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| **Bulletin No. 132**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by Lawlex on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1. [Recent Corporate Law and Corporate Governance Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20132%20August%202008.htm#h1)
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| **1. Recent Corporate Law and Corporate Governance Developments**  |  | ext Section |

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| **1.1 SEC and ASIC sign mutual recognition agreement**On 26 August 2008, the US Securities and Exchange Commission (SEC) and the Australian Securities and Investments Commission (ASIC) entered into a mutual recognition arrangement.The mutual recognition arrangement provides a framework for the SEC, the Australian government and ASIC to consider regulatory exemptions that would permit US and eligible Australian stock exchanges and broker-dealers to operate in both jurisdictions, without the need for these entities (in certain aspects) to be separately regulated in both countries. Through this mutual recognition arrangement, the SEC and the Australian authorities agree to consider providing exemptions to exchanges and securities brokers in one another's countries. Once implemented, these exemptions could permit US stock exchanges and broker-dealers regulated by the SEC, subject to conditions imposed by the Australian authorities, to offer their services to Australian wholesale investors and financial firms without being subject to most ASIC regulation. Likewise, eligible Australian stock exchanges and broker-dealers regulated by ASIC, subject to conditions imposed by the SEC, could offer their services to certain types of US investors and firms without being subject to most SEC regulation.An integral component of the mutual recognition arrangement is an Enhanced Enforcement Memorandum of Understanding (MOU) and a new Supervisory MOU that will allow for considerably greater regulatory and enforcement cooperation and coordination between the SEC and ASIC. These MOUs will apply broadly to all US and Australian market activity and not just those related to the mutual recognition arrangement. Under the arrangement, both the SEC and ASIC will retain jurisdiction to pursue violations of their respective anti-fraud laws and regulations.Following signing of the mutual recognition arrangement, the SEC and Australian authorities will begin considering regulatory exemptions under the arrangement as they are submitted to the two agencies. It is expected that the process of considering the initial applications for exemptions for approval by the authorities could be concluded in early 2009.  The [Mutual Recognition Arrangement](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/SEC_framework_arrangement_aug_08.pdf/%24file/SEC_framework_arrangement_aug_08.pdf%22%20%5Ct%20%22_new), the [Enhanced Enforcement MOU](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/SEC_enhanced_enforcement_mou.pdf/%24file/SEC_enhanced_enforcement_mou.pdf%22%20%5Ct%20%22_new) and the [Supervisory MOU](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/SEC_supervisory_mou_aug_08.pdf/%24file/SEC_supervisory_mou_aug_08.pdf%22%20%5Ct%20%22_new) are available from the ASIC website.etailed Contents**1.2 Legal barriers in EU cross-border securities transactions** On 22 August 2008, the European Commission's Legal Certainty Group (LCG) put forward solutions to legal barriers related to the cross-border holding and settlement of securities. The solutions proposed in its report, titled "Second Advice", are expected to lead to an improved and harmonised legal framework for holding and settlement of securities through intermediaries and for the processing of corporate actions. Furthermore, the report proposes to give issuers free choice between European Central Securities Depositories. Recommendations 1-11 present possible solutions to the absence of an EU-wide framework of laws regarding book-entry securities. The Recommendations address the legal effects of book-entries made to securities accounts. However, they circumvent the necessity to make fundamental changes to Member States' laws that currently govern securities holding and settlement. The Recommendations deliver rules that cover many important legal aspects, such as the different methods for creating security interests, priorities, and the protection of the integrity of the issue.  Recommendations 12-14 deal with the differing rules governing corporate actions processing. They propose the removal of insufficiencies in corporate actions processing by introducing a rule on cross-border interconnectivity between conflicting models of securities holding. They also propose a rule on the specific duties of intermediaries regarding the information flow between investor and issuer as well as on the exercise of certain investors' rights through the holding chain. Recommendation 15 deals with restrictions on the location of securities and ties in with the Code of Conduct for Clearing and Settlement. It proposes that issuers should have a free choice in choosing their Central Securities Depository. Such a freedom of choice would considerably enhance competition. The Second Advice of the Legal Certainty Group is available from the [European Commission](http://ec.europa.eu/internal_market/financial-markets/clearing/certainty_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.3 Report on issues regarding the valuation of structured credit products** On 19 August 2008, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) announced the publication of its report on issues regarding the valuation of structured credit products.The report is focused on the impact on insurance undertakings arising from issues related to the valuation of structured credit products, taking into account the latest developments in the Solvency II project and in International Financial Reporting Standards (IFRS).It highlights the following issues relating to valuation:* the use and application of economic valuation in the context of the future Solvency II prudential framework for insurance undertakings;
* the main issues highlighted by the market turmoil in relation to the valuation of illiquid assets and the resulting concerns in terms of public disclosure;
* the specific issues posed by monoline insurance undertakings; and
* the lessons to be learnt from the turmoil in the area of risk management, management of investments made by undertakings and governance.

The report is available on the [CEIOPS](http://www.ceiops.eu/media/docman/public_files/publications/reports/CEIOPS-DOC-30-08%20CEIOPS%20Report%20on%20Valuation%20Issues%20_20080819_.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.4 Recommended law changes for schemes and amalgamations in New Zealand** On 19 August 2008, the New Zealand Takeovers Panel made recommendations to the Minister of Commerce for changes to the Companies Act 1993 and the Takeovers Act 1993. The changes relate to amalgamations and schemes of arrangement under the Companies Act that involve changes of control of companies that fall under the Takeovers Code (Code companies). The Panel's key recommendation is that changes of control of Code companies should be able to be effected either under the Takeovers Code, or as a scheme of arrangement with Court approval under Part 15 of the Companies Act (a Part 15 scheme), but not by way of amalgamation under Part 13 of the Companies Act. The main features of the Panel's proposal include that:1. For any Part 15 scheme that has an effect on voting rights in a Code company, either:* the court would have to be satisfied, before it could approve the scheme, that the Code company shareholders would not be disadvantaged by the transaction not being undertaken under the Takeovers Code; or
* the promoters of the scheme could produce to the court a statement from the Takeovers Panel stating that the Panel has no objection to the scheme.

2. These requirements would be in addition to the current common law tests which the court applies when considering a scheme. 3. The promoters of schemes involving Code companies would be able to apply to the Panel for a "no-objection" statement before seeking Court orders for the proposed scheme. 4. Part 15 of the Companies Act would be amended to include some guidance for the court on how to determine the different interest classes of shareholders for the purpose of their meeting to vote on the scheme. 5. The Companies Act would set out the voting thresholds for the shareholders' approval of schemes involving Code companies. These thresholds would require approval by 75% of the votes cast at meetings of each interest class (this is the current voting threshold for a scheme) and, in addition, all of those votes combined would have to represent more than 50% of the total voting rights of the company. A "no-objection" statement from the Panel would assist the court to decide whether to approve a scheme. If the Panel opposed a transaction being undertaken as a scheme under the Companies Act, the Panel would be able to object to it in court. This is very similar to the Australian requirements which have been in place for about 25 years and which generally are considered to work well. The Panel's recommendations to the Minister are available from the [Takeovers Panel](http://www.takeovers.govt.nz/publications/code-amalgamations/recommendations.html%22%20%5Ct%20%22_new) website.The Regulatory Impact Statement that was prepared for the Minister is available from the [Takeovers Panel](http://www.takeovers.govt.nz/publications/code-amalgamations/regulatory.html%22%20%5Ct%20%22_new) website.The Explanatory Memorandum with a full explanation of the Panel's proposal and of the consultation process that was undertaken by the Panel is available from the [Takeovers Panel](http://www.takeovers.govt.nz/publications/code-amalgamations/01.html%22%20%5Ct%20%22_new) website.etailed Contents**1.5 Proposed national consumer law**On 15 August 2008, the Ministerial Council on Consumer Affairs (MCCA) agreed that all Australian governments should adopt a new national consumer law, which will operate in all Australian jurisdictions. The Ministerial Council has agreed to propose to the Business Regulation and Competition Working Group (BRCWG) that all Australian jurisdictions agree to adopt a national consumer law based on the consumer protection provisions of the [Trade Practices Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default). The Council of Australian Governments (COAG) will consider an enhanced consumer policy framework at its October meeting. The key features of the new national consumer law are:* it will be based on the current consumer protection provisions of the Trade Practices Act 1974 (TPA) and also incorporate appropriate amendments reflecting best practice in state and territory legislation;
* the new law should be developed by the agreement of all Australian governments and made law through an application legislation scheme with the Commonwealth as the lead legislator;
* the new generic consumer provisions should apply to all sectors of the economy, with the exception of the financial services sector that will need to retain a distinct legislative framework, however, to the extent that it is practicable, the Australian Government is committed to maintaining consistency between the two laws;
* it will include a provision that addresses unfair contract terms, based on the model outlined by the Productivity Commission;
* amendments to the national consumer law must be agreed by governments according to an Inter-Governmental Agreement, which will provide, among other things, for the amendments to be agreed by the Commonwealth plus four other state and territory governments, of which three must be states;
* joint enforcement of the national consumer law will be undertaken by the ACCC and the State and Territory offices of fair trading, with ASIC retaining responsibility for administering the consumer law that applies to financial services.

It is anticipated that the national consumer law will be fully implemented by 2011. Further information is available from the [Consumer.gov.au](http://www.consumer.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents**1.6 Agreement to strengthen surveillance, investigation and enforcement to prevent insider trading in the US** On 13 August 2008, the US's primary self-regulatory organisations for the securities industry, NYSE Regulation Inc and the Financial Industry Regulatory Authority (FINRA) announced an agreement with ten US exchanges to strengthen investor protection by consolidating the surveillance, investigation and enforcement of insider trading in equity securities.Under the agreement, each exchange gives responsibility for the detection of insider trading to NYSE Regulation for New York Stock Exchange- and NYSE Arca-listed securities, and to FINRA for Amex- and NASDAQ-listed securities, no matter where trading occurs in the United States. Market centres participating in the agreement, which has been filed with the Securities and Exchange Commission (SEC), are the American Stock Exchange, Boston Stock Exchange, CBOE Stock Exchange, Chicago Stock Exchange, International Securities Exchange, NASDAQ Stock Market, National Stock Exchange, New York Stock Exchange, NYSE Arca, Philadelphia Stock Exchange, and FINRA. Currently, each exchange conducts its own regulatory insider trading program and relies upon cooperation with other exchanges when potential insider trading is detected. Both NYSE Regulation and FINRA operate highly sophisticated surveillance programs to identify potential insider trading on a real-time basis. When suspect trading activity is identified, regulatory staff conducts an in-depth review using advanced analytical tools, news reports, and other sources of information. The agreement was made pursuant to section 17(d) of the Securities and Exchange Act of 1934, section 15 USC §78q(d), and SEC  Rule 17d-2, that allows the SEC  to approve plans for the allocation of regulatory responsibility among self-regulatory organisations. etailed Contents**1.7 Report on containing systemic risk**On 6 August 2008, the Counterparty Risk Management Policy Group III (CRMPG) released its report entitled, "Containing Systemic Risk: The Road to Reform".The report, prepared by a group of senior officials from a number of major financial institutions, provides a framework of private initiatives that will complement official oversight to help contain systemic risk. The Policy Group focused on four key areas, which it deemed the most important and timely and were the areas in which the Policy Group believed it could make the greatest contribution. Those areas include a reconsideration of the standards for consolidation under US GAAP of entities currently off-balance sheet coming on-balance sheet; measures to better understand and manage high-risk financial instruments; significant enhancements to risk monitoring and management; and a series of measures to enhance the resiliency of financial markets generally and the credit markets in particular, with a special emphasis on OTC derivatives and credit default swaps. The report also highlights important "emerging issues," which will require close attention in the period ahead. The Report identifies five "Core Precepts," which the Policy Group regards as relatively simple, readily understandable and forward-looking standards upon which the management of large integrated financial intermediaries must rest. The precepts are: * Precept I: The Basics of Corporate Governance
* Precept II: The Basics of Risk Monitoring
* Precept III: The Basics of Estimating Risk Appetite
* Precept IV: Focusing on Contagion
* Precept V: Enhanced Oversight

The Policy Group has framed its recommendations in specific terms that have operational content and foster accountability such that senior management, boards, and supervisors can evaluate progress against these goals. The report is available from the [CRMPG](http://www.crmpolicygroup.org/%22%20%5Ct%20%22_new) website. etailed Contents**1.8 SEC Advisory Committee makes recommendations to improve financial reporting for investors** On 1 August 2008, the US Securities and Exchange Commission (SEC) published the final report of an SEC advisory committee containing 25 recommendations to make financial information more useful and understandable to investors.The SEC already has taken steps to assist investors based on two earlier recommendations made by the Advisory Committee. On 14 May 2008, the Commission formally proposed using new technology to get important information to investors faster, more reliably, and at a lower cost by requiring all US companies to provide financial information using interactive data beginning as early as next year. And on 30 July 2008, the SEC approved new guidance to public companies to address their concerns about how to comply with the securities laws while developing their Web sites to serve as an effective means for disseminating important information to investors.The Committee's report provides practical proposals to improve financial reporting in five main areas:1. increasing the usefulness of information in SEC filings;
2. enhancing the accounting standards-setting process;
3. improving the substantive design of new standards;
4. delineating authoritative interpretive guidance; and
5. clarifying guidance on financial restatements and accounting judgements.

Among other things, the Committee noted in the first area that many individual investors find company filings with the SEC to be overly complex and detailed. Thus the Committee recommended the inclusion of a short executive summary at the beginning of a company's annual report that would describe concisely the main aspects of its business and its key performance metrics.In the second area, the Committee called for more investor participation in accounting standard setting by increasing investor representation on the FASB and Financial Accounting Foundation (FAF).In the third area, the Committee noted that the underlying objectives of certain accounting standards are sometimes obscured by dense language, detailed rules, and numerous exemptions. The Committee recommended a different approach to the substantive design of standards. For example, the Committee called for improved rules on off-balance sheet accounting and fewer situations where alternative accounting standards exist for the same transaction. The Committee recommended that companies provide better disclosure to investors about what portion of their earnings constitutes cash or accrued income based on historic cost accounting and what portion represents unrealized gains or losses based on fair value estimates.To reduce the proliferation of US GAAP, the Committee said it strongly supports FASB's efforts to complete the codification of all authoritative accounting literature into one document. The Committee said that others such as audit firms may still publish their views on accounting issues, but they should be labeled as non-authoritative. In this fourth area, the Committee also called for a clearer delineation of functions on interpreting accounting standards with the FASB taking the lead on broad issues and the SEC on registrant-specific issues. In the fifth area, the Committee recommended increased correction of accounting errors and more disclosures about those corrections to investors. However, the Committee warned that the correction of every accounting error should not automatically result in a lengthy process of restating financial statements for several prior years. The Committee said that in the "dark period" during restatements when companies generally cease filing current financial reports, companies usually do not provide investors with much information. Thus, the Committee said it believes that restatements of prior years should be undertaken for the correction of accounting errors that are material to current investors. The report is available on the [SEC](http://www.sec.gov/about/offices/oca/acifr/acifr-finalreport.pdf%22%20%5Ct%20%22_New) website.etailed Contents**1.9 Consultation papers published on credit rating agencies** On 31 July 2008, the European Commission published two consultation documents on credit rating agencies (CRAs). The first document relates to the conditions for the authorisation, operation and supervision of credit rating agencies. The second proposes policy options in order to tackle what is felt to be an excessive reliance on ratings in EU legislation. According to the Commission, it is generally accepted that CRAs underestimated the credit risk of structured credit products and failed to reflect early enough in their ratings the worsening of market conditions thereby sharing a large responsibility for the current market turmoil. The current crisis has shown that the existing framework for the operation of CRAs in the EU (mostly based on the IOSCO Code of Conduct for CRAs) needs to be significantly reinforced. The move to legislate in this area was recently welcomed by the Ecofin Council at its meeting in July.  The consultation paper suggests the adoption of a set of rules introducing a number of substantive requirements that CRAs will need to respect for the authorisation and exercise of their rating activity in the EU. The main objective of the Commission proposal is to ensure that ratings are reliable and accurate pieces of information for investors. CRAs will be obliged to deal with conflicts of interest, have sound rating methodologies and increase the transparency of their rating activities.  The consultation document also proposes two options for an efficient EU oversight of CRAs: The first option is based on a reinforced co-ordination role for the Committee of European Securities Regulators (CESR) and strong regulatory co-operation between national regulators. The second option would combine the establishment of a European Agency (either CESR or a new agency) for the EU-wide registration of CRAs and the reliance on national regulators for the supervision of CRA activities. The consultation document on reliance on ratings identifies the references made to ratings in existing EU legislation and looks at possible approaches to the issue of excessive reliance on ratings. Further information is available on the [Europa](http://ec.europa.eu/internal_market/securities/agencies/index_en.htm%22%20%5Ct%20%22_new) website. etailed Contents**1.10 Joint Forum release of credit risk transfer paper**On 31 July 2008, the Joint Forum released the final version of its paper titled "Credit Risk Transfer - Developments from 2005 to 2007". This follows the consultation process that began in April 2008.Market participants provided direct feedback on the consultative draft during meetings held with Joint Forum representatives in London and New York last May. The comments provided by participants or sent directly to the Joint Forum secretariat reflected general support for the report's conclusions. Changes to the report based on the consultation, while not substantial, contributed to an improved final report.The paper was developed in response to a request from the Financial Stability Forum (FSF) in March 2007 to consider the extent to which the Joint Forum's March 2005 paper 'Credit Risk Transfer (CRT)' required updating as a result of the continued growth and rapid innovation in the CRT markets. While development of the paper was underway well ahead of the market disruption that began in 2007, it formed the centrepiece of the Joint Forum's submission to the FSF in support of its work on the market turmoil.  The paper is available on the [Bank for International Settlements](http://www.bis.org/%22%20%5Ct%20%22_new) website, the [IOSCO](http://www.iosco.org/%22%20%5Ct%20%22_new) website and the [IAIS](http://www.iaisweb.org/%22%20%5Ct%20%22_new) website.etailed Contents**1.11 Task force issues global recommendations for credit rating agency reform** On 31 July 2008, the Securities Industry and Financial Markets Association (SIFMA) Credit Rating Agency Task Force issued its recommendations for credit rating agency reform. The recommendations are being shared with regulators, lawmakers, and credit rating agencies globally, and reflect the efforts of the senior-level investor-led industry group. The recommendations also respond directly to the designation by the US President's Working Group on Financial Markets (PWG) of the blue ribbon Task Force as the private-sector group providing the PWG with industry guidance on credit rating matters.  The Task Force, formed to examine key issues related to ratings and credit rating agencies, is comprised of 37 individuals from the US, Europe, and Asia. The Task Force includes asset managers, underwriters, and issuers who are experts in structured finance, corporate debt, municipal debt, and risk.  Recognising the importance of credit rating agencies and the ratings they provide in the overall functioning of the financial markets, to determine priority areas of focus the Task Force identified the credit-rating-related causal variables that played a significant role in triggering the credit crisis of the past year. Sixteen key issues were identified, and ranked in order of importance. The recommendations address those issues that topped the list, including transparency, model quality, and surveillance.  In addition to enhancing disclosure of rating methodologies, due diligence information, surveillance procedures, credit rating agency performance, and fees, the recommendations also encourage a more harmonised and convergent global regulatory framework, and independent risk analyses by investors. The Task Force also identified the need for industry members, globally, to provide expert input and advice on issues related to credit ratings to regulators, lawmakers, and other market participants. To this end, the Task Force recommends the creation of a global, independent industry Credit Ratings Advisory Board, under the auspices of SIFMA. The Advisory Board members will initially be drawn from the Task Force, and will continue the Task Force's work to date as an advisor and consultative resource.  The recommendations include the following:* credit rating agencies (CRAs) should provide enhanced, clear, concise, and standardized disclosure of CRA rating methodologies;
* CRAs should disclose results of due diligence and examination of underlying asset data examinations, and limitations on available data, as well as certain other information relied upon by the CRAs in the ratings process;
* CRAs should disclose CRA surveillance procedures; this will foster transparency, and allow market users of ratings to understand their bases and limitations;
* CRAs should provide access to data regarding CRA performance; this will allow investors to assess how CRAs differ both in the performance of their initial ratings, and in their ongoing surveillance of existing ratings;
* conflicts of interest should be addressed with a sensitivity towards the difference between CRA "core" services and CRA consulting services;
* a global SIFMA advisory board of industry participants should be established to advise regulators and lawmakers on ratings issues; this will give regulators access to industry expertise, and encourage the more fully harmonised global regulatory framework the Task Force views as essential;
* lawmakers, regulators, and law enforcers across the globe should coordinate more closely in addressing this global problem, in order to avoid counter-productive, piecemeal, inconsistent attempts at remediation;
* CRA fee structures, and identities of top payors, should be disclosed by CRAs to their regulators;
* CRAs should ensure that ratings performance of structured products are consistently in line with ratings performance of other asset classes; this will increase investor confidence in the reliability of ratings;
* rating "modifiers" should not be the means adopted to create transparency; they would lead to significant unnecessary costs, while at the same time likely triggering unintended negative consequences;
* investors should understand the limits of ratings, and use them as just one of many inputs and considerations as they conduct their own independent analyses; and
* all members of the financial industry involved in the generation and use of ratings, including issuers and underwriters, should examine their processes with an eye towards improvement, including working towards standardizing reporting and disclosure on underlying assets.

The recommendations are available on the [SIFMA](http://www.sifma.org/capital_markets/docs/SIFMA-CRA-Recommendations.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.12 SEC provides guidance to open up use of corporate websites for disclosures to investors**On 30 July 2008, the US Securities and Exchange Commission (SEC) voted unanimously to provide new guidance to public companies about how to comply with the securities laws while developing their Web sites to serve as an effective means for disseminating important information to investors. Issued in the form of an interpretive release, the SEC's guidance provides information for companies considering providing investors with interactive content on their Web sites, as well as summary information and links to third-party information. The SEC's guidance addresses a recommendation made by the SEC's Advisory Committee on Improvements to Financial Reporting in its February 2008 Progress Report for the Commission to provide clarity on issues and questions that arise in connection with SEC rules against selective disclosure of material nonpublic information.The SEC's guidance is divided into four parts:1. The guidance clarifies how information posted on a company Web site can be considered "public" and provides guidance to help companies comply with public disclosure requirements under Regulation FD.2. The guidance clarifies the liability framework for certain types of electronic disclosure, including how companies can provide access to historical or archived data without it being considered reissued or republished every time it is accessed. It provides guidance on how companies can link to third party information or Web sites without having to "adopt" that content for liability purposes. It provides guidance on the appropriate use of summary information in the context of the securities laws' antifraud provisions. It also clarifies that the antifraud provisions apply to statements made by the company (or by a person acting on behalf of the company) in blogs and electronic shareholder forums, and companies cannot require investors to waive protections under the federal securities laws as a condition to enter or participate in a blog or electronic shareholder forum. 3. The guidance clarifies that information posted on company Web sites would not generally be subject to rules under the Sarbanes-Oxley Act relating to a company's "disclosure controls and procedures." 4. The guidance clarifies that information need not satisfy a "printer-friendly" standard, unless other rules explicitly require it, that could restrict creative Web enhancements that incorporate interactive and dynamic design features.Further information is available on the [SEC](http://www.sec.gov/index.htm%22%20%5Ct%20%22_new) websiteetailed Contents**1.13 SOX survey finds financial executives seeing diminished incremental benefits from SOX compliance** On 29 July 2008, the Oversight Systems Inc, a provider of automated transaction monitoring software, released the results of the 2008 Oversight Systems Financial Executive Report on Sarbanes-Oxley. The survey of financial executives indicates that they are no longer seeing incremental benefits from SOX, and they are looking to reduce both compliance costs as well as the number of key controls. At the same time, they want a better way to fight fraud. Results of the survey show that confidence in SOX reducing financial fraud has fallen from 40 % in 2005 to a new low of 29 %. New data collected in this year's survey further indicates that Audit Standard 5 (AS 5), issued last year by the Public Company Accounting Oversight Board (PCAOB), has created new challenges of its own in terms of risk management. Fifty-six % of survey respondents cited identifying areas of greatest risk as a major challenge in complying with the new guidance. The survey is available on the [Oversight Systems](http://www.oversightsystems.com/resources_reports.php%22%20%5Ct%20%22_new) website. etailed Contents**1.14 US securities class action research**During the first half of 2008 US securities class action filings continued the rebound that started in the second half of 2007, following two years of lower activity.According to a report published on the 29 July 2008 by Cornerstone Research in cooperation with Stanford Law School's Securities Class Action Clearinghouse, there were 110 filings between 1 January and 30 June 2008, suggesting as many as 220 filings by the end of the year.The recent high level of filings coincided with a marked increase in stock market volatility. Filings jumped from 119 in the twelve months ending June 2007 to 217 over the next twelve months, and stock market volatility doubled over the same period. This level of litigation activity exceeded the annual average for the eleven years between January 1997 and December 2007. About half of the filings in the first half of 2008 were driven by the subprime mortgage/credit crunch, with 58 filings containing related allegations. Of these, 17 involved auction rate securities.Additional findings include:* Financial sector had the most filings. The Financial sector had the most securities class action filings for the third straight six-month period, with 63 filings in the first half of 2008 - up from 30 in the second half of 2007 and 19 in the first half of 2007. This sector also registered more filings than all other sectors combined. The subprime/credit crunch fallout drove this spike, with almost all the Financial sector filings involving related allegations. In 2007 and the first half of 2008, 87 of the 97 subprime/credit crunch-related filings were in the Financial sector.
* Market capitalization losses increased. Maximum Dollar Losses (MDL) rose from US$504 billion in the second half 2007 to US$587 billion in the first half of 2008 - the highest level since the second half of 2002. Annualized, this figure would represent a 74 % increase over 2007 and a 69 % rise over the average for the eleven years ending December 2007. Disclosure Dollar Losses (DDL) also remained high in the first half of 2008, at US$106 billion. Annualised, that would be 40 % more than in 2007 and 65 % more than the average for the eleven years ending December 2007.
* Incidences of "mega" MDL filings (cases associated with MDL of US$10 billion or more) also continued at high levels, with 17 in the first half of 2008 compared with 16 in all of 2007. In addition, there were 7 mega DDL filings (cases associated with DDL of US$5 billion or more) in the first half of 2008, compared with 9 in 2007 and just 1 in 2006.

The full text of the report is available at: [http://securities.cornerstone.com/](http://securities.cornerstone.com/%22%20%5Ct%20%22_new) and [http://securities.stanford.edu/](http://securities.stanford.edu/%22%20%5Ct%20%22_new) The NERA has also published a report on US securities class action filings and this report is available on the NERA website.etailed Contents**1.15 IOSCO announces next steps on credit rating agencies**  On 28 July 2008, the International Organization of Securities Commission's (IOSCO) Task Force on Credit Rating Agencies (Task Force) announced its next steps with regard to the monitoring of compliance with the Code of Conduct Fundamentals for Credit Rating Agencies (Code of Conduct).  The Code of Conduct focuses on transparency and disclosure in relation to credit rating agencies' (CRAs) methodologies, conflicts of interest, use of information, performance and duties to issuers and the public. It does not dictate business models or governance but rather seeks to provide the market with information to judge and assess CRA activities, performance and reliability. IOSCO believes that, for the Code of Conduct to be effective CRAs need to comply with the prescribed disclosures and regulators should take steps to determine the veracity of these disclosures.  The Task Force is currently exploring the means by which its members might work together to verify the proper and complete disclosure by CRAs of information required by the Code of Conduct, and adherence to the mechanisms it contains designed to protect against conflicts of interest. As part of this project, the Task Force will be considering a number of options for the effective monitoring of compliance with the Code of Conduct, including the potential for:* detailed arrangements for exchanging information between national securities regulators;
* co-operative inspection programs for CRAs; or
* a specialised IOSCO committee to confer on compliance with the code of conduct by CRAs.

In its deliberations IOSCO also will review members' recent and upcoming rule proposals.  According to IOSCO, the recent changes to the Code of Conduct continue to ensure that it offers a set of robust and practical measures to guide CRAs in implementing IOSCO's Principles on Credit Rating Agencies and meets the objectives of improving investor protection, ensuring the fairness, efficiency and transparency of securities markets and reducing systemic risk. The Task Force will submit its final recommendations to the Technical Committee at its next meeting in September 2008. etailed Contents**1.16 US Treasury releases best practices to encourage additional form of mortgage finance**On 28 July 2008, the US Treasury Department took steps to encourage additional sources of mortgage finance and strengthen financial institutions by issuing Best Practices for Residential Covered Bonds.A covered bond is a secured debt instrument that provides funding to a depository institution, collateralized by high-quality mortgage loans that remain on the issuer's balance sheet. Covered bonds have the potential to increase funding for mortgages and to strengthen financial institutions by offering them a new funding source that will diversify their overall funding portfolio. While a large European covered bond market already exists, valued at US$3.3 trillion in 2007, only two US institutions to date have issued covered bonds. Market participants sought structural clarity to develop the US covered bond market.  The Treasury document is intended to provide clarity and homogeneity to the new market. It is meant to define a starting point for the US covered bond market and serve as a complement to the Federal Deposit Insurance Corporation final policy statement. Treasury believes the US$11 trillion mortgage market can benefit from all forms of mortgage finance. Covered bonds can serve as a complement to the housing government sponsored enterprises, helping to provide additional funding to homeowners. In conjunction with the release of the Best Practices Guide, Treasury will update its own collateral acceptability policy to include covered bonds as an approved asset category for securing the Treasury's investments and deposits of public money with commercial counterparties. The Treasury document is available on the [Treasury](http://www.treas.gov/press/releases/reports/factsheet.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.17 SEC alerts compliance officers about deficiencies and weaknesses found during recent compliance examinations** On 22 July 2008, the US Securities and Exchange Commission (SEC) staff released a new ComplianceAlert letter identifying common deficiencies and weaknesses that SEC examiners have recently found during compliance examinations of firms that are registered with the SEC. The Compliance Alert is intended to foster robust compliance in the securities industry by providing information about deficiencies and encouraging chief compliance officers to take steps to address any similar issues at their firms. The SEC's Office of Compliance Inspections and Examinations conducts compliance examinations of investment advisers, investment companies, broker-dealers, transfer agents and other types of SEC-registered firms to determine whether they are in compliance with the federal securities laws and regulations. The SEC staff last year issued its first ComplianceAlert letter to describe compliance issues and deficiencies found in examinations and to encourage firms to review compliance in those identified areas and implement improvements as appropriate. The new ComplianceAlert letter describes examination findings in several areas:* personal trading by investment advisory employees;
* soft dollar practices by advisers;
* mutual funds' proxy voting practices;
* valuation and liquidity issues for high-yield municipal bond funds;
* "free lunch" sales seminars;
* broker-dealers' valuation and collateral management processes;
* issues identified at broker-dealers affiliated with insurance companies;
* supervision of solicitations for advisory services;
* use of mortgage financing as credit for the purchase of securities;
* broker-dealers' supervisory and compliance controls over offices of supervisory jurisdiction; and
* transfer agents' practices regarding "lost security holders".

The ComplianceAlert letter is available on the [SEC](http://www.sec.gov/about/offices/ocie/complialert0708.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.18 FSA consults on changes to disclosure and transparency rules**  On 21 July 2008, the UK Financial Services Authority (FSA) announced that it is consulting on a proposal that financial institutions in receipt of liquidity support from a central bank will have a legitimate interest for delaying the public disclosure of such support. The proposal is the next update on this issue, following the joint Bank of England, Treasury and FSA (Tripartite Authorities) consultation document Financial Stability and Depositor Protection: Strengthening the Framework published in January 2008 and the consultation paper, Strengthening Financial Stability and Depositor Protection published on 1 July 2008. The details of the proposal are contained within the FSA's CP08/13 consultation paper.  Under the EU's Market Abuse Directive from which the disclosure rules are derived, firms admitted to trading on a regulated market are obliged to publicly disclose inside information to the market. The directive allows, in certain specific circumstances, the disclosure of inside information to be delayed. The FSA proposals make clear that a financial institution in receipt of liquidity support from a central bank may have a legitimate interest to delay the disclosure of such support. The delay would be justified on the grounds that immediate disclosure could, by leading to a loss of confidence among consumers, exacerbate the existing liquidity problems and cause a threat to the solvency of the financial institution.  It should be noted that the proposal would not grant a financial institution an unconditional or indefinite delay to disclose the receipt of liquidity support. Under certain circumstances, immediate disclosure would still be required. The consultation will close on 30 September 2008.  The consultation paper "Financial Stability and Depositor Protection: Strengthening the Framework" is available on the [FSA](http://www.fsa.gov.uk/pubs/cp/JointCP_banking_stability.pdf%22%20%5Ct%20%22_new) website.The latest consultation paper is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/CP/2008/08_13.shtml%22%20%5Ct%20%22_new) website.etailed Contents**1.19 Consultation on a proposed EU market abuse framework for energy markets**  On 21 July 2008, the European Regulators' Group for Electricity and Gas (ERGEG) and the Committee of European Securities Regulators (CESR) published a consultation paper on market abuse issues relating to energy trading. In the joint consultation paper ERGEG and CESR advise the European Commission to explore a tailor-made EU market abuse framework for the electricity and gas sector, and note that there are substantial interdependencies between electricity and gas markets and some other markets, such as emission allowances, coal and oil markets. Trading in these markets is to a large extent conducted by the same market participants. CESR and ERGEG also call for legally binding disclosure obligations in energy sector regulation including sanction mechanisms. The regulators drafted their advice following a mandate from the Commission in the context of the Third Energy Package.  The existing EU securities legislation (i.e. the Market Abuse Directive - MAD) may not properly address potential market integrity issues in the electricity and gas markets. MAD applies almost exclusively to financial instruments admitted to trading on a regulated market. Physical products (e.g. spot market products) are not covered, and derivatives markets products are covered only if they are admitted to trading on a regulated market. Therefore, and particularly with regard to the physical markets, ERGEG and CESR propose that the Commission should evaluate the creation of a tailor-made EU market abuse framework for electricity and gas products not covered by MAD. In December 2007, the Commission issued a joint mandate to ERGEG and CESR requesting joint advice on issues concerning record keeping and transparency of transactions in electricity and gas supply contracts and derivatives in the context of the Third Energy Package. Advice was also sought on a possible clarification of the scope of the MAD in relation to trading in energy and energy derivatives, in the context of the review of that Directive by the Commission to be completed in early 2009. ERGEG and CESR have also conducted a fact-finding exercise on the current situation in the EU Member States with regard to pre and post trade transparency and trading oversight on the basis of a questionnaire circulated to their members. The results of the fact finding exercise will be sent to the Commission. ERGEG and CESR invite market participants to comment on their draft advice. Further information is available on the [CESR](http://www.cesr.eu/data/document/CESR_ERGEG_PR_21_07.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.20 Private equity firms and management of conflicts of interest**In July 2008, the UK Financial Services Authority (FSA) published in its Capital Markets Bulletin its review of the management of conflicts of interest within private equity firms. The review, which followed the FSA's Feedback Statement to DP06/6: "Private equity: a discussion on risk and regulatory engagement", focused on the key conflicts of interest which arise between private equity firms and the underlying investors in the funds that they operate, manage and advise. The bulletin sets out key findings of the review and examples of good practice. The FSA states that it intends to continue visiting private equity firms, and may consider comparing firms against the findings of its review.The Bulletin is available on the [FSA](http://www.fsa.gov.uk/pubs/newsletters/cm_bulletin3.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.21 Market timing guidelines for managers of investment funds**In July 2008, the Investment Management Association (IMA) published market timing guidelines for managers of investment funds. The guidelines provide members with suggestions for a control framework that will give them, and the investors in their funds, comfort that managers are taking all reasonable steps to help ensure that funds are being protected from the activities of market timers. Market timing is defined in the guidelines as a trading strategy, often coupled with frequent purchases and sales of units in open ended funds, with the intention of dealing on prices that do not fully reflect market information. The guidelines are available on the [IMA](http://www.investmentuk.org/news/standards/MarketTiming.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

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| **2.1 Alert to accountants who provide "capacity to repay" certificates**On 19 August 2008, the Australian Securities and Investments Commission (ASIC) published a media release reminding accountants who certify that borrowers applying for finance have the 'capacity to repay' a loan about their responsibilities to ensure there is a reasonable basis for providing the certification. The alert follows the release of an ASIC report, "Protecting wealth in the family home", which drew on a qualitative examination of a small number of refinancing transactions for borrowers in financial difficulty. The report discussed the practice by some lenders of relying on an accountant's certificate to verify a borrower's capacity to make repayments before approving a loan. The report also examined a small number of cases where accountants had provided certificates without properly ascertaining or investigating the borrower's financial position, or their true capacity to repay the loan. The report shows that mortgage brokers seeking to arrange refinancing transactions for borrowers in mortgage stress regularly approach accountants for a certificate of the borrowers 'capacity to repay'. The report analysed three refinances in detail. For those three borrowers, refinancing cost them on average: * 27 % of the equity accumulated in their home; and
* a minimum of $20,120 in fees and charges.

The report questioned the value of the accountants' certificates in verifying capacity to meet repayments, even where those certificates were completed accurately and in good faith. The accountants' certificates were determined to be an inadequate substitute for proper credit assessment procedures. The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_119_Protecting_wealth_in_family_home.pdf/%24file/REP_119_Protecting_wealth_in_family_home.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.2 Guidance to people overseas wanting to offer financial services in Australia**On 11 August 2008, the Australian Securities and Investments Commission (ASIC) issued a new regulatory guide 'Doing Financial Services Business in Australia' (RG 121).The guide is part of ASIC's international capital flows work (see ASIC's recent report "Enhancing Capital flows in and out of Australia" (Report 134)). One of the aims of ASIC's international capital flows project is to make it easier to establish a financial services business in Australia. The new guide assists foreign financial services providers understand Australia's financial services regime under the Corporations Act by:* setting out the statutory regime and describing ASIC's regulation of the financial services industry;
* describing the requirement to be licensed if the provider wants to provide financial services in Australia;
* summarising the exemptions available from the requirement to hold a licence, including those exemptions designed specifically for foreign financial services providers;
* introducing some of the obligations that come with being a licensee;
* describing disclosure obligations that apply if the provider offers financial products in Australia, even if the provider does not need a licence; and
* noting some of the other rules and legislation that may apply to someone from overseas that wishes to offer financial services in Australia.

The guide 'Doing Financial Services Business in Australia is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg121.pdf/%24file/rg121.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.3 Ongoing licensing relief for trustees of wholesale equity schemes**On 8 August 2008, the Australian Securities and Investments Commission (ASIC) gave ongoing relief exempting trustees of wholesale equity schemes from having to hold an Australian financial services (AFS) licence to provide custodial or depository services and dealing services (wholesale equity financial services).ASIC has released Class Order [CO 08/405] "Wholesale equity schemes: licensing relief for trustees - Amendment", which makes the licensing relief in Class Order [CO 07/74] "Wholesale Equity Schemes: Licensing Relief for Trustee" ongoing.ASIC has released Regulatory Guide 192 'Licensing: Wholesale Equity Venture Capital Schemes: Trustee Licensing' (RG 192) which explains the licensing relief in [CO 07/74].**Background**A wholesale equity scheme is an unregistered managed investment scheme that primarily invests in the securities of unlisted companies and whose members are wholesale clients.For tax reasons, wholesale equity schemes are usually structured using a multiple unit trust structure with separate corporate trustees. The AFS licensing provisions in the Corporations Act are likely to require the trustee of each of the multiple trusts in a wholesale equity scheme to hold an AFS licence to provide wholesale equity financial services, even though the scheme is effectively only being operated by a fund manager that already holds an AFS licence. ASIC has given the relief because it considers that requiring each trustee to hold an AFS licence, when a fund manager that is already an AFS licence holder takes responsibility for the operation of the wholesale equity scheme, would impose a disproportionate cost burden on the scheme.Whilst consulting on whether to give ongoing relief, ASIC issued CO 07/74 in May 2007 to provide interim licensing relief to trustees of wholesale equity schemes when a fund manager that has an AFS licence and is a related body corporate of the trustees accepts responsibility for the conduct of the trustees. The interim relief expires on 31 December 2008.Further information on CO 07/74 is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/IR%2B07-21%2BASIC%2Bconsults%2Bon%2Bpolicy%2Bon%2Blicensing%2Brelief%2Bfor%2Btrustees%2Bof%2Bwholesale%2Bequity%2Bschemes?openDocument" \t "_new) website.The Class Order [CO 08/405] "Wholesale equity schemes: licensing relief for trustees - Amendment" is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co08-405.pdf/%24file/co08-405.pdf%22%20%5Ct%20%22_new) website.The Regulatory Guide 192 "Licensing: wholesale equity venture capital schemes: trustee licensing" (RG 192) is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg192.pdf/%24file/rg192.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.4 Market turmoil response to financial services industry**On 7 August 2008, the Australian Securities and Investments Commission (ASIC) outlined five key market issues it will be focussing on over the coming months, specifically responding to concerns emerging from the current market conditions.Speaking at the Investment and Financial Services Association (IFSA) Annual Conference, ASIC Commissioner Belinda Gibson said the key areas are: * managed investment schemes (MIS) and the disclosure of risk;
* credit ratings agencies (CRA);
* listed investment vehicles;
* audit and accounting issues surrounding present valuation methodologies and disclosure for complicated financial assets; and
* market surveillance for illegal trading activities.

Ms Gibson told the conference that ASIC will continue to review sectors in the managed investment scheme industry to see how businesses operate and just how the market should be informed about the business models.ASIC recently issued a draft regulatory guide for mortgage and property funds, following its similar extensive work in the area of unlisted and unrated debenture products."It is perhaps self evident to say that where a MIS is in financial difficulties, we will want to focus management on liquidity, redemption practices and valuations", she said.ASIC is working with Treasury on a review of how credit rating agencies operate, as part of Australia's response to the Financial Stability Forum recommendations. It recently held roundtables with the CRAs, industry groups, research houses and consumer groups.Ms Gibson said the review was considering the extent to which investors rely on the ratings agencies and whether the level of diligence and discussion undertaken by agencies warrants this reliance. It will also consider how the agencies deal with conflicts of interest.ASIC will also focus on major transactions involving listed investment vehicles that are trading at a significant discount to their announced asset values. These transactions aim to increase share price or provide an alternative exit mechanism for holders.These transactions can take the form of privatisation, substantial buy-backs, buy-outs of activist shareholders, asset sales and wind-ups.Ms Gibson said ASIC would examine these transactions closely."Directors and responsible entities have a duty to act in the interests of all security holders. We will look closely to see how conflicts of interest are handled. Providing arms length valuations and independent expert reports as to value will be of great assistance in our assessment, and that of the market."ASIC will also look at adequacy and timeliness of disclosure. Directors should be frank about alternatives to the proposed transaction, and the possible benefits of the transaction to the person proposing it."ASIC is also on alert for substantial shareholders collaborating to force a restructure in breach of the takeover provisions.With financial results for the year to 30 June 2008 due out in the next few weeks, Ms Gibson said ASIC's accounting team will be focusing on several key areas."Valuation accounting will be important. Correct treatment of off-balance sheet entities will be important. In light of events earlier this year, correct classification of debt as current or long-term will be important."Ms Gibson told the conference that underpinning ASIC's work on these immediate priority issues would be its continued work on promoting confidence in Australia's market integrity.ASIC is constantly working to ensure timely and accurate disclosure of market sensitive information and the detection of insider trading, market manipulation and false rumours."A new project this year will be to review listed entities' analysts briefings that accompany results announcements. We will be looking to see that these briefings are available to all investors. We would expect forward looking statements to be clear about assumptions and risks."The speech is on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Gibson_market_turmoil_response_Aug_08.pdf/%24file/Gibson_market_turmoil_response_Aug_08.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.5 Key areas for enhanced international capital flows**On 31 July 2008, the Australian Securities and Investments Commission (ASIC) released a report on its work to enhance capital flows into and out of Australia.The 'Enhancing Capital Flows into and out of Australia' report details ASIC's recent mutual recognition work with some of the world's most significant markets and identifies objectives for the future.The net amount of capital flowing into Australia increased by 200 % between 2001 and 2006, while Australian investment abroad has increased from $7.3 billion in 1992 to $107 billion in 2006. The report details how ASIC, working with the Treasury, has been using its connections with other regulators to assist the freer movement of capital. ASIC and the Hong Kong Securities and Futures Exchange (SFC) have agreed to allow certain managed investments registered with ASIC to offer in Hong Kong and certain collective investments authorised by the SFC to offer in Australia. This is the first time the SFC has granted this type of recognition to foreign schemes. The Minister for Superannuation and Corporate Law, Nick Sherry and his New Zealand counterpart recently finalised an agreement to mutually recognise securities offerings. This means issuers can now use one prospectus to offer shares, debentures and/or managed or collective investment schemes to investors in both countries, subject to certain agreements.The report released also outlines how ASIC will respond to issues raised and as they emerge through its consultation of financial sector stakeholders. ASIC discussed impediments to international capital flows with 17 leading financial stakeholders (including commercial and investments banks, asset consultants and fund managers) to identify areas where it could make a difference.As a result of those discussions, ASIC has identified three key areas within its scope that would most contribute to increasing investment both into, and out of, Australia:* maximising the use of recognition arrangements (whether unilateral, bilateral or multilateral);
* maximising and enhancing international cooperation arrangements; and
* facilitating cross-border financial services businesses (in and out of Australia).

To progress the three key areas, ASIC will focus over the next year on actively maximising recognition for foreign markets and regulatory regimes and maximising international supervision and enforcement cooperation.The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_134.pdf/%24file/REP_134.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

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| **3.1 ASIC releases annual assessment of ASX****(a) Results of assessment**On 14 August 2008, the Australian Securities and Investments Commission (ASIC) released its assessment of each of the licensees of the Australian Securities Exchange (the ASX group). The report covers the period 1 July 2006 to 30 March 2008. Ordinarily, ASIC's assessment period is a calendar year with ASIC's report issued about May the following year. For this report, the assessment period was extended to cover ASX group's supervision of the market during a significant turnaround in market performance and sentiment since December 2007. Hence the later than usual delivery of the report to the Minister.ASIC's task is to assess if, over the period in question, ASX had adequate arrangements in place to supervise its markets (including to manage its conflicts of interest) and its clearing and settlement facilities under ss792A(c) and 821A(c) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).ASIC's assessment concluded that:* both ASX and SFE have adequate arrangements to:
	+ supervise their respective markets, including arrangements for handling conflicts between commercial interests and the need for licensees to ensure that the market is fair, orderly and transparent;
	+ monitor the conduct of participants in the market;
	+ enforce compliance with the markets rules;
* the provision of supervisory services by the ASX and SFE is adequately resourced;
* each of ACH, ASTC, SFECC and Austraclear have adequate arrangements:
	+ to supervise their respective clearing and settlement facilities, including arrangements for handling conflicts between commercial interests and the need for licensees to ensure that the facility services are provided in a fair and effective way;
	+ for enforcing compliance with the facility's operating rules; and
* the provision of supervisory services by ACH, ASTC, SFECC and Austraclear is adequately resourced.

During the assessment, ASIC identified areas for improvement to assist ASX in ensuring its supervisory arrangements remain adequate. Following discussions with ASIC, ASX has agreed to take 10 actions which ASIC believes will improve the supervision arrangements for the future, including its arrangements to manage conflicts.These agreed actions are detailed in the report and fall under these headings:* Role of ASX Markets Supervision Pty Limited (ASXMS) board and Licence Compliance - agreement to formally clarify roles of Licence Compliance and ASXMS in certain respects
* Role of the Policy Committee - agreement to clarify role and constitution of the Policy Committee
* Human, financial and technological resources - agreement to continue to monitor supervision resources, particularly for special projects
* Reporting of staffing for non-ASXMS supervisory activities - agreement to revise the quarterly report of the Group Executive Operations to cover the division's supervisory resources
* Assurance about total cost of supervision - agreement to provide additional certification of supervisory expenditure
* ASXMS funding levels - agreement to provide additional certification of sufficiency of budget to meet supervision obligations
* SYCOM upgrade process - agreement to review SYCOM upgrade process
* Benchmark measures - ASIC and ASX to cooperate on developing benchmarks for market supervision
* Error resolution - agreement of SFE to revise certain procedures for Error Resolution Policy applications
* ASTC settlement process - agreement to revise certain ASTC settlement processes in light of Tricom related delays experienced in February.

While there are matters for improvement, ASIC's view is that nevertheless, ASX had adequate arrangements in place for the review period and with these agreed actions, should continue to have adequate arrangements. In prior years, ASIC provided recommendations to ASX. In this report, as ASX agrees to the actions, they are presented as 'Agreed Actions' between ASX and ASIC.**(b) Background** **(i) ASX Group**The ASX Group comprises ASX Limited (ASX), Australian Clearing House Pty Ltd (ACH), ASX Settlement and Transfer Corporation Pty Limited (ASTC), Sydney Futures Exchange Limited (SFE), SFE Clearing Corporation Pty Ltd (SFECC) and Austraclear Limited (Austraclear).**(ii) Conflicts of interest**Under s792A(c)(i) and s821A(c)(i) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), ASX must have adequate arrangements to handle its conflicts of interests. This is, in effect, an obligation to ensure that its commercial interests do not prevail over the requirement to ensure that the market is fair, orderly and transparent or that clearing and settlement services are provided in a fair and effective way. In ASIC's report, ASIC makes two points by way of clarification of the existing legislative framework because there have been concerns in the market during recent volatility over ASX's role as a market operator and supervisor of its markets: * First, the regulatory regime under which ASX operates does not preclude the existence of conflicts of interest for ASX. There is no per se prohibition on ASX having conflicts of interest but ASX must manage its conflicts so as not to allow its commercial interests to prevail over its supervisory role. Whether or not (e.g. through separation of ASX's supervisory function from its commercial role or otherwise) there should be such a per se prohibition is a policy matter for Government. ASIC's role is to conduct the assessment (for an earlier period and not in real time) within the existing legislative framework.
* Second, the statutory standard on ASX is that it adequately manages its conflicts (i.e. that its management processes are adequate to ensure that ASX's commercial interests do not prevail over its supervisory function). ASIC's role is to assess if ASX has adequate arrangements in place. In the last five reports, and in this report, ASIC has concluded that ASX's arrangements for managing conflicts are adequate (i.e. meet the statutory standard).

**(c) Separate roles of ASX and ASIC - ASIC's cooperation with ASX**Under the existing legislative framework, both ASX and ASIC have separate roles in the supervision of the markets and of market participants. In addition, ASIC supervises ASX. ASX and ASIC co-operate extensively with each other, under the umbrella of a Memorandum of Understanding between the two organisations, that notes their complementary roles. ASIC and ASX meet formally each month to discuss supervisory issues, relating to both listed entities and market participants. In recent months, there have been joint supervisory reviews of market participants. The surveillance of short selling and possibly illegal trading activity that started in March 2008 was also a joint activity.ASIC is in the process of refocussing its MarketWatch and markets enforcement teams that deal with referrals from ASX on insider trading and market manipulation, to enhance its capabilities. In addition, ASIC recently announced that it would add more resources to the oversight of brokers and market participants. They will add to the total resources of both organisations available for market surveillance. These additional resources should also assist in reducing potential risks inherent from the fact that ASX and ASIC are separate organisations (particularly for areas such as insider trading where speed from possible detection to investigation is imperative).The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_135.pdf/%24file/REP_135.pdf%22%20%5Ct%20%22_new) website. The full ASIC assessment report is available on the [ASIC](http://www.asic.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents**3.2 Foreign exempt companies to become eligible for index inclusion** Standard & Poor's Index Services (S&P) and the Australian Securities Exchange (ASX) on 11 August 2008 announced, after consulting the market, that Foreign Exempt companies listed on ASX will be eligible for index inclusion, effective 1 September 2008. Under this change, Foreign Exempt companies listed on ASX will now be eligible for index inclusion, provided the primary listing of the stock is on a major exchange within a developed market. Foreign Exempt companies will still be required to meet all the standard index inclusion criteria in the S&P Index methodology such as capitalisation and liquidity thresholds.etailed Contents**3.3 ASX announces financial and operating performance for FY08** ASX Limited (ASX) announced its full-year result for the year ending 30 June 2008 (FY08). Normal net profit after tax of $365.9 million was achieved, a 16.9% increase on the $313.1 million for the prior corresponding period (pcp) to 30 June 2007 (FY07). The profit was achieved on operating revenue of $614.7 million, 11.2% higher than the $552.7 million in revenue in FY07, and on cash operating expenses of $136.7 million, 1.5% lower than the $138.8 million in expenses in FY07. A final dividend of 93.9 cents per share (cps) fully franked has been declared, up 2.6% on the FY07 final dividend of 91.5 cps. This maintains the ASX policy of paying 90% of normal net profit after tax as fully franked dividends to shareholders. Total fully franked dividends declared in FY08 are 192.4 cps, up 17.5% on 163.8 cps in FY07.etailed Contents**3.4 ASX Market Rule amendments to introduce the proposed AQUA market lodged with ASIC** ASX has lodged rule amendments with ASIC which provide for the introduction of the AQUA Market.  The proposed AQUA Market will facilitate the quotation of managed funds, exchange traded funds and structured products (AQUA products) on the ASX Market.The AQUA market will consist of the AQUA trading market and the AQUA quote display board.The AQUA trading market will provide a platform for AQUA Products and will operate on the Integrated Trading System in a similar way to the existing warrants market, with continuous matching of bids and offers and an opening and closing auction.The AQUA quote display board will provide a facility whereby Trading Participants may advertise indicative prices for AQUA Products. Other Trading Participants who wish to enter into transactions for these products will contact the Trading Participant that advertised them and enter into an agreement. This facility will be used for AQUA Products where the issuer does not seek on-market trading of the product but where CHESS settlement of the product may be attractive to the issuer for commercial or operational reasons.Having rules specifically designed for AQUA products will provide a clear framework for the quotation and trading of these products. The trading of AQUA Products on a licensed market will facilitate increased liquidity, price transparency and a high level of regulatory integrity in relation to these products.The rule amendments are subject to the non-disallowance process under the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  Further information will be provided once this process is complete.etailed Contents |

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| **4.1 Will the court grant an application for an examination summons where the person concerned is resident outside of Australia?** (By Eliza Metherall and Justin Fox, Corrs Chambers Westgarth) McGrath as Liquidators of HIH Insurance Ltd [2008] NSWSC 780, New South Wales Supreme Court, Justice Barrett, 31 July 2008  The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/july/2008nswsc780.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/july/2008nswsc780.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** This case dealt with an application by liquidators for an examination summons to be served on a resident of Hong Kong.  The court considered whether the proposed examinee was someone able to give information regarding the examinable affairs of the company under section 596B of the [Corporations Act 2001(Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The court further considered whether the court should exercise its discretion to summon the proposed examinee, notwithstanding that the proposed examinee was resident outside of Australia.  Having considered those issues, Barrett J granted the orders being sought. **(b) Facts** Liquidators for HIH Insurance Limited ("HIH") made an ex parte application for an examination summons under section 596B of the Corporations Act 2001, seeking to compel a resident of Hong Kong to be examined in relation to the affairs of HIH.   The liquidators sought to examine the proposed examinee in connection with the facts surrounding certain "takeover loss proceedings", which the liquidators had commenced in relation to HIH.  In the takeover loss proceedings, it was alleged that a Part B Statement prepared by FAI Insurances Ltd, which was then subject to a bid from HIH, was false and misleading and that certain persons might have acted to prevent the bid continuing or at least have taken steps to stop the bid, if those persons had known of the false and misleading information contained in FAI's Part B Statement. The application for examination summons related to a person (the Proposed Examinee) who, it was alleged, was in a position to stop the takeover bid, and that he could, might or would have taken or contributed to such actions had he known the true position at the time of the takeover bid.  The liquidators sought an order under section 596B of the Corporations Act 2001 to examine the Proposed Examinee on these issues.  Relevantly, the Proposed Examinee resided in Hong Kong. **(c) Decision**  Section 596B(1)(b)(ii) of the Corporations Act 2001 gives the court discretionary power to summons a person for examination in respect of a corporation's examinable affairs if an "eligible applicant" applies for the summons, and the proposed examinee "may be able to give information about examinable affairs of the corporation". After deciding that the liquidators were "eligible applicants" Barrett J turned to whether the Proposed Examinee might be able to give information about the "examinable affairs" of HIH.  His Honour stated that the chose in action the liquidators alleged HIH to have because of FAI's alleged misconduct relevant to the HIH bid, is an aspect of the "examinable affairs" of HIH.  Moreover, Barrett J concluded that any evidence the proposed examinee could give in respect of the possibility that the loss ultimately suffered by HIH may have been avoided "bears to that aspect of HIH's 'examinable affairs' a relationship that makes information from the proposed examinee as to evidence he could give, information 'about' those 'examinable affairs' within section 596B(1)(b)(ii)". Having determined that that the court had jurisdiction to consider the application under section 596B(1)(b)(ii), Barrett J considered whether the court should exercise its discretion to grant the examination summons. Barrett J considered two factors relevant to the exercise of the court's jurisdiction:   First, Barrett J considered whether the existence of confidentiality obligations on the Proposed Examinee which may prevent the examinee from responding to an examination, should lead the court to refrain from exercising its discretion to grant the orders.  On this issue, Barrett J agreed with the liquidators that the existence, scope and ramifications of any duty of confidentiality to which a proposed examinee is subject are not issues to be considered when the application for an order for an examination summons is considered.  Those issues are appropriately dealt with at the examination stage.   Barrett J qualified this conclusion by stating that where such a duty is so obviously an impediment that it can be said, without further inquiry, that it negates the person's ability to give any information at all about the company's examinable affairs, the court should not grant the order.  If so, that person would, because of the resultant inability, not be a person "able" to give information about the examinable affairs of the company in terms of section 596B(1)(b)(ii). Second, Barrett J considered whether the court's discretion should be withheld on the basis that the Proposed Examinee resided in Hong Kong.  In this regard, Barrett J accepted the submissions of the liquidators that there were three issues to be considered in this regard, namely:* whether the situation is within section 581(4) of the Corporations Act 2001;
* whether there is some good substantive reason for the request; and
* whether the foreign court is likely to accept and act upon the request if it is made.

Section 581(4) of the Corporations Act 2001 provides that a court may request a court of an external Territory, or a court of a country other than Australia, that has jurisdiction in external administration matters to act in aid of, and be auxiliary to, it in an external administration matter.Barrett J found the examination of the Proposed Examinee to be within section 581(4) of the Corporations Act on the basis that an examination by the liquidators of a company being wound up in insolvency is an "external administration matter".  Further, Barrett J concluded that the fact that the Proposed Examinee, was not compellable directly by Commonwealth law and orders of the New South Wales Supreme Court, represented a good substantive reason to request the aid of the Hong Kong court.  Turning to the third condition Barrett J found that based on the opinion of Hong Kong solicitors tendered in evidence, a Hong Kong court is likely to accept and act upon a request made by the Supreme Court of New South Wales.  While acknowledging that this is ultimately a matter for the Hong Kong court to decide, Barrett J found that there was at least some utility in the request the liquidators requested the court to make. Accordingly, Barrett J made the orders requested.etailed Contents**4.2 Substitution of liquidators and applications to extend the limitation period in section 588FF(3) of the Corporations Act**(By Megan Esson, Blake Dawson) Ansell Limited v Davies [2008] SASC 203, Supreme Court of South Australia, Full Court, Doyle CJ, Anderson and David JJ, 23 July 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2008/july/2008sasc203.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2008/july/2008sasc203.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary**The issues to be considered by their Honours in these appeals were:* whether, where new liquidators are appointed after original liquidators resign or are removed, those new liquidators can be substituted for the original liquidators in the relevant proceedings; and
* whether the current liquidators can pursue an application to extend the limitation period in section 588FF(3) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Corporations Act) against formerly unidentified creditors and whether such an application can be pursued without joining the formerly unidentified creditors.

The court dismissed the appeals and upheld Debelle J's findings that:* the new liquidators could be substituted for the original liquidators; and
* it was unnecessary to join the formerly unidentified creditors, but if it was necessary, the court had the power to do so.

**(b) Facts**   On 3 January 2002, creditors of Harris Scarfe Limited (Receivers and Managers Appointed) (HSL) and Harris Scarfe Wholesale Pty Ltd (Receivers and Managers Appointed) (HSW) agreed to the voluntary winding up of HSL and HSW and liquidators (the original liquidators) were appointed.  On 31 March 2004 the original liquidators applied for an order under section 588FF(3)(b) of the Corporations Act fixing a "longer period" within which they could make an application for orders about voidable transactions under section 588FF(1) (the extension proceedings). The time period for making such an application to recover payments made by HSL or HSW in transactions which are alleged to be voidable because of section 588FE was to expire on 2 April 2004, unless the court made an order fixing a "longer period". Orders were made against a number of ascertained creditors, who were defendants to the application and against creditors who at that time were unidentified (the unidentified creditors), extending the period for making an application under section 588F(1) to 2 October 2005 (the extension orders). Following this, one of the original liquidators resigned and the other was removed upon application to the court, at which time the current liquidators (the current liquidators) were appointed. The current liquidators brought proceedings around 30 September 2005 for orders under section 588FF(1) against 19 formerly unidentified creditors.  Debelle J set aside the extension orders against those creditors because the extension orders were made without the unidentified creditors having been served or heard.  In November 2006, the current liquidators applied to be either joined as plaintiffs or substituted for the original liquidators in the extension proceedings (2006 application). In December 2007 they then applied in the same proceedings to join the formerly unidentified creditors as defendants to the application under section 588FF(3) for an order fixing a period within which orders might be sought under section 588FF(1) (2007 application). This decision concerned appeals from the orders made by Debelle J in relation to each of the 2006 application and the 2007 application. **(c) Decision**  **(i) First appeal - substitution of liquidators** The court upheld Debelle J's decision and found that the current liquidators were entitled to the benefit of any orders obtained, or application made, by the original liquidators and could therefore be substituted for the original liquidators. Further, their Honours held it was not appropriate to simply join the current liquidators to the proceedings, as that would have left the original liquidators as plaintiffs. Doyle CJ considered that the power to order substitution could also arise under rules 28.01 and 27.05 of the South Australian Supreme Court Rules (SASCR). Rule 28.01 provides that proceedings are not to be defeated by the mis-joinder or non-joinder of any person. Rule 27.05 provides that the court may join additional parties to a proceedings if that person claims an interest in the subject matter of the proceedings and has a right to joinder under an enactment or rule. In the alternative, Doyle CJ, disagreeing with the view taken by Debelle J, considered that the court could exercise the power conferred by rule 31.02 of the SASCR, which provides that a court may substitute or add a party where the interest of a party has been assigned, transmitted or devolved upon another person. His Honour considered that the terms "transmission" and "devolution" are often used to refer to a legal consequence that flows from an involuntary act and as a matter of ordinary language, the interest of the original liquidators in the proceedings can be said to have been transmitted to, or devolved upon, the current liquidators once they were appointed. **(ii) Second appeal - fixing of "longer period" for making of an application for orders under section 588FF(1)** Because the extension orders had been set aside, the court held the application could still be pursued as it remained before the court and undisposed of. The court dismissed the appeal, upholding Debelle J's decision that the 2007 application made by the current liquidators could be pursued without the individual creditors being joined as defendants. Further, the court agreed with Debelle J that, if in fact it was necessary to join the creditors, the court had the power to do this despite the period for making an application under section 588FF(3) having expired and not being able to be extended. **(iii) Power to join formerly unidentified creditors** The court agreed with Debelle J and the approach taken by Spigelman CJ in BP Australia Ltd v Brown [2003] NSWCA 216 at [149] - [152], which is that the limit under section 588FF(3)(a) does not apply to a particular creditor as a person. Instead, it is a time "limit for the making of an application for an order fixing a "longer period", and that time limit had been satisfied when the application was made", albeit that the creditor was not then joined.   Further, the court agreed with Debelle J that the formerly unidentified creditors could be joined under rule 28.05 of the SASCR, albeit that the rule states that when a person is added as defendant ". the proceedings as against such parties shall be deemed to have begun from the date of such service being effected". Acknowledging the subtle distinction between the following issues, Doyle CJ stated that the relevant issue for the court was "whether an application was made under section 588FF(3) within the required period" and "not whether the proceedings in which the application is made are deemed by the SASCR to have been commenced against the relevant creditor within that period". Accordingly, the court found that the application under section 588FF(3) was filed and made within the required time, and was not to be treated as made when served on the relevant creditor or when that creditor is joined to the proceedings. Doyle CJ noted that even if he disagreed with Spigelman CJ's approach, he would apply it in the "interests of consistency of decision making in relation to the Corporations Act". The court also considered the validity of the application by the original liquidators in the extension proceedings. Doyle CJ noted that it was implicit in Spigelman CJ's approach that the original liquidators' application was a valid application under section 588FF(3), to the extent that it was made in relation to the formerly unidentified creditors. His Honour referred to and agreed with the reasoning of Spigelman CJ in BP Australia Ltd v Brown (which has subsequently been followed in a number of decisions) that there will be circumstances in which a liquidator is unable to ascertain the identity the persons against whom claims can or should be made under section 588FF(1) and that "the power to extend the time limit for commencing proceedings should be broad enough to allow, in those circumstances, for an order granting an extension of time in general terms". Doyle CJ considered, again, that even if he disagreed with Spigelman CJ, that this reasoning should be followed in the interests of consistency. **(d) Unnecessary to join creditors** The court accepted the submission that "the interests of a creditor against whom or in relation to whom an order is sought, are affected". Accordingly, the creditor is entitled to be heard in opposition to the making of an order, may challenge the evidence presented by the liquidators and may prevent his or her own evidence.  While refraining to express a final view, Doyle CJ considered that it did not follow that the creditor must be joined.  His Honour noted, however, that there was no reason why a court should refrain from joining the formerly unidentified creditors.etailed Contents**4.3 Triple-stapled securities and section 411 of the Corporations Act** (By Emily Ramsden, Clayton Utz) Macquarie Capital Alliance Ltd [2008] NSWSC 745, Supreme Court of New South Wales, Austin J, 22 July 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/july/2008nswsc745.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/july/2008nswsc745.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** This was an application by Macquarie Capital Alliance Ltd ("MCAL") and Macquarie Capital Alliance Management Ltd ("MCAML") as responsible entity for Macquarie Capital Alliance Trust ("MCAT") for orders pursuant to section 411(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for the convening of a meeting of members to consider a proposed scheme of arrangement, and for orders in respect of a proposed trust scheme. The court found that the scheme of arrangement and trust scheme were both relatively straightforward, and that the matters raised on behalf of the plaintiff, having regard to the principles enunciated in *FT Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd (1977) 3 ACLR 69*, in relation to the proposed schemes did not give rise to any concerns. Accordingly, the Court made the orders sought.  **(b) Facts** MCAG is the name used to identify a triple stapled investment fund quoted on the Australia Securities Exchange.  The stapled securities are made up of:* shares in MCAL, an Australian public company;
* shares in Macquarie Capital Alliance International Ltd ("MCAIL"), a company registered under the laws of Bermuda; and
* units in MCAT, an Australian registered managed investment scheme.

The responsible entity of MCAT is MCAML, a wholly owned subsidiary of Macquarie Group Ltd.  The bidder, Macquarie Advanced Investment Company Pty Ltd ("MAIC") is a wholly owned subsidiary of Macquarie Advanced Investment Limited ("MAIL"), a Bermuda mutual fund.  Pursuant to the schemes, MAIC is seeking to acquire the:* shares in MCAL, which will be wholly owned by MAIC;
* shares in MCAIL as nominee for a Bermuda mutual fund company called Macquarie Advanced Investment International Ltd ("MAIIL"); and
* units in MCAT as nominee for Macquarie Advanced Investment Trust ("MAIT").

The proposed acquisition of MCAG securities is to be implemented by three interdependent schemes.  These proceedings relate to:* a scheme of arrangement under section 411 of the Act between MCAL and its members; and
* a trust scheme in relation to MCAT, in which MCAML as responsible entity of MCAT sought 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 relation to proposed amendments to the constitution of MCAT.

Concurrently, a scheme of arrangement between MCAIL and its members is proposed under the Companies Act of Bermuda.  Under the proposal, each MCAG security holder is entitled to receive, for each MCAG security, either wholly cash consideration of $3.40 or a wholly scrip alternative, at the election of the security holders. The cash consideration will be comprised of a capital distribution made by MCAT pro-rata to all security holders, which will provide up to $0.40 per security, with the remainder to be provided by the bidder.  Security holders who opt for the scrip alternative will receive one MAIG security for each MCAG security. The capital distribution that they would have otherwise received in cash will be held in a trust account to be used at the discretion of MAIG. The scrip alternative will not be available unless MCAG security holders representing 5% of those securities opt for scrip. If those opting for scrip represent more than 20%, scrip will be scaled back on a pro-rata basis so that no more than 20% of MAIG's issued capital will be held by former MCAG security holders. **(c) Decision** In hearing the plaintiffs' application under s 411 of the Act, Austin J adopted the approach enunciated in FT Eastment. In that case, Street CJ said (at p 72) that "the court will not ordinarily summon a meeting unless the scheme is of such a nature and cast in such terms that, if it received the statutory majority at the . meeting the court would be likely to approve it on the hearing of a petition which is unopposed". Austin J noted that the Court performs this task by reviewing the scheme documentation carefully and raising queries with counsel for the plaintiff company. Typically, the first hearing is an ex parte application by the plaintiff company. In the present case, however, the Court was also aided by an appearance, with leave, by senior counsel for the bidder, MAIC. Austin J stated that the appearance by counsel for MAIC did not detract from the force of Barrett J's observations in Re Permanent Trustee Company Ltd (2000) 43 ACSR 6011 at [7], namely that "an applicant in this kind of situation, like an applicant ex parte for an injunction, carries the responsibility of bringing to the court's attention all matters that could be considered relevant to the exercise of discretion". Having regard to the principles in Permanent Trustee, the Court's attention was drawn to a number of matters. Austin J's views on each of these issues are set out below. **(i) Related party issues** Austin J noted that the participation of Macquarie entities on both sides of the transaction raised issues about potential conflicts of interest, and in particular the potential conflict of interest that may arise for Macquarie representatives on the board of MCAG in recommending the proposed scheme to MCAG security holders. Having regard to the terms of the FT Eastment standard, and the precautions that had been taken against these issues, Austin J concluded that there was no reason to doubt that if the requisite approvals were received, the requisite orders would be obtained at the second court hearing.  The precautions taken by the bidder included:* the establishment of an independent board committee ("IBC") of MCAG, consisting of independent directors;
* the preparation of an independent expert's report;
* the preparation of a separate report to the IBC regarding related party transactions and arrangements for management and performance fees at various levels of the ownership structure; and
* implementation of voting exclusions, including additional voting restrictions adopted in view of the presence of Macquarie interests in the proposed ownership and management structure.

**(ii) Interdependent Australian schemes and Bermudan scheme** The dependency of the Australian schemes upon the implementation of the Bermudan scheme was not problematic. Austin J noted that the scheme booklet included substantial disclosure about the relevant Bermudan laws, and that the relevant approval was a certain event that could be evidenced. **(iii) Cash consideration** The fact that payment of part of the cash consideration would be a capital distribution from MCAT was not, in principle, problematic. It was, however, up to the responsible entity of MCAT to ensure that what was done fell within the trustee's powers conferred by the trust instrument. **(iv) Scrip consideration - Minimum and maximum take-up requirements** Noting that the minimum and maximum take-up requirements appeared to be adequately disclosed in the scheme booklet, and provided that those conditions were clearly defined and capable of prompt ascertainment, Austin J saw no objection to such arrangements. **(d) Conclusion** In light of the matters set out above, Austin J agreed with the overall submissions made on behalf of the plaintiffs that the matters to which attention had been drawn did not give rise to anything that should be of concern to the Court in terms of the FT Eastment principles. Accordingly, Austin J made the orders sought.etailed Contents**4.4 Placement of shares for the illegitimate purpose of keeping directors in office** (By Sabrina Ng and Katrina Sleiman, Corrs Chambers Westgarth)Bell IXL Investments Ltd v Therapeutics Ltd [2008] FCA 1081, Federal Court of Australia, Finkelstein J, 22 July 2008The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/july/2008fca1081.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/july/2008fca1081.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**Bell IXL Investments Limited (Bell IXL), a substantial shareholder of Life Therapeutics Limited (LFE), challenged a placement of shares by LFE to Bell Potter Nominees Limited (Bell Potter) on the ground that the power to allot shares was not exercised bona fide in the interests in LFE but for the illegitimate purpose of keeping the directors of LFE in office. The court found that the placement of shares by LFE was made for the alleged ulterior purpose and restrained Bell Potter from exercising the right to vote attaching to its shares in LFE at an upcoming shareholders' meeting.**(b) Facts**LFE's operations became unprofitable during 2006 / 2007 and in the early part of 2008 its financial position was precarious.  In or about March 2008 LFE entered into an arrangement with its largest customer, Octapharma AG (Octapharma) consisting of a management agreement, a loan agreement, and a put and call option which, subject to shareholder approval, gave Octapharma the option to purchase the shares in LFE's US subsidiaries at an exercise price of US$47.1 million. Following the announcement of the Octapharma transaction, the directors of LFE, Mr Bellman and Mr Milne, discussed with LFE's financial adviser the desire to raise further capital as they had in mind that LFE would become an "investment vehicle".    On 11 April 2008 Octapharma exercised its call option which required LFE to convene a meeting of shareholders to consider whether they would approve the sale.   Bell IXL held the largest parcel of shares in LFE, having acquired those shares on the ASX between 14 May and 4 June 2008.  Bell IXL's shares together with those of its associate represented about 10.17 % of the issued capital.   The directors of LFE discovered on 19 or 20 May 2008 that Bell IXL had acquired a substantial shareholding in LFE.  On 20 May 2008 Bellman and Milne met Mr Booth of Asandas, a licensed stock broker.  Booth's evidence was that he was told that LFE's business "had been running down" but that if shareholders approved the Octapharma transaction "the company would have a future".  Importantly Booth said he was told that the company "did not want to touch the . Octapharma monies (held by the company as cash on deposit) as if shareholders did not approve the transaction, the company's overall position would be even worse."  For this reason, LFE had to raise additional funds.  Booth also remembered being told that LFE had a large shareholder who held about 7 % of the issued stock. On 23 May 2008 Bell IXL lodged a substantial shareholding notice and issued a requisition for a meeting to consider replacing the board with Bell IXL's nominees.On 3 June 2008 Booth approached Mr Waller of Aegis Partners Limited (Aegis) as a potential investor in LFE.  The email from Booth to Waller stated "The directors have few shares and want to do a placement to hold on, 15%.  They have a group who has bought 7% and obviously want the shell.  We could do this 15%, they said board seat no problem and change of activity no problem, they don't want to lose their shell".  Waller replied to Booth within three hours stating:  "Let's do it boss". Bellman's evidence was that he did not tell Booth that shares were to be issued so that the directors would not "lose [control of] the shell".  Rather, apart from telling Booth about the Octapharma transaction he told him he was looking for investors so that LFE could "move forward into the future".  Booth maintained that he had not been told "directly" what he had written in the email to Waller. On 12 June 2008 Bell IXL gave notice that it would convene a meeting of LFE shareholders to consider replacing the board with Bell IXL's nominees.  On the same day LFE sent a subscription agreement for the placement of shares in LFE to Booth, who immediately sent it on to Aegis.  Aegis executed the agreement and returned it the same day without negotiating any of the terms.On 13 June 2008 LFE retained Global Proxy Solicitation Pty Ltd (GPS) to assist LFE obtain shareholder approval for the Octapharma sale.  GPS was also soliciting shareholders to vote against the resolution to remove the board pursuant to a separate retainer with the directors. On about 9 July 2008 Aegis instructed Bell Potter to take the placement and allocate the shares between its clients, only one of which was associated with Aegis. The allotment gave Bell Potter 13.04% of the voting shares and reduced Bell IXL's interest to 8.85 %. When Bellman learned that the shares were to be taken by Bell Potter he sent an email to an officer of Bell Potter which stated, "we understand you are sending the substantial shareholder notice. Also, can you please look at getting the proxy forms completed as well.  We don't want to risk leaving this to the last minute". **(c) Decision**  Finkelstein J considered that the email from Booth to Waller was important both for what it said and for what it did not say.  In relation to the omissions, there are several things a prudent investor would want to know about a company in which he was being offered a 15 % stake, including information as what LFE does, its assets and liabilities, details about the Octapharma deal and the likelihood of it being approved by shareholders, and what would happen to LFE if the sale was not approved by shareholders. Finkelstein J suggested that not only would a prudent investor want to know these things, a sensible adviser would provide that kind of information.    If the email reflected what Booth was told by Bellman or Milne, Finkelstein J held that the placement was not intended to benefit LFE, rather, its purpose was to keep the directors in office. As Finkelstein J considered that a broker of 24 years experience would not make the statements he did to a prospective investor unless he was confident they were true, his Honour held that Booth recorded what he was told or what was properly to be inferred from the comments made by Bellman or Milne.      Finkelstein J did not reject Bellman's evidence that he wanted to create a future for LFE and to achieve that future it was necessary to complete the Octapharma transaction and to raise additional capital. However, as the presence of Bell IXL had the potential to thwart Bellman's intentions, Finkelstein J held that his immediate object was to ensure that the directors were not removed so that the general objective could be achieved. Finkelstein J relied on three events in support of the finding that what motivated the share issue was Bellman's desire to keep himself and the other directors in office.   First, Waller took only three hours to decide to take the placement, seemingly without any detailed investigation of LFE, suggesting that the placement was not a normal commercial investment. This was confirmed by the speed with which Aegis executed the subscription agreement. Second, in relation to GPS' retainer, it may be that one purpose for retaining GPS was to encourage shareholders to approve the Octapharma deal, however, another, and more immediate purpose, was to prevent Bell IXL obtaining control of LFE. Third, in relation to Bellman's dealings with Bell Potter, Bellman evidence was that preparing the proxy form was merely "completing the transaction with Bell Potter". However, Finkelstein J held that Bellman had in mind receiving a proxy from Bell Potter that would support the existing board at the forthcoming meeting as it is likely that Bell Potter had agreed that it would vote against the removal of the board.   For these reasons, Finkelstein J held that the share placement was for an ulterior purpose, namely to support the existing directors and keep them in office, and made orders restraining Bell Potter from exercising the right to vote attached to the shares allotted to it until further order, and that the meeting called pursuant to the notice given by Bell IXL to consider the resolutions to remove the current directors which was scheduled for 23 July 2008 be adjourned. **(d) Addendum** Life Therapeutics Ltd v Bell IXL Investments Ltd [2008] FCAFC 144, Federal Court of Australia, Full Court, Ryan, Goldberg and Gordon JJ, 15 August 2008. LFE appealed to the Full Court of the Federal Court on the ground that the critical findings of fact by Finkelstein J which led him to the conclusion that the allotment of the shares was for an ulterior purpose which was improper were not open on the evidence and that Finkelstein J had failed to provide any or any sufficient findings and reasons to justify his conclusion that the allotment of shares was improper.  On 15 August 2008 the Full Court allowed the appeal on the ground that Finkelstein J did not expose his reasoning or set out the intermediate findings of fact which warranted the findings and conclusions. In particular, it was not possible to identify or determine the basis upon which Finkelstein J found that the directors of LFE discovered on 19 or 20 May 2008 that Bell IXL had acquired a substantial shareholding in LFE, as the only evidence before Finkelstein J when the directors discovered, or could have discovered, the extent of Bell IXL's shareholding in LFE, was that LFE received Bell IXL's first substantial shareholding notice on 23 May 2008. The Full Court remitted the proceedings to Finkelstein J for re-hearing.etailed Contents**4.5 The appropriate source of power to grant an extension of time within which to comply with section 625 of the Corporations Act** (By Kathryn Finlayson, Minter Ellison)In the matter of MacMahon Holdings Limited (ACN 007 406) [2008] FCA 1079, Federal Court of Australia, McKerracher J, 22 July 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/july/2008fca1079.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/july/2008fca1079.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary**The most appropriate source of power to grant an extension of time within which to comply with section 625(3)(c)(i) is section 1325A(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).**(b) Facts** The plaintiff, MacMahon Holdings Limited, is a public company admitted to the official list of the financial market conducted by the ASX. On 22 May 2008, it lodged a bidder's statement with ASIC in relation to its proposed acquisition of all the fully paid shares in Ausdrill Ltd (Ausdrill) by way of an off-market takeover offer. The bidder's statement was given to Ausdrill and lodged with the ASX on the same date.  Pursuant to the bid, the bid period commenced on the same date. The offer to Ausdrill shareholders involved an offer of shares in McMahon with any shares so issued admitted to quotation under the ASX. The offer was scheduled to close on 15 August 2008. Section 625(3)(c)(i) of the Corporations Act required the plaintiff to make an application to the ASX for the quotation of the maximum number of its shares that it would be required to issue under the offer within 7 days i.e. by 29 May 2008.    Due to an 'administrative oversight', the plaintiff's solicitors did not advise it of the timing requirements of section 625(3)(c)(i) until 10 July 2008.  The plaintiff lodged an application for quotation with the ASX the same day. The plaintiff sought declaratory relief and an extension of time within which to comply with section 625(3)(c)(i) under a variety of sections of the Corporations Act 2001 (Cth) including sections 1322 and section 1325D.  **(c) Decision**  His Honour granted an extension of time for compliance with section 625(3)(c)(i) pursuant to section 1325A(2) until the date of lodgement of the application. His Honour found that the date on which the error was discovered and the prompt response that discovery caused were adequately explained. In his Honour's opinion, granting an extension of time protected the interests of the offerees by ensuring that the securities which they had accepted with a reasonable expectation that they would be listed would, in fact, be listed. His Honour considered but did not decide whether the proper source of the power to extend the time for compliance with section 625 was section 1322. His Honour noted that at least one member of the Federal Court had expressed 'faint reservations' in relation to whether section 1322(1) and section 1325D could apply in relation to a contravention of section 625.  In the circumstances, his Honour held that section 1325A(2) was the most appropriate source of power to grant the relief.  etailed Contents**4.6 Social members' entitlement to vote on the distribution of surplus from liquidation** (By Justin Tilley, DLA Phillips Fox) Austinmer Bowling Club Ltd (in liq); Russell v Rodden [2008] NSWSC 730, New South Wales Supreme Court, Austin J, 17 July 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/july/2008nswsc730.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/july/2008nswsc730.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** This decision concerned the liquidation of Austinmer Bowling Club Ltd ("the Club") and the distribution of the liquidator's anticipated surplus. Austin J held that any determination by members as to the surplus can only be made at a meeting of members convened in accordance with the Club's articles of association and at any such meeting only Bowling and Life Members may attend and vote.  **(b) Facts** The Club is a company limited by guarantee formed under the Companies Act 1961 (NSW) and registered for the purposes of the [Registered Clubs Act 1976 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4200" \t "Default) ("the Act"). As at 31 May 2007 the Club consisted of 7 Life Members, 85 Bowling Members and 460 Social Members but by September 2007, when bowling activities ceased, those numbers had dropped by approximately one third. By 22 October 2007 the Club was in voluntary administration and Gregory Alexander Russell was appointed administrator.  Mr Russell investigated various potential amalgamations but was unsuccessful. On 11 December 2007 he was appointed liquidator; and after selling various assets of the club Mr Russell anticipated a surplus of approximately $850,000.  On 6 February 2008 Mr Russell sent a letter to all members of the Club setting out two proposals for the distribution of the surplus and inviting members to respond with their own proposals for distribution.  Mr Ian Rodden, who was a party to this proceeding representing the interests of the Social Members, proposed to form a sports trust to receive the surplus and support sporting activities (including bowls) in the local community.  However, on 12 February 2008 the directors of the Club purportedly met and made a recommendation that 60 % of the surplus should be distributed pro-rata to the clubs which Bowling and Life Members had joined and 40 % should be distributed to a trust fund.  In the course of these discussions an issue was raised as to how the decision would be made about the destination of the surplus and in particular whether the Social Members would be entitled to vote. In such circumstances, the liquidator commenced the current proceedings by originating process, seeking binding declarations on the questions of whether the members' decision must be at a meeting, and if so, whether the Social Members should be permitted to attend and vote.  **(c) Decision** Austin J approached this issue by addressing the relevant provisions in the Club's memorandum of association ("memorandum") and articles of association ("articles").  **(i) Definition of members - memorandum of association** Clause 6 of the memorandum of association provides that any surplus "shall be given or transferred to some institution or institutions having objects similar or in part similar to the objects of the Club . [s]uch institution or institutions shall be determined by the members of the Club". His Honour stated that the word "members" means all the members of the Club for three reasons. First, his Honour based his decision on the concept of membership now found in section 231 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), which was section 16(5) of the Companies Act 1961 (NSW). Secondly, the memorandum does not define the word 'members' and does not categorise membership into classes; and thirdly, there are several provisions of the memorandum that signify an intention that the word 'members' is to apply to membership as a whole.  However, whilst interpreting 'members' to include all members for the purposes of Clause 6, his Honour emphasised that neither Clause 6 nor any other provision of the memorandum deals with the way in which members are to make a decision such as the decision about surplus - that being left to the articles.  **(ii) How the decision is to be made - articles of association** The articles provide a procedure for member decisions to be made by voting at a meeting of members which explicitly excludes social members. It is in these circumstances that counsel for Mr Rodden was invited to make submissions that Social Members nonetheless maintained a right to participate in the determination of the distribution of the surplus.   Counsel for Mr Rodden made three submissions. First, that section 20(b) of the Act, which states that 'every member when eligible to vote shall be entitled to vote both on a show of hands and on the taking of a poll and shall have one vote', contemplates a process of taking a poll as an alternative to voting at a meeting; with the result that Social Members of the Club are able to vote.   Secondly, that various provisions of the Act permit all members to participate in certain decisions and consequently, Social Members in this case are entitled to participate in major decisions of the Club such as determining the destination of surplus on winding up.   Thirdly, that in order to give the memorandum and the articles reasonable business efficacy, those documents must be construed so as to imply a procedure for determining the surplus otherwise than at a meeting (for example, by postal ballot), or hold that there is no reason why Mr Russell should not give effect to the members' entitlement to participate in the decision making by some means other than by meeting.  In response, Austin J discounted counsel's first "courageous submission that the article contemplates a process of taking a poll as an alternative to voting", because it is a well established process in the constitutions of companies that the taking of a poll is not a separate form of decision making available to be used as an alternative to decision making at a meeting. Secondly, his Honour opined that the provisions of the Act were irrelevant to the question before him for determination; and thirdly, his Honour stated that the Court could not imply an entire procedure for decision making not contemplated by the memorandum or leave it to Mr Russell to create a new procedure outside that of a meeting.   Further to his response in relation to counsel's submissions, his Honour emphasised two matters. First, that there was nothing unreasonable in finding that Social Members are excluded by the articles from participating in decision making as to the surplus when Bowling Members, who are involved in the sporting activities (which are at the heart of the objects of the Club), pay membership fees reflecting their level of participation that are 10 times the annual fee for Social Members; and secondly, that the contribution of members to a deficit on winding up is limited to $2 per member.  **(iii) Conclusion and orders** His Honour concluded that the determination by members envisaged by Clause 6 is one to be made by following the procedure for members' decisions set out in the articles.  That procedure embraces decisions to be made by voting at a meeting of members. In doing so his Honour relied on his previous decision in the case of *Application of Gregory Jay Parker (liquidator of Shellharbour Golf Club Ltd (in liq)) [2006] NSWSC 219* and the principle enunciated by Hudson J in Re Buck, deceased [1964] VR 284 that whilst the memorandum is the dominant instrument, reference may be made to the articles to explain any ambiguities or to supplement the memorandum on matters upon which it is silent.   Consequently, his Honour concluded that Social Members cannot attend and vote at meetings convened to deal with the destination of the surplus in winding up under Clause 6 of the memorandum.  Austin J then summarised the manner in which he would make orders. His Honour surmised that whilst he agreed in substance with the declarations sought by Mr Russell, his Honour was not in a position to make an order binding a class of members of the Company (Life Members and Bowling Members) simply because the company, by its liquidator, presented a case which appeared to reflect their interests. In doing so Austin J requested supplementary written submission on this point, which if his Honour was satisfied with, he would subsequently make orders in chambers in terms of the declarations sought. In the interim his Honour confined relief to 'orders under s511(1)(a), or perhaps s511(1)(b) in conjunction with s479(3)' of the Corporations Act 2001 (Cth) that Mr Russell may apply to the court to determine any question arising from the winding up, or exercise all or any of the powers that the court might exercise if the company were being wound up by the court. His Honour then made an order as to costs in accordance with an existing agreement between the parties that costs should be borne in the liquidation of the Club. etailed Contents**4.7 Should a holder of redeemable preference shares be considered a creditor of a company for the purposes of Part 5.3A of the Corporations Act?**(By Xanthe Ranger, Mallesons Stephen Jaques) Heesh v Baker [2008] NSWSC 711, New South Wales Supreme Court, Barrett J, 15 July 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/july/2008nswsc711.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/july/2008nswsc711.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** Barrett J held that holders of redeemable preference shares of a company in voluntary administration should not be considered creditors of the company for the purpose of Part 5.3A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act") in order to claim outstanding dividend instalments and to effect redemption of their shares. **(b) Facts** York Capital Ltd ("York") was registered as a company in July 2006.  It lodged a prospectus with ASIC, inviting subscription for redeemable preference shares. These shares were referred to in both the prospectus and York's constitution as "CPRPS shares". Two core rights attaching to each CPRPS share were, first, the right to a cumulative preferential dividend and, second, the right to be redeemed for the face value of the CPRPS plus accrued dividends. Administrators were appointed to York under Part 5.3A of the Corporations Act on 5 June 2008. The first defendants were the joint holders of a parcel of CPRPS shares. They brought proceedings in their own right and as representatives of all other holders of those shares under rule 7.4(2) of the [Uniform Civil Procedure Rules 2005](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "Default) seeking a declaration that they were "creditors" of York for the purposes of Part 5.3A of the Corporations Act. The defendants submitted that they, and all other holders of the CPRPS shares ("CPRPS holders"), had claims against York that could be proven in winding up. First, if and when York had funds whereby it could lawfully pay a cumulative preferential dividend to the holders of the CPRPS shares and could effect redemption of their shares in accordance with the Corporations Act, York was obliged to make payments and accordingly the CPRPS holders were contingent creditors. In the alternative, the defendants argued that there was an implied term between York and the CPRPS holders that York would do all that was necessary to enable the CPRPS holders to have the benefit of an accruing right to the cumulative preferential dividend and the redemption sum, and as such, the CPRPS holders should rank as creditors of the company for voluntary administration purposes. **(c) Decision** Barrett J declared that the first defendants and other CPRPS holders were not creditors of the company for the purposes of Part 5.3A of the Corporations Act.  His Honour examined the terms of both the constitution and the CPRPS share prospectus in order to determine whether the CPRPS holders were creditors of York for the purposes of Part 5.3A of the Corporations Act. First, his Honour considered the circumstances where a cumulative preferential dividend could be paid on the CPRPS shares bearing in mind the operation of the company's constitution and statutory restrictions. Secondly, his Honour examined when redemption of the CPRPS shares could occur. Finally, his Honour discussed the relevant concept of creditor under Part 5.3A of the Corporations Act and its application to the facts of the case.   **(i) When are profits available for a cumulative preferential dividend to be paid?** Section 254T of the Corporations Act states that a dividend may only be paid out of profits of the company. Barrett J considered both the CPRPS prospectus and the company's constitution and held that these documents intended to reiterate this provision. His Honour briefly considered the concept of profit and distinguished "distributable profits" from "profits for dividend". York's constitution allowed the directors to set aside sums out of company profits as they thought proper, as reserves to be applied for any purpose the company might require. As such, the existence of profit of the company itself was not enough to ensure a dividend was declared. Profits that might have otherwise have been used to pay dividends may be applied in other ways. Only after the directors had exercised their powers to deal with company profits would any residue profit be available for dividend. Moreover, the cumulative preferential dividend entitlement for a particular period would only be satisfied where the dividend was declared by the directors. **(ii) Redemption of shares** Article 24.5.14 of the constitution stated that a CPRPS share 'shall be redeemed on or before the Redemption Date by payment to the holders, the sum paid up on such share and all arrears of dividends'. In addition, two references in the prospectus implied that redemption would not be required unless all conditions making the redemption lawful were satisfied. Barrett J interpreted these provisions as meaning that redemption would only be effected at the point of payment and only in accordance with Corporations Act restrictions. In particular, his Honour noted that, because section 254K of the Corporations Act prohibits a company from redeeming shares unless it is out of profits or proceeds of a new issue of shares made for the purpose of the redemption, York was unable to redeem the CPRPS where no profits were available. **(iii) The relevant concept of creditor** Barrett J applied the test in Brash Holdings v Katile [1996] 1 VR 24 that a "creditor" for the purposes of voluntary administration provisions in part 5.3A of the Corporations Act is a person who would have been a creditor had the company gone into liquidation. This definition incorporated the criteria set out in section 553 of the Corporations Act for creditors in a winding up context. Barrett J emphasised that all claims against a company (whether present, future, certain or contingent) were provable in a winding up following the enactment of the Corporate Law Review Act 1998 (Cth). On the facts, Barrett J rejected the defendants' argument that, if and when York had sufficient funds to pay the stipulated dividends to CPRPS holders and to effect redemption in compliance with the Corporations Act, York was obliged to pay and accordingly the CPRPS holders were contingent creditors. His Honour expressed concern that, if this was to be held correct, it may be possible to conclude that every shareholder of every company was a creditor of that company. In general, a company is not obliged to pay shareholders a dividend until the company has funds making it lawful to pay the dividend and the processes necessary to cause a dividend to be payable have been undertaken.   Barrett J rejected the defendants' alternative argument that an implied term existed between York and the CPRPS holders whereby York was obliged to do all that was necessary to enable the shareholders to have the benefit of their accrued dividends and any redemption sum. His Honour considered similar cases from a number of jurisdictions and concluded that the question was ultimately one of construction. Barrett J held that York owed no obligation to the CPRPS holders to do all things necessary to enable holders to have the benefit of accrued dividends and any redemption sum as York's obligations to pay these amounts under the CPRPS share terms were conditional on compliance with the statutory constraints of the Corporations Act. Because of York's financial situation, there were no profits or proceeds capable of distribution to CPRPS holders by way of dividend or redemption in accordance with the requirements of sections 254T and 254K of the Corporations Act. His Honour considered it important that the dividend payable on the CPRPS shares was a cumulative preference dividend. It meant that the CPRPS share terms accommodated the possibility that because of an absence or insufficiency of available profits, the whole or some of a dividend instalment of the CPRPS shares may not have been forthcoming on a particular date. In addition, where insufficient profits were available to declare a dividend, the whole of the available profit was to be carried forward into the next succeeding period until declared. This further emphasised that there was no absolute obligation on or implied term requiring the company to take all necessary steps to pay a dividend or redeem the CPRPS shares. Finally, Barrett J observed that if a dividend had been declared on the CPRPS shares but remained unpaid, York would have been indebted to each CPRPS holder for the amount of the dividend and would have been a creditor for the purposes of Part 5.3A of the Corporations Act. However, on the facts of the case, this situation did not arise.  etailed Contents**4.8 Application for joinder and leave to proceed against insurer** (By Joshua Morris, DLA Phillips Fox) Zhang v Minox Securities Pty Ltd; Liu v Minox Securities Pty Ltd [2008] NSWSC 689, New South Wales Supreme Court, Barrett J, 9 July 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/july/2008nswsc689.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/july/2008nswsc689.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** This case concerned the circumstances in which an insurer of a company in liquidation may be joined in an action against that company for breach by an authorised representative of the company of provisions of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act"). **(b) Facts** This case dealt with two separate applications made by the plaintiffs in their respective Corporations List proceedings. The first application was an application under section 500(2) of the Corporations Act for leave to proceed against the defendant, Minox Securities Pty Ltd, formerly Quantum Securities Pty Ltd ("Quantum"). Quantum became subject to creditors voluntary winding up following a period of voluntary administration under Part 5.3A of the Act after proceedings were commenced. The second application sought leave to join QBE Insurance (Australia) Ltd ("QBE") as a defendant to each proceeding under a combination of section 6(4) of the Law Reform (Miscellaneous Provisions) Act 1946 ("Law Reform Act") and the rules of court. As the applications, claims, and circumstances were, in relevant respects, the same in each case they were heard together. Mr Chen was an authorised representative of Quantum. The proceedings to which the applications relate concern the activities of Mr Chen with regard to solicitation of persons to invest in promissory notes issued by two companies related to Quantum, namely Mount Street Mezzanine Pty Ltd and Bayshore Mezzanine Pty Ltd ("the Mezzanine Companies"), each of which became subject to Part 5.3A administration in December 2005 and are now in creditors voluntary winding up. It was alleged that Mr Chen, as Quantum's authorised representative, breached a number of provisions of the Corporations Act. These included failing to give the plaintiffs and group members: a Financial Services Guide in contravention of section 941B of the Corporations Act, a Statement of Advice in contravention of section 946A of the Corporations Act, and a Product Disclosure Statement in contravention of 1012A of the Corporations Act. It was further alleged that Mr Chen contravened section 945A in relation to giving "personal advice" without a reasonable basis for doing so. An additional claim was also proposed concerning the alleged failure of Quantum to supervise and monitor the activities of Mr Chen as its authorised representative. The development of pleadings for the proceedings in relation to these claims was interrupted by the voluntary administration and subsequent winding up of Quantum. Following this it became apparent that there would very likely be no dividend to creditors. During the course of external administration the plaintiffs became aware of the existence of two insurance policies (a professional indemnity policy and a financial institutions policy) written by QBE and held by Quantum in relation to seemingly relevant risks. This awareness of the existence of the insurance policies prompted the plaintiffs to seek joinder of QBE as a defendant in each proceeding. The plaintiffs contended that, by operation of section 6(1) of the Law Reform Act, a charge attached to insurance moneys that were or may have become payable in respect of any liability that Quantum was found to have to the plaintiffs and the other persons for whom they sued. The plaintiffs argued that the charge arose because Quantum was indemnified by the QBE contract of insurance against that liability. Section 6(4) of the Law Reform Act, it was argued, thus enabled the plaintiffs to maintain an action against QBE to enforce the charge. **(c) Decision**  Barrett J found that there was no arguable basis for contending that either the professional indemnity policy or the financial institutions policy of QBE was responsive to the plaintiffs' claims against Quantum. For that reason, Barrett J dismissed the application for leave to join under section 6(4) of the Law Reform Act. In reaching that decision, Barrett J noted that it was "uncontroversial that the question of leave under section 6(4) must be approached in the way described by Priestly JA in Oswald v Bailey (1987) 11 NSWLR 715". Essentially, this required that the plaintiffs show that there was an arguable case as to the liability of the defendant, and that the QBE policies responded. Barrett J addressed this issue separately in relation to each policy. **(d) The professional indemnity policy** Attention was given to the construction of the "product list exclusion" in the professional indemnity policy schedule, which stated that there was no cover in respect of claims in specified circumstances. The plaintiffs argued that the "product list exclusion" might not operate to exclude the plaintiffs' claims against Quantum because Mr Chen was arguably not an "Insured" as defined in the policy. It was argued that, although Mr Chen was an "Authorised Representative" of Quantum, he was not an "Insured" because the activities he engaged in that were the subject of the proceedings were beyond the scope of his authority.  Barrett J noted that section 917B of the Corporations Act makes it clear that "Quantum will, for the purposes of relevant statutory provisions, be responsible for relevant conduct of Mr Chen even if Mr Chen was, at the time, on a 'frolic of his own'". However, Barrett J found that there was no reason why the product list exclusion could not be invoked. This was because the focus of the product list exclusion was not upon the person who committed the "actual or alleged act, error or omission" as set out in this exclusion, but rather the focus was on the person against whom the claim was brought - which in this instance was Quantum and not Mr Chen. Barrett J commented that regardless of whether Mr Chen was an "Insured", Quantum was clearly an "Insured" and the plaintiffs were proceeding against Quantum alone.  Barrett J found that at the time of the "actual or alleged act, error or omission" by Mr Chen (for which Quantum was responsible by virtue of section 917B of the Corporations Act) the Mezzanine company promissory notes were not on Quantum's approved product list and there was therefore no basis for contending that the professional indemnity policy provided indemnity for Quantum in respect of the matters alleged against it in the proceedings. **(e) The financial institutions policy** The issue for determination in relation to the QBE financial institutions policy concerned whether the financial planning exclusion in that policy applied to the claims made against Mr Chen. The financial planning exclusion set out that "QBE shall not be liable.in respect of any claim against the Insured: Directly or indirectly based upon, attributable to, or in consequence of the provision by or on behalf of the Insured of any advice usually provided by a Financial Planner". The plaintiffs argued that some of the claims, at least, were beyond the scope of the financial planning exclusion. The plaintiffs emphasised that in relation to the claim under section 941B of the Corporations Act the allegation was that Mr Chen failed to provide a document and not that he actively gave advice. Barrett J found that each of the allegations against Mr Chen related ultimately to "advice" given by him, and that there was no doubt that such advice was of a kind "usually" provided by a financial planner. Barrett J thus concluded that there was no arguable basis for contending that the financial institutions policy provided indemnity for Quantum in respect of the claims. In relation to the leave application under section 6(4) of the Law Reform Act, Barrett J found that neither the professional indemnity policy nor the financial institutions policy were responsive to the plaintiffs' claims against Quantum. In relation to the application for leave to proceed under section 500(2) of the Corporations Act, Barrett J made a direction for further consideration of that question in light of the fact that QBE would not be joined as a defendant and that the question of leave to proceed under that section had not been fully argued.etailed Contents**4.9 Setting aside a statutory demand under section 459H(1)(a) of the Corporations Act** (By NT Vijayalingam, Blake Dawson) Heron Park Pty Ltd v Bob Garner Excavations Pty Ltd [2008] VSC 248 Supreme Court of Victoria, Robson J, 9 July 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/july/2008vsc248.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/july/2008vsc248.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** The defendant company claimed the plaintiff company owed it money for excavation works. A statutory demand was issued by the defendant company. The plaintiff company applied to set aside the notice of statutory demand pursuant to section 459H(1)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). That provision permits a court to set aside a statutory demand if it is satisfied 'that there is genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates.'   Robson J granted the application and set aside the statutory demand. His Honour found that the fact in issue was not the merits of a dispute about the existence of a debt, but the existence of a genuine dispute about a debt. The plaintiff company established there was a plausible dispute about the debt claimed by the defendant company that warranted further investigation. That was enough to grant the application. **(b) Facts**  In May 2007 Rob Garner, the sole director of the defendant company, commenced excavation work on a subdivision project in Kilmore, Victoria.  The owners and developers of the subdivided land included the plaintiff company, Heron Park Pty Ltd.   Mr Garner was approached to commence excavation by Norm Thompson, a director of Glowell Pty Ltd ('Glowell'). Glowell was responsible for subdividing the land and had been contracted by the owners of the property to do so. Mr Garner deposed that Mr Thompson did not indicate to him during these discussions that he was an owner or developer. From the commencement of work until early August 2007, the defendant company addressed its invoices to Glowell. It received most payments by way of cheques drawn on account of the plaintiff company. However, Mr Garner ceased work during this period, claiming the total payments were insufficient and left a shortfall of some $70,000.     The contractor, Glowell, called a meeting with Daryl Reynolds, a director of the plaintiff company, to address outstanding accounts with sub-contractors such as the defendant company. According to the evidence brought on affidavit, this was the first time Mr Reynolds had met or was aware of any outstanding accounts with sub-contractors such as the defendant.   Subsequently, Mr Reynolds made further payments to the defendant company to partially account for outstanding fees and requested a resumption of excavation works. During these discussions Mr Reynolds also provided Mr Garner with letters confirming the existence of a contract between the defendant company and the contractor, and noted the plaintiff company was "responsible for the debts which" Glowell was incurring on its behalf.   Immediately afterward the defendant company made a formal demand to the plaintiff company for recovery of the remaining outstanding fees of some $60,000.00 owing for excavation works.  Correspondence ensued whereby the defendant company provided copies of its accounts and fees for the services rendered, as requested by the plaintiff company. The plaintiff company claimed the information provided was insufficient and refused to comply with the demand.   **(c) Decision**  On 1 November 2007 the plaintiff company was served with a notice of statutory demand. On 22 November 2007, the plaintiff company commenced proceedings to set aside the notice of statutory demand by way of originating process. The matter came before a Master who dismissed the application to set aside by way of Orders made on 26 February 2008.  The plaintiff company appealed to a single judge of the Supreme Court.  The matter came before Robson J on 22 May 2008. Under the Court Rules, an appeal from a matter heard by a Master is an appeal de novo. His Honour found a court can set aside a statutory demand if it is satisfied there is a genuine dispute between the parties. This does not involve a determination of the dispute on its merits. Rather, a court need only be satisfied that there is a 'plausible contention requiring investigation.'   Robson J relied on the decision of McClelland CJ in Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785, where his Honour said (at 787) that such an investigation raises 'much the same sort of considerations as the "serious question to be tried" criterion which arises on an application for an interlocutory injunction.'  The fact in issue is not the merits of the claim resisted by the applicant, but the plausibility of that claim.  Robson J cited with approval the recent comments of Dodds-Streeton JA in TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd 66 ACSR 67, where her Honour, with Neave and Kellam JJA agreeing, said (at [71]):The dispute or off-setting claim should have a sufficient objective existence and prima facie plausibility to distinguish it from a merely spurious claim, bluster or assertion and sufficient factual particularity to exclude the merely fanciful or futile.   His Honour found that a genuine dispute did exist in the case for the following principal reasons:* the evidence suggested the defendant company, until very recently, only considered it was in a contractual relationship with the contractor, Glowell, and not the plaintiff company;
* it was usual practice that a sub-contractor's agreement to carry out services would be with the contractor rather than the owner or developer of the subdivided land;
* the plaintiff did not admit to liability unambiguously or that the defendant ever had a right to relief against it; and
* the defendant furnished no real evidence going directly to the source of its rights against the plaintiff.

These factors suggested the dispute was genuine because it was supported by objective evidence and was prima facie plausible. That was all that was required to grant the application to set aside the demand. The plaintiff company had successfully discharged its onus of proof. This case adds to a long line of consistent authorities. It confirms that companies applying to set aside a statutory demand under section 459H(1)(a) of the Corporations Act 2001 are required to satisfy a relatively undemanding threshold to resist a creditor's statutory demand.etailed Contents**4.10 Doctrine of public interest immunity and protecting the identity of informers**  (By Marnie O'Brien, Mallesons Stephen Jaques) Australian Securities & Investments Commission v P Dawson Nominees Pty Ltd [2008] FCAFC 123, Full Court of the Federal Court of Australia, Heerey, Moore and Tracey JJ, 4 July 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/july/2008fcafc123.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/july/2008fcafc123.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** The Full Court of the Federal Court of Australia allowed ASIC's appeal against a decision refusing to grant public interest immunity over documents relating to ASIC's investigation of Multiplex Ltd (Multiplex). It was held that the documents, which included transcripts of interview with an informer who had given information to ASIC, did not have sufficient importance for the conduct of a civil action brought against Multiplex to outweigh the public interest in not disclosing the identity of the informer. **(b) Facts**  Multiplex contracted to design and construct a new Wembley Stadium in London. The project suffered time and cost blowouts. Multiplex announced a forecast loss on the project and resultant earnings reduction. The price of ASX-listed Multiplex shares fell substantially. ASIC investigated the circumstances surrounding Multiplex's announcement and the fall in the price of its shares. ASIC made findings that Multiplex had failed to comply with its continuous disclosure obligations. As a result, P Dawson Nominees Pty Ltd ("PDN"), on its own behalf and on behalf of persons who had acquired Multiplex shares between the period of 2 August 2004 and 30 May 2005, brought proceedings against Multiplex alleging that it had suffered loss as a result of misleading and deceptive statements made by Multiplex in the period leading up to the Wembley Stadium announcement.   PDN obtained leave to issue a subpoena duces tecum to ASIC to produce documents, including transcripts of examinations with an anonymous informer, connected with ASIC's investigation of Multiplex. A Federal Court judge rejected ASIC's objection to the production of the documents which ASIC argued were covered by public interest immunity because they would tend to reveal the identity of an informer (or informers) employed by a company associated with the Wembley Stadium project who informed ASIC of the project's problems and Multiplex's alleged failure to disclose them.  ASIC appealed to the Full Court of the Federal Court. **(c) Decision**  The Full Court of the Federal Court (Heerey, Moore and Tracey JJ) upheld ASIC's appeal and held that the documents sought to be obtained by PDN were subject to public interest immunity.   The judgment of Heerey, Moore and Tracey JJ considered four significant issues:1. What were the principles for appellate review of a trial judge's interlocutory order in relation to public interest immunity?
2. Was there absolute public interest immunity from disclosure of an informer's identity in civil proceedings, or was a balancing exercise called for?
3. If a balancing exercise was called for, is it conclusive against public interest immunity that the informer's identity is known to the entity informed against?
4. If not, what did the balancing exercise favour on the facts of the case?

**(i) Appellate review of interlocutory order to refuse to grant public interest immunity is not a review of an exercise of discretion** The Full Court held that an interlocutory order refusing to recognise public interest immunity over documents the subject of a subpoena is not discretionary.  Following the decision of the Victorian Court of Appeal in *State of Victoria v Brazel [2008] VSCA 37*, the Full Court held that a decision whether to grant public interest immunity is not an exercise of discretion. According to the court, competing public interests must be balanced in order to ascertain whether public interest immunity applies to the facts of a case. This balancing exercise is not discretionary, but is a question of substantive law, appellable on its merits. **(ii) There is no absolute public interest immunity applying to documents tending to reveal the identity of an informer**  The Full Court considered that, for the purposes of civil proceedings, there is no absolute public interest immunity applying to documents tending to reveal the identity of an informer.    The Full Court noted the general rule in Sankey v Whitlam (1978) 142 CLR 1 and Alister v The Queen (1984) 154 CLR 404 that public interest immunity will apply to a document where the public interest that the document should not be produced outweighs the public interest that a court should not be denied access to relevant evidence. Application of this general rule to the facts of a particular case therefore involves balancing two competing public interests. However, the Full Court noted that, in Cain v Glass (No 2) (1985) 3 NSWLR 230 at 246-252, McHugh JA (as he then was) held that, subject to one exception, public interest immunity was absolute and not subject to any balancing exercise when it applied to the protection of the identity of informers.  The only exception was, according to McHugh JA, that public interest immunity would not apply to protect the identity of an informer in criminal proceedings where it could help to show the defendant was not guilty. The Full Court decided not to follow the judgment of McHugh JA in Cain v Glass.  It held that, while there was a public interest in the protection of a particular informer, there was no reason to treat the protection of informers as justifying an absolute application of public interest immunity in civil proceedings.  It reasoned that there was a public interest in the fair and efficient disposition of civil disputes, including the access of courts to relevant evidence which litigants may wish to produce. Accordingly, whether public interest immunity applied to particular documents tending to reveal the identity of an informer required a balancing of competing public interests. **(iii) It is not conclusive against public interest immunity that the informer's identity is known to the entity informed against**  The Full Court held that, contrary to the decision of the trial judge, public interest immunity should not automatically be refused where the informer's identity was known to the entity informed against.   Following the decision of Doyle CJ in *Haydon v Magistrates Court (2001) 87 SASR 448 at [23]*, the Full Court held that the partial disclosure of an informer's identity, even to the person informed against, was not conclusive to the question of public interest immunity. This was because public interest immunity could be frustrated by accident, or by the malice of a witness who blurted out the name of an informer in open court. In addition, the overriding policy of Pt 9.4AAA of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) is to protect the identity of whistleblowers, notwithstanding that in some cases the identity of the whistleblower may become known to the employer (section 1317AA(1)(b)(ii), (iii) and (iv)).   **(iv) Public interest immunity applies to the documents which tend to reveal the identity of the informer**  The Full Court held that public interest immunity attached to the documents which tended to reveal the identity of the informer who had whistleblown on Multiplex.  The Court balanced the public interest in not disclosing the documents against the public interest that PDN should be denied access to them for its civil proceedings against Multiplex. The Full Court reasoned that there was significant public interest in not disclosing the documents. It was observed that the public interest in protecting informers, and encouraging future informers, is as important to ASIC as it is to police in their traditional role. By allowing disclosure of information on a confidential basis, the whistleblowing regulations of the Corporations Act facilitated early and efficient detection and investigation of misconduct by ASIC. Additionally, it was in the public interest to protect informers and future informers against the adverse consequences of disclosure of their identity, including possible intimidation or loss of employment.   The court then considered whether PDN would suffer disadvantage in its litigation against Multiplex by not getting access to the documents. It was noted that the documents were relevant to, but not sufficiently important for, PDN's case, which turned on what had occurred in relation to the Wembley Stadium project and whether or not the status of the project should have been disclosed by Multiplex to ASX. The documents in question did not have sufficient importance for the conduct of PDN's litigation to outweigh the importance of not disclosing the identity of the informers. Therefore, public interest immunity applied.etailed Contents**4.11 Deed of company arrangement did not create a trust** (By Stephen Magee) Parker, in the matter of Strongest Link Pty Ltd [2008] FCA 1007, Federal Court of Australia, Lander J, 3 July 2008The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/july/2008fca1007.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/july/2008fca1007.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** Where a deed of company arrangement (DOCA) provides for the establishment of a fund to pay pre-administration creditors, that money remains the beneficial and legal property of the company, unless the DOCA clearly establishes a trust over the money. Accordingly, if the DOCA is terminated, any surplus money in the fund is returned to the company. The funds are not held on trust for the pre-administration creditors. If a company is ordered into winding up while a DOCA is still in place, it is appropriate to order the termination of the DOCA. **(b) Facts**  On 31 December 2005, Strongest Link Pty Ltd and its creditors entered into a DOCA. Under the DOCA, the director of the company would pay money to the administrator. The administrator would hold that money in a fund for payment to creditors. Payment from the fund (even if only pro rata) would extinguish a creditor's claim against the company. Before all creditors were paid their full entitlements from the fund, the company was ordered to be wound up in insolvency. The deed administrator was appointed liquidator. However, there was no formal termination of the DOCA. In his capacity as deed administrator, the liquidator applied for court directions under section 447D of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). In his capacity as liquidator, he applied for directions under section 479(3). He sought directions about how to deal with the money in the fund established under the DOCA. He also sought an order for the termination of the DOCA under section 445D(1). The central issue was whether the fund should be applied in accordance with the terms of the DOCA or whether it should be applied in accordance with the statutory provisions governing winding up. If the fund were applied in accordance with the terms of the DOCA, the resulting payment to pre-administration creditors would be greater than they would receive in the winding up. **(c) Decision**  The first question to be decided was whether the DOCA fund was an asset of the company or whether it had been held by the administrator on trust for the pre-administration creditors. The court noted that there are conflicting authorities on this issue. It opted to follow the decision of Barrett J in *Lombe v Wagga Leagues Club Ltd (2006) ACSR 387*. There, it was held that a fund created by a DOCA for the payment of creditors was not held on trust by the administrator. In following this decision, the court said that, if Parliament had intended to create a trust under a DOCA, it could have done so.  Even if a DOCA could create a trust, it would be necessary to find the provisions creating such a trust in the DOCA itself. The DOCA in this case did not contain such provisions.  Accordingly, the remaining fund moneys were not impressed with a trust in favour of the pre-administration creditors. Nevertheless, the DOCA was still in place. The court held that the DOCA should be terminated under section 445D(1). The appointment of a liquidator meant that the administrator of the DOCA was unable to exercise his powers (an administrator is an officer of the company and the appointment of a liquidator suspends the powers of company officers (section 471A)). This meant that the DOCA had no further work to do, necessitating its termination. The liquidator was ordered to apply the DOCA fund in accordance with the usual rules of winding up. **(d) Comment** This was a novel case, because a DOCA normally terminates before the company is placed in liquidation. However, the central issue - the status of surplus money in a DOCA fund - is one which has arisen several times in the normal situation.  As Lander J noted, there are conflicting authorities on how that surplus is to be applied in the winding up.  The majority of judges who have considered this issue have held that the surplus funds are to be applied in accordance with the normal rules of winding up. However, the matter is unlikely to be resolved definitively until an appellate court rules on it or Parliament amends the Act. etailed Contents**4.12 What is the business of banking for the purpose of the Banking Act?**(By Steven Rice, Freehills)Siminton v Australian Prudential Regulation Authority [2008] FCAFC 88, Full Court of the Federal Court of Australia, Spender ACJ, Lander and Buchanan JJ, 30 May 2008The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/may/2008fcafc88.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/may/2008fcafc88.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**This decision by Spender ACJ, Lander and Buchanan JJ is authority that the making of a loan by a person is sufficient to establish that the person is engaged in the business of banking for the purposes of the [Banking Act 1959](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6665" \t "Default) ('Banking Act'). Injunctive powers under the Banking Act will be enlivened where a person other than a body corporate proposes to carry on banking business, or carries on a financial business and uses a restricted word under that legislation (such as "bank" or "banking") without appropriate regulatory consent.**(b) Facts**In 2002 and later, the appellant took steps to establish a country and "bank". In that year, he registered the business name "Principality of Camside" which ostensibly established the principality of that name. The Principality of Camside was later advertised on a website of the appellant, as was the fact that the Principality had a "bank" called the "Terra Nova Cache". The appellant also addressed a number of public meetings, at which deposits were sought for the "bank" in return for the payment of a high interest rate. More than $1.5 million was raised. Some persons who sought return of their funds were unsuccessful.The respondent commenced proceedings against the appellant on 14 December 2005. In the primary proceedings, the respondent alleged the conduct outlined above meant the appellant had contravened sections 7 and 66 of the Banking Act. Section 7 of the Banking Act prohibits a person other than a body corporate from carrying on banking business. Section 66 of the Banking Act prohibits a person from using certain words and expressions (including "bank" and "banking") without the consent of the Australian Prudential Regulation Authority. The respondent sought orders under section 65A of the Banking Act to restrain this conduct.Subsequent to the making of interim and interlocutory orders, the decision in the primary proceedings was handed down by Tracey J on 29 October 2007 (see Australian Prudential Regulation Authority v Siminton (No 6) [2007] FCA 1608). Following this, Tracey J made orders granting injunctions under section 65A of the Banking Act. The orders sought to prevent the appellant from receiving deposits of monies from the public, assuming or using words similar to "bank", advertising that he is carrying on banking business, and dealing with monies in accounts to the credit of the Principality of Camside or the Terra Nova Cache.The decision in Siminton v Australian Prudential Regulation Authority [2008] FCAFC 88 is an appeal from those primary proceedings. In the Full Court, the appellant contended that section 65A of the Banking Act was invalid, the primary proceedings were an abuse of process, and that Tracey J had erred in finding the appellant was in the business of banking.**(c) Decision****(i) Section 65A of the Banking Act is valid**The Full Court rejected all of the contentions of the appellant that section 65A of the Banking Act is invalid. First, the Full Court rejected the contentions of the appellant that section 65A of the Banking Act is not supported by the banking power in section 51(xiii) of the Constitution. In doing so, the Full Court considered sections 7 and 66 of the Banking Act represent a valid exercise of the power in section 51(xiii) of the Constitution (which provides the Commonwealth with the ability to make laws in relation to banking). The Full Court also held section 65A of the Banking Act represents a valid exercise of power derived from sections 51(xiii) and 51(xxxix) of the Constitution (the latter being the incidental power). The Full Court found support for this conclusion in R v Smithers; Ex parte McMillan (1982) 152 CLR 477, a matter dealing with customs legislation containing a provision similar to section 65A of the Banking Act.Second, the Full Court rejected the appellant's contention that section 65A of the Banking Act effected the acquisition of property on other than just terms. This contention was disposed of because the Full Court found there was no acquisition of property. Further, the Full Court held that imposing a requirement to provide just terms for the restraint on access to the property the subject of the orders would defeat the purpose of imposing the restraint in the first place. The conclusion to a similar effect in R v Smithers; Ex parte McMillan (citation above) was noted.Third, the Full Court rejected the contention that section 65A of the Banking Act is invalid because it does not require trial by jury (as provided for in section 80 of the Constitution). The Full Court concluded that while the appellant had been found to have contravened sections 7 and 66 of the Banking Act, this did not make him guilty of an offence. The Full Court held that section 65A of the Banking Act provides for civil remedies in the case of a person who has or may commit criminal offences, and that section 80 of the Constitution has no application in these circumstances.Fourth, the Full Court did not agree that section 65A vests legislative power in the court contrary to Chapter 3 of the Constitution. Their Honours held that section 65A of the Banking Act (and in particular, section 65A(11), which provides for a compensatory power) does not confer upon the court any legislative function. The Full Court considered section 65A(11) of the Banking Act is similar to provisions in other legislation, such as section 80 of the [Trade Practices Act 1974](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) and section 1324 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), and shares many of the features of section 23 of the [Federal Court of Australia Act 1976](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "Default).**(ii) The proceedings against the appellant were not an abuse of process**The Full Court believed the appellant was suggesting that the respondent was bringing the proceedings under section 65A of the Banking Act for the collateral purpose of seeking information to substantiate or justify an allegation of criminal offences. The Full Court noted the particulars of this complaint had been put the court and rejected on three previous occasions. The Full Court paid particular attention to, and rejected, the allegation of improper contact between the respondent and the District Registrar of the court.**(iii) The appellant was in the business of banking**The Full Court did not accept the contention by the appellant that he was not in the business of banking at the relevant times. In considering this argument, the Full Court examined the evidence in light of the findings of the High Court in Melbourne Corporation v The Commonwealth (1947) 74 CLR 31 and Australian Independent Distributors v Winter (1964) 112 CLR 443. The Full Court found that the respondent had established that the appellant had received investments and made a loan, and that the loan was enough to establish the appellant was engaged in the business of banking.etailed Contents**4.13 Plaintiff liquidator (funded by a 3rd party) ordered to provide security for costs**(By Owen Wolahan, Freehills) Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd [2008] NSWCA 148, New South Wales Court of Appeal, Hodgson, Basten, Campbell JJA, 20 June 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/june/2008nswca148.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/june/2008nswca148.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** A defendant successfully sought security for costs against a plaintiff liquidator who was funded by a litigation funder. The liquidator appealed against this order on grounds including that, as a plaintiff liquidator, security for costs should not have been awarded against him and that the primary judge should not have considered the litigation funder as a relevant factor. The defendant cross-appealed as it was unsatisfied with the amount ordered. The court found that the primary judge had erred in principle but upheld his original order. Security for costs can be ordered against a plaintiff liquidator. The presence of a litigation funder is relevant because they are interested in the proceedings solely for commercial profit. Gross delay is relevant, and it was appropriate to grant only future costs in these circumstances and not incurred costs. **(b) Facts** Arimco Mining Pty Limited's (Arimco) liquidator, Martin John Green, had commenced proceedings against Arimco's former directors and other officers. He sought to recover $22m plus interest for insolvent trading. He later secured funding from a litigation funder and joined the officers' insurance company (CGU) to the proceedings. CGU sought an order for security for costs in the amount of about $2.6 million. Arimco's officers had settled and CGU was the sole remaining defendant. Green was ordered to pay $450,000, being for CGU's future costs only, failing which his proceedings would be stayed: [2008] NSWSC 449. Green appealed, arguing that security for costs cannot be ordered against a plaintiff liquidator, and that the primary judge should not have considered the existence of a litigation funder as a relevant factor. He also argued that the primary judge did not properly consider the delay in CGU bringing its claim for security for costs. CGU applied for security for costs on 6 March 2008, having been advised that Green was funded by a third party around 14 December 2004. On 27 November 2007, the proceedings were set down to commence on 15 July 2008. CGU cross-appealed as the primary judge had awarded security for future costs only. CGU argued the primary judge erred in law, and failed to give adequate reasons for declining to order security for incurred costs as well. **(c) Decision** Hodgson JA gave the lead judgement. Hodgson JA found that the primary judge had erred. He therefore re-exercised the discretion, but affirmed the original order. Campbell JA agreed, and added some discussion. Basten JA agreed with Hodgson and Campbell JJA's discussion of the legal principles involved, but disagreed that an order for security for costs should be made in these circumstances. The main issues were:* whether security for costs may be ordered against a plaintiff liquidator;
* the relevance of the litigation funder;
* the relevance of delay in CGU claiming security for costs; and
* re-exercise of the discretion.

**(i) Can security for costs be ordered against a plaintiff liquidator?** Hodgson JA discusses two competing strands of authority. The first strand of authority suggests that security for costs will not be ordered against a liquidator suing personally (Re Strand Wood Co Limited [1904] 2 Ch 1). It is an extension of the general rule that a natural person will not be ordered to give security for costs because "poverty is no bar to a litigant": Cowell v Taylor (1885) 31 Ch D 34. The effect of this rule is that security for costs will not be ordered except in certain excepted cases, such as appeals and nominal plaintiffs. It is different where the plaintiff is a corporation. Section 1335 of the Corporations Law permitted a court to order security for costs against a corporation (now section 1335 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)). This introduced the distinction between a liquidator suing personally and a company suing through its agent the liquidator. The court has previously held that this distinction should not be merely regarded as "pedantic": Hession v Century 21 South Pacific Limited (1992) 28 NSWLR 120. The second strand of authority suggests that there are no rules or practices limiting the discretion to order security for costs. The second strand is principally concerned with what is required by the justice of the matter: Merribee Pastoral Industries Pty Limited v Australia and New Zealand Banking Group Limited (1998) 193 CLR 502. This applies where a defendant is relying on the inherent power of the court to control proceedings and prevent abuse of process. Examples of where the discretion has been exercised are where the plaintiff's poverty is self-inflicted, or where the plaintiff is a prolific litigator with already outstanding costs orders. Hodgson JA decided that a court considering applications for security for costs against liquidators should have regard to guidelines. These may be summarised as:* Liquidators suing personally are generally to be treated in the same way as natural persons. This means adverse costs orders may be made against them, and also that they may be ordered to pay security for costs.
* Security for costs may be ordered (at first instance) where the conditions set out in Rule 42.21 of the [Uniform Civil Procedure Rules 2005](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "Default) (NSW) (UCPR) are satisfied, and (on appeal) where there are "special circumstances" within UCPR 51.50.
* Security for costs can be ordered outside UCPR where there are "special circumstances", as with appeals.
* "Special circumstances" first requires proof that there is reason to believe the plaintiff will be unable to pay the defendant's costs. It also seems to require an additional element. Examples are where the plaintiff: has dissipated assets; has not paid previous costs orders; brings a weak case to harass the defendant; and/or brings a case for the benefit of others. Inability to meet an adverse costs order does not on its own constitute special circumstances, and does not itself place the onus on the plaintiff to prove that an order for security would stultify the proceedings.
* Where the plaintiff is a company in liquidation and not the liquidator, security for costs will be more readily ordered. Although, the court's discretion is unfettered and there is no presupposition in favour of granting security. If the plaintiff claims that an order for security will frustrate the litigation, it must show that those who stand behind the company and would benefit from the litigation are unable to provide security.

**(ii) Litigation funder** Hodgson JA found that a court should be readier to provide security for costs where there is a litigation funder. This is a third party who stands to benefit from the proceedings where their interest is solely to make a commercial profit from funding the litigation. He noted that shareholders or creditors of a plaintiff corporation are interested third parties but their interest is in having rights vindicated, not in commercial profit. Basten JA expressed concern that "litigation funder" is not defined anywhere, and strongly suggests that this is an area where the law could be standardised in the broader context of the regulation of corporate litigation lending. **(iii) Delay** Hodgson JA upheld the primary judge's reasoning on this issue. The primary judge noted that applications for security for costs ought to be made promptly however delay is not per se fatal. The liquidator led no evidence whether he would have pursued the proceedings if an order for security for costs had been made, arguing instead that the onus is on the defendant to disprove a presumption of prejudice. The trial judge noted that the liquidator's litigation funder was obliged to indemnify the liquidator for any security for costs. He said that the principled exercise of his discretion on this point is to order security for future costs. CGU could have obtained security for earlier costs had it applied earlier. **(iv) Re-exercise of discretion** Having decided that the primary judge acted on a wrong principle and/or failed to take into account relevant considerations, Hodgson JA proceeded to re-exercise the discretion. He found that the primary judge's decision to order security for costs, limited to future costs, was justified having regard to:* the very heavy costs of this case;
* the involvement of the litigation funder; and
* the primary judge's finding that the liquidator himself would or may be unable to meet an adverse costs order (not challenged on appeal).

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| **5. Contributions** |  |   |

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