in the company group being required to pay the higher corporate tax rate.  The company group had not made provision for the higher tax rate and was subsequently liquidated. Her Majesty's Revenue and Customs (HMRC) brought proceedings under section 212 of the Insolvency Act 1986 (Eng) against Mr and Mrs Holland, alleging that they were de facto directors of the trading companies and therefore, guilty of misfeasance and breaches of duty in causing various payments of unlawful dividends. In the first instance, Mr Holland was held to be a de facto director of the trading companies and consequently, personally liable for one of the periods in which unlawful dividends were paid. Mr Holland appealed.    The Court of Appeal of England and Wales unanimously held that Mr Holland could not be regarded as a de facto director of the trading companies merely because he was the director of the sole corporate director, Paycheck Directors.   **(b) Facts**   This litigation arose out of a complicated restructure of Mr and Mrs Holland's business which administered the business and tax affairs of contractors working in various industry sectors. Each contractor was an employee of one of the companies and allotted a non-voting share in the relevant company which enabled the contractor to be rewarded by salary and dividends.     According to the relevant tax legislation, the companies would only be liable to pay corporation tax at the small companies' rate as long as the companies were not regarded as 'associated' and its annual profits were below the £300,000 threshold. In 1998, it appeared that the profits of the original company were going to exceed the £300,000 threshold.  Mr and Mrs Holland established a new company structure in order to avoid liability to pay corporate tax at the higher rate.  The new corporate structure involved the following:   * Mr and Mrs Holland each held 50% of the issued shares in, and were directors of, a new trading company Paycheck Services Limited (Paycheck Services). * Paycheck Services held 100% of the issued shares of Paycheck (Directors Services) Limited (Paycheck Directors) and Paycheck (Secretarial Services) Limited (Paycheck Secretarial). * Mr and Mrs Holland were both directors of Paycheck Directors and Paycheck Secretarial. * Paycheck Directors and Paycheck Secretarial were incorporated to act as the sole director (in the case of Paycheck Directors) and sole secretary (in the case of Paycheck Secretarial) of each of the 42 trading companies. * Each trading company had one voting 'A' share and 50 non-voting shares, each non-voting share being in a separate class. * The 'A' share of each company was held by Paycheck Services Trustee Limited (PST), a company in which Mr and Mrs Holland each held 50% of the issued shares and of which they were directors. * The non-voting shares in each company were held by 50 employees of the company. * On the terms of the trust deed, PST held the 'A' share of each company for the benefit of the shareholder/employees of that company.   The purpose behind the new structure was to provide to the shareholder/employees of each trading company the same tax advantages they would have enjoyed had each set up his own company.    Unfortunately, the arrangements relating to the shareholding of the companies were flawed. The combined effect of sections 13 and 416 of the Income and Corporation Taxes Act 1988 and PST's control of each of the composite companies by its holding of the 'A' shares meant that the composite companies were 'associated' for the purposes of the relevant taxing legislation. Consequently, their collective profits exceeded the £300,000 threshold and each was liable to pay the higher corporate tax rate.   The companies had made no provision for the higher tax and each trading company had declared and paid dividends which should not have been paid because there were insufficient distributable reserves to permit them. The entire company group ceased trading on 13 October 2004 and went into creditors' voluntary liquidation in February 2005.   Mr and Mrs Holland were alleged to have been guilty, as de facto directors of the trading companies, of misfeasance and breaches of duty, in causing various payments of unlawful dividends during three separate periods. At first instance, the judge dismissed the claims against Mrs Holland. In relation to Mr Holland, the judge held that he was a de facto director of the trading companies and, during the period of 23 August to 19 October 2004, when Mr Holland knew that there were insufficient profits to justify the distributions, held Mr Holland guilty of misfeasance and breach of duty in causing the payment of dividends during that period.   Mr Holland appealed on a number of grounds, including that he should not have been regarded as a de facto director of the trading companies.     **(c) Decision**   Mr Holland argued that the only director of the trading companies was Paycheck Directors, and, that while Mr and Mrs Holland were certainly directors of Paycheck Directors and the human agents behind Paycheck Directors, those facts did not entitle the judge to find that Mr Holland was also a de facto director of the trading companies. It was argued that such a conclusion was a step too far which ignored the separate legal identities of Paycheck Directors and Mr Holland.   The judge at first instance had held that as a matter of fact Mr Holland directed the affairs of the trading companies and assumed the functions of a director albeit not holding himself out as such. Consequently, the judge held that the corporate veil point did not prevent him from finding that Mr Holland was a de facto director of the composite companies.   On appeal, the Court of Appeal unanimously held that the main issue was the question raised by section 251 of the Insolvency Act 1986, essentially a factual question, of whether or not Mr Holland was someone 'occupying the position of director of the composite companies by whatever name called'. It was agreed that the crucial issue in relation to de facto directorship is "whether the individual in question has assumed the status and function of a company director so as to make himself responsible under the [Company Directors Disqualification Act 1986] as if he were a de jure director."   The court noted that it had not been presented with any authority in which someone who acted as a director of the sole corporate director of a company was, merely by so acting, regarded also as a de facto director of the subject company. The Court relied on Millett J's reasoning in *In re Hydrodam (Corby) Limited* [1994] 2 BCLC 180 that "membership of the board of a corporate director will not, without more, make such member a shadow or de facto director of any company of which the corporate director is a director." Although it was conceded that Hydrodam did not answer the precise question in this case, the court regarded it as giving a "principled steer away" from the conclusion that Mr Holland could be regarded as a de facto director of the composite companies.    In order to be regarded as a de facto director of the trading companies, something more was required than the mere performance by the director of his duties as a de jure director of the corporate director. The Court of Appeal held that the judge in the first instance was in error in finding that Mr Holland was a de facto director of the trading companies.  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