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If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** |  | | |  | | | [1. 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SAI Global extends its apologies to Mr Bannerman and to Corporate Law Bulletin readers for any confusion caused. |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **1. Recent Corporate Law and Corporate Governance Developments** |  |  | | |  | | |  | | --- | | **1.1 Seminar (Melbourne and Sydney) The James Hardie decision - Implications for directors and their advisors**   The decision of the NSW Supreme Court in James Hardie is one of the most widely discussed judgments in recent years.  It was extensively reported in the media and its implications are now being analysed.  The court found that seven former non-executive directors and three former executives of James Hardie had breached their duties.  James Hardie was also found to have breached disclosure obligations in relation to ASX announcements.   In its media release of 23 April 2009, ASIC stated that the judgment is "a landmark decision in Australia on corporate governance".  ASIC also states that the decision provides directors with important guidance on (a) the practical application of the scope and content of the duties of executives (CEOs, CFOs and company secretaries) when taking important matters to the Board and disclosing those matters to the market; and (b) the responsibilities on non-executive directors when asked by management to consider strategic matters and to approve disclosure to the market of the Board's decisions.   This important seminar brings together well-known speakers to discuss the implications of the James Hardie decision.  The topics discussed by the speakers include:   * How company directors should react to the decision in James Hardie, in particular, the way in which meetings are conducted and recorded, and the implications for the business judgment rule. * The implications of the decision in relation to the allocation of responsibilities and liabilities between non-executive directors and executive officers when preparing and approving key ASX announcements, circumstances in which a director may be held responsible for a draft announcement they have not seen and management's obligation to fully inform the Board about the content in (and background to) a draft announcement. * Who is the relevant audience for directors to consider when authorising company announcements? * The intersection between the court's findings in James Hardie and continuous disclosure (and the obligation to announce immediately once an officer is aware of price sensitive information) * Implications of the decision for Board processes (draft minutes, agenda, process for decision-making and authorising announcements, role of advisors, and urgently convened meetings).   Speakers for the seminars are: Pricilla Bryans (Melbourne seminar) Partner, Freehills; Alan Cameron A.M. (Sydney seminar) Company Director; Quentin Digby (Sydney seminar) Partner, Freehills; Colin Galbraith A.M. (Melbourne seminar) Company Director; Bill Koeck (Sydney seminar) Partner, Blake Dawson; Marie McDonald (Melbourne seminar) Partner, Blake Dawson.  The seminar is convened by Professor Ian Ramsay, Director of the Centre for Corporate Law and Securities Regulation at the University of Melbourne.    The seminar is being held in Melbourne on 16 June 2009 and Sydney on 25 June 2009, 5.30pm to 7.15pm.    The flyer and registration form are available on the [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/go/news/index.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.2 Issues in the governance of central banks**  On 18 May 2009, the Bank for International Settlements (BIS) released 'Issues in the Governance of Central Banks', a report that was prepared by the Central Bank Governance Group. Given that central banks differ significantly in the nature of their functions and in their socioeconomic environments, the report does not intend to set out a single set of "best practices" but instead seeks to present information that will help decision-makers set up governance arrangements that are most suitable for their own circumstances.  The report highlights that the role of central banks has changed significantly over the years. Changes have often taken place in response to persistent policy problems or severe crises. For example, the need to deal with chronic inflation in the 1970s and 1980s prompted the identification of price stability as a formal central objective and led to a significant reworking of governance arrangements. The current global financial crisis could well have equally important implications for central banks, particularly with respect to their role in fostering financial stability. Although it is far too early to know how central banking will change as a result of the crisis, the report takes an important first step in identifying some of the governance questions that the crisis poses.  The report is available on the [BIS](http://www.bis.org/publ/othp04.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.3 Report calls for overhaul of executive remuneration in the banking sector**  On 15 May 2009, the UK Treasury Committee released its third report on the banking crisis. The report examines remuneration in the banking sector, as well as the roles of private actors, including non-executive directors, institutional shareholders, auditors and credit rating agencies in the banking crisis.  **(a) Remuneration in the City of London**   The report concludes that the banking crisis has exposed serious flaws and shortcomings in remuneration practices in the banking sector and, in particular, within investment banking. Moreover, the Committee is concerned that the FSA's Turner Review downplays the role that remuneration played in causing the banking crisis and questions whether the regulator is attaching sufficient priority to tackling the issue.  **(b) Non-executive directors**  The financial crisis has exposed serious flaws and shortcomings in the system of non-executive oversight of bank executives, the report says. It pinpoints three problems: the lack of time many non-executives commit to their role, with many combining a senior full-time position with multiple non-executive directorships; in many instances a lack of expertise; and a lack of diversity.  It calls for a broadening of the talent pool from which the banks draw upon, possible restrictions on the number of directorships an individual can hold, dedicated support or a secretariat to help non-executives carry out their responsibilities effectively, reforms to ensure greater banking expertise amongst non-executives directors, as well as stronger links between non-executive directors and institutional shareholders.   **(c) Remuneration in Lloyds and RBS**   On the issue of remuneration practices in the part-nationalised banks, the report acknowledges that, whilst there is a strong case for curbing or stopping bonus payments for senior staff in Lloyds Banking Group and Royal Bank of Scotland, the position of the banks would be worsened if they could not make bonus payments. That said, the report highlights a lack of transparency regarding the exact cost of bonus payments and these banks, including deferred bonus payments, and calls on the Government and UKFI to rectify this.   The report also proposes a number of reforms to remuneration more widely in the banking sector. These include enhanced disclosure requirements on firms about their remuneration structures and about remuneration below board-level, reforms to remuneration committees to make them more open and transparent, and a Code of Ethics for remuneration consultants.   **(d) Shareholders**  The report notes the failure of institutional investors effectively to scrutinise and monitor the decision of boards and executive management in the banking sector, concluding that this may reflect the low priority some institutional investors have accorded to governance issues, and that, in some cases, they may have even encouraged the risk-taking that proved the downfall of some banks. The Committee is particularly concerned that fragmented and dispersed ownership, combined with the costs of detailed engagement with firms by shareholders, resulted in the phenomenon of 'ownerless corporations.'  **(e) Auditors**   The audit process failed to highlight developing problems in the banking sector, leading the Committee to question how useful audit as it is currently designed is. The report also questions the issue of auditor independence and argues that investor confidence and trust in audit would be enhanced by a prohibition on audit firms conducting non-audit work for the same company. The report recommends the FSA should also consult on ways in which financial reporting can be improved to provide information on bank activities in a more accessible way.   The report: 'Banking Crisis: Reforming Corporate Governance and Pay in the City' is available on the [UK Parliament](http://www.publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/519/51902.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.4 Consultation on complex and non-complex financial instruments**     The European Markets in Financial Instruments Directive (MiFID) includes conduct of business requirements applying to a range of investment services. In certain respects, concerning investment firms' obligations to their clients and the information they must ask of clients, the approach and detail of these requirements differs according to the nature of the service; in particular whether or not the firm is providing investment advice to the client or is managing the client's portfolio on a discretionary basis.    MiFID lays down three sets of requirements in this area. On 15 May 2009, the Committee of European Securities Regulators (CESR) published a consultation paper that deals with the way in which the requirements apply to particular types of MiFID financial instruments.    CESR invites responses to this consultation paper by 17 July 2009.    Further information is available on the [CESR](http://www.cesr-eu.org/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.5 Working paper on the interaction of market and credit risk**   On 14 May 2009, the Basel Committee on Banking Supervision (BIS) issued a working paper titled 'Findings on the Interaction of Market and Credit Risk'. The paper summarises the findings of a working group under the Committee's Research Task Force.   The distinction between market and credit risk has been blurred by the development of credit risk transfer markets and the broad move to mark-to-market accounting for a wide variety of financial instruments. This has raised questions regarding approaches that treat the two types of risks separately. The financial crisis has illustrated how the two risks may reinforce each other and that in such stress situations illiquidity can exacerbate losses.  The working paper discusses the conceptual distinctions and empirical relationships between market and credit risk. It reviews issues related to aggregation and diversification benefits and discusses how market liquidity affects the relationship between market and credit risk.    The paper is available on the [BIS](http://www.bis.org/publ/bcbs_wp16.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.6 Regulatory reform of over-the-counter (OTC) derivatives**    On 13 May 2009, the US Department of the Treasury outlined proposed reforms for the regulation of over-the-counter (OTC) derivatives.  **Objectives of regulatory reform of OTC derivatives markets**   **(a) Preventing activities within the OTC markets from posing risk to the financial system**   Regulators must have the following authority to ensure that participants do not engage in practices that put the financial system at risk:   * The Commodity Exchange Act (CEA) and the securities laws should be amended to require clearing of all standardized OTC derivatives through regulated central counterparties (CCP): * CCPs must impose robust margin requirements and other necessary risk controls and ensure that customized OTC derivatives are not used solely as a means to avoid using a CCP. * For example, if an OTC derivative is accepted for clearing by one or more fully regulated CCPs, it should create a presumption that it is a standardized contract and thus required to be cleared. * All OTC derivatives dealers and all other firms who create large exposures to counterparties should be subject to a robust regime of prudential supervision and regulation, which will include: Conservative capital requirements, Business conduct standards, Reporting requirements and Initial margin requirements with respect to bilateral credit exposures on both standardized and customized contracts.   **(b) Promoting efficiency and transparency within the OTC markets**   To ensure regulators have comprehensive and timely information about the positions of each and every participant in all OTC derivatives markets, the new framework includes amending the CEA and securities laws to authorize the CFTC and the SEC to impose:   * Recordkeeping and reporting requirements (including audit trails). * Requirements for all trades not cleared by CCPs to be reported to a regulated trade repository. * CCPs and trade repositories must make aggregate data on open positions and trading volumes available to the public. * CCPs and trade repositories must make data on individual counterparty's trades and positions available to federal regulators. * The movement of standardized trades onto regulated exchanges and regulated transparent electronic trade execution systems. * The development of a system for the timely reporting of trades and prompt dissemination of prices and other trade information. * The encouragement of regulated institutions to make greater use of regulated exchange-traded derivatives.   **(c) Preventing market manipulation, fraud, and other market abuses**   The Commodity Exchange Act (CEA) and securities laws should be amended to ensure that the CFTC and the SEC have:   * Clear and unimpeded authority for market regulators to police fraud, market manipulation, and other market abuses. * Authority to set position limits on OTC derivatives that perform or affect a significant price discovery function with respect to futures markets. * A complete picture of market information from CCPs, trade repositories, and market participants to provide to market regulators.   **(d) Ensuring that OTC derivatives are not marketed inappropriately to unsophisticated parties**   Current law seeks to protect unsophisticated parties from entering into inappropriate derivatives transactions by limiting the types of counterparties that could participate in those markets.  But the limits are not sufficiently stringent.    The CFTC and SEC are reviewing the participation limits in the existing law to recommend how the CEA and the securities laws should be amended to tighten the limits or to impose additional disclosure requirements or standards of care with respect to the marketing of derivatives to less sophisticated counterparties such as small municipalities.   Further information is available on the [US Treasury](http://www.ustreas.gov/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.7 CEO turnover: study**  On 12 May 2009, Booz & Company published its annual study of global CEO succession patterns. The study examines the degree, nature and geographic spread of leadership change among the world's 2,500 largest publicly traded companies. Included this year for the first time is data on the incoming class of CEOs that sheds light on the career paths of executives who advance to the top of their organizations.  The Booz & Company study concludes that the nature of the recession is leading boards of directors of Western companies to stick with the leaders they know. CEO departures fell 0.5 percentage points in North America and 1.9 percentage points in Europe in 2008 over 2007, while globally that figure climbed 0.6 percentage points. Conflict-related departures, where CEOs and boards parted ways over differences in strategic direction, also fell in North America and Europe, by 0.3 and 0.2 percentage points respectively.  Among the key findings in the report:   * The reasons for CEO departures were remarkably consistent with past years. Of the 361 succession events among the companies studied, 180 were planned (retirement, illness, long-expected changes), 127 were forced (where a board removes a CEO for poor financial performance, ethical lapses or irreconcilable differences) and 54 were prompted by mergers. By comparison, in 2007, 346 CEOs left their companies; 169 departures were planned, 106 were forced, and 71 followed a merger. * Financial services and energy led all other industries in turnover rate increases. The financial services industry saw 18% of its CEOs losing their jobs, breaking with the patterns of previous years. The rate of forced successions was 8.8%, more than double the historical rate of 3.4%. Forced turnover in the energy sector also hit a record high, with 5.6% of its companies' CEOs ousted, versus the typical 2.7%, as enormous commodity price volatility in 2008 ended the comfort of steady high returns for much of the 2000s. Meanwhile, industries that are less sensitive to discretionary spending, such as industrials, utilities, healthcare and consumer staples experienced stable leadership, with turnover rates falling below their historic rates. * The average age of this year's incoming CEO class is 52.9, nearly two years older than the average 51.0 years of age, which has held steady over the past decade. * Nearly 20% of the CEOs studied have had held the top position before, almost double the 9.8% average rate for the 11 years Booz & Company has studied (1995, 1998; 2000-2008). Importantly, 65.6% of new CEOs have run a business, with 18.9% having served as CEOs before, 27.4% serving as business unit leaders, and others who had been regional heads, presidents or chief operating officers. * In Asia, forced removals nearly doubled from 3.8% to 6.1%; in Japan rates jumped nearly four-fold, from 0.8% to 3.1%.   Additional study findings:  **The "insider" advantage:** Among new CEOs, "outsiders" - those brought in from outside to lead the company - comprised about 24% of the incoming class, compared to 76% who were "insiders," promoted from within. Further, boards now appear to be "road-testing" potential leaders as chief operating officer or chief financial officer before giving them the wheel; 15% of new insider CEOs were auditioned, meaning they joined the company they now lead within the past three years.  **International but not multicultural:** Although 52% of incoming chief executives have previously held an international title, just 13% hail from countries outside the company's home nation. All but four of the 361 new CEOs are men, despite at least half of developed nations' workforces being made up of women.  **Resurgence of the "apprentice" model:** Half the incoming CEOs in planned successions assumed office having been apprentices, as their predecessors ascended to the Chairman role. This trend grew profoundly in North America, where 2008 saw 57% of new CEOs taking office in an apprenticeship situation, 20 percentage points above the region's historical average. While the apprentice model has always characterized Japanese businesses - with 82% of that country's outgoing CEOs over the 11 years studied falling into that pattern - it is unusual in North America, which typically sees just 42% of outgoing CEOs having been apprenticed in the same period.  **North American CEOs seen safest:** CEO tenure in North America is the longest it has been since 2000. Outgoing CEOs in the region enjoyed a median tenure of 7.9 years in 2008, versus 7.2 years in the 11 years Booz & Company has been analyzing data.   The report is available on the [Booz & Company](http://www.booz.com/media/uploads/CEO_Succession_2008.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.8 Consultation on national unfair contract terms provision**  On 11 May 2009, the Australian Consumer Affairs Minister, the Hon Chris Bowen MP, released the Government's draft national unfair contract terms provision for public comment.   The draft national unfair contract terms provision reflects the model agreed by Ministerial Council on Consumer Affairs on 15 August 2008 and confirmed by COAG on 2 October 2008.   The draft national unfair contract terms provision includes the following features:   * it will be implemented in the Australia Consumer Law, generally, and as part of the [Australian Securities and Investments Commission Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default), in respect of financial services; * a non-exhaustive, indicative 'grey-list' of types of terms that may considered to be unfair; * a regulation-making power for the Minister to prohibit terms in a standard-form contract that are considered to be, in all circumstances unfair; * the exclusion of terms 'required, or expressly permitted, by a law of the Commonwealth or a State or Territory'; * it will apply to all: new standard-form contracts entered into on or after the commencement  date (1 January 2010) and contracts that are renewed or varied on or after the commencement date, to the extent of the renewal or variation.   The draft national unfair contract terms provision contains the following key features:   * a term is deemed to be 'unfair' when it causes a significant imbalance in the parties' rights and obligations arising under the contract and it is not reasonably necessary to protect the legitimate interests of the supplier; * a remedy can only be applied where the claimant shows detriment, or a substantial likelihood of detriment, to the consumer; * it will relate only to standard-form contracts; * it will exclude the upfront price of the good or service; * the provision will apply to all sectors of the economy as part of the generic national consumer law.   The unfair contract terms provisions will be included in a Bill which is scheduled to be introduced into the Australian Parliament in June 2009. This legislation will also include new enforcement powers for the Australian Competition and Consumer Commission.   As part of the COAG agreement on a national unfair contract terms provision, Australia's consumer enforcement agencies will issue common national guidance in relation to the enforcement of the unfair contract terms provisions.  A consultation paper with the draft unfair contract term provisions is available on the [Treasury](http://www.treasury.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.9 UK Government to strengthen resolution arrangements for investment banks**   On 11 May 2009, UK Financial Services Secretary Paul Myners published a report setting out the Government's initial thinking on reforms to strengthen the UK's ability to deal with the failure of an investment bank.   The report outlines the Government's thinking on the changes to market practice, regulation, and insolvency law that might be needed to deal with any future failure of a major investment bank.   The report considers the treatment of investment banking clients after default, the future of their assets, and the treatment of their open or unreconciled trading positions. It also examines what can be done to make the process of insolvency more effective, and to limit the damage that may be done by a failing investment bank.    The report is available on the [UK Treasury](http://www.hm-treasury.gov.uk/consult_investment_banks.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.10 Consumer advocacy and research in Australia's new consumer policy framework**   On 8 May 2009, the Australian Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, released an issues paper entitled 'Consumer Voices: Sustaining Advocacy and Research in Australia's New Consumer Policy Framework'.   This issues paper outlines the Australian Government's approach to consumer policy, as well as existing Australian Government support for consumer advocacy and consumer policy research. It raises issues in relation to finding sustainable approaches to supporting consumer advocacy and consumer policy-focused research in the medium to long term.   The issues paper is available on the [Treasury](http://www.treasury.gov.au/documents/1532/PDF/Issues_paper_Consumer_voices.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.11 Financial services modernisation draft legislation released**   On 7 May 2009, Senator Nick Sherry, the Australian Minister for Superannuation and Corporate Law, released the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009. The Bill reforms the regulation of trustee companies, debentures and margin lending.    **(a) National regulation of trustee companies**   The Bill provides for the Commonwealth Government to assume responsibility for the regulation of trustee companies through the introduction of legislation providing for a single, standard, national regulatory regime.   Trustee companies are currently regulated at the State and Territory level. There are currently ten private licensed trustee companies operating in Australia. Members of the Trustee Corporations Association, the sectors' peak body, have approximately $510 billion of assets under management. Of this, around $24 billion is in "traditional trustee services", such as when acting as a trustee for charitable trusts, in deceased estate administration and for minors.    The new regime, which is focused on entity level regulation of trustee companies' traditional services, will provide authority under Commonwealth law for trustee companies to perform these traditional functions, deem such services to be "financial services" and require them to hold an Australian Financial Services Licence when selling such services.    During 2008, the Government raised the options of establishing either the prudential regulation of trustee companies or a consumer-focused regulatory regime to be overseen by the Australian Securities and Investments Commission (ASIC). After extensive consultation, ASIC regulation has been chosen as the most effective way forward. However, the Bill also contains a requirement for trustee corporations to maintain a minimum capital level, thereby further enhancing consumer protection.   As part of the new laws, trustee companies will be subject to new obligations covering financial product disclosure, licensing, conduct and advice, resulting in greater levels of consumer protection. Trustee companies will also need internal and external dispute resolution mechanisms, providing a simpler, cheaper way for consumers to resolve complaints, as an alternative to the high costs and delays involved in court action.   The replacement of different and inconsistent State-based regimes will also make it easier for trustee companies to operate across Australia, thereby removing artificial barriers to entry, promoting greater competition and allowing the development of a truly national market for trustee services.   The Bill also establishes an innovative approach to the issue of trustee company fees, which in most jurisdictions are currently subject to regulation. For the first time, all fees must be fully disclosed to all of the Australian public via the internet. Overall, fee caps are to be removed and subject to market conditions, noting that new clients can only be charged the fees specified in the company's latest fee schedule, and existing contractual arrangements remain in place.    Finally, the level of fees charged to charitable trusts and foundations that are new clients of trustee companies will remain, for a period of two years, subject to regulation based on the fee regime set out in the Victorian Trustee Companies Act (1984). Charitable trusts that are existing clients will have their fee levels grandfathered to ensure no existing client fees rise as a result of the new regime.   State owned entities that meet the legislation's criteria will be considered for inclusion on the list of trustee companies to be created under the new national scheme.   **(b) Regulation of debentures**  Debentures are debt instruments used by the issuer to raise funds from investors in return for the payment of interest. Debenture issues are governed by a trust deed and a requirement for the appointment of a trustee who undertakes a range of investor protection functions on behalf of debenture holders.   Promissory notes are very similar in function to debentures, however, they are regulated according to their value. Promissory notes issued with a value less than $50,000 are regulated as debentures; while promissory notes issued with a value greater than $50,000 are not subject to debenture regulation and treated as financial products.   As such, some issuers have sought to manipulate this loophole and have priced what are essentially debentures at above the threshold definition of a promissory note. This has the effect of avoiding having to comply with the consumer protection requirements under trustee arrangements.   The Financial Modernisation Bill will harmonise the legal regime to require all retail debentures and promissory notes to be subject to the full range of consumer disclosure and protection measures currently only applicable to debentures. This will include the requirement to have a trust deed and trustee arrangements, and to issue a full prospectus.   Additionally, the new laws will boost transparency in the debenture issuing sector for the benefit of investors by establishing a public register of debenture trustees, to be established and maintained by the Australian Securities and Investments Commission (ASIC).    The register, which will be established during 2009, will be available for review by investors online. ASIC will shortly issue guidance for debenture trustees on the process for registration and the information required as part of this process.   **(c) Regulation of margin lending**   Under the new laws, margin lending will be added to the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) as a financial product. Lenders will be required to hold an Australian Financial Services Licence, will be regulated by the Australian Securities and Investments Commission (ASIC), will be required to be members of low-cost external dispute bodies, will be required to clearly disclose fees and commissions before lending and will have to lend under a tailored margin lending-specific set of responsible lending obligations.   The Government's Financial Services Working Group will shortly release a simplified margin lending Product Disclosure Statement. The new disclosure regime will commence in conjunction with the new laws.   Finally, the new laws will clarify the operation of margin calls, which occur when the security provided by the borrower has fallen in value by a certain amount and the lender calls for additional security or cash to be provided, failing which the lender may sell down some or all of the investments provided by the borrower as security. Delays in these notifications and a consequent failure by borrowers to act quickly to meet their obligations may cause borrowers to fall into "negative equity".   The Bill will uniformly clarify for the first time which of the lender or financial adviser is responsible for notifying the margin loan borrower in the case of a margin call. The Bill provides that lenders notify clients of a margin call, unless arrangements are in place for the financial planner to do so.   The Exposure Draft of the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 is available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1533" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.12 Report on UK financial services sector**   On 7 May 2009, the UK Treasury published the report of the Financial Services Global Competitiveness Group.    The report highlights the contribution of regional financial centres, noting that the majority of financial sector jobs are based outside the City of London, providing employment for hundreds of thousands of workers in regional economies.  It also argues that the UK-based industry must seize opportunities to help meet the financial services needs of businesses and citizens in emerging markets, such as China.    The Group acknowledges the huge fiscal costs of the banking crisis to the global economy, taxpayers and public finances, and argues that effective regulation - with the UK taking a leading role in formulating global and European standards-will be the most important determinant of the sector's future success.    Alongside regulation, the Report also highlights the importance of maintaining effective long-term performance in areas such as the UK's skills base, tax environment, innovation and promotional efforts to ensure that the financial services sector is well positioned to play a role in meeting the future economic opportunities of the UK and global economy.    The report is available on the [UK Treasury](http://www.hm-treasury.gov.uk/d/uk_internationalfinancialservices070509.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.13 Hedge funds: Overview of regulatory oversight, counterparty risks, and investment challenges**  On 7 May 2009, the US Government Accountability Office (GAO) issued a report on hedge funds. These funds are pooled investment vehicles that are privately managed and often engage in active trading of various types of securities and commodity futures and options contracts highlighting the need for continued regulatory attention and for guidance to better inform pension plans on the risks and challenges of hedge fund investments.   This report discusses:   * federal regulators' oversight of hedge fund-related activities; * potential benefits, risks, and challenges pension plans face in investing in hedge funds; * the measures investors, creditors, and counterparties have taken to impose market discipline on hedge funds; and * the potential for systemic risk from hedge fund-related activities.   The report is available on the [GAO](http://www.gao.gov/new.items/d09677t.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.14 Report raises concerns about the SEC**    On 6 May 2009, the US Government Accountability Office (GAO) published a report on the Securities and Exchange Commission (SEC). According to the report the SEC Division of Enforcement (Enforcement) has played a key role in meeting the agency's mission to protect investors and maintain fair and orderly markets. In recent years, Enforcement has brought cases yielding record civil penalties, but questions have been raised about its capacity to manage its resources and fulfil its law enforcement and investor protection responsibilities.   The GAO was asked to evaluate, among other issues:   * SEC's progress toward implementing GAO's 2007 recommendations; * the exent to which Enforcement has an appropriate mix of resources dedicated to achieving its objectives; and * the adoption, implementation, and effects of recent penalty policies.   Recent overall Enforcement resources and activities have been relatively level, but the number of investigative attorneys has decreased 11.5% over fiscal years 2004 through 2008. Enforcement management said resource levels have allowed them to continue to bring cases across a range of violations, but both management and staff said resource challenges have delayed cases, reduced the number of cases that can be brought, and potentially undermined the quality of some cases.    The GAO also identified other concerns, including the perception that SEC had "retreated" on penalties, and made it more difficult for investigative staff to obtain "formal orders of investigation," which allow issuance of subpoenas for testimony and records. The GAO review also showed that in adopting and implementing new penalty policies, the Commission did not act in concert with agency strategic goals calling for broad communication with, and involvement of, the staff. In particular, Enforcement had limited input into the policies the division would be responsible for implementing. As a result, Enforcement attorneys reported frustration and uncertainty in application of the penalty policies.   The full report is available on the [GAO](http://www.gao.gov/new.items/d09358.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.15 Government releases termination benefits reform Bill**  On 5 May 2009, Senator Nick Sherry, the Australian Minister for Superannuation and Corporate Law, released the Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009, which enhances the regulation of termination benefits for executives and directors.  The Bill:   * significantly lowers the threshold at which shareholder approval is required for a termination payment from seven times an annual remuneration package to one times average annual base pay; * expands the number of company officers for which approval is required; * broadens the definition of what constitutes such a "benefit", including a new Regulation-making power to deem new forms of payment that seek to avoid the law as a termination benefit; and * does not alter contractual arrangements entered into before the Bill becomes law, including defined benefit superannuation arrangements, and excludes statutory superannuation payments from the calculation of "benefits".   In addition, the Bill proposes:   * significantly higher penalties, with potential fines for individuals now set at $19,800, up from $2,750, and for corporations now set at $99,000, up from $16,500; and * a mechanism for shareholders to assess golden handshakes in the context of the recipient's actual performance by requiring shareholder votes on termination benefits to take place at a future annual general meeting following an executive's departure and a ban on the calling of extraordinary general meetings that are only to undertake such an approval vote.   The Bill and draft commentary are available on the [Treasury](http://www.treasury.gov.au/home.asp?ContentID=521" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.16 IOSCO publishes interim recommendations on unregulated financial markets and products**   On 5 May 2009, the International Organization of Securities Commissions (IOSCO) Technical Committee published 'Unregulated Financial Markets and Products' - consultation report (Report) prepared by its Task Force on Unregulated Financial Markets and Products (Task Force). The Report contains interim recommendations for regulatory action designed to improve confidence in the securitisation process and the market for credit default swaps (CDS).   The Task Force was established by the Technical Committee in November 2008 in response to concerns expressed by the G20 regarding the crisis and the pivotal role that certain unregulated market segments and products had played in the evolution of capital markets.   The interim recommendations contained in the Report address issues of immediate concern with respect to:   * securitised products, including asset-backed securities (ABS), asset-backed commercial paper (ABCP) and structured credit products such as collateralised debt obligations (CDOs), synthetic CDOs, and collateralised loan obligations (CLOs); and * CDS.   **Interim recommendations**   While IOSCO encourages industry responses in the securitisation process and CDS market the Task Force recognises that industry initiatives alone will not be sufficient to restore transparency, market quality and integrity and has therefore formulated a number of interim recommendations to address the following concerns associated with both these areas. IOSCO will further consider which additional standards are necessary for the purpose of consistent implementation by national regulators of final recommendations.   **(a) Securitisation**    **Interim Recommendation 1 - Wrong incentives**    1. Consider requiring originators and/or sponsors to retain a long-term   economic exposure to the securitisation;  2. Enhance transparency through disclosure by issuers of all checks, assessments and duties that have been performed or risk practices that  have been undertaken by the underwriter, sponsor and/or originator; 3. Require independence of experts used by issuers; and  4. Require experts to revisit and maintain reports over the life of the product.    **Interim Recommendation 2 - Inadequate risk management practices**    1. Mandate improvements in disclosure by issuers including initial and ongoing information about underlying asset pool performance and the review practices of underwriters, sponsors and/or originators including all checks, assessments and duties that have been performed or risk practices that have been undertaken. Disclosure should also include details of the creditworthiness of the person(s) with direct or indirect liability to the issuer;  2. Strengthen investor suitability requirements as well as the definition of sophisticated investor in this market; and  3. Encourage the development of alternative means to evaluate risk with the support of the buy-side.    **Interim Recommendation 3 - Regulatory structure and oversight issues**   IOSCO recommends that jurisdictions should assess the scope of their regulatory reach and consider which enhancements to regulatory powers are needed to support interim recommendations 1 and 2 in a manner promoting international coordination of regulation.    **(b) Credit default swaps**    **Interim Recommendation 4 - Counterparty risk and lack of transparency**   In forming the interim recommendations below, the Task Force considered the establishment of central counterparties (CCPs) for the clearing of standardised CDS as an important factor in addressing the issues of counterparty risk and transparency.   1. Provide sufficient regulatory structure for the establishment of CCPs to clear standardised CDS, including requirements to ensure:  (a) appropriate financial resources and risk management practices to  minimise risk of CCP failure;  (b) CCPs make available transaction and market information that would  inform the market and regulators; and  (c) cooperation with regulators;    2. Encourage financial institutions and market participants to work on  standardising CDS contracts to facilitate CCP clearing;  3. CPSS-IOSCO Recommendations for CCPs should take into account issues arising from the central clearing of CDS;  4. Facilitate appropriate and timely disclosure of CDS data relating to price, volume and open-interest by market participants, electronic trading platforms, data providers and data warehouses;  5. Establish an appropriate framework to facilitate information sharing and regulatory cooperation between IOSCO members and other supervisory bodies in relation to CDS market information and regulation; and  6. Encourage market participants' engagement in industry initiatives for operational efficiencies.    **Interim Recommendation 5 - Regulatory structure and oversight issues**  IOSCO recommends that jurisdictions should assess the scope of their regulatory reach and consider which enhancements to regulatory powers are needed to support interim recommendation 4 in a manner promoting international coordination of regulation.    On the basis of the interim recommendations for these markets, the Report also identifies the need for further consideration of the other unregulated financial markets and products before general recommendations can be developed.   The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD290.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.17 SEC charges hedge fund manager and bond salesman in first insider trading case involving credit default swaps**  On 5 May 2009, the US Securities and Exchange Commission (SEC) charged Renato Negrin, a former portfolio manager at hedge fund investment adviser Millennium Partners LP, and Jon-Paul Rorech, a salesman at Deutsche Bank Securities Inc, with insider trading in credit default swaps of VNU N.V., an international holding company that owns Nielsen Media and other media businesses.  The SEC's complaint alleges that Rorech learned information from Deutsche Bank investment bankers about a change to the proposed VNU bond offering that was expected to increase the price of the CDS on VNU bonds. Deutsche Bank was the lead underwriter for a proposed bond offering by VNU. According to the SEC's complaint, Rorech illegally tipped Negrin about the contemplated change to the bond structure, and Negrin then purchased CDS on VNU for a Millennium hedge fund. When news of the restructured bond offering became public in late July 2006, the price of VNU CDS substantially increased, and Negrin closed Millennium's VNU CDS position at a profit of approximately $1.2 million.   This is the first insider trading enforcement action involving credit default swaps.   The SEC's complaint charges Negrin and Rorech with violations of the antifraud provisions of the Securities Exchange Act of 1934 and seeks a final judgment ordering them to pay financial penalties and disgorgement of ill-gotten gains plus prejudgment interest. Millennium has agreed to escrow the amount that the SEC is seeking as ill-gotten gains pending a final judgment in this case.   The litigation release is available on the [SEC](http://www.sec.gov/litigation/litreleases/2009/lr21023.htm" \t "_new) website.   The complaint is available on the [SEC](http://www.sec.gov/litigation/complaints/2009/comp21023.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.18 Transitioning to fee-based remuneration for financial planning advice**   On 1 May 2009, the Australian Financial Planning Association (FPA) recommended that, from 2012, fee based remuneration becomes the standard model for financial planning advice. This means that the profession will be encouraged to transition away from commission paid advice.    FPA members and the broader community have been asked to respond to a consultation paper which argues that changes to the current remuneration practices are necessary to reduce the potential for bias (and the perception of bias) and to improve overall industry sustainability and consumer confidence.   Financial planners in Australia, including FPA members, currently use commission based, fee-for-service or a combination of both remuneration models.   Under the commission-based system, on-going services provided to a consumer by a financial planner are paid for by the product provider, such as a super fund, to the financial planner through their licensee, for recommending the product to the consumer. Commissions are not paid directly by the client and cannot be switched off. They are paid until the client withdraws their funds or ceases life insurance cover. Commissions also bundle charges and make it difficult for clients to understand what component of the commission relates to advice, product, or administration.   Under the fee-for-service or direct-charge model the consumer is billed directly by the financial planner based on an agreement with the client. The product provider might be required to facilitate or execute the payment on behalf of the client, but this becomes an administrative issue rather than one of perceived influence or control.   The changes, if adopted, would apply to new clients from 2012.    Further information is available on the [FPA](http://www.fpa.asn.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.19 UK Treasury Select Committee publishes report on banking crisis**   On 1 May 2009, the UK House of Commons Treasury Select Committee published a report titled "Banking crisis: dealing with the failure of the UK banks". The report considers the causes of the banking crisis, how the UK Government has responded and recommends how issues can be resolved.  The summary of the report states that:    "The origins of the banking crisis were many and varied, including low real interest rates, a search for yield, apparent excess liquidity and a misplaced faith in financial innovation. These ingredients combined to create an environment rich in overconfidence, over-optimism and the stifling of contrary opinions. Notwithstanding this febrile environment, some of the banks have been the principal authors of their own demise. The culture within parts of British banking has increasingly been one of risk taking leading to the meltdown that we have witnessed. Bankers have made an astonishing mess of the financial system. However, this was a failure not only within individual banks but also of the supervisory system designed to protect the public from systemic risk."   The report is available on the [UK Parliament](http://www.publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/416/416.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.20 APRA consults on the use of reserves in superannuation funds**   On 29 April 2009, the Australian Prudential Regulation Authority (APRA) released draft guidance on the management of reserves by APRA-regulated superannuation trustees.     A discussion paper and draft Prudential Practice Guide 235 'Use of reserves in superannuation funds' (SPG 235) have been provided for consultation prior to finalisation of the guide later in 2009.     The [Superannuation Industry (Supervision) Act 1993](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "Default) (SIS Act) contains provisions relating to the maintenance and management of fund reserves.  Trustees and their directors are required to develop and implement a strategy for the prudent management of these reserves.    Reserves are not defined in the SIS Act.  The draft SPG 235 distinguishes between amounts set aside for contingent events and provisions for accrued expenses such as administration or taxation.  It also focuses on measures a trustee might consider in formulating a comprehensive reserving strategy.   The guide is available on the [APRA](http://www.apra.gov.au/Policy/Superannuation-Consultation-Packages.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.21 European Commission sets out principles on remuneration of risk-taking staff in financial institutions**  On 29 April 2009, the European Commission adopted a Recommendation on remuneration in the financial services sector. It recommends that Member States should ensure that financial institutions have remuneration policies for risk-taking staff that are consistent with and promote sound and effective risk-management. The Recommendation sets out guidelines on the structure of pay, on the process of design and implementation of remuneration policies and on the role of supervisory authorities in the review of remuneration policies of financial institutions. The Commission has also adopted a Recommendation on directors' pay (see IP/09/673) - see Item 1.24 in this Bulletin.  The Recommendation invites Member States to adopt measures in four areas:  1. Structure of pay: remuneration policies for risk-taking staff should be consistent with and promote sound and effective risk management. For this purpose, financial institutions should strike an appropriate balance between the level of the core pay and the level of the bonus. The payment of the major part of the bonus should be deferred in order to take into account risks linked to the underlying performance through the business cycle. Performance measurement criteria should privilege longer-term performance of financial institutions and adjust the underlying performance for risk, cost of capital and liquidity. Financial institutions should also be able to claim back already paid bonuses, where data has been proven to be manifestly misstated (claw-back).   2. Governance: remuneration policy should be transparent internally, should be clear and properly documented and contain measures to avoid conflicts of interest. The board should have responsibility for oversight of the operation of the remuneration policy for the financial institution as a whole with an adequate involvement of internal control functions and human resources departments or experts. Board members and other staff involved in the design and operation of remuneration policies should be independent.   3. Disclosure: remuneration policy should be adequately disclosed to stakeholders. The disclosure should be made in a clear and easily understandable way and contain core elements of the remuneration policy, its design and operation.   4. Supervision: supervisors should ensure, using the supervisory tools at their disposal, that financial institutions apply the principles on sound remuneration policies to the largest possible extent and have remuneration policies consistent with effective risk management. In order to address the question of proportionality, supervisors should take account of the nature and scale of the financial institution and the complexity of its activities in order to assess its compliance with the principles on sound remuneration policies.  The Recommendation will be followed up by legislative proposals to bring remuneration schemes within the scope of prudential oversight. In June, the Commission will present proposals to revise the Capital Requirements Directive to ensure that regulatory capital adequately covers the risks inherent in banks' trading book, securitisation positions and remuneration policies.   The Recommendation is available on the [European Commission](http://ec.europa.eu/internal_market/company/directors-remun/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.22 European Commission proposes EU framework for managers of alternative investment funds**  On 29 April 2009, the European Commission proposed a Directive on Alternative Investment Fund Managers (AIFM). The proposed Directive is part of the European Commission's response to the financial crisis, as set out in the Communication on Driving European Recovery. It aims to create a comprehensive and effective regulatory and supervisory framework for AIFM in the European Union. AIFM, which include the managers of hedge funds and private equity funds, managed around ?2 trillion in assets at the end of 2008. This is the first attempt in any jurisdiction to create a comprehensive framework for the direct regulation and supervision in the alternative fund industry. The proposal now passes to the European Parliament and Council for consideration.   The proposed Directive will require all AIFM within scope to be authorised and to be subject to harmonised regulatory standards on an ongoing basis. It will also enhance the transparency of the activities of AIFM and the funds they manage towards investors and public authorities. This will enable Member States to improve the macro-prudential oversight of the sector and to take coordinated action as necessary to ensure the proper functioning of financial markets. The proposal will help to overcome gaps and inconsistencies in existing regulatory frameworks at national level and will provide a secure basis for the development of the internal market.  The proposed AIFM Directive will:   * Adopt an 'all encompassing' approach so as to ensure that no significant AIFM escapes effective regulation and oversight, while recognising the legitimate differences in existing business models and providing exemptions for smaller managers for whom the requirements would be disproportionate. Therefore, the Directive will only apply to those AIFM managing a portfolio of more than 100 million euros. A higher threshold of 500 million euros applies to AIFM not using leverage (and having a five years lock-in period for their investors) as they are not regarded as posing systemic risks. A threshold of ?100 million implies that roughly 30% of hedge fund managers, managing almost 90% of assets of EU domiciled hedge funds, would be covered by the Directive. * Regulate all major sources of risks in the alternative investment value chain by ensuring that AIFM are authorised and subject to ongoing regulation and that key service providers, including depositaries and administrators, are subject to robust regulatory standards. * Enhance the transparency of AIFM and the funds they manage towards supervisors, investors and other key stakeholders. * Ensure that all regulated entities are subject to appropriate governance standards and have robust systems in place for the management of risks, liquidity and conflicts of interest. * Permit AIFM to market funds to professional investors throughout the EU subject to compliance with demanding regulatory standards. * Grant access to the European market to third country funds after a transitional period of three years. This should allow the EU to check whether the necessary guarantees are in place in the countries where the funds are domiciled (equivalence of regulatory and supervisory standards, exchange of information on tax matters).   Further information is available on the [European Commission](http://ec.europa.eu/internal_market/investment/alternative_investments_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.23 European Commission proposes better investor protection measures for packaged retail investment products**  On 29 April 2009, the European Commission committed to delivering important improvements to investor protection measures for the main investment products bought by retail investors. Inconsistencies in existing standards can be detrimental to investors and can lead to competitive distortions in the retail investment market. The Commission's conclusions, set out in the Communication on Packaged Retail Investment Products, are that product information requirements and rules on product sales need to be improved and made more coherent. The Communication outlines proposals for a new, horizontal legislative approach, drawing on the best of existing requirements and applying these to all relevant products. The Commission will now begin work on the detailed legislative proposals required for this new approach, and will provide an update on the work by the end of 2009.  The proposals focus on product disclosures and sales processes for all packaged retail investment products, such as investment funds, insurance-based investments and the various types of structured products. These products dominate the retail investment market, satisfy similar investor needs and raise comparable and important investor protection challenges.   The Communication does not contain detailed legislative proposals at this stage but sets out the high-level principles of a horizontal approach to product disclosures and selling practices and commits the Commission to bring forward legislative proposals to deliver these results.   The market for packaged retail investment products is very large, and can be estimated to have been worth up to 8 trillion EUR at the end of 2008. These products can offer considerable benefits to retail investors. However, they are often complex and difficult for investors to fully understand, particularly with regard to their risks and costs.   Further information is available on the [European Commission](http://ec.europa.eu/internal_market/finservices-retail/investment_products_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.24 European Commission sets out further guidance on structure and determination of directors' remuneration**   On 29 April 2009, the European Commission adopted a Recommendation on the regime for the remuneration of directors of listed companies, complementing previous Recommendations 2004/913/EC and 2005/162/EC. An appropriate remuneration policy should ensure pay for performance and stimulate directors to ensure the medium and long term sustainability of the company. The existing Directors' remuneration Recommendation is based on the idea of pay for performance through disclosure of the remuneration policy. The new Recommendation will give further guidance on achieving this by setting out best practices for the design of an appropriate remuneration policy. To this end, it focuses on certain aspects of the structure of directors' remuneration and the process of determining directors' remuneration, including shareholder supervision. The Commission has also adopted a Recommendation on remuneration policy in the financial services sector (see IP/09/674).  On the structure of directors' remuneration, the Recommendation invites Member States to:   * set a limit (2 years maximum of fixed component of directors' pay) on severance pay (golden parachutes) and to ban severance pay in case of failure. * require a balance between fixed and variable pay and link variable pay to predetermined and measurable performance criteria to strengthen the link between performance and pay. * promote the long term sustainability of companies through a balance between long and short term performance criteria of directors' remuneration, deferment of variable pay, a minimum vesting period for stock options and shares (at least three years); retention of part of shares until the end of employment. * allow companies to reclaim variable pay paid on the basis of data, which proved to be manifestly misstated ("clawback").   On the process of determining directors' remuneration, the Recommendation invites Member States to:   * extend certain disclosure requirements contained in the existing Recommendation to improve shareholder oversight of remuneration policies; * ensure that shareholders, in particular institutional investors, attend general meetings where appropriate and make considered use of their votes regarding directors´ remuneration; * provide that non-executives should not receive share options as part of their remuneration to avoid conflict of interests; * strengthen the role and operation of the remuneration committee through new principles on (i) the composition of remuneration committees; (ii) the obligation for the members of the remuneration committee to be present at the general meeting where the remuneration policy is discussed in order to provide explanations to shareholders; (iii) avoiding conflicts of remuneration consultants.   The Recommendation is available on the [European Commission](http://ec.europa.eu/internal_market/company/directors-remun/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.25 New national responsible lending laws**  On 27 April 2009, Senator Nick Sherry, the Australian Minister for Superannuation and Corporate Law, released the draft National Consumer Credit Protection Bill 2009 which will put in place new national responsible lending laws for all consumer credit in Australia.   It will be a condition of holding a new Australian Credit License (ACL) that lending must be done responsibly. All forms of consumer credit will be captured and it will become an offence to supply credit irresponsibly.   The laws, which are intended to operate from 1 November 2009, will entail two elements for assessing whether credit is being extended responsibly. These are: (a) assessing the unsuitability of a credit product for an individual and (b) assessing a persons' capacity to repay the proposed credit debt.   A credit contract must be assessed as unsuitable for the consumer if at the time of making the assessment it is likely that:   * the consumer will be unable to comply with the financial obligations under the contract, or could only comply with substantial hardship; * the contract will not meet the consumer's requirements and objectives; or prescribed circumstances set out that the contract must be assessed as unsuitable.   The possible range of factors that may need to be established in relation to a consumer's capacity to repay credit could include:   * the consumer's current income and expenditure; * the maximum amount the consumer is likely to have to pay under the credit contract for the credit; * the extent to which any existing credit contracts are to be repaid, in full or in part, from the credit advanced; * the consumer's credit history, including any existing or previous defaults by the consumer in making payments under a credit contract; * the consumer's future prospects, including any significant change in the consumer's financial circumstances that are reasonably foreseeable (such as a change in the amount the consumer has to pay under the credit contract for the credit or under any other credit contract to which the consumer is party); and * greater care would need to be taken in regard to inquiries about the consumer's financial situation in the circumstance where the consumer is refinancing, particularly due to an inability to meet the repayments of an existing credit contract. Refinancing may incur transaction costs and fees and charges, including fees for moving from one credit contract to another. All costs of moving credit contracts are expected to be taken into consideration when assessing the consumer's ability to meet the obligations of the new credit contract over a reasonably foreseeable term.   Further details of the national consumer credit package, including the full text of the Bills are available on the [Treasury](http://www.treasury.gov.au/consumercredit" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.26 Enhanced regulation for the issuance of credit ratings**    On 23 April 2009, the European Commission welcomed the respective approvals from the European Parliament and from the Council on the proposed Regulation on credit rating agencies (CRAs). The Regulation will have a major impact on the activity of credit rating agencies, which issue opinions on creditworthiness of companies, governments and sophisticated financial structures. Credit rating agencies will be expected to comply with strict standards of integrity, quality and transparency and will be subject to ongoing supervision of public authorities. Users of credit ratings in the EU will be in a better position to decide if the opinions of a specific credit rating agency are trustworthy and to what extent those opinions should impact their investment choices.   As a rule, all credit rating agencies that would like their credit ratings to be used in the EU will need to apply for registration. The applications will be submitted to the Committee of European Securities Regulators (CESR) and decided upon in a consensual manner by the relevant securities regulators grouped in a college. The college of regulators will also be involved in the day-to-day supervision of credit rating agencies.    Specific, albeit sufficiently exacting, treatment is envisaged and may be extended, on a case-by-case basis, to credit rating agencies operating exclusively from non-EU jurisdictions provided that their countries of origin have established regulatory and supervisory frameworks as stringent as the one now put in place in the EU.   Registered credit rating agencies will have to comply with rigorous rules to make sure (i) that ratings are not affected by conflicts of interest, (ii) that credit rating agencies remain vigilant on the quality of the rating methodology and the ratings, and (iii) that credit rating agencies act in a transparent manner. The Regulation also includes an effective surveillance regime whereby regulators will supervise credit rating agencies.    New rules include the following:   * Credit rating agencies may not provide advisory services. * They will not be allowed to rate financial instruments if they do not have sufficient quality information to base their ratings on. * They must disclose the models, methodologies and key assumptions on which they base their ratings. * They must differentiate the ratings of more complex products by adding a specific symbol. * They will be obliged to publish an annual transparency report. * They will have to create an internal function to review the quality of their ratings. * They should have at least two independent directors on their boards whose remuneration cannot depend on the business performance of the rating agency. They will be appointed for a single term of office which can be no longer than five years. They can only be dismissed in case of professional misconduct. At least one of them should be an expert in securitisation and structured finance.   The new rules are largely based on the standards set in the International Organisation of Securities Commissions (IOSCO) code.   The Regulation is available on the [Europa](http://ec.europa.eu/internal_market/securities/agencies/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.27 Private pensions and policy responses to the financial and economic crisis**  The current financial crisis has had a major impact on global pension assets, with the OECD estimating declines of US$5.4tn (over 20%) at the end of 2008. This is putting pressure on funding levels for defined benefit (DB) pension plans, and has served a severe blow to members of defined contribution (DC) plans close to retirement, denting confidence in many DC systems.   Representatives of the OECD and the International Organisation of Pension Supervisors (IOPS) met to assess policy responses to the financial and economic crisis in light of their international guidelines and best practices. Consequently, some lessons have been drawn on the important role of private pensions in complementing public systems, and on how pension systems should be best designed to introduce some degree of protection, improve sustainability of funding, enhance management and supervision, and step up disclosure and communication.   The resulting Working Paper on 'Private Pensions and Policy Responses to the Economic and Financial Crisis' was published on 29 April 2009.   The issues discussed in the paper include:  **Supervisory oversight should be proportionate, flexible and risk-based**   * Monitoring of pension funds has been strengthened by most authorities (via stricter stress testing, more frequent on-site visits and increased reporting). * Coordination - with industry, government ministries and other regulators - has also been stepped up. * Supervisory oversight should be risk-based, focusing on the main threats facing pension fund beneficiaries and the pension system as a whole.   **Funding and solvency rules for defined benefit plans should be counter-cyclical**   * Flexibility in meeting funding requirements has been shown by authorities (longer time for recovery plans etc.) thereby avoiding 'pro-cyclical policies' and allowing pension assets to act as long-term investors and potentially stabilising forces within the global financial system.   **Use the safety net to address issues of insufficient income at retirement**   * Public provisioning should provide adequate pensions for low income workers. * 'Top ups' for DC accounts are hard to administer affordably or fairly. * Incentives to keep working and to increase contributions would help rebuild pension assets.   **Improve the design of defined contribution plans, including default investment strategies**   * Default, life-cycle funds can help protect those close to retirement. * Guarantees for DC accounts may help - but it is unclear what level is necessary or who would pay for these. * Flexibility should be allowed in the timing of annuity purchases.   **Improve the governance and risk management of pension funds**   * Pension fund risk management needs to be strengthened to reduce exposure to unduly risky investments. * Pension fund governance needs to be improved to avoid exposure to assets not fully understood.   **Step up disclosure and communication and improve financial education**   * National campaigns to explain the long-term nature of pension assets are required to rebuild confidence in pension systems. * Better disclosure of performance and costs is also necessary. * Financial education is needed to help beneficiaries (and to some extent pension fund managers) to improve the understanding of investing, risk and return.   The working paper is available on the [IOPS](http://www.iopsweb.org/dataoecd/31/0/42618315.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.28 European Commission launches consultation on new legal framework for intermediated securities**   On 20 April 2009, the European Commission launched a consultation on the harmonisation of the legal framework for securities holding and transactions.  Following a request by the Economic and Financial Affairs (ECOFIN) Council, the Commission intends to come forward with a legislative proposal to increase legal certainty and efficiency of securities holding and improve protection of investors' rights, as well as address some other related aspects.   The Commission has prepared a legislative proposal addressing the relevant aspects relating to the legal certainty and efficiency of securities holding and transactions. Under the chosen approach, the proposal addresses four issues:  (a) the legal framework of holding and disposition of securities held in securities accounts, covering aspects belonging to the sphere of substantive law as well as conflict-of-laws;  (b) the legal framework governing the exercise of investors' rights flowing from securities through a "chain" of intermediaries, in particular in cross-border situations;  (c) the establishment of the free, EU-wide choice of issuers regarding the initial entry of their securities in the relevant holding structures, in particular central securities depositories; and  (d) the submission of any activity of safekeeping and administration of securities under an appropriate supervisory regime.   The Commission intends to propose a legislative measure covering these aspects towards the end of 2009.    The consultation paper is available on the [Europa](http://ec.europa.eu/internal_market/financial-markets/securities-law/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.29 European Commission launches call for evidence on review of Market Abuse Directive**   On 20 April 2009, the European Commission launched a call for evidence on its review of the application of the Market Abuse Directive, including some preliminary findings and proposals to improve and simplify this Directive. The Market Abuse Directive aims to ensure that behaviour such as insider dealing and market manipulation is properly deterred and sanctioned. The review is a key element of the Commission's policy to strengthen the EU regulatory framework for financial services set out in the Communication on "Driving European recovery" (IP/09/351) and of its action plan to reduce administrative burdens on EU companies by 25% by the end of 2012.  The Directive prohibits abusive behaviour such as insider dealing and market manipulation. It creates obligations aimed at deterring abuses, such as insiders' lists, suspicious transaction reporting, and disclosure of trades by managers of issuers. It also requires issuers to disclose inside information. It increases the means for regulators to fight against market abuse and provides for greater cooperation in international investigations.   **Issues addressed by the consultation**   The Commission considers that the effect of the Market Abuse Directive has generally been positive. It has defined different types of market abuse, created important obligations and specified the means to deter and sanction abusive behaviour.   The Commission has however identified some elements of the Directive that should be reviewed in order to improve its effectiveness and to reduce where possible unnecessary burdens. These issues include:   * The scope of the markets and financial instruments covered by the Directive; * The ability of listed issuers to delay disclosure of inside information; * Disclosure of inside information by issuers of commodity derivatives; * The ability of competent authorities to gain access to telephone records and other data; * The obligation to draw up insiders' lists and to report the transactions of managers of issuers.   Questions related to short selling, a topic that is not expressly addressed in the current Directive, are also included in the call for evidence.    The call for evidence is available on the [Europa](http://ec.europa.eu/internal_market/consultations/2009/market_abuse_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.30 CEBS publishes its principles on remuneration**   On 20 April 2009, the Committee of European Banking Supervisors (CEBS) published a finalised set of principles for remuneration policies following a one-month public consultation period and a public hearing. The principles address key aspects of well functioning remuneration policies and thus support the sound operation of banking institutions.    The scope of the principles covers remuneration policies applying throughout an organisation rather than focusing exclusively on executive pay or severance pay.    It focuses on key aspects of remuneration policies, and in particular:   * alignment of company and individual objectives; * transparency towards internal and external stakeholders; * governance with respect to oversight and decision-making; * performance measurement; and * forms of remuneration.   Implementation of these guidelines by the institutions is expected to take place by the end of Q3 2009 in order for supervisors to make a first assessment of the institutions' progress in transposing the principles.   The principles are available on the [CEBS](http://www.c-ebs.org/getdoc/34beb2e0-bdff-4b8e-979a-5115a482a7ba/High-level-principles-for-remuneration-policies.aspx" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1)  **1.31 New Centre for Corporate Law research reports**  The Centre for Corporate Law and Securities Regulation at the University of Melbourne has published four new research reports titled:   * Should Australia Replace Section 181 of the Corporations Act 2001 (Cth) With Wording Similar to Section 172 of the Companies Act 2006 (UK)? * Forgiving a Director's Breach of Duty: A Review of Recent Decisions * A Report on Enforceable Undertakings Accepted by ASIC from 1998 to 2008 * Stakeholders and Directors' Duties: Law, Theory and Evidence   The research reports are available on the [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/go/news/index.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  |  | | |  | | |  | | --- | | **2.1 ASIC improves dispute resolution schemes**  On 18 May 2009, the Australian Securities and Investments Commission (ASIC), announced that it has improved consumer access to dispute resolution schemes so that disputes can be resolved more quickly and efficiently, saving time and money for industry and consumers.   The key changes are twofold:   * With effect from 1 January 2010, all schemes will be required to deal with claims worth up to $500,000, even though they will be allowed to limit the maximum amount of compensation payable per claim to less than that amount, in accordance with their existing rules. Currently, EDR scheme rules bar a complaint involving more than the applicable compensation limit; and * With effect from 1 January 2012, EDR schemes will only be allowed to limit (cap) the maximum amount of compensation payable per claim to a minimum of $280,000 (or $150,000 if the claim relates to an insurance broker) with the ability to opt for a higher figure in the rules of the scheme.   EDR schemes will also be able to award interest in addition to compensation awards.   Other significant changes to ASIC's dispute resolution guidance include:   * EDR schemes will have a discretion whether or not to cancel a member's membership and/or to continue to handle a complaint where a member ceases to carry on business. This change will improve complainants' access to EDR, in light of difficulties some investors have had in the wake of recent corporate collapses; * EDR schemes will be required to publish statistics about the number of complaints received and resolved against individual EDR scheme members; and * Financial service providers will be required to adopt a new definition of 'complaint' (based on the 2006 Australian Standard on dispute resolution (AS ISO 10002-2006)) in their internal dispute resolution processes.   The changes are outlined in two revised regulatory guides. ASIC has released the revised guides now to ensure that the new Financial Ombudsman Service (FOS), the amalgamation of five dispute resolution bodies, will develop its new Terms of Reference in line with the new guides and set the standard for external dispute resolution.  **Phased implementation of new arrangements**  Most of the new requirements will be implemented from 1 January 2010, in line with the implementation of the FOS' new Terms of Reference. The new minimum level for compensation caps will be implemented from 1 January 2012. This will ensure that financial service businesses, EDR schemes and the professional indemnity insurance market will have sufficient time to understand and reflect these changes.  The revised Regulatory Guide 139 - 'Approval and Oversight of External Dispute Resolution Schemes' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg139.pdf/$file/rg139.pdf" \t "_new) website.  The revised Regulatory Guide 165 - 'Licensing: Internal and External Dispute' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg165.pdf/$file/rg165.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h2)  **2.2 ASIC releases financial hardship report**  On 7 May 2009, the Australian Securities and Investments Commission (ASIC), in conjunction with Consumer Affairs Victoria (CAV), released a report examining how lenders and mortgage brokers respond to borrowers experiencing financial difficulties.   The report, 'Helping home borrowers in financial hardship' (REP 152), found that while some lenders are responding well to the needs of their customers, there is generally room for improvement and provides guidance to industry on how to improve practices.  The report found that:   * Information about financial hardship is usually only provided following payment default, making it very difficult for borrowers to take positive action at an early stage. Equally concerning, this information is often insufficient for borrowers to understand their options and make informed choices; * Some lenders do very little to identify borrowers who may require hardship assistance. Many lenders leave this identification of need to collection officers who may not be trained for the purpose eg. one lender only identifies hardship where the borrower raises the need for assistance themselves; * Lenders appear to prefer offering short-term assistance, such as a three month payment moratorium, rather than genuinely engaging with, and responding to, a borrower's specific situation. For example, a home loan borrower who has lost income through reduced overtime may need their loan to be extended with lower repayments over a longer period. In such circumstances, a short moratorium is a very temporary fix leaving the borrower likely to default when repayments resume; * Some lenders have adopted policies that are inconsistent with the rights and remedies available to borrowers under the Uniform Consumer Credit Code. For example, by refusing hardship assistance once payments are more than 60 days overdue or limiting any variation in repayments to a maximum period of six months; and * Despite clear industry standards mortgage brokers generally have a limited understanding of their role in responding to financial hardship. While most brokers say they offer assistance, there is little evidence of formal policies and procedures to ensure it is done effectively or constructively.   Further information is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP152_Helping%20home%20borrowers%20in%20financial%20hardship.pdf/$file/REP152_Helping%20home%20borrowers%20in%20financial%20hardship.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h2)  **2.3 ASIC issues report on relief applications decided between August to November 2008**  On 24 April 2009, the Australian Securities and Investments Commission (ASIC) released a report outlining recent decisions on applications for relief from the corporate finance, financial services and managed investment provisions of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) between 1 August and 30 November 2008.   The report, 'Overview of decisions on relief applications (August to November 2008)' (the Report) provides an overview of the applications where ASIC has exercised, or refused to exercise, its exemption and modification powers from the financial reporting, managed investment, takeovers, fundraising and financial services provisions of the Act. As a result of ASIC's short selling ban implemented on 19 September 2008, the Report includes an overview of ASIC's response to the issues arising from the ban.  The Report also highlights instances where ASIC decided to adopt a no-action position regarding specified non-compliance with the provisions, and features an appendix detailing the relief instruments it executed.   The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep150-relief-applications.pdf/$file/rep150-relief-applications.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  |  | | |  | | |  | | --- | | **3.1 Responses to key initiatives outlined in the consultation papers: enhancing Australia's equity settlement system and CCP harmonisation and linking**   On 9 December 2008, the Australian Securities Exchange (ASX) circulated two consultation papers requesting comment on enhancing Australia's equity settlement system and on delivering efficiencies to the marketplace through the harmonisation and linking of CCP activities. ASX received approximately 25 submissions from interested stakeholders.   On 7 May 2009, ASX released two papers summarising the main themes of the responses received.    The 'Delivering Efficiencies' paper is available on the [ASX](http://www.asx.com.au/about/pdf/consultation_paper_response_delivering_efficiencies.pdf" \t "_new) website.    The 'Enhancing Equity Settlement' paper is available on the [ASX](http://www.asx.com.au/about/pdf/consultation_paper_response_enhancing_equity_settlement.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h3)  **3.2 Review of disclosure of directors' interest notices**   On 30 April 2009, ASX released its review of disclosure of Directors' Interest Notices lodged by listed entities.  The review was conducted by ASX Markets Supervision (ASXMS) on all Directors' Interest Notices lodged between 1 January and 31 March 2009 (Q1 2009).  The notices cover a director's appointment, changes to a director's interests and ceasing to be a director.  This is the third such review that ASXMS has completed.   The media release is available on the [ASX](http://www.asx.com.au/about/pdf/mr_300409_review_director_interest_notices_report.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h3)  **3.3 Rule amendment - Requirements for clients trading partly paid securities for the first time**   On 6 April 2009, ASX amended Market Rule 7.1.2 (and the related procedures and appendices) to require brokers to alert retail clients of the need to inform them of the rights and obligations associated with trading Partly Paid Securities (as defined in Market Rule 2.10). This will reinforce those existing provisions of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) applying to brokers that require the disclosure of risks associated with the trading of financial products.  Appendix 7.1.2 - 4 (Partly Paid Security Client Agreement) has been added to the Appendices.   Brokers are now required to obtain from retail clients a signed agreement that their clients are aware they have a responsibility to obtain and read a copy of a prospectus, product disclosure statement or information memorandum produced by the product issuer when they are entering into a transaction to buy a partly paid security for the first time. Client agreement rules of this kind already exist for complex products such as options, futures and warrants.   The media release is available on the [ASX](http://www.asx.com.au/about/pdf/mr060409_partly_paid_newrule.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h3)  **3.4 Equity market enhancements**   Phase 1 of the ITS Trading Platform upgrade took place over the weekend of 16 - 17 May 2009.  The upgrade provides a version of the ITS Workstation which supports the changes associated with the ITS Capacity, Short Selling and Order Type initiatives outlined in ASX Circular 548/08.   Phase 1 introduced the capacity enhancements.  Note that the activation of Short Selling Tagging is contingent on further advice from ASIC.   Phase 2 will, subject to regulatory clearance, comprise the activation of the new order types: Undisclosed, Centre Point®, Centre Point Priority Crossings and VolumeMatch®.  Phase 2 is scheduled for mid 2009, but the "go-live" date has not yet been set.   Further information is available on the [ASX](https://www.asxonline.com/intradoc-cgi/groups/participant_services/documents/communications/asx_023402.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  |  | | |  | | |  | | --- | | **4.1 Panel publishes consultation paper**  On 13 May 2009, the Takeovers Panel released a Consultation Paper seeking public comment on four draft rewritten guidance notes:  1. GN 7 on lock up devices;  2. GN 12 on frustrating action;  3. GN 14 on funding arrangements for a bid; and  4. GN 17 on rights issues.  Over the last two years, the Panel has been simplifying its procedures and documentation. The release of these draft guidance notes is part of that process.  The Panel seeks comments from practitioners, market participants and investors who may be affected by the guidance, particularly in respect of market practices that may have changed since the last issue of the guidance notes. There are some additional issues raised in the paper on which the Panel seeks comments.  The consultation paper is available on the [Panel](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=consultation/030.htm&pageID=&Year=" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h4)  **4.2 Gloucester Coal Limited 01R(a) and 01R(b) - Declaration of unacceptable circumstances and orders**  On 29 April 2009, the review Panel announced that it has made a declaration of unacceptable circumstances and final orders in relation to applications dated 19 March 2009 by Whitehaven Coal Limited and Gloucester Coal Limited (see TP09/23). The applications were heard together.  **(a) Background**   On 20 February 2009, Gloucester announced a bid for Whitehaven offering 1 Gloucester share for every 2.45 Whitehaven shares (Merger). At the time, the market capitalisation of Whitehaven was approximately 2.3 times that of Gloucester.   Gloucester and Whitehaven entered a Merger Implementation Agreement (MIA). The MIA, but not the Merger as announced, provides a fiduciary out to Gloucester. In the announcement there was no condition that the bid for Whitehaven was subject to there being no superior proposal emerging for Gloucester.   On 27 February 2009, Noble Group Limited announced a bid for Gloucester of $4.85 cash per share, subject only to the Merger not proceeding and prescribed occurrences.  **(b) Declaration**   The review Panel considered that the circumstances of the Merger without a condition in the bid allowing Gloucester not to proceed with its bid if a superior proposal for it is made or announced were unacceptable. The review Panel considered that unacceptable circumstances existed because, contrary to the principles in sections 602(a) and (c) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), the Merger acted as a lock up device of Gloucester. The review Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in section 657A(3).  **(c) Orders**   The review Panel revoked the initial Panel's declaration and orders requiring a Gloucester shareholders meeting and replaced them with a declaration and orders to the effect that Gloucester's bid for Whitehaven be subject to a condition that no superior proposal is made for Gloucester.  Further information is available on the [Takeovers](http://www.takeovers.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  |  | | |  | | |  | | --- | | **5.1 A funded class action does not constitute a managed investment scheme**  (By Sarah Rogers, Freehills)   Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd (No 3) [2009] FCA 450, Federal Court of Australia, Finkelstein J, 6 May 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/may/2009fca450.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/may/2009fca450.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   The court held that the arrangements between the litigation funder, legal counsel and group members in a funded class action did not create a managed investment scheme. The court held that the essence of a managed investment scheme was a scheme in which people invest money (or money's worth) in a common venture with the expectation of profit that will result from the efforts of others.   **(b) Facts**   The fourth defendant, P Dawson Nominees Pty Limited, as the representative party in one class action and the fifth defendant, Frederick Henry Hart, as the representative party in another class action, sued to recover damages or compensation from the plaintiffs, Brookfield Multiplex Limited and Brookfield Multiplex Funds Management Limited (together "Multiplex"). In both actions, the representative party and each group member retained the third defendant, Maurice Blackburn Pty Limited ("Maurice Blackburn"), to act on their behalf. In addition, the representative party and each group member entered into a funding agreement with the second defendant, Onario Inc, to finance the action (later assigned to the first defendant, International Litigation Funding Partners Pte Ltd). Given the identicality of the issues in each action, the actions progressed as a consolidated action.   The representative parties and the group that each representative party represented held an interest in Multiplex securities. The claim was based on the alleged failure by Multiplex to disclose information that would have a material effect on the price or value of Multiplex securities in contravention of sections 674 and 675 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act"). Specifically, it was alleged that Multiplex did not keep the market informed about the state of the construction of Wembley National Stadium, a development that had substantially exceeded budget, was behind its construction schedule and would not produce a profit.   Multiplex argued that the arrangements between the litigation funder, Maurice Blackburn and the group members established a managed investment scheme, which was required to be, but had not been, registered under the Corporations Act. In addition, Multiplex sought an injunction restraining the litigation funder from providing any more funding and preventing Maurice Blackburn from taking any further steps in the consolidated action.   **(c) Decision**   **(i) Issue**   The question for the court was whether the arrangements between the litigation funder, Maurice Blackburn and the group members established a managed investment scheme.   **(ii) Reasoning**   The court examined the terms of the relevant agreements, being the retainer agreements and the funding agreements, to determine the arrangements in existence between the parties.   The court considered the purpose of Chapter 5C of the Corporations Act and considered it to be persuasive in this case. The court referred to the Australian Law Reform Commission and the Companies and Securities Advisory Committee report titled "Collective Investments: Other People's Money", which describes the kinds of collective investment schemes that should be regulated by corporations law. First, the report focuses on "schemes that raise funds from members and invest those funds". Second, certain arrangements, which did not involve the investment of funds were excluded from regulation because "they were not true investment arrangements".   The court considered the relevant legislation. Section 9 of the Corporations Act defines a managed investment scheme as a scheme that has the following features:  (i)  people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not); (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the members) who hold interests in the scheme (whether as contributions to the scheme or as people who have acquired interests from holders); (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).   The court considered the first element of the definition. The court interpreted the meaning of "scheme" to be a programme or plan of action. On this construction, the court held that the agreements in this case brought into existence a plan of action involving: (a) putting in place a group of persons willing to participate in proceedings against Multiplex; (b) ensuring that those persons would not be exposed to costs; (c) retaining a firm of solicitors that would act on the group's behalf; and (d) making sure that the legal fees would be paid.   The court held that a promise to do something was a "contribution". The litigation funder's contribution is either the money (the payment of legal fees etc) or the promise to pay that money. The contribution of each group member was the assignment of future property (each group member had promised to pay to the litigation funder a percentage of the resolution sum). These contributions were held to be "money's worth" since each promise given was capable of being valued, notwithstanding, in the case of a group member's promise, the contingent nature of the right that had been assigned.   However, the court held that each contribution was not given in consideration for the acquisition of "rights.to benefits produced by the scheme", since each group member would not acquire a "benefit". The court considered that the aggregated value of the group members' promises were likely to be far greater than the value of the consideration they receive from the litigation funder in return. Therefore, while each group member may obtain an advantage, they do not acquire a benefit. The court was persuaded by the fact that the consideration provided by the litigation funder could not be characterised as a profit made by the group members. In addition, the court considered that any additional benefits (such as immunity from an adverse costs order and the requirement to pay security for costs) were illusory as they were not produced by the scheme (since no costs order or order for the provision of security can be made against group members). Therefore, the court held that the first element of the definition was not satisfied.   The court considered the second element of the definition. The court found that the group member's contribution (the assignment of future property), were chooses in action, being property not capable of being possessed. Therefore, the contributions were difficult to "pool" since this is a physical concept. In each group member assigning to the litigation funder part of the resolution sum and, in return, the litigation funder agreeing to provide funding, the court concluded that a series of bilateral agreements were made, but not an aggregation of them.   The court held that an agreement to fund litigation on behalf of a group was not an "enterprise". The court found that, for there to be an "enterprise", there must be something in the nature of a business or commercial undertaking and that litigation was not of that order. Even if the litigation funder is taken to engage in an enterprise, the enterprise must be common to at least two people, and it is an inapt description for each group member and for Maurice Blackburn as legal counsel (who act in a professional capacity on behalf of the group members). Even if, contrary to the court's view, running litigation was an "enterprise", the contributions did not produce a "benefit" for the reasons outlined above. Therefore, the court found that the second element of the definition was not satisfied.   The court considered the third element of the definition. The court held that the concept of "day-to-day control" over the operation of the scheme was apt for the conduct of a business and other commercial enterprises, but had little application to the running of litigation where things do not happen on a day-to-day basis. Even if the concept were to apply, the court found that group members had ceded control to Maurice Blackburn. Therefore, the court found that the third element of the definition was not satisfied.   The court noted that a scheme must have a constitution, a compliance plan and a responsible entity (being the person who operates the scheme) to obtain registration. The court determined that it was not clear who operated the scheme, noting that Maurice Blackburn could not be one of the operators, since most legal practices operate as partnerships and the responsible entity must be a public company. In addition, section 135(2) of the [Legal Profession Act 2004 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=81842" \t "Default) provides that incorporated legal practices must not conduct managed investment schemes.    The court also noted that few of the obligations imposed on operators of managed investment schemes would protect group members in a funded class action. For example, the requirements relating to minimum financial requirements, PDSs, compliance and risk management systems and dispute resolution systems have no role in this case. The court held that those obligations were designed to protect people who have an interest in a facility through which they make financial investments, manage financial risk or make non-cash payments.   **(iii) Orders**   The action was dismissed and the plaintiff was ordered to pay the defendant's costs.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h5)  **5.2 Chairman's statement of intention and undirected proxies**  (By Roderick Lyle and Tom Lin, Clayton Utz)   Jervois Mining Ltd, in the matter of; Campbell v Jervois Mining Ltd [2009] FCA 401, Federal Court of Australia, Goldberg J, 24 April 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/april/2009fca401.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/april/2009fca401.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**  This decision arose out of an Extraordinary General Meeting (EGM) of members of Jervois Mining Ltd (Company) held on 2 April 2009.   In the blank proxy form which was dispatched to the Company's members in respect of the EGM, there was a statement to the effect that the Chairman intended to vote undirected proxies in favour of each item of business (which included resolutions to "spill" the existing board of directors).  Contrary to that statement of intention, the Chairman voted undirected proxies against the resolutions in relation to the spill motions.    The applicants argued that this "change of mind" constituted a breach of the Company's Constitution, section 250A(4)(c) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) and the Chairman's general law duty as agent of the proxy-givers.    The court held that the Chairman's statement of intention, as contained in the proxy form, was no more than a present indication of intention as to how the Chairman intended to vote undirected proxies.  The court considered that, upon proper construction of the proxy forms, any member who did not mark the "For", "Against" or "Abstain" boxes was merely directing the Chairman to vote their shares as the Chairman saw fit at the time of the EGM.  That is, those members were not giving the Chairman a direction to vote in any particular manner in respect of the spill motions.    **(b) Facts**   **(i) Requisition for EGM**   The EGM was called by the directors of the Company pursuant to a requisition for general meeting (Requisition) given to the Company on 6 February 2009 by 124 members under section 249 of the Corporations Act.     The applicants were part of the group of members who tendered the Requisition.  The first applicant, Mr Richard Campbell, was appointed as a director of the Company on 29 July 2008.  One of the resolutions proposed under the Requisition was for the confirmation of Mr Campbell's directorship by the Company's members.  That resolution was not passed at the EGM and Mr Campbell was removed as a director of the Company.    The third applicant, Mr Norman Seckold, held a significant parcel of shares in the Company personally and through the fourth applicant, Altinova Nominees Pty Ltd.  One of the resolutions proposed under the Requisition was for the election of Mr Seckold as a director of the Company.  That resolution was not passed at the EGM and Mr Seckold was not appointed as a director of the Company.  At the time of hearing, there was no second applicant in the proceeding.     The Requisition also included resolutions which proposed to remove the incumbent board of directors.   **(ii) The proxy form and chairman's statement of intention**   The proxy form which accompanied the notice of EGM dispatched to members of the Company on 27 February 2009 included the following features:   On the first page under the heading "Appointment of Proxy" the following was stated: "Direct your proxy how to vote by marking one of the boxes opposite each item of business. If you do not mark a box your proxy may vote as they choose.  If you mark more than one box on an item your vote will be invalid on that item."    Set out opposite each of the 11 proposed resolutions were three empty boxes entitled "For", "Against" and "Abstain".    Beneath the 11 resolutions and just above the place for the signature of the member there appeared the following statement:   "The Chairman of the Meeting intends to vote undirected proxies in favour of each item of business."   At the meeting, the Chairman voted "undirected" proxies against the following motions, which were defeated:   * the resolution to confirm Mr Campbell's directorship; * the resolutions to appoint Mr Seckold and other persons nominated by the requisitionists as directors of the Company; and * the resolutions to remove the incumbent board of directors.   **(iii) Complaint by the requisitionists**   The applicants challenged the validity of the resolutions on the basis that the Chairman should have cast all undirected proxies in favour of each of the 11 resolutions (i.e. in accordance with the Chairman's statement of intention contained in the proxy form).    The applicants argued that, on the basis of the Chairman's statement of intention as contained in the proxy forms, the Chairman had:   * breached Article 50.6 of the Company's Constitution, which provided that:   "A proxy may vote or abstain as he or she chooses except to the extent that appointment of the proxy indicates the manner in which the proxy will vote on any resolution.  The proxy must vote or abstain on a poll or show of hands in accordance with any instructions on the appointment."   * Breached section 250A(4)(c) of the Act which provides that:   "An appointment may specify the way the proxy is to vote on a particular resolution.  If it does [and] if the proxy is the chair - the proxy must vote on a poll, and must vote that way".   * Breached his duty at common law, as agent of the proxy-givers, to vote all undirected proxies given to him in accordance with the statement of intention noted on the proxy form.    The central question for the court was, therefore, whether undirected proxies constituted the giving of a direction to the Chairman to vote in favour of each resolution.   **(c) Decision**   The court found against the applicants.  It held that undirected proxies (i.e. forms which appointed the Chairman as proxy but did not otherwise tick the "For", "Against" or "Abstain" boxes) did not constitute any specific directions to the Chairman on how to vote in any particular way, or to vote at all, in respect any of the resolutions put to members at the EGM.     The Company's central submission, with which the court agreed, was that the Chairman's statement of intention did not form part of the direction given to the Chairman by the proxy-givers, and that it "merely" conveyed a statement of intention on the part of the Chairman.  The court considered that this was "objectively the correct construction" in respect of the undirected proxy forms.     It particular, the Chairman's statement of intention was held by the court to be "no more than an indication, albeit, at that time, a present indication, of the manner in which the Chairman, whoever that was, intended to vote.  I [Justice Goldberg] do not consider that an indication of the manner in which the Chairman intended to vote undirected proxies was thereby converted into a "direction" by the shareholder as to how the Chairman should vote".     Accordingly, the court found that the Chairman had not breached Article 50.6 of the Company's Constitution nor section 250A(4)(c) of the Corporations Act.  It also followed that the Chairman had not acted in breach of his general law duty of agency owed to the proxy-givers.     The applicants were ordered to pay the respondent's costs of and incidental to the application.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h5)  **5.3 Innocent third party payee ruled not to be liable to true owner of fraudulently obtained cheques**   (By James Moor, Freehills)   Perpetual Trustees Australia Ltd v Heperu Pty Ltd [2009] NSWCA 84, New South Wales Court of Appeal, Allsop, P, Campbell, JA and Handley, AJA, 23 April 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/april/perpetual\_trustees\_australia\_ltd\_v\_heperu\_pt\_nswca%2084\_done.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/april/perpetual_trustees_australia_ltd_v_heperu_pt_nswca%2084_done.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   This case was an appeal from a decision of the New South Wales Supreme Court in which the primary judge found that title of  the cheques did not pass to the appellant (Perpetual) and that the appellant had converted the cheques and was thus liable in damages to the respondents.      Allsop, P and Handley AJA (Campbell JA agreeing) of the New South Wales Court of Appeal allowed Perpetual's appeal because:   * there was no conversion by Perpetual, the respondents' agent having apparent authority to pass title to the bearer cheques to Perpetual who gave value, took bona fide and without notice; * there was no unjust enrichment, Perpetual having changed its position in full on faith of the receipts and given value; * there was no negligence as Perpetual did not owe the relevant duty of care; and * there was no misleading or deceptive conduct because there was no misrepresentation and no relevant reliance.   **(b) Facts**    Between August 2001 and November 2003 Mr Dominic Cincotta (Mr Cincotta) practised a fraud upon three companies controlled by Dr Barry Landa as well as upon Dr Landa himself. Perpetual was entirely innocent of the fraud.      Dr Landa and his companies (the respondents) entered into a contract with Morgan Brooks via the agency of Mr Cincotta. Under this agreement they invested money with Morgan Brooks for the purpose of Morgan Brooks investing the money with Perpetual on their behalf. Morgan Brooks was then to repay the sums with interest at 8%, and cause Perpetual shares to be transferred.    The case against Perpetual concerned six cheques: three bank cheques and three personal cheques, each given to Mr Cincotta by Dr Landa. Mr Cincotta took the cheques to Perpetual as instructed. However, Mr Cincotta then instructed Perpetual to invest the cheques in an account controlled by him. Perpetual ultimately transferred the proceeds of the cheques to a bank account. No separate bank accounts were kept by Perpetual for individual customers. Perpetual allocated units (1 unit for each $1) to Mr Cincotta's account and Mr Cincotta used the funds in the account for his own purposes.    **(c) Law**   **(i) Conversion**   Conversion is the unauthorised assumption and exercise of the right of ownership over goods or personal chattels belonging to another. To maintain an action in conversion, a plaintiff must have either possession or the immediate right to possession at the time of the conversion.   **(ii) Restitution / moneys had and received**   The law recognises a right to recover a mistaken payment based on the principle of unjust enrichment. If money is paid as a result of a mistake, the plaintiff will have a prima facie right to recover it and the receipt is the basis of that right. The law recognises a number of defences which displace or reduce the prima facie right to recover one of which is a change of position by the defendant.    **(iii) Negligence**   The tort of negligence requires proof that a duty of care is owed by the defendant to the plaintiff. It has been held that five fundamental matters are relevant in determining whether a duty exists in cases of a liability for pure economic loss one of which is 'vulnerability to risk'.   **(iv) Misleading and deceptive conduct**   Section 42 of the [Fair Trading Act 1987 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3955" \t "Default) states that: "A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."   **(d) Decision**   **(i) Conversion**   **Title / Authority**   The New South Wales Court of appeal, distinguished the current case from the authority relied upon by the primary judge, noting that, in this case, the payee (Perpetual) was not the creation of the rogue (Mr Cincotta). As a result, the court ruled that the fraud did not remove all authority. Rather, the contract entered into between the respondents and Morgan Brooks and the form of the cheques themselves gave Mr Cincotta authority to deliver the cheques to Perpetual.    The court did not accept, as submitted, the necessity of a pre-existing binding bilateral contract between the true owner and the intended payee for title to pass to the payee.    The court accepted that Perpetual acquired only a voidable title but could not accept that Perpetual could be sued retrospectively for conversion because the acts which would constitute the conversion, at the time they were done, had the cover of title.   **Value**   Their Honours, viewing the question of value in the context of the Cheques Act, were of the view that, dealing with the funds pursuant to the terms of the prospectus, managing the investments and crediting a return on the units allocated, as Perpetual had done, constituted giving value. As such any rescission would be unjust.    **Took bona fide and without notice**   The court noted that the cheques, despite being crossed non-negotiable, bore no mark of limitation on any authority of Mr Cincotta. The bank cheques were bearer cheques in the hands of a person who appeared to be in possession of the cheques and to be holder. The personal cheques were drawn as fully negotiable instruments and thus any person in possession of them could convey good title to them.   The court noted that, although a trustee's duties may exceed those of a bank, in the circumstances it was satisfied that Perpetual was not negligent by either standard. Additionally, the court determined that, as the fraud was not revealed before Mr Cincotta took the cheques to Perpetual, Perpetual could not be said to hold on trust for the respondents.     **(ii) Moneys had and received**   The court was prepared to assume that, because the cheques were paid to Perpetual by the respondents being induced by fraud, subject to relevant defences, the respondents had a prima facie right to recovery in restitution.   The court ruled, however, that, the change of position by Perpetual, in making payment to Mr Cincotta, combined with the presence of circumstances recognised by the law, being the mistake or fraud, meant that the defence was made out. The court determined that Perpetual made the payment to Mr Cincotta on the faith of the receipt, as required by the case law, because they would not have been made unless the receipts had been recognised as valid.    The court noted that the payee must know more than the fact of receipt. There needs to be a foundation of information obtained in connection with the receipt to justify acting on the basis of the receipt. Here, Mr Cincotta had apparent authority and that was deemed sufficient.     **(iii) Negligence**   The court rejected the submission that Perpetual owed the respondents a duty of care in the circumstances. The Court ruled that the respondents were not vulnerable as there were various steps they could have taken to exercise greater control and security over the large sums of money. Also, Perpetual was not responsible for the circumstances which made the respondents vulnerable.    **(iv) Misleading and deceptive conduct**   The respondents argued that Perpetual made various representations through application forms and prospectuses describing a system in place for the acceptance of cheques; a system which was not adhered to. Further the respondents submitted that without the misleading or deceptive conduct the loss would not have occurred and it did not matter that they had no knowledge of the representations.     The court rejected these arguments ruling that whilst the representation as to the existence of a system was misleading the actual operation of the fund was not. The court therefore determined that as the respondents were ignorant of these misleading statements, the statements could not be seen to have anything to do with the investment and later loss of the money in question.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h5)  **5.4 Directors and executives beware - personal liability for breach of duty of care and diligence for misleading statements made by a company (the James Hardie judgment)**   (By Matt Bernardo, Mallesons Stephen Jaques)   Australian Securities and Investments Commission v Macdonald (No 11) [2009] NSWSC 287, New South Wales Supreme Court, Gzell J, 23 April 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/april/2009nswsc287.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/april/2009nswsc287.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**  The Australian Securities and Investments Commission ("ASIC") commenced proceedings in the NSW Supreme Court against James Hardie Industries Limited ("JHIL"), James Hardie Industries NV ("JHINV"), and seven former directors and three former executives of JHIL.  ASIC alleged that various public statements made by JHIL and JHINV about the establishment and funding of the Medical Research and Compensation Foundation ("Foundation"), established to pay asbestos claims against the James Hardie Group, were false and misleading, or misleading and deceptive, and that the directors and executives had breached various provisions of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") in the preparation and approval of those statements.  ASIC also made allegations regarding disclosures concerning the subsequent restructuring of the James Hardie Group.  Gzell J found that the companies, the directors, and the executives had breached various provisions of the Act by approving drafts or final versions of certain of the public statements made by JHIL or JHINV.  It is still to be decided if any of the directors should be exonerated under sections 1317S or 1318 of the Act.  **(b) Facts**  ASIC's case primarily centred on the following events:   **(i) Draft ASX Announcement**   On 15 February 2001, the Board of JHIL approved a Draft ASX Announcement, which contained statements that the Foundation would have sufficient funds to meet all legitimate claims, that it was fully funded, and provided certainty for people with legitimate claims.  **(ii) Deed of Covenant and Indemnity ("DOCI") disclosure and execution**  At the 15 February 2001 meeting, it was resolved to execute a DOCI, under which subsidiaries of JHIL involved in the manufacture and sale of asbestos products agreed not to make any claims against JHIL, and would indemnify JHIL against any claims made against it.  In consideration, JHIL would make annual payments to these subsidiaries.  **(iii) Final ASX Announcement**  Mr Macdonald (the CEO of JHIL) approved a Final ASX Announcement, with a minor amendment made to the Draft ASX Announcement stating that the Foundation had sufficient funds to meet all legitimate compensation claims "anticipated" from people.  **(iv) Press conference statements**  Mr Macdonald made similar emphatic statements as to the sufficiency of funding of the Foundation at a press conference held on 16 February 2001.      **(v) ASX announcements made on 23 February 2001 and 21 March 2001**  Subsequent ASX announcements were released, which contained very similar over-emphatic statements as those contained in the Draft ASX Announcement (ie as to sufficiency of funding).  **(vi) Scheme of arrangement**    At a board meeting of JHIL on 23 July 2001, Mr Brown, Mr Gillfillan, Ms Hellicar, Mr Koffel and Mr Willcox (non-executive directors of JHIL) approved a draft of an information memorandum ("Draft IM") to be sent to members of JHIL as part of a members' scheme of arrangement.  The scheme involved the creation of a new holding company of the group (JHINV), incorporated in the Netherlands.  This involved JHIL issuing to JHINV 100,000 partly paid shares.    **(vii) Roadshow presentations**  Mr Macdonald made representations with respect to JHINV at functions in Edinburgh and London, the slides for these presentations being lodged with the ASX.  In these presentations, Mr Macdonald said that the Foundation was fully funded (which was also reiterated in the ASX announcement), and very similar over-emphatic language was used as in the Draft ASX Announcement.    **(viii) Cancellation of partly paid shares**   At a meeting of the Board of directors on JHINV on 25 March 2003, steps were approved for the transfer of JHIL out of the James Hardie Group.  These steps included, amongst other things, cancellation of partly paid shares by JHIL.  **(c) Decision**   **(i) Draft ASX Announcement**  The nature of the announcement, being a key statement in relation to a highly significant restructure of the James Hardie Group, made it appropriate for management to ask the Board to approve its content.  The court held that once asked, the Board had a duty to consider its content carefully, and none of the directors were entitled to abdicate responsibility by delegating their duty to a fellow director.  Although the Draft ASX Announcement was not read out in full at the Board meeting, the court was satisfied that it was discussed and approved by all directors present.  Two non-executive directors attended the meeting by telephone, and these directors didn't ask for a copy of the draft, didn't raise any objections that they hadn't seen the draft, nor abstained from voting to approve the draft.  ASIC alleged that the statements in the Draft ASX Announcement were false or misleading, and that the directors were in breach of their statutory duties of care and diligence under section 180(1) of the Act by approving the draft announcement ie on the material provided to them, they could not have been satisfied that JHIL had a proper basis for making the assertions.  When approving the announcement, the Board considered a Cashflow Model (subject to a limited review by external consultants, PWC and Access Economics), and Trowbridge reports which contained best estimates used as a basis to assess the adequacy of funding for the Foundation. The Board had before it various statements identifying the uncertainty of predicting the level of future asbestos liabilities, and had enough information to appreciate that the Cashflow Model contained several limitations, and the actuarial estimates were uncertain.  In light of this, Gzell J held that the "emphatic nature" of the Draft ASX Announcement was at fault - the Board was aware of the shortcomings of the Cashflow Model and actuarial estimates, and should have realised that this prevented them from approving the "unequivocal and unqualified statements as to certainty of sufficient funding" in the announcement.  Each director therefore had a duty to speak out against, or in modification of, the announcement.  Those attending by telephone had a duty to call for a copy to familiarise themselves with its terms, or abstain from voting.  As such, all seven former directors breached section 180(1) of the Act by failing to exercise their powers and discharge their duties with the necessary degree of care and diligence when approving the announcement.  The CEO and General Counsel breached section 180(1) by failing to advise the Board of the over-emphatic terms of the announcement, and of the limited nature of the external reviews of the Cashflow Model.  **(ii) DOCI disclosure and execution**  ASIC alleged there was an obligation to disclose information in relation to the DOCI to the ASX, under Listing Rule 3.1.  The court held that JHIL negligently failed to disclose the DOCI information, in breach of section 1001A(2) of the Corporations Law (as carried over into the Act), because:   * the DOCI information was not generally available; * a reasonable person would expect it to have a material effect on the price or value of JHIL's shares (as the rights in the DOCI had considerable value to JHIL); * it did not fall within an exception to ASX Listing Rule 3.1; and * the failure to notify the ASX was negligent (ie no legal advice was sought as to whether disclosure was required, and neither the Board nor management considered disclosure).   The CEO and General Counsel breached section 180(1) of the Act by failing to advise the Board appropriately in relation to disclosure.  Mr Macdonald relied on the business judgment rule in section 180(2) of the Act (ie that he rationally believed that a business judgment was in the best interests of JHIL). However, as he gave no evidence that he had a belief that such a business judgment was in the best interests of JHIL, his appeal to section 180(2) failed.   Mr Morley (the CFO of JHIL) executed the DOCI on 16 February 2001.  ASIC alleged that he breached section 180(1) of the Act by failing to make sufficient inquiries to determine if further funding was required, so that the amount of funds available would be sufficient to meet all legitimate present and future claims.  The court did not uphold this allegation.   **(iii) Final ASX Announcement**  Mr Macdonald approved the Final ASX Announcement, which contained a minor amendment stating that the Foundation had sufficient funds to meet all legitimate compensation claims "anticipated" from people. The court rejected his argument that this new wording removed the problem of a too emphatic statement.  As such, the court found that Mr Macdonald breached section 180(1) of the Act, in that a reasonable person, if a director and CEO of a corporation in JHIL's circumstances (and occupying the offices held by Mr Macdonald with the same responsibilities), would not have approved the announcement for release, or would have advised that it be appropriately amended prior to release.  The court further held that the Final ASX Announcement was a notice published in relation to securities for the purposes of section 995(2) of the Corporations Law (as carried over into the Act), which prohibits misleading or deceptive conduct in connection with securities.  The announcement encouraged support for the re-structure of the James Hardie Group, and highlighted the positive reaction by the market to JHIL's shares.  By issuing the Final ASX Announcement, JHIL engaged in conduct that was misleading or deceptive, or was likely to mislead or deceive, contrary to section 995(2) of the Corporations Law.  ASIC further alleged that JHIL contravened section 999 of the Corporations Law (as carried over into the Act) by publishing the Final ASX Announcement, as it constituted a statement or information that was likely to induce people to sell or purchase shares in JHIL, or would be likely to have the effect of increasing, reducing, maintaining or stabilising the market price of JHIL shares.  At the time of the announcement, JHIL shares were blighted by market perceptions of uncertainty as to its ability to cope with claims, and JHIL intended that the emphatic terms of the announcement would have a positive effect on its shares.  Accordingly, JHIL was in contravention of section 999 of the Corporations Law.     **(iv) Press conference statements**  Mr Macdonald's statements and accompanying slides at the press conference conveyed that JHIL had received expert advice that supported the assertion that the Foundation's funding was sufficient to meet all legitimate claims.  These statements were false or misleading for the reasons discussed in relation to the Draft ASX Announcement, and Mr Macdonald thus breached section 180(1) of the Act.  In making the press conference statements, JHIL engaged in conduct that was misleading or deceptive, or was likely to mislead or deceive, contrary to section 995(2) of the Corporations Law.    The court also found that the press conference statements were likely to induce persons to purchase JHIL shares and increase the market price of JHIL shares, and Mr Macdonald knew, or ought to have known, that the statements were false in a material particular or were materially misleading.  Therefore, JHIL also contravened section 999 of the Corporations Law.  **(v) ASX announcements made on 23 February 2001 and 21 March 2001**  The CEO approved for release these announcements, which contained similar false and misleading statements as contained in the Draft ASX Announcement.  The court found that Mr Macdonald breached section 180(1) by approving these announcements. By issuing the announcements, JHIL engaged in conduct that was misleading or deceptive, or was likely to mislead or deceive, contrary to section 995(2) of the Corporations Law.    JHIL also breached section 999 of the Corporations Law by publishing the 23 February 2001 ASX Announcement, because the natural and probable result of its publication was to induce the reader to hold JHIL's shares, thereby maintaining or stabilising their market price.  **(vi) Scheme of arrangement**   The Draft IM contained statements to the effect that the partly paid shares would enable JHIL to call upon JHINV to pay if it was required to meet any liabilities of JHIL.  ASIC alleged that the statements were false or misleading, because JHIL could cancel the partly paid shares at any time in the future, and management had proposed to the Board that after completion of the restructure, the put option should be exercised, the partly paid shares should be cancelled, the shares should be transferred to another trust, or JHIL should be liquidated.  The court found that the Draft IM was not false or misleading, as there was no intention or assumption on the part of JHIL that would deny its ability to call upon JHINV to pay all or any of the remainder of the issue price of the partly paid shares.  **(vii) Roadshow presentations**  Part and parcel of Mr Macdonald's role was to make and authorise public statements on behalf of JHINV, and brief financial analysts.  Evidence was presented that the chair of the Foundation had several phone conversations with Mr Macdonald prior to September 2001, where he expressed the view that the Foundation had a very limited life, could be insolvent in less than 10 years, and could face estimated future claims of $600 million.  Despite Mr Macdonald's clear knowledge that the Foundation was seriously underfunded, he was prepared to extol JHINV to overseas analysts and investors by telling them that the Foundation was fully funded.  The court therefore held that Mr Macdonald contravened section 180(1) of the Act by making these statements.   The court also held that JHINV breached section 1041E of the Act by making false or misleading statements which induced members of the public to purchase JHINV shares.  The slides were designed to encourage the purchase of JHINV shares, and maintain the market for those shares.  Through Mr Macdonald, JHINV knew, or ought reasonably to have known, that the statements were false in a material particular or were materially misleading.  However, the court held that as far as the Edinburgh and London representations were concerned, the limited nature of the audience addressed meant that there was no inducement to purchase shares.   In forwarding the slides to the ASX, JHINV breached section 1041H of the Act (misleading or deceptive conduct in relation to a financial product), because the slides contained misleading or deceptive statements.  The statements related to a financial product (ie the shares in JHINV).   **(viii) Cancellation of partly paid shares**    ASIC alleged that at a meeting of the Board of JHINV on 25 March 2003, it was resolved that:   * JHINV execute a trust deed establishing the ABN 60 Foundation; * JHINV approve a $1.5m capital reduction by JHIL by payment to it of $1.5m; * JHINV request JHIL to issue 1,000 shares to the ABN 60 Foundation; * the cancellation by JHIL for no consideration of the one fully paid ordinary share held by JHINV was in its best interests; and * JHINV enter into a deed of covenant indemnity and access.   Gzell J found that between 25 March 2003 and 30 June 2003, JHINV failed to notify the ASX of the required information in accordance with Listing Rule 3.1, and thus breached section 674(2) of the Act.  **(d) Conclusion**  The major lessons in the case, which should sound warning bells to all directors and executives when evaluating strategic proposals and announcements put forward by senior management are:   * each member of the Board has responsibility for important strategic matters, and cannot effectively delegate that responsibility to co-directors, internal legal corporate departments, actuaries or other external experts; * this duty applies to executive and non executive directors and officers whether full time or part time, and experienced in the company's industry or not; * it is important to keep accurate and contemporaneous minutes of directors' meetings at which strategic decisions are considered; * directors must be diligent in initially evaluating "unequivocal and unqualified" announcements and strategic management and other decisions and ensure that the hard questions and concerns are raised with honest and reasonable responses; and * senior management have an obligation to bring to the attention of the Board all material information upon which proposed public statements and strategic decisions are based.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h5)  **5.5 The capacity of a shareholder to sue for damage incurred by the company /security for costs when plaintiffs sue concurrently**   (By Laura Keily and James Rankin, Corrs Chambers Westgarth)   K & J Acquisitions Pty Ltd v Manauzzi [2009] NSWSC 279, Supreme Court of New South Wales, Kirby J, 17 April 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/april/k\_j\_acquisitions\_nswsc%20279\_done.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/april/k_j_acquisitions_nswsc%20279_done.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**  This case was an interlocutory application by the defendants to dismiss the plaintiffs' case for lack of a reasonable cause of action and to seek additional security for costs from the plaintiff. This decision was heard by Kirby J in the Supreme Court of New South Wales.    The background to this case was an action by the first plaintiff, K & J Acquisitions Pty Ltd (K&J), and its 45% shareholder and director, Kevin Carter (Carter), against K&J's former auditors for breach of contract, negligence, misrepresentation and a breach of section 52 of the [Trade Practices Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default).    The key issue in this case was whether the plaintiffs had a reasonable cause of action. This required Kirby J to explore the 'Prudential Principle', from Prudential Assurance Co Ltd v Newman Industries Ltd (No 2).   This involved an assessment by Kirby J as to whether Carter had sufficient capacity to sue the defendants for damages due to a diminution of his share value, while relying on the same cause of action and facts as K&J. Kirby J also considered whether additional security for costs was required to be given in this case.    Kirby J found that, essentially, Carter had sufficient capacity to sue the defendants as Carter's loss derived from damage incurred by him, independently of K&J, and as Carter pleaded his case in the alternative. In resolving the costs question, after citing several cases, Kirby J concluded that sufficient security for costs had already been provided by the plaintiff. Accordingly, Kirby J dismissed the defendants' application as the defendants failed to make out their submissions.   **(b) Facts**   K&J ran a successful business building and installing office refurbishments. Its only two shareholders were Carter, who held a 44.5% shareholding and Colin Alexander (Alexander), who held a 55.5% shareholding. Carter and Alexander were the only two directors. Between 1998 and 2001, Alexander, using his position as manager of K&J's finances and administration, made a number of unauthorised purchases of overseas securities and foreign currency exchanges.  Alexander's actions cost K&J a total of $11,577,212.00. Carter only became aware of this by June 2001. After this point, K&J and Carter set about recouping this loss.    Of the total $11,577,212.00, the following funds were recovered:   * $1,265,484.03, repaid by Alexander voluntarily; * $1,752,176.00, from Alexander through an earlier suit by K&J; and * $4,500,000.00 from Westpac, the company's bank, through an action for failing to notice and stop the transactions.   K&J and Carter then brought an action against its auditors to recoup the remaining $4,059,557.97. The crux of K&J and Carter's case was that the defendants failed to properly describe Alexander's unauthorised activities in their reporting and to notify K&J and Carter.    The difference between K&J and Carter's submissions was that, firstly, Carter did not sue the defendants for breach of contract and, secondly, Carter's damages submission was that the defendants' actions caused a loss to K&J, which then led to a reciprocal decrease in the value of Carter's shares and dividends.   The defendants brought the action by an Amended Notice of Motion.    **(c) Decision**    The defendants made two submissions:   * that Carter, a shareholder, did not have a reasonable cause of action, as member of a company cannot sue for loss or damage merely because that company suffered a loss; and * the plaintiffs had to provide additional security for costs, with individual amounts attributable to each plaintiff.   Kirby J rejected these submissions. Addressing the first submission, his Honour found that Carter had a reasonable cause of action as Carter's action was within the limited capacity of a member of a company to sue for a diminution of share value known as the 'Prudential Principle'. In resolving the defendants' second submission, his Honour found, after a thorough analysis of the relevant principles that no further security for costs was required and that sufficient security for costs had already been provided.    **(i) The Prudential Principle**   The Prudential Principle is a doctrine accepted in Australian law that was established by the House of Lords in Prudential Assurance Co Ltd v Newman Industries Ltd (No 2). The principles set down in that case can be summarised as follows:   * Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. The shareholder has no right to sue in his or her own capacity where the diminution of share value merely reflects the loss suffered by the company. This is the rule even when a company has declined or failed to make good on that loss. * If a shareholder suffers a loss due to a diminution of share value, the shareholder may sue if, firstly, the shareholder has a cause of action and, secondly, the company has no cause of action to sue to recover that loss. * A shareholder may sue where a company suffers a loss caused by breach of duty to it and the shareholder suffers a loss separate from that suffered by the company caused by a breach of duty independently owed to the shareholder. Neither the shareholder or the company, however, may sue to recover each other's separate losses on behalf of the other.   Kirby J applied this principle to the case, finding that Carter came within the second and third limbs of the Prudential principle. Carter accepted that if the company were to succeed he would have no right to damages in respect of the same loss.  His claim was brought as an alternative to the company's claim, should that claim fail and, according to the plaintiffs, the claim was made pursuant to an independent breach of duty to Carter (i.e. Carter's submission was that the defendants, as K&J's auditors, should have reported Alexander's transactions to Carter).    Carter, a shareholder, was suing for loss due to a diminution of share value and was relying on the same cause of action as K&J. However, the claim arose independently and was pleaded in the alternative to be relied upon should the company's claim fail. Therefore, the claim fell within the second limb of the Prudential principle according to Kirby J. Also, the plaintiffs claimed that an additional loss was suffered by Carter which was not shared by the company and which was claimed to have arisen from the defendants' breach.  This claim was apparently pleaded late and was not made clear in the judgment.  Kirby J found, as a result of this, that Carter's claim also fell within the third limb of the Prudential principle.     Accordingly, Kirby J concluded that Carter had a reasonable basis for a cause of action and the defendants' strike-out application failed.    **(ii) Costs**    The defendants had already secured an undertaking for security for costs of $75,000 by bank guarantee, during prior litigation in 2008. In this application, the defendants sought an additional $75,000, estimating that their costs would total $150,000. By the time this action took place, K&J was no longer trading, had no significant assets and it was accepted that without support, K&J would be unable to pay all the costs of the defendants if ordered.    Kirby J reviewed the authorities regarding plaintiffs relying on interlocking arguments but did not reach any firm conclusion about these. His Honour did not form a clear view as to whether the cases of K&J and Carter were completely interlocked (in which case the possibility would be that Carter would be exposed to a costs order for the defendants' costs).    He found that if Carter succeeded and the company failed, the defendants would only be entitled to the particular costs arising from the joinder of the company in the action, not the general costs. He found that the security lodged was more than adequate to cover that possibility.    He then found that, if both the company and Carter failed, the position is (if the litigation is considered to be completely interlocked) Carter would be exposed to an order for the defendants' costs and security would not be appropriate.  His Honour concluded that the overlap between the two cases was substantial. In the case that both plaintiffs failed, it was likely that costs would be ordered against both and the defendant could look to either. If the costs order was to award a set proportion against the company, his Honour concluded that Carter would be able to make up the balance. He did not, therefore, award any further security for costs.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h5)  **5.6 First UNCITRAL application in Australia**   (By Stephen Magee)   Hur v Samsun Logix Corporation [2009] FCA 372, Federal Court of Australia, Jacobson J, 17 April 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/april/2009fca372.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/april/2009fca372.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   The Korean-appointed receiver of a Korean corporation applied for recognition under the [Cross Border Insolvency Act 2008 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=101816" \t "Default).    The Federal Court made an order which:   * recognised the Korean receivership as the foreign main proceeding; * barred any enforcement of a charge or lien against the company's property; * barred any landlord taking possession of the company's property; * barred any enforcement action against the company's property; and * barred any court proceedings against the company or its property.   **(b) Facts**   The Cross-Border Insolvency Act 2008 is a piece of Commonwealth legislation which gives domestic effect to the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (UNCITRAL). The text of UNCITRAL is contained in Schedule 1 to the Act.   In effect, the Act allows a foreign-appointed liquidator of a foreign corporation to apply to an Australian Court for freezing orders that prevent the initiation of legal or enforcement proceedings against the corporation or its property in Australia. This is intended to facilitate the consolidation of all insolvency proceedings against the company into a single insolvency proceeding in its home jurisdiction.   Samsun was incorporated in South Korea.   Seoul Central District Court, 3rd Bankruptcy Division had granted an application by Samsun to commence rehabilitation proceedings and, to that end, appointed a receiver. The Australian judgment does not record the technical details of the Korean appointment, but the Federal Court judge commented that the nature of the order of the Korean court was akin to the effect of Chapter 11 of the United States' bankruptcy laws.   The Korean receiver brought an application under articles 15, 17 and 21 of Schedule 1 of the Act for the recognition of the Korean proceeding in Australia and for orders to preserve Samsun's property in Australia.   The Federal Court initially made interlocutory orders that no person could enforce a charge on the property of Samsun and other orders pursuant to articles 19 and 21 of Schedule 1.  The court also ordered that the application be advertised in accordance with rules 15A.6 of the Federal Court (Corporations) Rules 2000.   The current judgment dealt with the final hearing of the application.    **(c) Issues**   The three main issues before the court were:  1. whether the Korean receiver was a "foreign representative" entitled to make the application; 2. whether the Korean proceeding was a foreign proceeding under the Act; and 3. whether the Korean proceeding was to be recognised as a "foreign main proceeding" under the Act.  The third issue was the important one, because a positive holding would allow the court to make the protective orders sought by the receiver. A positive holding on the first two issues was a prerequisite to the third issue.   **(d) Decision**   **(i) Foreign representative**   Article 2(d) of Schedule 1 defines a "foreign representative" as a "person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding".   The court was satisfied that the Korean receiver satisfied this definition. It noted that he had been appointed as the receiver of Samsun and was an officer of Samsun.  The court commented that "this demonstrates the analogy of the [Korean] orders to Chapter 11 of the American bankruptcy laws rather than to an order under Part 5.3A of the Corporations Act".  (It is unclear what the court intended to convey by this comment, since the regime established by Part 5.3A does not depend upon the making of a court order.)   **(ii) Foreign proceeding**   Article 2(a) defines "foreign proceeding" as "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation".   The court was satisfied that the Korean proceeding was a foreign proceeding: "What is important is that the Korean proceeding is a proceeding relating to insolvency in which the assets and affairs of Samsun are subject to the supervision of the Korean Court for the purpose of the re-organisation of that company.  This is made clear by the terms of the order of the Korean Court dated 6 March 2009 and the reasons for the decision of that court."   **(iii) Foreign main proceeding**   The next question was whether the Korean receivership was a "foreign main proceeding" within the meaning of article 2(b).     A foreign main proceeding is one which is taking place "in the State where the debtor has the centre of its main interests".   The court held that the Korean receivership was in Samsun's "centre of main interests". To reach this conclusion, it applied the presumption in article 16(3): "In the absence of proof to the contrary, the debtor's registered office ... is presumed to be the centre of the debtor's main interests".    Samsun's registered office was in Korea.   **(iv) Orders**   The court was satisfied that it was appropriate to make protective orders under article 21(1).    Accordingly, it made orders that:   * no-one could enforce a charge on Samsun's property; * if property of Samsun was subject to a lien or pledge and was in the lawful possession of the holder of the lien or pledge, then the holder of the lien or pledge could not sell the property or otherwise enforce the lien or pledge; * the owner or lessor of property used or occupied by, or in the possession of, Samsun could not  take possession of the property or otherwise recover it; * a proceeding in any court against Samsun, or in relation to any of its property, could not be begun or proceeded with; * no enforcement process in relation to Samsun's property could be begun or proceeded with; * Samsun should publish a notice of the making of the order in a daily newspaper circulating generally in Australia and send a notice of the making of the order to each Australian creditor of Samsun.   Liberty was granted to any person to apply to the court in respect of the substantive orders.  **(e) Comment**   This case is of historical and practical significance, because it is the first application to an Australian Court under UNCITRAL. It may, therefore, be expected to provide a template for future applications.   In terms of substantive law, there was little judicial consideration of any of the interesting legal questions thrown up by UNCITRAL. The issue which always gets commentators excited and which has given rise to major litigation in the USA and Europe - the identification of the company's Centre of Main Interests (COMI) - was disposed of without any reference to the US and European case law, because there was no evidence to rebut the presumption in art 16(3).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h5)  **5.7 Administrators' personal liability under section 443(1) limited to the extent of their right of indemnity under section 443D**   (By Kathryn Finlayson, Minter Ellison)  In the matter of Carter, Georges and Gordon as administrators of SFM Australasia Pty Ltd (administrators appointed) [2009] FCA 360, Federal Court of Australia, Mansfield J, 16 April 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/april/2009fca360.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/april/2009fca360.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**  The administrators' personal liability under section 443(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) was limited to the extent of their right of indemnity under section 443D.   The court approved the terms of the cash facility agreement entered into by the administrators only to the extent of the drawdown of the first advance and the incurring of the commitment fee pending consideration of the agreement by the unsecured creditors.    **(b) Facts**     On 25 March 2009, the applicants were appointed as administrators of SFM Australasia Pty Ltd in accordance with the provisions of Pt 5.3A of the Act.   SFM had had limited current assets, two secured creditors and a number of unsecured creditors.  It had insufficient money to pay wages or incur trading expenses to keep the company trading whilst the administrators considered what alternatives were available to creditors in terms of a restructure involving a deed of company arrangement or any other arrangement.   The administrators had initiated a funding arrangement to facilitate SFM's trading while the restructure proposal was considered.  In particular, the administrators had entered into a proposed cash facility agreement under which a financier would provide funding to facilitate SFM's interim trading.  The agreement provided for an advance commitment fee of 2% and had been executed by the administrators.  An initial advance had been made pursuant to the agreement to permit ongoing trading while the restructure that would yield the best outcome for creditors was determined and implemented.    The administrators applied to the court for directions and orders that:   * the court limit the administrators' personal liability under the cash facility agreement to the extent of their right of indemnity under section 443D of the Act; * pursuant to section 447A, section 447D(1) of the Act was to operate in relation to SFM so that in an application by the administrators for directions pursuant to that section, the court may give a direction that it approved the terms of the cash facility agreement and that the administrators may properly and justifiably give effect to it; and * pursuant to section 447D(1), the court approve the terms of the cash facility agreement and that the administrators may properly and justifiably give effect to it.   The effect of section 443(1) of the Act is that administrators are personally liable for borrowings.  Section 443D gives administrators a right of indemnity against a company's assets in relation to any amounts for which they are personally liable.  Section 447D permits an administrator to apply to the court for directions about a matter arising in connection with the performance or exercise of any of the administrator's functions and powers.   **(c) Decision**   Justice Mansfield was satisfied on the material available to him that it was appropriate to make the first two orders sought by the administrators.  His Honour recognised that the court should not pronounce upon the commercial prudence of an agreement entered into by administrators and that the court will act in an appropriate case to protect administrators from claims that they have acted unreasonably in entering into particular agreements.   Justice Mansfield noted that the agreement did not practically effect the position of the secured creditors of SFM but was concerned that the proposed third order had the potential to impact on unsecured creditors which had not yet met nor had an opportunity to determine whether they supported the approach of the administrators.    Justice Mansfield made the third order proposed by the administrators with an amendment to limit the court's approval of the agreement under section 447D(1) to the extent of the drawdown of the first advance and the incurring of the commitment fee.     In his Honour's view, he could modify the operation of section 443(1) and limit the personal liability of the administrators under section 443A while still preserving, except to a limited extent, the opportunity of the unsecured creditors to be heard on whether any further drawdown of funds under the agreement should be made.   Finally, his Honour noted that the administrators may exercise liberty to apply to seek further directions in respect of further drawdowns under the agreement after the unsecured creditors had had the opportunity to consider the agreement, the administrators' assessment of the state of SFM and suggested course for the administration.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h5)  **5.8 Liability of lenders for economic and non-economic losses suffered by a borrower**  (By Mark Cessario and Emily Bell, Corrs Chambers Westgarth)   Politarhis v Westpac Banking Corporation [2009] SASC 96, Full Court of the Supreme Court of South Australia, Doyle CJ, Sulan and Vanstone JJ, 14 April 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2009/april/politarhis\_96\_done\_sasc%2096.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2009/april/politarhis_96_done_sasc%2096.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   Westpac Banking Corporation ("Westpac") provided a loan to Mr and Mrs Politarhis by way of a line of credit.  The loan was secured by way of a mortgage over the Politarhises' home.  At the time the loan agreements were entered into, Mr Politarhis had a history of problem gambling.  Westpac was not aware of this.     Due to a mistake by Westpac, it advanced more monies than was intended to the Politarhises.  Mr Politarhis became aware of the mistake and did not notify Westpac or his wife.  Mr Politarhis gambled away a large proportion of the monies which were mistakenly made available by Westpac before notifying Westpac of the error.   Mr and Mrs Politarhis made claims in negligence against Westpac, who cross-claimed for possession of the Politarhises' home.  The trial judge dismissed the Politarhis' claims and made orders in favour of Westpac for possession of the mortgaged property.  Mr and Mrs Politarhis appealed to the Full Court.   The Full Court held that no duty of care existed and, if such a duty existed, Westpac had not breached its duty, nor had the Politarhises proved that Westpac's actions caused their loss.  In relation to the alleged duty owed by Westpac, the court held that it was not reasonably foreseeable that, if the bank were to lend a large amount of money to the appellants, Mr Politarhis would become a compulsive gambler.  There was no duty of care owed to Mr Politarhis by Westpac to avoid causing him to develop a psychiatric injury.  Additionally, the bank did not owe a duty to take reasonable care to avoid causing financial loss to Mr Politarhis by lending him money in circumstances in which it was foreseeable that Mr Politarhis would lose the money gambling.  Significantly, Westpac had no knowledge of Mr Politarhis' gambling problem and the court held that a duty of care would seldom arise absent this knowledge on the part of a bank.     The court dismissed the appeals and upheld the decision of the trial judge.     **(b) Facts**   Westpac provided two loans to Mr and Mrs Politarhis.  The first loan agreement, made in April 2003, provided the Politarhises with a line to credit limited to $180,000 ("first loan").  The first loan was secured by way of a mortgage over the Politarhises' home.  In December 2003, Westpac agreed to advance Mr and Mrs Politarhis an amount not exceeding $198,000 ("the second loan").  The second loan was secured by the existing mortgage over the Politarhises' home.     Under the second loan agreement, Westpac was to apply the monies from the second loan to pay off the balance owing under the first loan.  In effect, then, the second loan was to allow the Politarhises to draw down on a further $18,000. However, due to a mistake on the part of Westpac, Westpac failed to use the second loan to pay off the first loan.  Rather, Westpac treated the second loan as additional to the first loan.  This enabled the Politarhises to draw down on a further $198,000.    Mr Politarhis was a problem gambler, and there was evidence that he was a frequent cannabis user.  Mr Politarhis' evidence also suggested that he had psychological injuries associated with depression, anxiety and paranoia.     In late December 2003, Mr Politarhis realised Westpac's mistake.  He did not tell Westpac or his wife of the mistake.  Rather, Mr Politarhis began to draw down on the second loan for gambling purposes.  By 29 March 2004 he had withdrawn, and gambled or spent $154,520.81.  On that day, Mr Politarhis told Westpac of its mistake.  Westpac promptly "froze" each of the loan accounts and subsequently threatened to enforce the mortgage over the Politarhises' home.     **(c) Claims**   In March 2007, Mr Politarhis commenced proceedings in the Supreme Court of South Australia.  As Mr Politarhis was self-represented throughout, the legal basis of his claim was not clear.  The trial judge articulated Mr Politarhis' claim as a claim in negligence against Westpac for damages in respect of psychiatric injury and financial loss allegedly caused by Westpac's conduct.    Westpac cross-claimed against Mr and Mrs Politarhis, seeking an order for possession of the mortgaged property on the basis that the Politarhises' failure to pay the amount owing under the second loan agreement was a default under the mortgage.   Mrs Politarhis then cross-claimed against Westpac.  She sought damages in respect of the adverse health affects she had allegedly suffered as a result of her husband's gambling, which she said was attributable to Westpac's error.     At first instance, the trial judge dismissed Mr Politarhis' claim and Mrs Politarhis' cross-claim.  His Honour gave orders in favour of Westpac for the possession of the Politarhises' home.  Mr and Mrs Politarhis appealed the decision.     **(d) Decision of the Court of Appeal**   Doyle CJ delivered the leading judgment, with Sulan and Vanstone JJ agreeing.  Each appeal was dismissed.     On appeal, Mr Politarhis submitted that Westpac should not be entitled to payment of the money which it advanced by mistake.  The court noted that, although Mr Politarhis raised this argument in support of his claim, it could only properly be raised as a defence to Westpac's cross-claim.  The court held that the mistake by Westpac did not prevent it from recovering all of the money which it advanced.  It would be recoverable either under the loan contract, or on a restitutionary basis.  The court also rejected the submission that Westpac was in breach of the loan contract by making the mistaken advance.    Mr Politarhis submitted that the trial judge erred in finding that Mr Politarhis' depression, anxiety, paranoia and cannabis use were not matters which Westpac was causally responsible for.  Mr Politarhis also challenged the trial judge's finding that his compulsive gambling was "well-entrenched" by mid- to late-1999.  The court rejected both of these submissions, finding that the evidence relied upon by the trial judge provided firm support for his findings.     As the Politarhises were self-represented, there were no substantive challenges to the trial judge's conclusions on matters of law.  Nonetheless, as the appeal challenged the dismissal of the claim, the court provided its reasons for its agreement with the trial judge's conclusions on matters of law.     In relation to Mr Politarhis' claim for non-economic loss, the trial judge had formulated the requisite duty of care, on the part of Westpac, as one "to take reasonable care to avoid causing Mr Politarhis, as a borrower from Westpac, to develop a psychiatric injury or illness or to experience an exacerbation in the seriousness of a pre-existing psychiatric injury of illness" (at [104]).  In agreement with the trial judge, the court found that no such duty was owed by Westpac.  In so finding, the court held that it was not reasonably foreseeable that "if Westpac were to lend a large amount of money to him and Mrs Politarhis, Mr Politarhis would become a compulsive gambler" (at [109]).  Further, the court stated that, on balance, "a duty of care should not be imposed on a lender of money requiring it to take reasonable care to avoid lending money to a person who, once the money is available, might use the money in a manner that causes himself psychiatric injury or causes injury to his physical health" (at [110]).    In coming to this finding, the court placed significant weight on the fact that Westpac had no knowledge or awareness of Mr Politarhis' gambling problem at the time the first and second loans were entered into.  The court stated that "the interest which a potential borrower might have in being protected against borrowing, when to lend to that borrower might ultimately result in harm to the borrower's health because of the manner in which the borrower uses the money, is not an interest that the law should recognise, absent at least awareness on the part of the lender of a particular vulnerability on the part of the would be borrower" (at [116]).   Further, the court held that, even if Westpac did owe the relevant duty of care to Mr Politarhis, it did not fail to take reasonable care.  The court also upheld the trial judge's finding that Mr Politarhis did not establish that his state of health was caused by Westpac.     In relation to Mr Politarhis' claim for financial loss, the court articulated the requisite duty as "one requiring Westpac to take reasonable care to avoid causing financial loss to Mr Politarhis by lending money to him in circumstances in which it was foreseeable that Mr Politarhis would lose the money gambling" (at [124]).  In holding that no such duty of care was owed, the Court relied (at [132]) on the fact that:   * Westpac had no knowledge of Mr Politarhis' gambling problem; * Mr Politarhis was in as good a position as Westpac to protect himself against the likeliehood of loss through gambling; * there was no indication that Mr Politarhis had relied on Westpac to protect his interests; and * Westpac had no means of control over Mr Politarhis' conduct.   Further, the court found that Westpac had not failed to take reasonable care, nor had Westpac caused Mr Politarhis' loss (at [134] and [135]).     In relation to Mrs Politarhis' cross claims against Westpac, the court held that the trial judge was correct in finding that no duty was owed by Westpac, nor was there any proof of breach of such a duty, nor that Westpac's actions caused Mrs Politarhis' loss.  Furthermore, whilst Mr Politarhis' gambling did have an adverse impact on Mrs Politarhis' health, she did not suffer a psychiatric illness.    The court therefore dismissed Mr and Mrs Politarhis' appeals.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h5)  **5.9 Can an injunction be granted to restrain the responsible entity and members from requisitioning a meeting and passing resolutions to alter the constitution if the company has contracted that its constitution not be altered?**   (By Dorothy Lo, Blake Dawson)   Macquarie Capital Advisers Ltd v Brisconnections Management Co Ltd (as responsible entity for the Brisconnections Investment Trust & the Brisconnections Holding Trust) [2009] QSC 82, Supreme Court of Queensland, Dutney J, 14 April 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/april/2009qsc82.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/april/2009qsc82.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   The Supreme Court of Queensland held that members are entitled to requisition a meeting and pass a special resolution altering the constitution, even if the company has contracted that its constitution will not be altered. An injunction restraining the calling of a general meeting may be granted in a suitable case, but only if it does not prevent the company from discharging its statutory obligations. In this case, the court did not grant an injunction because the first defendant (BCM) has a statutory obligation under section 252B of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) to call the meeting and to permit the special and extraordinary resolutions to be put and voted upon.    Similarly, the court also noted that legislative requirements will override any powers given by the trust constitutions. Therefore, if a resolution is passed for the trust to be wound up, Brisconnections Management Co Ltd (BCM) must commence winding up of the scheme under section 601NE of the Corporations Act and cannot rely on clause 11.3 of the constitution to refuse the winding up.    The court further held that second defendant (ASI), being a substantial unitholder of the trust, has a statutory right to requisition meetings as it has a superior statutory right under section 252B. However, the ordinary resolution directing BCM to defer calls for the first instalment is only a right under the trusts' constitution and thus is not superior to the plaintiffs' rights. Where a superior right does not exist, the grant of an injunction will depend on discretionary factors, including whether damages would be an adequate remedy and the degree of likelihood that damages will be paid. In this case, the court did not grant an injunction as the plaintiffs will have an adequate remedy through pursing unpaid instalments in the event of a winding up.    The court also rejected the claim that there is a separate contractual obligation for ASI to maintain the scheme described in the product disclosure statement (PDS). The PDS is not a contractual document and therefore applicants for the units are not bound by the scheme described in the PDS.    **(b) Facts**   BCM is the responsible entity of two trusts that comprise a listed managed investment scheme. The scheme was awarded a concession to design, construct, operate, maintain and finance the Airport Link project in Brisbane.    BCM engaged in an initial public offering on about 24 June 2008. It did so by issuing a PDS, which enclosed an application form by which applicants for the units agreed to be bound by the constitution and the terms and conditions of the offer. The issue price for the units was $3 and unit holders were required to pay $1 on application, $1 nine months after the allotment date and $1 eighteen months after the allotment date.    The plaintiffs contracted with BCM to provide bridging finance (the IPO Equity Bridge), where the second and final instalments would be used to repay it. The plaintiffs also contracted to partly underwrite the unitholders' obligations to pay those instalments (the Underwriting Agreement). Both the IPO Equity Bridge and the Underwriting Agreement contained negative covenants whereby BCM has agreed not to defer the calls for the second and final instalments and not to vary the constitution without the plaintiffs' consent.    On 12 February 2009, ASI, being a substantial unitholder, requisitioned BCM under section 252B of the Corporations Act to call a meeting of members to consider and vote on seven resolutions. These comprise of special resolutions to:   * consider and vote on a winding up of the trusts; * amend the constitutions of the trusts to include a clause requiring payment of a dividend referred to in the PDS but subsequently deferred; * amend the constitution of the trusts to require BCM to exercise its power to defer or cancel calls for the second or final instalments; and * amend the constitutions to deprive BCM of the power to ignore constitutional obligations, compliance with which would result in BCM being in breach of the Underwriting Agreement and the IPO Equity Bridge.   The resolutions also include the following ordinary resolutions to:   * give a direction to BCM to defer the first call until January 2010; * remove BCM as the responsible entity; and * appoint a new responsible entity but without any alternative nominated.   **(c) Claim**   The plaintiffs sought an injunction restraining BCM from putting the resolutions and restraining ASI from interfering with BCM's contractual arrangements with the plaintiffs. The plaintiffs also sought specific performance of the negative covenants contained in the Underwriting Agreement and the IPO Equity Bridge, which passing the resolutions will breach.   **(d) Decision**   **(i) Injunctions against BCM**   Dutney J quoted from Newspapers Group Ltd v Cumberland & Westmorland Herald Newspaper & Printing Co Ltd [1987] 1 Ch 1 where it was stated that members are entitled to requisition a meeting and pass a special resolution altering the constitution, even if the company has contracted that its constitution will not be altered. In a suitable case, the company could be injuncted from initiating the calling of a general meeting, but only if the injunction does not prevent the company from discharging its statutory obligations.    Dutney J went on to find that these principles are applicable to unit holders in a unit trust. Furthermore, since BCM has a statutory obligation under section 252B to call the meeting and to permit the special and extraordinary resolutions to be put and voted upon, the court did not grant an injunction nor grant specific performance of the negative covenants.    **(ii) Tortious interference with contractual relations**   Dutney J also considered whether the plaintiffs' right to contractual performance from BCM is protectable against ASI. In this case, the court held that ASI has a superior right as its power to requisition meetings and to move and vote in favour of the resolutions is granted by sections 252B and 252L of the Corporations Act. As a statutory right given to a member of a managed investment scheme, this right is superior to the quasi-proprietary rights the plaintiffs have to enforce their contractual rights.    In regards to the resolution directing that BCM defer the calls for the first instalment, this right is constitutional and thus is equal to the quasi-proprietary rights of the plaintiff. Therefore, the grant of an injunction will depend on discretionary factors. Dutney J considered whether damages would be an adequate remedy and the degree of likelihood that damages will be paid in determining whether to grant an injunction.    Unpaid instalments are included as assets of the trust, as the definition of assets only exclude "anything by way of consideration for units which have not yet issued". Under clause 21.1 of the trust constitutions, winding up requires the manager to "sell, collect, call in and realise the Assets of the trust".    Dutney J did not find that 'special factors' existed since the plaintiffs have no interest in BCM's business and therefore the failure of that business will only affect the plaintiffs to the extent that it makes recovery of the loan more difficult. As the right to payment of the second or final instalment is not lost or defeated by reason of any winding up of the scheme, the plaintiffs will have an adequate remedy in pursing damages.    Dutney J further rejected the claim that there is a separate contractual obligation for ASI to maintain the scheme described in the PDS. The plaintiffs argued that the unitholders are bound by the conditions of offer contained in the PDS, which could be enforced by the plaintiffs pursuant to a right of subrogation to the rights of BCM against unitholders. Dutney J held that the PDS is not a contractual document. Rather, the application form contains the terms of the offer, but it did not contain an acknowledgment that the applicant is to be bound by the PDS.    Dutney J also rejected ASI's arguments that BCM's entry into the Underwriting Agreement or the IPO Equity Bridge is contrary to the interests of members and thus a fraud on the power. Dutney J found that members' rights to vote takes precedence, as it is a statutory right, and further, there is no authority to support that it can be a fraud on the power to enter into transactions which the trust deed expressly authorises.   **(iii) Effect of a resolution for winding up**   Dutney J also noted the effect of clause 11.3 of the constitution, which provides that the "Manager shall not be obliged to perform any obligation under this constitution if it would result in. a breach by the Manager of an obligation under any of the transaction documents [IPO Equity Bridge and Underwriting Agreement]". However, section 601NE of the Corporations Act also requires the scheme to be wound up upon the passing of a resolution for the winding up of the scheme. Since this is a legislative requirement, the court held that this provision may override the power given by the trust constitutions.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h5)  **5.10 Winding up proceedings and proof of insolvency**  (By Jillian Williams, DLA Phillips Fox)   Ann Street Mezzanine Pty Ltd (in liq) v Beck [2009] FCA 333, Federal Court of Australia, Finkelstein J, 9 April 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/april/ann\_street\_fca%20333\_done.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/april/ann_street_fca%20333_done.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   This action is one of a series arising from the collapse of the retail and residential developer, the Westpoint group. The plaintiff, Ann Street Mezzanine Pty Ltd (in liq) (Ann Street) (wound up by a Federal Court order after application by ASIC) sought to strike out part of the defence raised by Norman Carey (the fourth defendant).  In addition, ASIC and the Commonwealth (as cross-respondents) applied to have the cross-claims against them struck out.    Finkelstein J considered the merits of the cross-claim, and ASIC's application to have the claim struck out on the basis of issue estoppel and abuse of process. In response to the issue estoppel claim, his Honour considered the meaning of 'a party' and privity to a proceeding. In considering the abuse of process claim, his Honour considered whether an attempt to re-litigate or collaterally attack a finding was an abuse, and whether special reasons were required to prevent a person raising an issue raised in another court to which they are not strictly bound.    Ultimately, Finkelstein J refused to strike out either the parts of the defence sought by the applicant, or the cross-claims against ASIC and the Commonwealth.   **(b) Facts**   In summary, Ann Street raised in excess of $64 million by the issue of promissory notes. It then entered into a loan agreement with another company in the Westpoint group, Ann Street Brisbane Pty Ltd ('ASB'). Pursuant to the loan agreement (as varied), Ann Street was required to loan ASB the funds raised through the issue of promissory notes, which would only be used by ASB for a particular development. ASB would repay the loan when it received sufficient proceeds from the sale of the proposed development. However, this did not occur.  Rather, after payment of commissions (including to Mr Beck's companies), the balance (approximately $57 million) was paid to Westpoint Corporation Pty Ltd ('WPC') another company in the group. After the collapse of the Westpoint group, most of the money paid to WPC could not be recovered from WPC or ASB.   Ann Street's central complaint to the Federal Court was that a breach of directors' duties allowed Ann Street to:   * Enter the loan agreement with ASB (which did not have the means to repay the loan); * Vary the repayment clause (so that the obligation to repay the loan did not arise until such time as ASB received sufficient proceeds from the sale of the proposed development); * Pay commissions to promoters/advisors; * Pay WPC the balance of the money raised from the issue of promissory notes.   Accordingly, Ann Street claimed that the directors were obliged to make good the loss. There was also a claim for the commissions paid to Mr Beck's companies.    **(i)   The application to strike out part of the defence and the cross-claim**   In these proceedings, Ann Street sought to strike out part of the defence of the fourth defendant, Mr Carey. In the same proceedings, ASIC and the Commonwealth sought to have the cross-claims brought against them struck out.    The cross claimants alleged that:   * Each Westpoint group company was solvent prior to the commencement by ASIC of its application to wind up Ann Street and York Street Mezzanine Pty Ltd. * The group's insolvency was the immediate and inevitable result of the filing of the winding up applications. * ASIC's decision to bring the applications to wind up both companies was made for an improper purpose (ie to 'shutdown' the Westpoint group); made following a failure to accord procedural fairness to the affected persons; and arrived at after a failure to take into account relevant considerations and after taking into account of irrelevant considerations.   The causes of action pleaded against ASIC were misfeasance in public office and negligence. Various heads of damages were sought including, by the shareholders, diminution in the value of their shareholding and, by the group companies, loss of the value of their assets and loss of income by reason of the collapse.    ASIC argued that the cross-claim should be struck out on the grounds of issue estoppel and abuse of process. The primary submission was that the cross-claimants were not permitted to contest the findings made by French J (on insolvency) in the earlier proceedings.    **(c) Decision**   **(i) The application to strike out the cross-claim**   In considering ASIC's application to have the cross-claim struck out on issue estoppel grounds, Finkelstein J considered the following issues:   * What must a court decide on a winding up application based on insolvency? * What did the judge in fact decide for the purposes of making an order that Ann Street be wound up? * In what circumstances, if at all, is a person entitled to attack findings in proceedings otherwise than by way of appeal?   His Honour noted that the creditor in an insolvency proceeding is required to establish the insolvency of the company both at the time of filing the application and at the time of the hearing, and that ASIC must have satisfied the court that there is a prima facie case of insolvency.    In the current matter, his Honour considered that French J held Ann Street should be wound up and that it was not in the interests of the creditors to continue in administration.  The question was therefore whether the finding by French J precluded the cross-claim. His Honour considered that although judgment for Ann Street to be wound up was in rem and therefore binding on the whole world, 'the judgment is not, special circumstances apart, binding as to the facts upon which it is based, except as between the parties to the winding up proceedings and their privies'.    His Honour held that the cross-claimants were not a party, nor were they privy to the earlier insolvency proceedings, and thus were not precluded from bringing the cross-claim against ASIC. Therefore, ASIC failed on the issue estoppel ground from having the cross-claim struck out.    His Honour then went on to consider ASIC's submission regarding the 'abuse of process' ground. He noted that an abuse of process may prevent a person from making a collateral attack on a judgment in an action with a different party (i.e. a person will not be permitted an opportunity to reargue a case, where he has already had a full opportunity to argue the matter). However, his Honour considered that this was a case 'where a person is seeking to raise an issue for the first time which has been dealt with in litigation between other parties'. Although another party (ASIC), had previously argued the issue successfully, the cross-claimants intended to challenge that finding on substantially different evidence.    His Honour held that the general principle is that whilst any attempt to re-litigate an issue may be an abuse of process, there must be a "special reason" to prevent a person raising an issue decided by another court but not strictly binding on him. Here there was no special reason and consequently, the cross-claim should not be struck out.    **(ii) The application to strike out part of the defence**   Finkelstein J briefly considered the dispute regarding the defence of Mr Carey. His Honour refused to strike out the parts of the defence which mirrored the cross-claim against ASIC, and in which Mr Carey contended that any damage suffered was caused by ASIC and not the defendants.  In part, this was because his Honour considered that the issues raised by those parts of the defence would be litigated at a further date in the cross-claim against ASIC.  However, he also considered it possible that Mr Carey may establish that the money paid to WPC was not lost (i.e. irrecoverable) until the collapse of the Wespoint group.  This was relevant because for the purposes of determining what damages flow from any breach of directors duties, regard may be had to later events.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h5)  **5.11 Winding up of an overseas company - jurisdiction of the court and general grounds to wind up**   (By Jodene Chia, DLA Phillips Fox)    Re Starport Futures Trading Corporation [2009] QSC 94, Supreme Court of Queensland, Applegarth J, 6 April 2009    The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/april/re\_starport\_futures94\_qsc%2094\_done.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/april/re_starport_futures94_qsc%2094_done.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   Eltran Pty Ltd (Eltran) and Eltran as trustee for the Eltran Superannuation Fund (the Eltran Fund) (together, the Applicants) applied to the Supreme Court of Queensland to wind up Starport Futures Trading Corporation (Starport), a company not registered as a company under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).   The Applicants relied upon sections 583(c)(i) and (ii) of the Act in support of their application which provides for the winding up of a Part 5.7 body. Section 583(c)(i) provides for a Part 5.7 body to be wound up if, amongst other things, it is unable to pay its debts. Section 583(c)(ii) of the Act provides for the winding up of a Part 5.7 body if the court is of the opinion that it is just and equitable that the Part 5.7 body should be wound up.   The threshold issue was whether Starport is a Part 5.7 body and therefore whether the Supreme Court of Queensland had jurisdiction to grant an Order for Starport to be wound up.  This turned on whether Starport carried on business in Australia.   Applegarth J found that Starport carried on business in Australia and therefore the Supreme Court of Queensland had jurisdiction.   The Applicants were also ultimately successful on both insolvency grounds and Applegarth J ordered that:   * Starport be wound up by the court under the provisions of the Act; and * a liquidator be appointed for the purposes of the winding up.   **(b) Facts**   Starport was incorporated in 1998 in Delaware, United States of America. Roger Gareth Munro was the sole director of Starport and lived at Kingscliff in New South Wales. Starport was in the business of trading on various equity, commodity, futures and currency markets.   RG Munro Futures Pty Ltd (RGMF) was a wholly owned Australian subsidiary of Starport and was incorporated on 13 January 1999. Mr Munro alleged that RGMF was incorporated in Australia with the intention that any Australian trading would be done exclusively by RGMF and not Starport.   Starport owed Eltran $9,821,264.00 and the Eltran Fund $21,467,158.00.  Other creditors who appeared in support of the application had demanded payment of sums invested totalling $12,854,722.    Following numerous demands having been made by the Applicants and other investors in Starport for the payment of these monies, the Applicants applied to have Starport wound up under Part 5.7 of the Act.   Starport opposed the application on the grounds that:   * The evidence did not provide that it was unable to pay its debts. * It was not taken to be insolvent under section 585 of the Act. * It would not be just and equitable to order its winding up.   **(c) Decision**   The Applicants relied upon sections 583(c)(i) and (ii) of the Act on the basis that Starport was a Part 5.7 body to which the winding up provisions of the Act apply by virtue of section 583.    The parties agreed that Starport would only be a Part 5.7 body if it carried on business in Australia.   **(i) Was Starport a Part 5.7 body?**   Applegarth J dealt with this question by considering sections 18 to 21 of the Act which sets out the circumstances in which a body may be said to carry on business in Australia.    In reaching his conclusion, Applegarth J principally directed inquiry as to whether Starport had a "place of business in Australia" and referred to Hyde v Sullivan (1956) 56 SR (NSW) 113 at 119 that provided that the term "carrying on a business" generally means to conduct some form of commercial enterprise, systemically and regularly, with a view to profit.   His Honour adopted the observations of McMurdo J in ASIC v Edwards (2004) 22 ACLC 1469, determining that the relevant inquiry was whether Starport's conduct in Australia either directly or through its agents involved "a succession of acts designed to advance some enterprise of a company pursued with a view of pecuniary gain" and that the factual question should be addressed not only by reference to the context of the particular statute but also with an understanding of the particular nature of the enterprise which constituted the company's business.   Based on the evidence at hand, Applegarth J found that Starport carried on business in Australia and that the court had jurisdiction.  In reaching this decision, his Honour considered, amongst other things, the following factors:   * Starport's dealings (i.e. the receipt, retention and redemption of sums invested by investors), at least with its Australian investors, occurred in Australia by procuring investments and entering into loan agreements in Australia on a routine and systemic basis. * The acknowledgements of debt entered into between each Applicant and Starport were entered into in Australia. * The evidence as to Mr Munro's usual location, the location of the Australian investors and Starport's use of an Australian postal address and Australian telephone and fax facilities in the context of reporting to Australian investors by sending reports to them in the post or by e-mail. * The lack of evidence that Starport operated a business office in Delaware. * The sworn evidence of what Starport did and not what RGMF did on its behalf.   Applegarth J also drew an analogy with the position of the relevant company in ASIC v Edwards (2004) 22 ACLC 1469 in which it was found that the procurement of funds was a step in the conduct of the company's business, rather than simply the raising of capital for the purposes of then carrying on the business.  His Honour concluded that Starport's dealings with Australian investors who invested money directly with it were activities undertaken as a commercial enterprise which were designed to advance the enterprise. They were routine and systemic and involved the carrying on of business in Australia.    **(ii) Was Starport insolvent?**   Applegarth J considered whether Starport was unable to pay its debts in view of the evidence of numerous demands having been made by the Applicants and other Australian investors.  His Honour rejected Starport's submission that it was not taken to be insolvent under section 585 of the Act for the following reasons:   * Two separate debts were due and remained unpaid following the proper service of demands for payment and therefore Starport was unable to pay its debts (section 585(a) of the Act). * The Applicants had instituted proceedings against Mr Munro, the sole shareholder of Starport, for the debt owing and Starport had not made payment or taken other suitable action within 10 days after proper service was made (section 585(b) of the Act). * Starport offered no evidence to displace the inference that it was unable to pay its debts and therefore Applegarth J was satisfied that Starport was unable to pay its debts (section 585(d) of the Act).   **(iii) Should Starport be wound up on just and equitable grounds?**   To make an order for the winding up of a company on just and equitable grounds, Applegarth J considered that whilst insolvency is not a pre-condition, to make such an order with respect to a prosperous or at least solvent company is an extreme step requiring a strong case. His Honour also referred to authorities which showed that factors relevant to the court's opinion as to whether such grounds had been established included whether:   * there is a justifiable lack of confidence in the conduct and management of the company's affairs; and * the business could be carried on consistently with candid and straightforward dealings with the public if the company's existence was prolonged.   Applegarth J found that these grounds were present in the circumstances and considered that Mr Munro may continue to procure money from Australian investors in order to trade the company out of its losses.  Therefore, it was in the public interest that Starport be prevented from continuing to procure money from Australian investors.   For the above reasons, his Honour concluded that it was appropriate that Starport be wound up on just and equitable grounds and the court appointed a liquidator accordingly.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h5)  **5.12 Greenmailer or white knight? Does requesting meetings to wind up BrisConnections' trusts or to alter the trusts' constitutions breach the Corporations Act?**   (By Georgina Molloy, Blake Dawson)   BrisConnections Management Company Ltd (as responsible entity for the BrisConnections Investment Trust and the BrisConnections Holding Trust) v Australian Style Investments Pty Ltd [2009] VSC 128, Victorian Supreme Court, Robson J, 6 April 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/april/2009vsc128.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/april/2009vsc128.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   The plaintiff, BrisConnections Management Company Ltd (BMC) brought an action against Australian Style Investments Pty Ltd (ASI) seeking a declaration that ASI's requests to convene unit holder meetings were not lawfully made, and seeking to wind up ASI. Robson J dismissed the application of BMC to wind up ASI and also dismissed the application of BMC for declarations and relief concerning the meetings.   Robson J found that ASI's two requests to convene unit holder meetings were made lawfully. The court held that there was no improper or collateral purpose in ASI seeking to wind up BMC, as the primary objective of the sole director of ASI was to gain value from his unit holding. The requisition to alter BrisConnections' trusts' constitutions was similarly found to be valid and not for an improper purpose, as Robson J found that the trusts' constitutions made provision for payment to beneficiaries and found no breach of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).   **(b) Facts**   BMC is the responsible entity for the BrisConnections Investment Trust and the BrisConnections Holding Trust (the trusts), which constitute a managed investment scheme under the Corporations Act. Awarded the concession to design, operate and finance the Brisbane Airport Link, BrisConnections (including BMC among other associated companies) issued Stapled Units to raise over $1.2 billion equity. The issue price for each Stapled Unit was $3, payable in three equal instalments: the first payment on application, the second payment due nine months after allotment date in April 2009 and the third payment due 18 months after allotment date in January 2010.   Mr Nicholas Bolton, the 26 year old sole director of ASI, began to acquire units in BrisConnections in November 2008 with an aim to reach a holding of 19.9 per cent.     On 12 and 20 February 2009, ASI made two requisitions. First, ASI sought a meeting of members of the trusts to vote on a special resolution to wind up the trusts. Second, ASI sought a series of cascading resolutions to amend the constitutions of the trusts and to remove BMC as the responsible entity. The proposed amendments to the trusts' constitutions include resolutions to reinstate the payment of dividends, postpone the second payment instalment from 29 April 2009 until 29 January 2010 and to remove the manager (BMC) as the responsible entity.   In response, BMC alleged that ASI, in requesting a meeting to consider a resolution to wind up the trusts, exercised its power for an improper or collateral purpose. BMC alleged that the winding up of the trusts would not necessarily eliminate members' outstanding liabilities. It was argued that ASI did not have reasonable grounds for making representations that winding up the trusts would be in members' best interests and thus ASI engaged in misleading conduct under section 769C of the Corporations Act and misleading and deceptive conduct contrary to section 1041H(1) of the Corporations Act. BMC also contended that ASI's second requisition notice to amend the trusts' constitutions in the event that the trusts were not wound up, was not given for a proper purpose.   Parties associated with the Brisbane Airport Link sought leave to be heard under Rule 2.13 [Supreme Court (Corporations) Rules 2003](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=73856" \t "Default). The underwriters, Deutsche Bank and Macquarie Capital Advisers and Macquarie Financial Holdings (Macquarie), and the equity participants (Leighton) were granted leave to make submissions. The State of Queensland submitted that removing BMC or winding up the trusts would constitute a tortious interference with the contractual relations of the State. Robson J found, however, that the State of Queensland was not a party to the proceedings. Although Robson J granted the State leave to make submissions, he did not extend this leave to allegations of tort on the part of the members.   **(c) Decision**    Robson J considered several issues in his judgment. The first issue was in relation to the requisition to wind up the trusts. BMC alleged that ASI, in requesting a meeting to consider a resolution to wind up the trusts, exercised its power for an improper or collateral purpose. Robson J did not accept BMC's contention that the resolution was invalid. Robson J applied the principles from Swansson v R A Pratt Properties Pty Ltd (2002) 42 ACSR 313 and Williams v Spautz (1992) 174 CLR 509, to test whether the resolution had been proposed in order to achieve the purpose for which it was designed. The court held that Mr Bolton, the "guiding mind of ASI", had a primary objective to "extract some value from his significant holding", although Robson J also accepted Mr Bolton may have been seeking to extract value by his strong "negotiating position". Consequently, Robson J found that the resolution had been proposed by ASI in order to achieve the purpose for which it was designed - here, the winding up of the trusts.    The second issue was whether the resolution to wind up the trusts would relieve the unit holders from their obligation to pay the next two instalments. Robson J found that ASI's statement to unit holders represented that unit holders might be better off winding up the scheme - there was a material risk that a loss suffered in contributing the further $2 per unit may be greater than the loss suffered if the trusts were wound up. BMC led evidence to suggest that Macquarie had a Power of Attorney under its security to require payment of instalments; yet Deutsche Bank argued that in the event of winding up it was doubtful that instalments would be payable. Robson J found that BMC did not establish that unit holders would not be better off in winding up the trusts instead of allowing them to continue, and therefore found that BMC failed to establish that the first requisition had been called for a purpose that could not be achieved.   Third, BMC claimed that ASI's statement that it was in the best interests of unit holders to wind up the trusts, was misleading and deceptive within the meaning of section 1041H(1) Corporations Act. BMC alleged that the winding up would not remove an obligation on unit holders to pay the two outstanding instalments, as set out in the trusts' constitutions. Robson J found that ASI's statement was neither misleading or deceptive on either grounds of omission or lack of reasonable grounds.    Following the wind up issue, the court considered the proposed amendments to the trusts' constitutions. BMC alleged that ASI's second requisition notice to amend the trusts' constitutions in the event that the trusts were not wound up, was not given for a proper purpose. The proposed amendments included resolutions to reinstate the payment of dividends, postpone the second payment instalment from 29 April 2009 until 29 January 2010 and to remove the manager (BMC) as the responsible entity. Robson J found that the Corporations Act and the constitution of the responsible entity made provisions for the distribution of property to the unit holders. Analysing the nature of the trust with its constitution making provision for payment to the beneficiaries, Robson J was satisfied that there was nothing improper or unlawful in such a provision.    Similarly, the resolution to remove a responsible entity was found to be valid, and BMC failed to establish that this resolution was for an improper purpose. BMC's claim that the "cascading" nature of the resolutions made the resolutions void also failed, as Robson J did not find any of the resolutions to be invalid.   The court also considered and rejected BMC's other claims based on procedural irregularities. As Robson J found the second requisition to be valid, BMC's claim that section 252C Corporations Act was not triggered was rejected. The court held that ASI was entitled to call a meeting on 14 April 2009 to consider the proposed resolutions. While ASI altered one resolution from ordinary to special, Robson J determined that this procedural irregularity within the meaning of section 1322 did not cause any substantial injustice and was therefore not invalid.   Finally, in relation to BMC's application to wind up ASI, BMC argued that BMC was a contingent or prospective creditor of ASI and had the right to apply for ASI to be wound up for insolvency under section 459A of the Corporations Act. Robson J found that there was no present obligation on ASI to pay an instalment - that obligation arises if a person is a unit holder on the instalment day, in this case on 29 April 2009. Therefore, BMC failed to establish that ASI was insolvent and thus Robson J refused BMC leave to apply for winding up of ASI. Likewise, BMC was found to have no standing to apply to wind up ASI under the just and equitable grounds within section 462(2) Corporations Act. Although Robson J found that Mr Bolton was an "unsatisfactory witness" and that ASI's put option with Mr John Williams was "a sham", Robson J found that these factors fell short of the conduct necessary to justify the winding up of an otherwise profitable company.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h5)  **5.13 Amendment of registered scheme constitutions- some further guidance**  (By Zoe Leyland, Mallesons Stephen Jaques)   ING Funds Management Ltd v ANZ Nominees Ltd; ING Funds Management Ltd v Professional Associations Superannuation Ltd [2009] NSWSC 243, New South Wales Supreme Court, Barrett J, 3 April 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/april/2009nswsc243.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/april/2009nswsc243.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   This decision of the New South Wales Supreme Court concerned claims on behalf of ING Funds Management Ltd ("INGFM") for declarations as to the validity of amendments to the constitutions of two registered managed investment schemes for which it is the responsible entity.   INGFM ultimately failed to establish any entitlement to the declaratory relief sought.   The decision is particularly relevant to responsible entities planning constitutional amendments to registered schemes under section 601GC(1)(b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") as it:   * confirms that the form of amendment is dictated by the form of the scheme constitution; * provides comprehensive guidance on the procedural steps to be taken when making the amendments; * offers clarification on the terminology used and when the power contained in that section may be exercised; and * illustrates the importance of ensuring that board minutes adequately reflect the deliberation of the impact of the proposed amendments on members' rights.   The decision may prove alarming for responsible entities wishing to suspend or alter redemption rights via the section 601GC(1)(b) mechanism in response to the recent decline in investor enthusiasm for managed investment schemes.   **(b) Facts**   INGFM sought to amend each constitution of two managed investment schemes in order to suspend members' rights to require redemption of some or all of their units. The amendments were in response to a large volume of redemption requests, both received and anticipated, which had the potential to oblige INGFM to realise assets on substantially discounted terms in order to meet the requests.     In November 2008, two documents described as "supplemental deeds" were signed by the general counsel and company secretary of INGFM.  The function of the "supplemental deeds" was to arrest redemption requests until meetings of members could be held to consider a resolution to amend each constitution in order to impose further restrictions on redemptions.    In December 2008, two documents again described as "supplemental deeds" were executed by INGFM in a manner consistent with section 127(1) of the Act.  The operative clauses were the same as those contained in the November documents save for the insertion of fixed dates for the end of the suspension periods.  The documents were subsequently lodged with the Australian Securities and Investments Commission ("ASIC").    In January 2009, INGFM sought to ratify the action taken in November 2008 through the execution of two further deeds in a manner consistent with section 127(1).  The further deeds purported to take effect from the time of the execution of the November 2008 "supplemental deeds".  Each deed recited the action taken by INGFM in November 2008 and a subsequent resolution of its board adopting and ratifying the "supplemental deed" and the acts of its officers in executing that deed.     **(c) Decision**   **(i) Arguments made by INGFM**   INGFM conceded that the "supplemental deeds" created in November 2008 were not in fact deeds and that the signatories to those documents were not persons whose signatures were capable of causing execution.  INGFM maintained, however, that the documents were nonetheless binding on INGFM and were sufficient, either by reason of their own force or subsequent ratification, to effect amendment of each constitution of the managed investment schemes under section 601GC(1)(b).     INGFM also argued that the "supplemental deeds" created in December 2008 were valid and binding, thus effecting amendment of each constitution from that date.   INGFM also maintained that the condition precedent to the power of variation under section 601GC(1)(b), that it must reasonably consider that the proposed amendment will not adversely affect members' rights, was satisfied in both November and December 2008.    **(ii) The applicable provisions of the Act**   Section 601GC(1)(b) provides that a constitution of a registered scheme may be modified, or repealed and replaced with a new constitution, by the responsible entity if it reasonably considers that the change will not adversely affect members' rights.  Under section 601GC(2), the modification, or repeal and replacement, cannot take effect until a copy is lodged with ASIC.   Section 601GB provides that a constitution of a registered scheme must be contained in a document that is legally enforceable between the responsible entity and its members.  **(iii) Efficacy of the November 2008 "supplemental deeds": was a deed required?**   The first issue for determination was whether a deed was in fact required.     In determining this issue, Barrett J drew contextual assistance from section 601GC(1)(a) which provides that, whatever the form of the constitution of a registered scheme, its provisions may be amended through a special resolution of members (subject to lodgment with ASIC under section 601GC(2)).  Section 601GC(1)(b), however, differs from section 601GC(1)(a) in two important respects.  First, it cannot be exercised unless the threshold condition, that the change will not adversely affect members' rights, is satisfied.  Second, while it establishes a power, it neglects to prescribe the method by which that power is to be exercised.  Barrett J resolved that as the method of amendment is left open it must be dictated by the form of the constitution.  The method of effecting amendment under section 601GC(1)(b) must be one which ensures that the constitution continues to be contained in a legally enforceable document between the members and the responsible entity, as required under section 601GB.  As the constitution of each registered managed investment scheme was in the form of a deed executed and delivered by the responsible entity as a sole party (and thus a deed poll), it must, having regard to the implicit requirements of the Act, the provisions of the constitution concerning variation and the common law, be amended by another deed.   **(iv) Efficacy of the November 2008 "supplemental deeds": was the condition precedent to the power of variation satisfied?**   Barrett J, while not required to do so given the conclusion above, went on to consider whether INGFM had satisfied the condition precedent to the power of variation under section 601GC(1)(b), being that it must have reasonably considered that the proposed amendment will not adversely affect members' rights.   Barrett J outlined the components which must be established by INGFM in this regard.  The first component involves an assessment of how INGFM viewed its members' rights prior to the amendment and how the proposed amendment would impact on those rights.  Second, INGFM must establish that following an assessment of its members' rights prior and subsequent to the proposed amendment, there would be no adverse affectation of those rights.  Third, INGFM must establish that its opinion as to the absence of any adverse affectation was reasonable.    The rights of members under consideration are the contractual and equitable rights conferred on members by the constitution.  The responsible entity must distinguish this from members' commercial interests or the enjoyment of their rights.    In determining the second component, Barrett J stated that the responsible entity must resolve whether the proposed amendment will "remove, curtail or impair [members'] existing rights in a way that is disadvantageous".  Any adverse affectation is sufficient to preclude the responsible entity from exercising its power under section 601GC(1)(b).    The requirement imposed in the third component is that the relevant opinion must actually be held by the responsible entity and that the basis for that opinion must conform to the standard of a reasonable person.    In this instance, the minutes of the board meetings in respect of each managed investment scheme recorded a decision that the proposed amendment will not adversely affect members' rights.  There was no evidence, however, of the basis on which that conclusion was reached.  The corollary was that INGFM was not able to prove that the grounds for its conclusion were reasonable.     Barrett J went on nonetheless to consider whether there could have been a reasonable basis for the conclusion that the proposed amendment would not adversely affect members' rights.  His Honour concluded that the deferral in the payment of cash to a member seeking redemption after the purported amendments took effect could only be construed as adverse from the perspective of members.  While the evidence proved that INGFM was concerned with the declining assets values of both funds, this concern went only to the value or enjoyment of members' rights.  The actual right in question was a member's right to receive a proportionate interest in the fund following a valid request for redemption.   Thus, even if the proposed amendments had been contained in the form of a deed, INGFM failed to satisfy the condition precedent to the power of variation under section 601GC(1)(b).   **(v) Efficacy of the December 2008 "supplemental deeds"**   While the documents executed by INGFM in December 2008 operated as deeds, the evidence of the decisions to execute the documents fails to disclose any grounds for the conclusion that the revised proposed amendments would not adversely affect members' rights.  INGFM therefore failed to establish that it held the reasonable opinion required to exercise its power of amendment under section 601GC(1)(b).    **(vi) Efficacy of the purported ratification in January 2009**   Barrett J concluded that the deeds executed in January 2009 which attempted to ratify the acts of November 2008 neglected to remedy the absence of the considerations called for under section 601GC(1)(b).  Further, Barrett J was persuaded by submissions that the fiction of the retrospective effect of ratification cannot operate where it is to alter the ordinary course of law: it cannot retrospectively defeat the accrued rights which arose from the redemption requests, the existing provisions of the constitutions and the ineffectiveness of the purported amendments.   **(d) Conclusion**    INGFM failed to establish any entitlement to the declaratory relief sought and was therefore unjustified in its refusal to act on redemption requests following the purported amendment in November 2008.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h5) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Contributions** |  |  | | |  | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20141.htm%20May%202009.htm%23h1) | | |  |

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