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| **Bulletin No. 156**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).[Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#h1) [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#h2) [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#h3) [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#h4) [Contributions](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#7) [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)  |

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| **Detailed Contents**  | own |

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| [1. Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#1)[1.1 Redesigning the contours of the future financial system: IMF report](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#011)[1.2 Equity capital raising in Australia: report](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#012)[1.3 IOSCO publishes principles for direct electronic access to markets](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#013)[1.4 APRA releases superannuation prudential practice guides](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#014)[1.5 Audit quality discussion paper](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#015)[1.6 Long-term issues in international banking: report](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#016) [1.7 FSA consults on changes to its Remuneration Code](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#017)[1.8 CESR report on trends, risks and vulnerabilities in financial markets](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#018)[1.9 Guidance on effective board performance](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#019)[1.10 New Zealand issuers can improve corporate governance reporting](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#0110)[1.11 Consultation on implementation of UK financial regulation reforms](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#0111) [1.12 Consultation on proposals for a restructuring moratorium in the UK](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#0112)[1.13 Agreement on Basel Committee capital and liquidity reform package](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#0113)[1.14 Provision of non-audit services by auditors and guidance for audit committees](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#0114)[1.15 OTC markets and derivatives trading in emerging markets: report](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#0115)[1.16 Investment management industry in Australia: report](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#0116) [1.17 SEC proposes measures to improve regulation of fund distribution fees and provide better disclosure for investors](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#0117)[1.18 Report on resolution of cross-border banks](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#0118) [2. Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#2)[2.1 ASIC provides relief for parent entity financial statements](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#021)[2.2 ASIC releases guidance on a director's duty to prevent insolvent trading](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#022)[3. Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#3)[3.1 Reports](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#031)[3.2 Listing Rule amendment notification - Remuneration committee requirement for top 300 listed entities](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#032)[3.3 Transfer of supervisory functions to ASIC](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#033)[3.4 Listing Rule amendment notification - Requirement for a trading policy](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#034)[4. Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm%22%20%5Cl%20%224)[4.1 Trustee in bankruptcy has an equitable right, independent of the trust deed, to sue upon a bankrupt directors' insurance policy](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#041)[4.2 Sole director's agreements with the company may be voidable at the option of the company](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#042)[4.3 Involvement in sale and purchase transactions that create or maintain an artificial price: construction of section 1041A of the Corporations Act](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#043) [4.4 Execution of documents by companies](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#044)[4.5 Receiver's liability for corporation's statutory breach, and entitlement to indemnification](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#045)[4.6 Meeting the requirements for leave to commence a derivative action](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#046)[4.7 Attempted reliance on agency and mistake of fact to recover loaned funds](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#047)[4.8 Court decides on validity of notices issued by ASIC prior to contempt of court proceedings](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#048)[4.9 Circumstances where a meeting is convened for a "proper purpose" and the validity of resolutions adopted](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#049)[4.10 Appointment of provisional liquidator appropriate for chaotic company which was probably insolvent](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#0410)[4.11 Secondary trading - validation and relief from liability following the issue of a defective prospectus](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#0411)[4.12 Contract of guarantee: Acknowledgment of personal liability by a director constitutes enforceable guarantee](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#0412)[4.13 Court approves administrators transferring shares from members](http://www.law.unimelb.edu.au/bulletins/156%20August%202010.htm#0413) |

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| **1. Recent Corporate Law and Corporate Governance Developments**  |  | ext Section |

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| **1.1 Redesigning the contours of the future financial system: IMF report**On 16 August 2010, the International Monetary Fund (IMF) published a report titled 'Redesigning the contours of the future financial system'. This report explores the responses of the private and public sector to the crisis and some of the probable outcomes. Aside from improved supervision of individual institutions, greater emphasis needs to be put on financial regulations that reflect the systemic nature of financial risks and the role that macroeconomic policies play. Global consistency of regulation and financial sector taxation will be essential to mitigate systemic risks, to avoid unintended distortions, and to help ensure a level playing field.  This report suggests the key aspects of the future contours will likely be:Banks are expected to return to their more traditional function as stricter regulation will limit the risks and activities that banks can undertake. The nonbanking sector will likely have a greater competitive advantage - both in supplying credit and providing investors with nonbank services - and will thus grow. The perimeter of regulation is bound to expand to take into account the risks in the nonbank sector. Market infrastructure will be reinforced to protect investors and as a consequence will need to provide simplicity and transparency to make risks clearer and the financial system safer. The global financial system is likely to be smaller, and less levered, than in the recent past, and could well be less innovative and dynamic, at least for a while. The report is available on the [IMF](http://www.imf.org/external/pubs/ft/spn/2010/spn1010.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.2 Equity capital raising in Australia: report**On 16 August 2010, ISS Governance Services (formerly RiskMetrics Australia) published a report titled 'Equity capital raising in Australia during 2008 and 2009'. Nearly half of all capital raised by top 200 companies in Australia in 2008 and 2009 was placed to investors selected by company management and their investment bank advisors. Areas of reform identified by ISS, aimed at improving transparency and fairness in the capital raising system, include:Requiring disclosure of placement recipients whose ownership interest has increased as a result of a placement (and the quantum of such increase); and Removing the requirement for prospectuses for retail investors given the protections afforded by Australia's continuous disclosure regime. In 2008 and 2009, S&P/ASX 200 entities raised a total of $98.94 billion with 45 percent of this amount allocated through placements. Capital raisings where all investors were given the opportunity to maintain their ownership interest in the company - rights issues - accounted for $46.2 billion of all funds raised. Investors invited to participate in placements in 2008 and 2009 were offered average discounts of 12.3 percent to the prevailing market price and would have received an average return of 20 percent on a six month investment had they participated in all placements.For the two years to 31 December 2009 investment banks received fees of $1.89 billion for advice and underwriting. According to ISS, fees paid to investment banks during this period appeared very high relative to the actual exposure of the underwriters. Over the two year period underwriters were required to subscribe for $1.89 billion in securities which represented 2.8 percent of all underwritten issues.etailed Contents**1.3 IOSCO publishes principles for direct electronic access to markets** On 13 August 2010, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a final report titled 'Principles for Direct Electronic Access to Markets (DEA Principles)' containing principles designed to guide intermediaries, markets and regulators in relation to the areas of pre-conditions for direct electronic access (DEA), information flow and adequate systems and controls.  The final report is based on analyses of market and regulatory developments and of the responses received to the original consultation report titled 'Policies on Direct Electronic Access' which identified and discussed the benefits, potential risks and concerns associated with DEA.**Principles for direct electronic access to markets**  The DEA Principles set out in the report are based on the recognition that markets, intermediaries and regulators must each play a role in addressing the potential risks posed by DEA. In addition regulators should retain the power to allow or prohibit any form of DEA as well as to establish requirements in the DEA area, including pre-trade controls and risk limits and should also exercise regulatory oversight over the decisions made by clients, intermediaries and exchanges.  **(a) Pre-conditions for DEA**  **Principle 1 Minimum customer standards**  Intermediaries should require DEA customers to meet minimum standards, including that: Each such DEA customer has appropriate financial resources; Each such DEA customer has appropriate procedures in place to assure that all relevant persons: - Are both familiar, and comply, with the rules of the market; and - Have knowledge of and proficiency in the use of the order entry system used by the DEA customer. Market authorities should have rules in place that require intermediaries to have such minimum customer standards. **Principle 2 Legally binding agreement** There should be a recorded, legally binding contract between the intermediary and the DEA customer, the nature and detail of which should be appropriate to the nature of the service provided. Each market should consider whether it is appropriate to have a legally binding contract or other relationship itself and the DEA customer. **Principle 3 Intermediary's responsibility for trades** An intermediary retains ultimate responsibility for all orders under its authority, and for compliance of such orders with all regulatory requirements and market rules. In those jurisdictions where a DEA customer is permitted to sub-delegate its direct access privileges to another party (a sub-delegate), the intermediary continues to be ultimately responsible for all orders entered under its authority by the sub-delegate and should require the sub-delegatee to meet minimum standards set for DEA customers in general. There should be a recorded, legally binding contract between the DEA customer and the sub-delegatee, the nature and detail of which should be appropriate to the nature of the service provided.  **(b) Information flow**  **Principle 4 customer identification** Intermediaries should disclose to market authorities upon request and in a timely manner the identity of their DEA customers in order to facilitate market surveillance. In those jurisdictions where sub-delegation is permitted, the intermediary also has such responsibility to the market authorities with respect to any sub-delegatees. **Principle 5 Pre and post-trade transparency**  Markets should provide member firms with access to relevant pre and post-trade information (on a real time basis) to enable these firms to implement appropriate monitoring and risk management controls.  **(c) Adequate systems and controls**  **Principle 6 Markets**  A market should not permit DEA unless there are in place effective systems and controls reasonably designed to enable the management of risk with regard to fair and orderly trading including, in particular, automated pre-trade controls that enable intermediaries to implement appropriate trading limits.  **Principle 7 Intermediaries**  Intermediaries (including, as appropriate, clearing firms) should use controls, including automated pre-trade controls, which can limit or prevent a DEA customer from placing an order that exceeds a relevant intermediary's existing position or credit limits.  **Principle 8 Adequacy of systems**  Intermediaries (including clearing firms) should have adequate operational and technical capabilities to manage appropriately the risks posed by DEA.  The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD332.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.4 APRA releases superannuation prudential practice guides** On 10 August 2010, the Australian Prudential Regulation Authority (APRA) released a response paper and prudential practice guides (PPGs) for superannuation trustees in the areas of capital, risk management, adequacy of resources and fitness and propriety. In August 2009, APRA released for consultation a discussion paper and draft PPGs covering these four areas. The PPGs are intended to assist registrable superannuation entity (RSE) licensees to satisfy licence conditions and operating standards under the Superannuation Industry (Supervision) Act 1993 (SIS Act) and the relevant SIS Regulations. The final PPGs released reflect APRA's existing policy position and replace previously issued guidance in these four areas. These PPGs are:Superannuation Prudential Practice Guide - SPG 110 - Capital; Superannuation Prudential Practice Guide - SPG 200 - Risk Management; Superannuation Prudential Practice Guide - SPG 230 - Adequacy of Resources; and Superannuation Prudential Practice Guide - SPG 520 - Fitness and Propriety. Further information is available on the [APRA](http://www.apra.gov.au/Policy/Release-guidance-for-superannuation-licensees.cfm%22%20%5Ct%20%22_new) website. etailed Contents**1.5 Audit quality discussion paper** On 5 August 2010, the UK Auditing Practices Board (APB) of the Financial Reporting Council issued for comment a Discussion Paper titled 'Auditor Scepticism: Raising the Bar'.  Professional scepticism is a crucial component of a high quality audit that pervades every aspect of the auditor's judgement. The Discussion Paper emphasises the importance of scepticism to audit quality and draws on recent research to stimulate debate about what actions may be needed to ensure that the appropriate degree of scepticism is applied by auditors in practice.The discussion paper is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/Discussion%20paper%20Auditor%20Scepticism%20-%20raising%20the%20bar1.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.6 Long-term issues in international banking: report**  On 29 July 2010, The Committee on the Global Financial System (CGFS) released a report titled 'Long-term issues in international banking', prepared by a CGFS Study Group.  The report addresses structural issues in international banking from three angles: a historical perspective, what the drivers have been, and what might happen next. The development of international banking: the report documents its evolution over the last 30 years in terms of size, form and geographical coverage. The factors behind the development: the report provides a critical review of the literature on the various drivers of international banking. A noteworthy conclusion is that the fast growth of internationally active banks, which contributed to the vulnerability of their business model, is difficult to explain on efficiency grounds, at least at an aggregate level. This suggests that institutions' incentives might have been distorted, which warrants further investigation. Potential future developments: in addressing this more speculative question, the report pays particular attention to the regulatory reform environment, the pattern of economic growth worldwide and the rapidly evolving interactions between markets and banks. The report is available on the [Bank for International Settlements](http://www.bis.org/publ/cgfs41.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.7 FSA consults on changes to its Remuneration Code**  On 29 July 2010, the UK Financial Services Authority (FSA) announced plans to update its Remuneration Code to take into account remuneration rules required by the Capital Requirements Directive (CRD 3) and the Financial Services Act 2010 (FS Act). The FSA also reported on the implementation of the Code so far, lessons learned from last year's implementation and discusses progress made in achieving international alignment.  The FSA's current Code applies to the largest banks, building societies and broker dealers. However, CRD3 will bring over 2,500 firms within the scope of the Code. These include all banks and building societies, asset managers, hedge fund managers, UCITS investment firms as well as some firms that engage in corporate finance, venture capital, the provision of financial advice and stockbrokers.The FSA does not intend the final rules to be super-equivalent to the CRD3 requirements unless required to do so by UK legislation. The existing Code requires that firms apply 'remuneration policies, practices and procedures that are consistent with and promote effective risk management'. Although the Code is broadly consistent with CRD3 provisions and the FS Act, the FSA is required to make some changes to ensure full alignment. In particular, the Code will be strengthened in the following ways:**Scope of the Code:** As the scope of the Code is expanded, the FSA is committed to applying a proportional approach to implementation and will ensure that 'institutions shall comply with the principles in a way and to the extent that is appropriate to their size, internal organisation and the nature, the scope and the complexity of their activities'. **Application:** The FSA is consulting on the group of employees to which the Code applies ('Code staff'). These will include senior management and anyone whose professional activities could have a material impact on a firm's risk profile.  The consultation paper sets out examples of the key positions in firms that the FSA believes should be subject to the Code.   The onus will be on firms to identify their Code staff in the first instance, but their lists will be subject to review and challenge by the FSA. **Deferral:** At least 40% of a bonus must be deferred over a period of at least three years for all 'code staff'. At least 60% must be deferred when the bonus is more than £500,000. **Proportion in shares:** At least 50% of any variable remuneration components must be made in shares, share-linked instruments or other equivalent non-cash instruments of the firm. These shares will need to be subject to a minimum retention policy. **Guarantees:** Firms must not offer guaranteed bonuses of more than one year. Guarantees may only be given in exceptional circumstances to new hires for the first year of service. **Strengthening of capital base:** Firms must ensure that their total variable remuneration does not limit the ability to strengthen their capital base. Total variable remuneration must be significantly reduced in circumstances where the firm produces a subdued or negative financial performance. **Voiding provisions:** A new rule will be introduced which defines instances where breaches of the code may render a contract void and/or require recovery of payments made. **Severance payments:** Should reflect performance over time and failure must not be rewarded. **Pensions:** CRD3 states that enhanced discretionary pension benefits should be held for five years in the form of shares or share-like instruments. **Implementation of the Code so far** Whilst it will take time to assess the full impact of the Code in contributing to effective risk management, all firms within scope that have paid bonuses since 1 January 2010 have adhered to the FSA's Code. Successful implementation has resulted in more demanding standards in a number of areas and has shifted the composition of remuneration structures to forms more consistent with effective risk management. More generally, the FSA has seen stronger and more independent remuneration committees and greater recognition of the need to consider risk when setting remuneration policies and signing off bonus policies. The consultation period closes on 8 October 2010. The FSA intends to issue a policy statement in November 2010 with rules effective from 1 January 2011. The text of the CRD3 was agreed in early July, and its remuneration provisions will come into force on 1 January 2011. The consultation paper is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/CP/2010/10_19.shtml%22%20%5Ct%20%22_new) website.etailed Contents**1.8 CESR report on trends, risks and vulnerabilities in financial markets** On 29 July 2010, the Committee of European Securities Regulators (CESR) published for the first time its report on trends, risks, and vulnerabilities that are directly relevant to securities markets regulators (Ref CESR/10-697). Over the last decades, financial markets have been transformed by the rapid development of new financial instruments, the rise of new categories of key market participants, and a supportive technological environment. More recently, fundamental areas of the financial sectors in Europe and elsewhere have experienced a severe crisis which is not yet over. Going forward, CESR would like to contribute more to the understanding of these trends and risks and communicate its insights to the general public through regular reports. The report covers developments in European securities markets both by considering broader trends and risks, and by looking into specific areas, such as activities in sovereign and corporate debt markets, securitisation in general, and the fund industry with a particular focus on the hedge fund sector and UCITS. It also considers in its analysis recent developments in mergers and acquisitions and initial public offerings. The report is available on the [CESR](http://www.cesr.eu/%22%20%5Ct%20%22_new) website.etailed Contents**1.9 Guidance on effective board performance** A well-designed decision-making process is one of the most important hallmarks of a strong board of directors, according to draft guidance published on 29 July 2010, for public consultation by the UK Institute of Chartered Secretaries and Administrators.  When making decisions, boards should guard against the effects of a dominant personality, the existence of "no go" areas for non-executives and a poor line of sight to significant risk. ICSA was asked to develop the guidance by the Financial Reporting Council to complement the new UK Corporate Governance Code which was issued in May. It will submit a final text later in the year for adoption by the FRC as a replacement to the existing Higgs Guidance. That exercise revealed overwhelming support for short, non-prescriptive guidance to help improve board effectiveness. Key issues covered by the draft guidance are:More emphasis on the role of the chair as critical to building an effective board; The importance of the board's role in creating a high-performance culture which maximises the opportunities for value creation and minimises risk; The need to create an environment of challenge in the boardroom; The value for companies of well-informed and high-quality board decision making; Board composition and diversity as major factors in delivering an effective board; The advantages of a good training and development program designed to improve directors' skills experience and knowledge; and The benefits of regular board evaluation to explore how well the board is functioning. The consultation paper is available on the [FRC](http://www.icsa.org.uk/assets/files/pdfs/consultations/2010/Higgs%20Responses/ICSA%20Review%20of%20the%20Higgs%20Guidance%20on%20behalf%20of%20the%20FRC.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.10 New Zealand issuers can improve corporate governance reporting**On 28 July 2010, the New Zealand Securities Commission published its latest review of corporate governance reporting which shows that while most issuers are doing well, many need to improve their disclosures when it comes to ethical standards, directors and executive's remuneration, risk management, and shareholder and stakeholder relations.  The Commission's review of 68 issuers found many disclosed relevant information on:board members' independence, expertise and experience;  the use of board committees, such as remuneration and audit committees; remuneration policies for directors and executives; risk management policies and processes; and processes for ensuring external auditors' quality and independence. However, issuers could improve their reporting by disclosing:  how directors observe and foster high ethical standards, such as by complying with a code of ethics; how remuneration incentives align with the issuer's objectives and risk management policies; how risk management policies are applied to material risks faced by the issuer; how the board builds constructive relationships with shareholders that encourage them to engage with the entity; and who the board considers its key stakeholders are and how it respects their interests. The review assessed the annual reports and website disclosures of selected issuers against the Commission's nine principles of good corporate governance.  The principles are set out in a corporate governance handbook for directors, executives and advisers published by the Commission in 2004. The review findings are available on the [NZ Securities Commission](http://www.seccom.govt.nz/publications/documents/corporate-governance-disclosures%22%20%5Ct%20%22_new) website. etailed Contents**1.11 Consultation on implementation of UK financial regulation reforms** On 26 July 2010, the UK Financial Secretary to the Treasury, Mark Hoban MP, launched the Government's consultation on the implementation of reforms to financial regulation. The document sets out detailed proposals for reform of the financial services sector, first announced by the Chancellor on 16 June 2010.  The Chancellor set out plans to overhaul the system of Financial Regulation giving the Bank of England powers over macro prudential regulation through a newly established Financial Policy Committee (FPC), which will be established on an interim basis from 2010.  The consultation invites views on this proposal in addition to plans to create: A new prudential regulator under the control of the Bank of England headed by a new Deputy Governor (the first of whom will be current Financial Services Authority Chief Executive, Hector Sants), which will be responsible for supervising the safety and soundness of individual financial firms. A new Consumer Protection and Markets Authority to act as a single integrated regulator focused on conduct in financial markets The consultation paper is available on the [UK Treasury](http://www.hm-treasury.gov.uk/d/consult_financial_regulation_condoc.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.12 Consultation on proposals for a restructuring moratorium in the UK** On 26 July 2010, the UK Insolvency Service launched a consultation on proposals for a new restructuring moratorium.  The proposals would provide company directors with the option of obtaining a protected breathing space in which to negotiate with their creditors and reorganise their business affairs, through a new statutory moratorium. The option of applying for a restructuring moratorium would be available to companies that are seeking a contractual compromise, or are preparing a statutory compromise proposal - either a Company Voluntary Arrangement or a Scheme of Arrangement.  For companies that are failing or are already insolvent, existing insolvency procedures (including administration or liquidation) would continue to apply.The proposed restructuring moratorium would initially last for three months, allowing a company to negotiate and agree terms of the restructuring or compromise.  An extension of this period would be available for more complex negotiations, or even where further time was required for the approval of a statutory compromise proposal. The effect of a moratorium is to temporarily prevent creditors taking action against the company to recover their debts, for example by petitioning to have the company wound up, by enforcing contractual security rights, or landlords repossessing their premises.  In order to help safeguard creditors' interests, the directors' application for a moratorium would be sanctioned at a court hearing during which creditors would be able to be represented.  An authorised insolvency practitioner would also be involved at certain key stages of the application process, and in helping to safeguard the interests of creditors whilst the moratorium was in force.   At present, a moratorium is only available outside of the administration procedure for small companies with a proposal for a company voluntary arrangement (a statutory mechanism for the company achieving a legally binding compromise with its creditors).   It is not available to large companies or to companies using other restructuring procedures. The consultation is available [here](http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/RestructuringMoratoriumConsultationDocument.pdf%22%20%5Ct%20%22_new). etailed Contents**1.13 Agreement on Basel Committee capital and liquidity reform package**On 26 July 2010, the Group of Governors and Heads of Supervision, the oversight body of the Basel Committee on Banking Supervision, announced they had reached broad agreement on the overall design of the capital and liquidity reform package. In particular, this includes the definition of capital, the treatment of counterparty credit risk, the leverage ratio, and the global liquidity standard. The Committee will finalise the regulatory buffers before the end of this year.Further information is available on the [BIS](http://www.bis.org/press/p100726/annex.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.14 Provision of non-audit services by auditors and guidance for audit committees**  On 23 July 2010, the UK Auditing Practices Board (APB) published stakeholder feedback following its consultation in October last year on whether there should be a prohibition on auditors providing non-audit services to the entities that they audit. In parallel the FRC has published for consultation updated guidance to audit committees on determining whether a company's auditor should be permitted to provide particular non-audit services.  The APB's October consultation followed a report last year by the House of Commons Treasury Committee which proposed a ban on the auditor providing non-audit services. The consultation generated a substantial number of responses from all APB's stakeholder groups, in particular, including the views of a range of investors. The overwhelming view of respondents (irrespective of the constituency involved) is that there should be no outright prohibition on non-audit services. There is agreement, however, that auditor objectivity and independence is perceived to be adversely affected by the provision of non-audit services and that improved transparency and governance would address these concerns. The APB is therefore proposing changes to the APB Ethical Standards for Auditors and amendments to the FRC's Guidance on Audit Committees. As part of the consultation APB asked commentators whether there were any other views that they would like to be taken into account and has also held discussions with the FRC's Audit Inspection Unit on their findings from audit inspections. As a result, APB is now consulting on three particular issues relating to the provision of non-audit services by auditors (restructuring services, contingent fees and conflicts of interest). The feedback and consultation paper: 'The Provision of Non-Audit Services by Auditors' is available [here](http://www.frc.org.uk/images/uploaded/documents/Consultation%20provision%20of%20non-audit%20services%20by%20auditors2.pdf%22%20%5Ct%20%22_new). The consultation document: 'Revisions to FRC Guidance on Audit Committees: Non-Audit Services' is available [here](http://www.frc.org.uk/images/uploaded/documents/Consultation%20revisions%20to%20FRC%20Guidance%20on%20Audit%20Committees%20-%20non-audit%20services1.pdf%22%20%5Ct%20%22_new).etailed Contents**1.15 OTC markets and derivatives trading in emerging markets: report** On 23 July 2010, the Emerging Markets Committee of the International Organization of Securities Commissions (IOSCO) published a report titled 'OTC Markets and Derivatives Trading in Emerging Markets'. The topics dealt with in the report are: objective, background and methodology; overview of OTC markets; current situation regarding OTC trading in emerging markets; regulatory issues regarding OTC markets; and recommendations (which deal with market entry, investor protection, standardisation, clearing/central counterparty clearing, transparency, providing data and reporting, collateralization and risk management, and valuation). The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD330.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.16 Investment management industry in Australia: report** A report titled 'Investment Management Industry in Australia' was published by Austrade's Financial Services division on 22 July 2010.Australia's investment management industry is the fourth largest in the world, and one of the fastest growing. It is an industry which is worth A$1.7 trillion and is projected to grow to around A$2 trillion by 2015.Among the subjects covered in 'Investment Management Industry in Australia' are:Size and scale of Australia's investment management industry; Participants in the investment management industry; Investors in investment management firms; Regulatory and tax environment; and Internationalisation of Australia's funds management industry. The report is available on the [Austrade](http://www.austrade.gov.au/ArticleDocuments/2792/Investment-Management-Industry-in-Australia.pdf.aspx%22%20%5Ct%20%22_new) website.etailed Contents**1.17 SEC proposes measures to improve regulation of fund distribution fees and provide better disclosure for investors** On 21 July 2010 the US Securities and Exchange Commission (SEC) voted unanimously to propose measures aimed to improve the regulation of mutual fund distribution fees and provide better disclosure for investors.The marketing and selling costs involved with running a mutual fund are commonly referred to as a fund's distribution costs. To cover these costs, the companies that run mutual funds are permitted to charge fees known as 12b-1 fees. These fees are deducted from a mutual fund to compensate securities professionals for sales efforts and services provided to the fund's investors.12b-1 fees were developed in the late 1970s when funds were losing investor assets faster than they were attracting new assets, and self-distributed funds were emerging in search of ways to pay for necessary marketing expenses. These fees amounted to an aggregate of just a few million dollars in 1980 when they were first permitted, but that total has ballooned as the use of 12b-1 fees has evolved. These fees amounted to US$9.5 billion in 2009.The SEC's proposal would:Protect investors by limiting fund sales charges; Improve transparency of fees for investors; Encourage retail price competition; and Revise fund director oversight duties. The proposals are available on the [SEC](http://www.sec.gov/rules/proposed/2010/33-9128.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.18 Report on resolution of cross-border banks** The International Monetary Fund (IMF) has published a report titled 'Resolution of Cross-Border Banks - A Proposed Framework for Enhanced Coordination'. The recent financial crisis has given renewed urgency to the need for resolution systems for financial institutions, which both safeguard financial stability and limit moral hazard. However, experience demonstrates that these systems will not be effective unless progress is also made in developing a framework that applies on a cross-border basis. Since many systemically important financial groups operate globally, an uncoordinated application of resolution systems by national authorities will make it much more difficult to both secure the continuity of essential functions (thereby limiting contagion), and ensure that shareholders and creditors bear the financial burden of the resolution process.  The report is available on the [IMF](http://www.imf.org/external/np/pp/eng/2010/061110.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

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| **2. Recent ASIC Developments** |  | ext Section |

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| **2.1 ASIC provides relief for parent entity financial statements**On 29 July 2010, the Australian Securities and Investments Commission (ASIC) announced the making of a new class order, [CO 10/654], to allow companies, registered schemes and disclosing entities that present consolidated financial statements to also present parent entity financial statements.In addition to the new class order, a previous class order, [CO 05/642], has been amended to permit the issuers of stapled securities that present their financial statements in one financial report not to present single entity financial statements for those stapled entities that have consolidated financial statements.The Corporations Amendment (Corporate Reporting Reform) Act 2010 (CRRA) was given Royal Assent on 29 June 2010 and became effective from 1 July 2010. CRRA amended the Corporations Act 2001 (the Act) so that those entities reporting under Chapter 2M that present consolidated financial statements are no longer required to present parent entity financial statements. This change applies for financial reports for the year ended 30 June 2010. Australian financial services (AFS) licensees continue to be required to present parent entity financial statements under Chapter 7 of the Act. The Act now prevents entities reporting under Chapter 2M from presenting parent entity financial statements. However, some entities want to present parent entity financial statements: to avoid the cost of changing their reporting formats, particularly for 30 June 2010 year ends; because they are AFS licensees that are required to present parent entity financial statements under Chapter 7 of the Act; or because they believe that the parent entity financial statements provide useful information to users of their financial reports. **(a) New class order [CO 10/654]**[CO 10/654] permits entities to continue to include parent entity financial statements in their financial reports. Entities taking advantage of the relief are not required to present the summary parent entity information otherwise required by regulation 2M.3.01.The directors' declaration and auditor's report must include the relevant opinions in relation to the parent entity financial statements and related notes.**(b) Stapled securities issuers [CO 05/642]**[CO 05/642] allows a stapled security issuer to include the financial statements of the other stapled entities together in a single financial report. The order has been amended by [CO 10/655] to allow the financial report to exclude parent entity financial statements for those stapled entities that prepare consolidated financial statements.New class order [CO 10/654] is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co10-654.pdf/%24file/co10-654.pdf%22%20%5Ct%20%22_new).Stapled securities issuers [CO 05/642] is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co05-642%2020100729.pdf/%24file/co05-642%2020100729.pdf%22%20%5Ct%20%22_new).The amended class order [CO10/655] is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co10-655.pdf/%24file/co10-655.pdf%22%20%5Ct%20%22_new).etailed Contents**2.2 ASIC releases guidance on a director's duty to prevent insolvent trading**On 29 July 2010, the Australian Securities and Investments Commission (ASIC) released regulatory guidance to assist directors to understand and comply with their duty under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/default.asp?cid=56482&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "Default) (Corporations Act) to prevent insolvent trading. Section 588G of the Corporations Act requires a director of a company to prevent the company from incurring a debt if the company is insolvent, or if the company will become insolvent by incurring the debt or a range of debts including the debt. Regulatory Guide 217 'Duty to prevent insolvent trading: Guide for directors' sets out four key principles which ASIC considers directors should follow to meet their obligation to prevent insolvent trading. That is, to: keep themselves informed about the company's financial position and affairs; regularly assess the company's solvency and investigate financial difficulties immediately; obtain appropriate professional advice to help address the company's financial difficulties where necessary; and consider and act in a timely manner on the advice. RG 217 also details factors which ASIC will consider when deciding to bring proceedings against a director for allowing a company to trade while insolvent (including criminal proceedings and proceedings to recover compensation for loss resulting from insolvent trading). Regulatory guide 217 'Duty to prevent insolvent trading: Guide for directors' is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg217-29July2010.pdf/%24file/rg217-29July2010.pdf%22%20%5Ct%20%22_new).The report 'Response to submissions on CP 124 Duty to prevent insolvent trading: Guide for directors' is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep210.pdf/%24file/rep210.pdf%22%20%5Ct%20%22_new).etailed Contents |

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| **3. Recent ASX Developments** |  | ext Section |

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| **3.1 Reports** On 5 August 2010, the Australian Securities Exchange (ASX) released:the ASX Group Monthly Activity Report; and the SFE Monthly Volume and Open Interest Report for July 2010. The ASX group monthly activity report is available [here](http://www.asx.com.au/about/pdf/20100805_asx_monthly_activity_report_july_2010.pdf%22%20%5Ct%20%22_new).The SFE monthly volume and open interest report is available [here](http://www.sfe.com.au/content/notices/2010/notice2010_125.pdf%22%20%5Ct%20%22_new).etailed Contents**3.2 Listing Rule amendment notification - Remuneration committee requirement for top 300 listed entities** On 4 August 2010, the ASX released the details of amendments to the Listing Rules which require S&P / ASX 300 Index entities to have a remuneration committee comprised solely of non executive directors.  The amendments to the Listing Rules will come into effect on 1 July 2011. The amendments to the Listing Rules are available on the [ASX](http://www.asx.com.au/about/pdf/20100804_listing_rule_amendments_remuneration_committee_req.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.3 Transfer of supervisory functions to ASIC** On 1 August 2010, the Australian Securities and Investments Commission (ASIC) assumed responsibility for the supervision of domestic licensed financial markets and for participants (including the relationship between participants and their clients) on those markets.  ASX retains responsibility for ensuring participants admitted to its market comply with its operating rules. From 1 August 2010, ASX renamed its subsidiary company ASX Compliance (formerly known as ASX Markets Supervision) to better reflect the subsidiary's role within the ASX Group and ASX's on-going obligations.  Kevin Lewis, who commenced his role on 19 July, is the Group Executive and Chief Compliance Officer in charge of ASX Compliance.  Alan Cameron AM, a former chairman of ASIC, will remain chairman of the ASX Compliance board.  As is presently the case, only one director on the board of ASX Compliance is also a director of ASX Ltd. To reflect ASX's redefined responsibilities, ASX Compliance has been restructured as follows:The former Compliance, Futures Supervision and Capital Monitoring teams have been amalgamated to form the Participants unit with responsibility for monitoring compliance of participants with the revised ASX and ASX 24 Operating Rules as well as the Operating Rules of ASX Settlement Corporation and ASX Clearing Corporation. The former Investigations and Enforcement teams have been merged.  The primary role of the merged unit will be to enforce the new rule framework in accordance with ASX's licence obligations.  It will also be responsible for the efficient prosecution of rule contraventions which arose up to the date of transition and which must be investigated and enforced under the "old" rule framework. The Surveillance unit will continue its continuous disclosure monitoring activities but cease to monitor for insider trading and market manipulation as these functions have been taken over by ASIC from 1 August 2010. The functions and reporting lines of the Issuers unit and the Executive Office have not altered. The media release regarding the transfer arrangements is available [here](http://www.asx.com.au/about/pdf/20100708_asx_asic_supervisory_transfer_arrangements.pdf%22%20%5Ct%20%22_new).The market announcement regarding the appointment of Kevin Lewis is available [here](http://www.asx.com.au/about/pdf/20100621_new_asx_chief_compliance_officer.pdf%22%20%5Ct%20%22_new). The ASX Circular regarding the restructured rule books is available [here](https://www.asxonline.com/intradoc-cgi/groups/participant_services/documents/communications/asx_027526.pdf%22%20%5Ct%20%22_new).etailed Contents**3.4 Listing Rule amendment notification - Requirement for a trading policy** On 19 July 2010 the Australian Securities Exchange (ASX), released the details of amendments to the Listing Rules, which require listed entities to adopt and disclose a company trading policy, and an associated Guidance Note (Guidance Note 27 - Trading Policies) to assist listed entities comply with their obligations under the relevant listing rules.  The amendments to the Listing Rules will come into effect on 1 January 2011. The amendments to the Listing Rules require listed entities to:adopt and disclose a trading policy on trading in the entity's securities by directors and other key management personnel; include restrictions and clearance procedures in the policy as to when trading can and cannot occur; and publicly disclose whether trading by directors occurred during a closed period where prior written clearance was required under the company trading policy and, if so, whether prior written clearance was provided. The Guidance Note provides listed entities with guidance on:the types of amendments to an entity's trading policy that may constitute a material change and which would require that the amended policy be given to ASX for release to the market; trading that an entity may choose to exclude from the operation of its trading policy; exceptional circumstances, in which key management personnel may be provided with a prior written clearance to trade during a prohibited period under the entity's trading policy; and the inclusion of restrictions on trading in derivative products by key management personnel during prohibited periods under the trading policy. The Rule amendments and the Guidance Note are available on the [ASX](http://www.asx.com.au/%22%20%5Ct%20%22_new) website.etailed Contents |

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| **4. Recent Corporate Law Decisions** |  | ext Section |

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| **4.1 Trustee in bankruptcy has an equitable right, independent of the trust deed, to sue upon a bankrupt director's insurance policy** (By Michael Power, Mallesons Stephen Jaques) CGU Insurance Limited v One.Tel Limited (In Liquidation) [2010] HCA 26, High Court of Australia, French CJ, Heydon, Crennan, Kiefel and Bell JJ, 4 August 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/HCA/2010/26.html](http://www.austlii.edu.au/au/cases/cth/HCA/2010/26.html%22%20%5Ct%20%22_new) **(a) Summary**  The High Court has decided that a director's trustee in bankruptcy has an equitable right to sue upon the director's insurance policy, independently of the deed of bankruptcy and as an incident of the trust itself. The decision is important for insurers who provide directors and officers insurance policies.  Their liability to pay the debts of bankrupt directors of insolvent companies will be harder to limit. It may also prove important for bare trustees in other contexts.  The decision suggests a broader range of equitable rights and obligations arising from the trust itself.  These innate rights and obligations will have to be considered when drafting trust deeds.  In particular, they will need to be considered where the trust deed purports to impose a limitation or restriction on those rights. **(b) Facts** The third respondent, John Greaves, was a director of One.Tel Limited ("One.Tel").  He was insured under a directors and officers liability policy of insurance issued by CGU Insurance Limited ("CGU").   On 6 September 2004, the Supreme Court of New South Wales ordered Mr Greaves to pay $20 million compensation to One.Tel, and $350,000 to the Australian Securities and Investments Commission ("ASIC").   On 30 November 2004, Mr Greaves entered into a Deed of Arrangement ("the Deed") pursuant to Part X of the [Bankruptcy Act 1966 (Cth)](http://my.lawlex.com.au/default.asp?cid=6559&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) ("Bankruptcy Act").  Relevantly, clause 4 provided that "[t]he Trustee shall get in and realise the assets" and those assets were defined to include Mr Greaves' rights under the insurance policy.   On 18 October 2006 the Trustee commenced proceedings against CGU in the Supreme Court of New South Wales.  On 30 November 2007 - before judgment was given - the Deed terminated, because three years had passed since it was executed.   **(c) Decision** The primary judge gave judgment for CGU.  The Court of Appeal overturned that decision.  Their decision was appealed to the High Court.   At each stage of proceedings there were essentially two issues in dispute.  First, whether the Trustee was entitled to continue the proceedings against CGU after the Deed terminated on 30 November 2007.  Second, whether Mr Greaves had indeed suffered any 'Loss' under the insurance policy.   **(i) The first issue** This is the important part of the judgment.  The High Court decided that the Trustee was entitled to continue the proceedings against CGU, despite the termination of the Deed which made it Trustee.  "Even if the termination of the Deed is assumed to have deprived the Trustee of any power in the Deed or the Act to continue the Trustee proceedings," they held, "it does not follow that there was not some other power to do so."  Importantly, CGU had conceded that the Trustee still held an equitable interest in the trust property (including Mr Greaves' chose in action under the insurance policy).   According to the court, the Trustee's right to continue the proceedings against CGU lay in that equitable interest:  "One obligation of a trustee which exists by virtue of the very office is the obligation to get the trust property in, protect it, and vindicate the rights attaching to it.  That obligation exists even if no provision of any statute or trust instrument creates it."   In finding that the Trustee had powers beyond the Deed itself, the court disregarded a number of submissions made by One.Tel based on the Bankruptcy Act.  Notably, One.Tel had pointed to section 276, which made it an offence for a person to act as a trustee under a Deed of Arrangement that had (to their knowledge) terminated.  In emphasising the powers of the trust over the Deed and the provisions of the Bankruptcy Act, the court may have been guided by convenience and commonsense.  Their Honours pointed out that "[d]iscontinuance by the Trustee with a view to letting some other person enforce the chose in action by starting a new action may have run the risk that the new action might be statute-barred, and would certainly have involved a waste of costs." **(ii) The second issue** Having found for the Trustee on the first issue, it was unnecessary for the court to consider the second issue.  However, they rejected it nonetheless. CGU submitted that Mr Greaves had suffered no 'Loss' under the insurance policy.  This argument was based on clause 11 of the Deed, which barred the Trustee and any creditor enforcing the debt against Mr Greaves until the Trustee had completed any claim under the insurance policy (or decided not to do so).  CGU submitted that clause 11, in protecting Mr Greaves from the enforcement of his judgment debt to One.Tel and ASIC, protected him from sustaining a 'Loss' under the insurance policy. The court rejected this submission for several reasons:once the Deed terminated, clause 11 did not continue in force (though it is in principle possible for a clause of a Deed to continue when the Deed itself terminates); even if clause 11 had continued in force and prevented One.Tel or ASIC enforcing the judgment debt against him,  it did not change the fact that Mr Greaves was still legally liable for that sum, and the sum was therefore still an "amount payable" and a "Loss"; and if clause 11 truly removed Mr Greave's liability to One.Tel and ASIC, then there would be no reason for the Trustee to sue CGU to recover money to pay that debt, thus removing the raison d'etre of the Deed itself. etailed Contents**4.2 Sole director's agreements with the company may be voidable at the option of the company**(By Natalie DePietro and Jiayue Li, DLA Phillips Fox) HYJ Pty Ltd v Joen [2010] NSWSC 854, New South Wales Supreme Court, Barrett J, 30 July 2010  The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/854.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/854.html%22%20%5Ct%20%22_new) **(a) Summary** The decision of Barrett J in the Supreme Court of New South Wales concerned an application by the plaintiff company under section 459G of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/default.asp?cid=56482&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) ("Act") to set aside a statutory demand issued by the defendant.   The alleged debt which was the subject of the statutory demand arose from a purported loan agreement between the plaintiff company and the defendant. The defendant, who was the sole director of the plaintiff company at the relevant time, purported to have caused the plaintiff company to enter into the loan agreement. Barrett J considered the fiduciary duties owed by a director to a company when entering into contracts with the company and the consequences of breaching these fiduciary duties.  The plaintiff company (at the instigation of another shareholder and the current sole director) sought to have the statutory demand set aside on the basis that there was a genuine dispute as to the existence of the debt and that the plaintiff company had an offsetting claim.  Barrett J found that there was a genuine dispute as to the existence of the debt and an offsetting claim and accordingly set aside the statutory demand. **(b) Facts**   The defendant was one of three shareholders and the sole director of the plaintiff company at the relevant time.  The defendant claimed that he lent $30,000 to the plaintiff company by depositing $30,000 in the plaintiff company's bank account in February 2009 and that this loan was payable on demand. The defendant caused the plaintiff company to enter into the loan agreement while he was the sole director, without the knowledge of the other shareholders.  In October 2009, the defendant ceased to be a director of the plaintiff company. The defendant claimed that upon issuing his notice of resignation on 2 October 2009 he made a demand for repayment and that loan then became immediately due and payable by the plaintiff. The defendant subsequently issued a statutory demand on the plaintiff company for the $30,000. The defendant also noted his intention to retain possession of a Toyota Corolla, which was acquired by the plaintiff company for use by the defendant while he was a director, until all financial matters were resolved. The plaintiff company challenged the statutory demand on the basis that there was a genuine dispute as to the existence of the debt and that the plaintiff had an offsetting claim, pursuant to sections 459H(1)(a) and 459H(1)(b) of the Act respectively. **(c) Decision**  Barrett J considered whether there was genuine dispute as to the existence of the debt and whether there was an offsetting claim to constitute grounds for setting aside the statutory demand. **(i) Genuine dispute as to the existence of the debt: Section 459H(1)(a)**  Barrett J first considered whether there was genuine dispute as to the existence of the debt pursuant to section 459H(1)(a) of the Act.   The plaintiff company argued that there was no reference to the loan in the plaintiff company's records and that the loan was not disclosed by the defendant to the other shareholders. The defendant contended that as he was the sole director there was no need for anyone else to be involved in the transaction.   Barrett J noted that the defendant, as the sole director of the company, owed fiduciary duties to the company and as a result could not enter into a transaction where his personal interests conflicted with the interests of the company.   Barrett J further noted that a breach of duty would not occur if the defendant obtained the fully informed consent of the plaintiff company in the form of a resolution at a general meeting or if a provision in the plaintiff company's constitution permitted the director to enter into such a transaction.  In the present case, his Honour found that there was no dispensation in the plaintiff company's constitution and no informed consent by the plaintiff company, and accordingly the defendant had breached his fiduciary duty. In considering the consequence of the breach, Barrett J cited the authority of *George A Bond & Co Ltd v Bond* (1929) 30 SR (NSW) and held that where fiduciaries, such as directors, enter into a contract with the company, the contract is 'voidable at the mere option' of the beneficiary, 'irrespective of how fair the contract may be or how full the consideration given' was.   Accordingly, Barrett J held that the fact that the loan agreement was voidable at the mere option of the plaintiff company meant that there was a genuine dispute as to the existence of the debt.   **(ii) Offsetting claim: Section 459H(1)(b)** Although the finding of a genuine dispute as to the existence of the debt was sufficient to dispose of the proceedings, Barrett J also considered the issue of the offsetting claim.  The plaintiff company alleged two offsetting claims. The first alleged offset was for $23,250 which represented the cost price of a car acquired by the company for use by the defendant.  The defendant retained the car when he left the company, and as a result the company claimed wrongful detention.   Barrett J observed that the company may have a cause of action for wrongful detention and wrongful interference with possession of the car.  However, his Honour stated that the cost price of the car was not a proper quantification of the claim and noted that there was no convincing explanation of how the cost price would be properly regarded as an amount for the purposes of section 459H. The second alleged offset was for $68,000, which the defendant caused the company to pay him while he was the sole director.  The defendant indicated that half of the money was used to pay industry creditors and the other half was used to pay his wage. The defendant contended that his entitlement to a wage arose under a written employment contract between the defendant and the company. Barrett J stated that, like the loan agreement, the employment contract raised the issue of self dealing. Barrett J held that if the defendant alone caused the company to enter into the contract without any authority in the constitution or a resolution at a general meeting, there was an arguable claim by the plaintiff to recover the money paid to the defendant pursuant to the employment agreement. **(iii) Conclusion**  Barrett J held that as there was a genuine dispute as to the existence of the debt and an offsetting claim (at least in relation to the wages), the substantiated amount of the statutory demand pursuant to section 459H(2) was zero and thus the statutory demand must be set aside pursuant to section 459H(3).   Accordingly, his Honour ordered that the statutory demand be set aside and that the defendant pay the plaintiff's costs of the proceedings.etailed Contents**4.3 Involvement in sale and purchase transactions that create or maintain an artificial price: construction of section 1041A of the Corporations Act**  (By Kirsty Souter, Blake Dawson) Australian Securities and Investments Commission v Administrative Appeals Tribunal [2010] FCA 807, Federal Court of Australia, Dowsett J, 30 July 2010  The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2010/807.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/807.html%22%20%5Ct%20%22_new) **(a) Summary** This judgment involved consideration of whether a financial trader had breached section 1041A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/default.asp?cid=56482&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "Default) ("the Act"). Section 1041A deals with the creation and maintenance of artificial prices for trading in financial products on financial markets. The court found that the financial trader had not complied with section 1041A and remitted the decision to the Administrative Appeals Tribunal ("the Tribunal") for further consideration.  **(b) Facts**    The case involved an appeal by the Australian Securities and Investments Commission ("ASIC") for review of a decision made by the Tribunal.  The Tribunal had rejected a decision by ASIC made under section 920A of the Act to ban a financial trader, Mr Bond, from providing financial services for a period of five years on the grounds that he had failed to comply with section 1041A of the Act, and that it had reason to believe Mr Bond would not comply with a financial services law.  Section 1041A prohibits a person from taking part in, or carrying out, one or more transactions that have, or are likely to have, the effect of creating or maintaining an artificial price, for trading in financial products on a financial market.   Mr Bond worked for a company ("Strategic") that provided financial advice and dealt in different financial products, including managed discretionary accounts ("MDAs").  The majority of the company's customers had MDAs.  These customers authorised the company to trade in shares within certain pre-agreed parameters without first obtaining their consent.   Mr Bond, in his capacity as trustee of his family trust, acquired 300,000 $1.00 units in the Prime Retirement and Aged Care Property Trust ("Prime").  Prime was listed on the ASX and the units were converted into the equivalent number of shares.  Prime later became an approved investment for Strategic's MDA customers.  Mr Bond received research material to suggest that Prime was a worthwhile investment.  Despite this, however, the share price fell gradually after listing and Mr Bond was required to make deposits in his margin lending account.  Shortly after being advised of a further margin call on his account due to further falls in Prime's share price, Mr Bond decided that certain MDA customers should acquire Prime Shares.  Before acquiring the shares on behalf of MDA customers, Mr Bond listed his own shares for sale at a price of $1.00 per share.  At that time, the highest price of Prime Shares had been $0.89 and a total of 40,800 shares had been traded.  Mr Bond commenced to buy a total of 2,500,000 shares over a period of several minutes (involving over 20 separate transactions) through gradually increasing the price of his offer to buy until he acquired a final parcel at $1.01.  Mr Bond sold his 300,000 shares at $1.00 each.  ASIC submitted that the Tribunal had erred in finding no breach by Mr Bond of section 1041A of the Act.  It argued that the primary purpose of the transactions was to enable Mr Bond to sell his own shares for the same price at which he purchased them and, in doing so, he had artificially raised the price of Prime shares.  ASIC further submitted that the Tribunal should have taken into account the fact that Mr Bond was able to sell his own shares when determining whether the transactions had the effect of creating an artificial price.  Mr Bond submitted that his conduct had not created an artificial price because the trades were made at prices, which, at the time, reflected the forces of genuine supply and demand.  **(c) Decision**  The court rejected Mr Bond's arguments.  It found that the Tribunal had erred in its finding that Mr Bond's sale of his own shares was not relevant to determining the effect or likely effect of the transaction on the share price.  It found that the trades were not made at prices that reflected genuine forces of supply and demand because Mr Bond had more knowledge about the transactions than other potential sellers.  In discussing section 1041A, the court held that:section 1041A does not expressly deal with intention of the person involved in the transaction; rather, it focuses on whether transactions have, or are likely to have, the effect of creating an artificial price for trading in financial products on financial markets; and if a transaction is not between a buyer and seller who are both seeking the most advantageous price, the transaction may have the effect or likely effect of creating an artificial price and thus breaching section 1041A. The court remitted the matter to the Tribunal for further consideration.  As a final point, the court noted that in order to impose a banning order under section 920A of the Act, the relevant decision-maker is only required to have reason to believe that a person will breach a financial services law.  It is not necessary that the decision-maker be satisfied that a person will in fact breach a financial services law. etailed Contents**4.4 Execution of documents by companies** (By Jey Nandacumaran, Clayton Utz) Vero Insurance Ltd v Kassem [2010] NSWSC 838, New South Wales Supreme Court, Barrett J, 30 July 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/supreme\_ct/2010/838.html](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2010/838.html%22%20%5Ct%20%22_new) **(a) Summary** A purported creditor was unable to terminate a deed of company arrangement approved at a creditors' meeting because:it did not execute its proxy in accordance with the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/default.asp?cid=56482&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default); the meeting's chairman was not entitled to adjourn the meeting so that the creditor could amend its proxy; and even if it was entitled to vote, it could only do so for a nominal amount (which would not have changed the outcome of the meeting). **(b) Facts** Vero Insurance Ltd (Vero) wrote home insurance under the Home Building Act in relation to residential units. The builder of the units was Lusted Pty Ltd and the developer was Ungul Properties Pty Ltd (the second defendant). The building was affected by water penetration, and under the legislation Ungul was liable to the owners corporation for the same warranties as Lusted Pty Ltd. Vero, as insurer, ended up paying the owners corporation $808,621.70. In later proceedings, the owners corporation, at the instigation of Vero, brought proceedings against Ungul for breach of statutory warranties. Vero, having paid the owners corporation, considered itself to be subrogated to their rights against Ungul. Voluntary administrators were appointed to Ungul. On 11 June 2009, at the second meeting of Ungul's creditors, six creditors (by proxy) voted unanimously in favour of the proposed resolution that a deed of company arrangement be executed. Vero was not entitled to vote as the chairman (Mr Barnden), one of Ungul's administrators, rejected Vero's proxy stating it was not properly executed. Mr Barnden also refused to adjourn the meeting to enable Vero to prepare another proxy. **(c) Decision** (**i) Was Vero a creditor?** Ungul contended that Vero was not a creditor entitled to attend and vote at Ungul's creditors' meeting or, if a creditor, it was only entitled to vote for a nominal sum. "Creditor" is defined broadly in the Pt 5.3A context. In *Selim v McGrath* [2003] NSWSC 929, it was said "creditors in a voluntary administration are all persons who have, as against the company concerned, "debts" or "claims" provable in a winding up." The claim pursued by the owners corporation against Ungul, with Vero beneficially entitled by way of its subrogation rights, was held to be sufficient to make Vero a creditor of Ungul. Regulation 5.6.23(2) of the [Corporations Regulations](http://my.lawlex.com.au/default.asp?cid=56758&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) provides that a creditor cannot vote in respect of an unliquidated debt, a contingent debt or a unquantified debt unless a "just estimate" of the debt's value has been made. Vero's claim was deemed an unliquidated equitable claim because the claim was for damages for breach of warranty (therefore unliquidated) and Vero was suing in the name of the owners corporation (therefore an equitable, not legal, claim). To establish a "just estimate" of Vero's debt, Vero's solicitor prepared a proof of debt which, from the $808,621.70 paid by Vero, subtracted payments received by Lusted Pty Ltd and added legal costs incurred. The final amount of Vero's claim was said to be $794,012.80. Vero's solicitor wrote and asked Ungul's administrators whether the proof would be accepted. Mr Kassem, Ungul's other administrator, replied on 10 June 2009 and accepted the proof subject to any further information becoming available and the right to re-adjudicate the proof of debt. On that same day, Mr Barnden received a letter from a third party which expressed concerns regarding Vero's proof of debt. The concerns were that the claim was statue-barred under section 18E of the Home Building Act and that the claim would be defeated by circuity. Barrett J held that the chairman of the meeting was responsible for admitting or rejecting a proof of debt for the purposes of voting (reg 5.6.26(1)). In the present case, Mr Barnden did not admit Vero's proof of debt or make a "just estimate" of Vero's claim, as he had already found that Vero's proxy was invalid. Had Mr Barnden made a "just estimate" of Vero's claim, the only conclusion available to him would have been to find a nominal sum (balancing Vero's unsupported assertion and the doubt cast by the letter). It was held that, although Vero was entitled to vote, even if it had voted against the deed of company arrangement it would have been defeated by number (six to one) and by value (the other creditors accounted for $64,796, Vero accounted for just a nominal sum). **(ii) Could the chairman adjourn the meeting?** Section 438B of the Corporations Act provides for the adjournment of Pt 5.3A meetings. It does not provide, however, for how the decision to adjourn is made (or by whom).  Regulation 5.6.18 of the Corporations Regulations governs when meetings can be adjourned. Broadly, a chairperson of a meeting must adjourn a meeting if directed by the meeting or may adjourn a meeting with consent of the meeting. The second of these confers a discretion on a chairperson (*Salisbury Gold Mining Co Ltd v Hathorn* [1897] AC 268), which must be exercised in good faith and for a proper purpose (*McKerlie v Drillsearch Energy Ltd* [2009] NSWSC 488). A chairperson can adjourn a meeting unilaterally in the event of disruption and disorder so to "facilitate the presence of those entitled to debate and vote on a resolution at a meeting where such debate and voting is possible" (*Byng v London Life Assn Ltd* [1990] Ch 170). In the present case, Barrett J found there was no direction or consent by the meeting (to adjourn), and the chairman's unilateral power to adjourn was not enlivened in the circumstances (because those entitled to debate and vote were not inhibited from doing so). Vero's submission that a chairperson has residual discretion was rejected; any gaps are filled by the common law rule which states that the meeting itself is master of its own procedure (*Stoughton v Reynolds* (1735) 2 Stra 1045). **(iii) Was Vero's proxy properly rejected?** Section 127 of the Corporations Act says that a company with a common seal can execute a document by affixing the seal, and having this witnessed by two directors or a director and company secretary (section 127(2)). A company can alternatively execute a document without a common seal if the document is signed by two directors or a director and company secretary (section 127(1)). In the present case, Vero's proxy was signed by "Neil Blount" on behalf of "Suncorp/Vero". Mr Blount purported to be the "executive manager" of Suncorp/Vero. Pursuant to regulation 5.6.28 of the Corporations Regulations, it was for the chairman, Mr Barnden, to consider the validity of instruments of proxy. Vero tried to rely on sections 128 and 129 of the Corporations Act (the 'indoor management rule'), arguing that Mr Barnden could assume that Vero's proxy had been duly executed and that the "executive manager" was authorised to sign proxies.  Mr Barnden nonetheless rejected the proxy. Barrett J found that Mr Barnden's decision was correct. There was no evidence from Vero that Mr Blount was an "executive manager". The proxy signed by Mr Blount, representations made by Vero's solicitor and a document setting out Mr Blount's authority (signed by Mr Blount himself, and not Vero) were not sufficient to establish Mr Blount's authority to execute Vero's proxy. Nor, it was held, does the office of "executive manager" imply any particular authority to bind a company. For these reasons, Barrett J upheld Mr Barnden's decision to reject Vero's proxy. He concluded his judgment by describing how Vero could have voted at the creditors' meeting and avoided litigation (providing a useful lesson for other large companies): "Most large companies have in place well documented systems of delegation to officers of different ranks. Internal delegations are often accompanied by powers of attorney executed under the common seal embodying, by way of safeguard, limitations and requirements for multiple signatures and sometimes allowing sub-delegation. Arrangements of that kind give those companies a ready and convenient means of proving the authority of officers on any occasion on which it becomes necessary or desirable to do so, particularly in a legal context. On the evidence before me, Vero is not shown to have had any such system in place."etailed Contents**4.5 Receiver's liability for corporation's statutory breach, and entitlement to indemnification** (By Sabrina Ng and Ellen White, Corrs Chambers Westgarth) Jackgreen (International) Pty Ltd [2010] NSWSC 817, New South Wales Supreme Court, Barrett J, 27 July 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/817.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/817.html%22%20%5Ct%20%22_new) **(a) Summary** The Queensland Competition Authority asserted that the receivers of an electricity retailer may be held liable for that company's breach of the [Electricity Act 1994](http://my.lawlex.com.au/default.asp?cid=13322&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) ("the Act"). The court held that the receivers were neither an "electricity entity" nor a "special approval holder" under the Act and could not be personally liable for civil penalties for the company's contraventions. The court declined to decide whether or not the receivers might be liable as an officer of the corporation for a criminal contravention as there was no allegation that the company had committed a criminal offence. The court declined to order an indemnity or lien to cover any claim that might be made by the Authority against the receivers as it had found there was no basis for any such claim. **(b) Facts**   The second plaintiff, Jackgreen (International) Pty Ltd ("Jackgreen") operated as a retailer of electricity sourced from the National Electricity Grid to customers in New South Wales, Queensland and Victoria.  On 23 December 2009, the plaintiffs were appointed as receivers and managers of Jackgreen ("Receivers"). On 5 March 2010, the Queensland Competition Authority ("QCA") wrote to the Receivers alleging that Jackgreen had breached certain provisions of the electricity industry codes.  The QCA indicated that as controllers of Jackgreen, the Receivers may be issued a warning notice ("Warning Notice") under section 120S of the Act which was subject to civil penalty orders for noncompliance. The Receivers replied on 31 March 2010, indicating that the Act empowered the QCA to issue the Warning Notice to an "electricity entity" and not to individuals.  In further correspondence the QCA did not respond to this claim or clarify whether they intended to proceed against the Receivers. The Receivers brought proceedings seeking the following relief:a declaration that the Receivers were not an electricity entity within the meaning of the Act; and a direction that the Receivers would be justified in retaining $650,000 from the assets of Jackgreen on their retirement, including $150,000 for costs estimated to be incurred in respect of any proceedings taken against them personally by the QCA. **(c) Decision**  **(i)  Receivers' liability under the Act** Under section 120 of the Act, an "electricity entity" can be subject to civil penalty provisions for noncompliance with industry codes.  Justice Barrett determined that the Receivers were not an "electricity entity" as defined by the Act.  Section 22 of the Act sets out that an electrical entity is an entity that is a participant in the electricity industry, such as:generation entities; transmission entities; distribution entities; and retail entities. Section 120A of the Act extends the meaning of electricity entity to include a "special approval holder".  Justice Barrett found that there was no suggestion that the Receivers held any authority or "special approval", and therefore held that there was "no conceivable basis" on which the Receivers could be said to be an electricity entity within the meaning of either sections 22 or 120A.  On the basis of this finding, Barrett J held that the Receivers could not be personally liable for civil penalties for Jackgreen's contravention of section 120 of the Act. Justice Barrett went on to consider whether the Receivers could be subject to criminal penalty provisions under the Act.  Section 240 provides that where a corporation contravenes the Act, the executive officers of that corporation also commit an offence.  Defences to this offence include that the officer took reasonable steps to ensure compliance, or that the officer was not in a position to influence the conduct of the corporation. Justice Barrett found that even if the Receivers could be subject to section 240, there was no occasion for operation of the provision in these circumstances.  Liability under section 240 could only arise in circumstances where the corporation had committed a criminal offence under the Act, and conduct leading to exposure to civil penalties was insufficient to attract operation of the provision.   Justice Barrett did not go on to consider whether the Receivers could be liable under section 240 in the event that the facts supported the conclusion that Jackgreen had committed a criminal offence.  He did however make the comment that the Receivers may not in those circumstances be entitled to indemnification of their liability because their criminal contravention of the Act would necessarily take their actions outside the scope of the proper conduct of their role as receivers. For these reasons, Barrett J held that there was no occasion for the Receivers to apprehend that they could be personally liable under the Act (in either a civil or criminal sense) on the basis of the facts of the case.   **(ii)  Receivers' indemnity and lien** On the issue of indemnification and liens, Barrett J referred to the general proposition that the Receivers were entitled to be indemnified out of the assets of Jackgreen for liabilities incurred in the proper conduct of their role.  This right of indemnity allowed for an equitable lien over mortgaged property, and Barrett J was required to determine the scope of the Recievers' right to retain property of Jackgreen for this purpose. The applicable rule Barrett J considered was that the right to lien does not arise merely in respect of possible future claims against the Receivers.  In *Flexible Manufacturing Systems Pty Ltd v Fernandez* [2003] FCA 1491, Heery J noted that a receiver's right of lien "does not cover contingent, as distinct from actual, liabilities".  Justice Barrett referred to his earlier finding that there was no basis to hold the Receivers civilly or criminally liable for Jackgreen's contravention of the Act.  His conclusion on this issue was there had been "no more than an amorphous and essentially unexplained foreshadowing by [QCA], coupled with their non-acceptance ... of an invitation to state their position clearly in relation to the question of the Receivers' personal liability". On this basis, Barrett J held that the Receivers had not shown any proper basis to justify a right of lien over Jackgreen's property. **(iii)    Payment of "settlement amount"** In addition to the central issues of the Receiver's liability, the court was required to determine a further issue regarding payment from the Australian Energy Market Operator Limited ("AEMO").  The AEMO calculates the amounts owed by, or to, industry participants in each trading period.  It was calculated that Jackgreen was entitled to $1 million when it ceased operating due to the voluntary administration which commenced on 18 December 2009. The question was whether the payment should be directed to the receivers or to the administrators.  As the administrators did not make a claim of entitlement to this money, Barrett J ordered that the payment should be made to the Receivers.etailed Contents**4.6 Meeting the requirements for leave to commence a derivative action**(By Steven Grant, Minter Ellison) Vinciguerra v MG Corrosion Consultants Pty Ltd [2010] FCA 763, Federal Court of Australia, Gilmour J, 21 July 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2010/763.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/763.html%22%20%5Ct%20%22_new)**(a) Summary** This judgment outlines the approach of the court when considering the requirements which must be satisfied before leave is granted to commence a derivative action by a member of a company under section 237 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/default.asp?cid=56482&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) (Act). **(b) Facts** The plaintiff, Albert Vinciguerra, sought leave under section 237 of the Act to commence proceedings on behalf of the defendant, MG Corosion Consultants Pty Ltd against Malcolm Gilmour, Tony Armenti and Sola-Kleen Pty Ltd (Sola-Kleen).  Under the draft statement of claim the plaintiff alleged that Mr Gilmour caused the defendant to incur unnecessary or inflated expenses for his benefit and/or the benefit of Sola-Kleen breaching both his duties to the defendant imposed by sections 181 to 183 of the Act and his fiduciary duties.  The most significant component of those expenses were large 'management fees' that Mr Gilmour allegedly caused the defendant to pay to Sola-Kleen each year.  The plaintiff owned 30 of the 100 ordinary shares issued in the defendant with the remainder owned by Sola-Kleen of which Mr Gilmour was the sole director and shareholder.  It was also alleged that Mr Armenti, the external accountant for the defendant, and Sola-Kleen were involved in those breaches or received property with notice of the breaches.     In November 2006, the plaintiff applied for orders requiring the defendant to permit him to inspect its books, which were granted.  In accordance with those orders Mr Gorey inspected the books of the defendant and provided the plaintiff with the Gorey Report.  Subsequently, the directors of the defendant (Mr Harradine and Mr Byfield with Mr Gilmour not participating in the decision) commissioned Mr Ruthven to prepare the Ruthven Report. Section 237 provides that a member of a company, being a person referred to in section 236(1)(a)(i), may apply to the Court for leave to bring proceedings in the name of the company.  Under section 237(2) the Court must grant the application if it is satisfied that:it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; the applicant is acting in good faith; it is in the best interests of the company that the applicant be granted leave; if the applicant is applying for leave to bring proceedings there is a serious question to be tried; and either: at least 14 days before making the application, the applicant gave written notice to the company of their intention to apply for leave and of the reasons for applying; or it is appropriate to grant leave even though the preceding requirement of this paragraph is not satisfied. The parties did not dispute that the required notice was given, however, the defendant submitted that none of the remaining requirements had been satisfied.  **(c) Decision** **(i)  Probability that the company will not itself bring the proceedings** Section 237(2)(a) will be satisfied if the plaintiff establishes that it is 'probable' that the defendant will not itself bring the proceedings or properly take responsibility for them or for the steps in them.  The defendant argued that Mr Harradine and Mr Byfield were at all material times, ready and willing to decide whether, in the best interests of the defendant the defendant should bring the proposed proceedings.  However, Mr Harradine and Mr Byfield considered that it would be irresponsible to commence the proposed proceedings solely on the basis of the Gorey Report in light of the Ruthven Report which refuted many of the claims made in the Gorey Report and cast doubt on others.  Citing Mr Harradine's lack of independence and his lack of candour in his affidavit in respect of his relationship with Mr Gilmour with whom he was a fellow director and shareholder of another company, Gilmour J gave little weight to the findings in the Ruthven Report on the basis that Mr Ruthven was not fully instructed with all relevant material for the purpose of preparing his report.  Given that the defendant continued to oppose the application and this position was unlikely to change, Gilmour J concluded that it was probable that the defendant will not itself commence the proceedings.   **(ii)  Applicant is acting in good faith**The courts will always have regard to the following factors when determining if the good faith requirement is satisfied:whether the plaintiff honestly believes that a good cause of action exists and has a reasonable prospect of success; and whether the plaintiff is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process. **Honest belief that a good cause of action exists and reasonable prospect of success** The plaintiff stated that as a result of Mr Gorey's inspection of the defendant's books and the content of the Gorey Report he believed that the defendant had causes of action against Mr Gilmour, Mr Armenti and Sola-Kleen.  Whilst the plaintiff appeared to have little knowledge of these matters as he appeared to have left the running of the application to his solicitors, leaving such matters to his solicitors and Mr Gorey did not detract from the plaintiff's good faith.  Based on the Gorey Report and the failure to produce the books and records of Sola-Kleen, Gilmour J concluded that the plaintiff had an honest and reasonable belief that a good cause of action existed and had a reasonable prospect of success.   **Collateral purpose**  The plaintiff submitted that his purpose in bringing the application was to cause the defendant to pursue a cause of action which, if successful, would increase the defendant's assets and the value of his shareholding in the defendant.  However, the defendant submitted that if an applicant for leave under section 237 seeks by the derivative action to receive a benefit which he or she should not receive in good conscience, then the application is not made in good faith, even if the company itself stands to obtain some benefit if the derivative action is successful.  In this respect the defendant alleged several collateral purposes existed. The defendant argued that the plaintiff's failure to accept an offer made by Sola-Kleen to purchase his shares in the defendant demonstrated that the application was an abuse of process and that the plaintiff was not acting in good faith.  Gilmour J considered that the plaintiff acted reasonably in rejecting Sola-Kleen's offer because each of the alternative processes for determining 'fair value' and ultimately the value of the shares were unreasonable and unlikely to have resulted in a 'fair value' in the ordinary sense. The defendant alleged that the proposed litigation was being used to enable the plaintiff to wind up the defendant.  Gilmour J noted that there was no reason why a proposal to wind up a company by a party seeking leave to pursue a derivative action in the name of that company must be demonstrative of bad faith.  Whilst the plaintiff had made several ill-advised statements, his actions spoke louder than his words, namely he:raised concerns regarding the defendant's affairs; successfully obtained an order to inspect the defendant's books; caused Mr Gorey, a forensic accountant, to inspect the defendant's books; received the Gorey Report; provided the defendant with a draft statement of claim based on the Gorey Report; and  sought leave to commence a derivative action in respect of allegations raised in that statement of claim. Furthermore, the winding up of the defendant was not an inevitable outcome of granting leave to the plaintiff to pursue a derivative action and the plaintiff would be prepared to sell his shares in the defendant to Sola-Kleen or some other party for a satisfactory fixed price or subject to a satisfactory process for the determination of a price.  Accordingly, Gilmour J did not consider the plaintiff's potential proposal to seek to have the defendant wound up as establishing a collateral purpose and thereby a lack of good faith on his part. The defendant made several allegations that the plaintiff had engaged in competition with the defendant in bad faith which suggested that the plaintiff's motive was to wind up or destroy the defendant's business.  Gilmour J considered these allegations in turn:It is not unlawful in itself for the plaintiff to work for the competitor of a former employee. It was alleged that the plaintiff attempted to sell the defendant's customer list to another company without approval.  However, there was a conflict in evidence which Gilmour J could not resolve. The fact that the plaintiff was the sole director, secretary and shareholder of a company which owned a business that in some way competed with the defendant did not necessarily lead to a conclusion that the plaintiff lacked good faith.  The defendant also submitted that the allegations in the draft statement of claim were responded to in the Ruthven Report but that the plaintiff had resisted providing support for the proposed proceedings by not providing a copy of the Gorey Report until many months after the institution of this application and by rejecting the proposal that Mr Gorey and Mr Ruthven confer.  Gilmour J considered that the fact that Mr Gorey considered that nothing could be gained in him meeting Mr Ruthven or reviewing Mr Ruthven's source documents, did not cast doubt on the plaintiff's good faith.  The defendant further submitted that the plaintiff was complicit in the matters complained of in the draft statement of claim on the basis that any such matters were disclosed to the plaintiff when he was provided with copies of the defendant's annual financial statements and when he signed off the defendant's accounts during the period when he was both a director and member of the defendant.  However, such disclosure pertained to periods prior to the impugned expenses being incurred.  Gilmour J accepted the plaintiff's submission that his actions had, at all times, been those of a significant but nonetheless minority shareholder who became concerned about the defendant's affairs, took steps to investigate those concerns, formed the opinion that the concerns were well founded and sought to have the concerns addressed when the defendant would not act.   **(iii)  It is in the best interests of the company that the applicant be granted leave**  The plaintiff submitted that if the action was successful, funds would be recovered by the defendant which would enhance its assets.  In these circumstances, Gilmour J considered that there was a prima facie presumption that bringing a derivative action would be in the best interests of the defendant.  The fact that the plaintiff would personally gain from the success of a derivative action indirectly through the increase in the value of his shares was not a reason to refuse the application, but rather demonstrated that it was in the best interests of the defendant if a derivative action was pursued.  Gilmour J considered that the grant of leave would be in the best interests of the defendant if leave was granted on the condition that the plaintiff would: pay the defendant's costs of prosecuting the action; indemnify the defendant against any adverse costs order in the foreshadowed litigation; and not claim contribution from the defendant in respect of any adverse costs order.  **(iv) Serious question to be tried** Gilmour J noted that determining whether there is a serious question to be tried does not require the court to consider the merits of the proposed derivative action to any great degree.  The question for ultimate determination in the proposed litigation would be whether the expenses in question were incurred in breach of duty by Mr Gilmour with the knowing involvement of Sola-Kleen and Mr Armenti.  The plaintiff had adduced the Gorey Report which constituted expert evidence.  As Mr Gilmour was the sole director of Sola-Kleen at all material times, if the allegations against him were proven Sola-Kleen would have received the payments or the benefit of the payments with full knowledge of Mr Gilmour's breaches of duty.  Accordingly, Sola-Kleen would be involved in Mr Gilmour's breaches of duty.  Sola-Kleen, would also be liable to pay equitable compensation to the defendant or to account to the defendant for its profits having knowingly received property as a result of Mr Gilmour's breaches of duty.  On this basis, Gilmour J was satisfied that the matters alleged in the draft statement of claim and the evidence provided raised serious issues to be tried. **(v) Orders** Accordingly, Gilmour J concluded that the requirements of section 237(2) of the Act had been established and granted leave to the plaintiff to bring proceedings in the name of the defendant against Mr Gilmour, Mr Armenti and Sola-Kleen on the conditions outlined above.etailed Contents**4.7 Attempted reliance on agency and mistake of fact to recover loaned funds**(By Laura Vogler, Freehills) Clarke v Abou-Samra [2010] SASC 205, Supreme Court of South Australia, Kourakis J, 20 July 2010  The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/sa/SASC/2010/205.html](http://www.austlii.edu.au/au/cases/sa/SASC/2010/205.html%22%20%5Ct%20%22_new) **(a) Summary** This case was an attempt by the plaintiffs (Mr and Mrs Clarke) to recover $207,518.20 they had loaned. Mr and Mrs Clarke were unsuccessful as Mr and Mrs Abou-Samra were not bound by the loan of $207,518.20 which Mr Samra purported to accept on behalf of Mr and Mrs Abou-Samra. However, Mr and Mrs Clarke were entitled to an equitable charge over the property for the amount of $67,518.20 plus interest. **(b) Facts** ALC Group Pty Ltd (ALC) (now in liquidation) arranged finance for Mr and Mrs Abou-Samra who were purchasing a property. Mr Michael Samra (now bankrupt) was the principal of ALC. Mr and Mrs Abou-Samra planned to pay the balance of $1,005,373.60 with a loan of almost $800,000, recalling their investment of $140,000 with ALC and obtaining a small private loan for the balance. This shortfall amount was anticipated by Mr and Mrs Abou-Samra to be between $50,000 to $100,000. Mr Samra undertook to pay ALC's debt of $140,000 to Eckermann Steinert, the conveyancers acting for Mr and Mrs Abou-Samra in their purchase. Mr and Mrs Clarke (clients of ALC) were approached by Mr Samra and believed they were loaning $207,518.20, to be repaid at the rate of 10% interest, to Mr and Mrs Abou-Samra. Mr and Mrs Clarke were provided with a settlement statement and provided Mr Samra with a cheque in this amount, on the understanding that Mr and Mrs Abou-Samra would receive this amount by way of loan. The cheque was delivered by ALC to Eckermann Steinert. Mr and Mrs Abou-Samra believed the cheque in the amount of $207,518.20 was to discharge ALC's debt of $140,000 and to provide a small private loan for the shortfall amount. **(c) Decision**   Mr and Mrs Clarke relied on the following arguments outlined below. **(i) Mr Samra was the agent for the loaned amount of $207,518.20** Mr and Mrs Abou-Samra understood that there may be a shortfall of $50,000 to $100,000 of which Mr Samra would organise as a private loan. As such the court held that Mr Samra was not the agent for the loaned amount of $207,518.20 for the following reasons:Mr Samra was not actually or ostensibly authorised by Mr and Mrs Abou-Samra to borrow the full $207,518.20 from Mr and Mrs Clarke, he was only authorised to borrow the shortfall of $67,518.20 from them. The stipulation of the shortfall amount was in effect a limitation on Mr Samra's authority. There was no implied authority to borrow more than the shortfall as this was not necessary for or incidental to the actual authority of Mr Samra. Mr and Mrs Abou-Samra had not acquiesced in an extended agency as they were not aware of what Mr Samra told Mr and Mrs Clarke. The provision of the settlement statement did not amount to a representation by Mr and Mrs Abou-Samra that Mr Samra was authorised to procure a loan for $207,518.20. **(ii) Acting under a mistaken belief** Mr Samra told Mr and Mrs Clarke that he was seeking a loan on behalf of Mr and Mrs Abou-Samra for the amount of $207,518.20 and Mr and Mrs Clarke advanced the money on that basis. Mr and Mrs Clarke were acting under the mistaken belief that Mr Samra was the authorised agent of Mr and Mrs Abou-Samra for this amount.  However, money paid under a mistake cannot be recovered where the money paid discharges a debt owed to the payee by the payer or a third party by whom he is authorised to discharge the debt: *Barclays Bank Ltd v W J Sims Son and Cooke (Southern)* [1980] QB 677 at 695. Applying this principle, Mr and Mrs Abou-Samra had a good defence to the claim of mistake as they received good value for the $207,518.20. The payment of the cheque into Eckermann Steinert's account effectively discharged ALC's debt to Mr and Mrs Abou-Samra. Therefore, as the cheque discharged ALC's debt, the money could not be recovered even though the cheque was misappropriated by Mr Samra. **(iii) Remedial constructive trust** Mr and Mrs Clarke argued that Mr and Mrs Abou-Samra held the property purchased on a remedial constructive trust.  This argument was unsuccessful as Mr and Mrs Clarke advanced the money by loan and it was never intended by the parties that Mr and Mrs Clarke would have a proprietary interest in the property.  Further, Mr and Mrs Abou-Samra should not be held to a trust or an equitable lien as they:did not contribute to Mr and Mrs Clarke's mistake; had no knowledge of it when they received the money; and received good value for the money as it discharged ALC's debt. However, the court held that Mr and Mrs Clarke were entitled to an equitable charge over the property for the amount of $67,518.20 plus interest.etailed Contents**4.8 Court decides on validity of notices issued by ASIC prior to contempt of court proceedings** (By Steven Rice, Freehills) Australian Securities and Investments Commission v Sigalla (No 2) [2010] NSWSC 792, New South Wales Supreme Court, White J, 15 July 2010 The full text of this judgment is available at:[http://www.lawlink.nsw.gov.au/scjudgments/2010nswsc.nsf/aef73009028d6777ca25673900081e8d/9a25e8d6d3545418ca2577640080ebff?OpenDocument](http://www.lawlink.nsw.gov.au/scjudgments/2010nswsc.nsf/aef73009028d6777ca25673900081e8d/9a25e8d6d3545418ca2577640080ebff?OpenDocument" \t "_new) **(a) Summary** This case deals with evidence obtained under notices issued by ASIC where the validity of those notices is challenged. The key points are:ASIC may issue notices under Part 3 Div 3 of the [Australian Securities and Investments Commission Act 2001](http://my.lawlex.com.au/default.asp?cid=56481&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) (ASIC Act) to investigate and pursue charges of contempt of court. In respect of a particular person and a particular investigation, ASIC only has to use the prescribed form once for a notice issued under section 19(2) of the ASIC Act to require that person to give reasonable assistance to ASIC. Subsequent notices in these circumstances do not need to be in the prescribed form. Notices issued by ASIC under Part 3 Div 3 of the ASIC Act may be valid even if they do not state one of the purposes of their issuance, so long as they are issued also for a stated purpose that was correct. Notices issued by ASIC under Part 3 Div 3 of the ASIC Act may be invalid when they were issued only for a purpose that was not stated on the face of the notice - i.e. where the purpose stated on the notice was wholly incorrect. **(b) Facts** This judgment concerns the admissibility of evidence objected to under section 138 of the [Evidence Act 1995 (NSW)](http://my.lawlex.com.au/default.asp?cid=4459&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) (Evidence Act). ASIC filed a Further Amended Interlocutory Process against Mr Sigalla. The Process charged Mr Sigalla with contempt for allegedly contravening various orders of the court made under section 1323 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/default.asp?cid=56482&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) (Corporations Act). The orders under section 1323 of the Corporations Act restrained Mr Sigalla from dealing with his assets. The charges by ASIC against Mr Sigalla (that were not withdrawn by ASIC) were, in summary, that Mr Sigalla:requested a transfer of $300,000 from his bank account and took no steps to prevent the transfer occurring; made a payment from his bank account that was ultimately used to place bets with the TAB; and made payments in cash or by credit card "for the provision of what are euphemistically called female models or escorts". Mr Sigalla objected to a number of ASIC affidavits which sought to adduce evidence gained by ASIC under notices issued pursuant to Part 3 Div 3 of the ASIC Act. Counsel for Mr Sigalla contended ASIC had no power to issue these notices, if ASIC did have the power it was not lawfully exercised, that the notices were invalid, and that the evidence was improperly obtained. **(c) Decision** The court made a number of important findings. **(i) ASIC was entitled to issue the notices under Part 3 Div 3 of the ASIC Act to investigate charges of contempt** Counsel for Mr Sigalla contended that ASIC was not entitled to issue notices under Part 3 Div 3 of the ASIC Act to investigate or pursue charges of contempt.  The court rejected this, instead finding that ASIC was entitled to do so. The court held that:just because a breach of section 1323 of the Corporations Act is an offence under section 1311 of the Corporations Act, does not mean that the power to investigate a breach of section 1323 of the Corporations Act can only be exercised for the purpose of investigating a criminal offence; obtaining material under Part 3 Div 3 of the ASIC Act to investigate and pursue a charge of contempt is authorised by each paragraph of section 28 of the ASIC Act; and books produced under a notice pursuant to sections 30 or 33 of the ASIC Act may be used in a proceeding in a court. This is by virtue of section 37(4) of the ASIC Act, and includes proceedings for contempt. **(ii) Each subsequent notice given to a person under section 19(2)(a) of the ASIC Act requiring "reasonable assistance" does not need to be in the prescribed form** The court did not accept the contention that each time Mr Sigalla was given a notice under section 19(2) of the ASIC Act requiring him to provide reasonable assistance to ASIC, that each notice must be in the prescribed form. The court held that provided a notice is given to a person in the prescribed form for a particular investigation, ASIC could make further requests for reasonable assistance by email and not by using the prescribed form. **(iii) Notices under Part 3 Div 3 of the ASIC Act were issued validly even if issued for a purpose not stated** The court examined the issuing of a number of notices under Part 3 Div 3 of the ASIC Act. In summary, the court held to be valid notices which:stated that the "matter" which was being investigated was the conduct of the former directors of TZ Limited, rather than setting out the specific contraventions of the Corporations Act being investigated; were issued for the purpose of tracing funds, as this related to the investigation into the conduct of the former directors of TZ Limited; were issued partly for the purpose of investigating a suspected contravention of the ASIC Act prohibition on giving false information at an examination under section 19 of the ASIC Act, even though this was not stated on the notice; were issued partly to identify sources of funds to bring a compensation claim;  were issued to investigate a suspected contravention of the orders made by the court under section 1323 of the Corporations Act; and were issued partly to identify whether there had been a contravention of the orders made by the court under section 1323 of the Corporations Act, and partly to identify whether other sources of funds were available to a person. **(iv) Notices under Part 3 Div 3 of the ASIC Act were not issued validly where they did not truly state the matters to which the request for production of documents related** The court held to be invalid notices which were issued for a purpose different to that set out on the face of those notices. The notices stated that they were issued in relation to particular purposes, being the investigation into suspected contraventions which occurred during a period of time. However, the notices were in fact given for different purposes, and sought information which related to a later period of time. The real purpose of the notice was wholly different from the stated purpose. The court held that a notice must put the recipient of the notice in a position to assess whether the notice was issued within power, and that because the notices did not do this the notices were not valid.  The evidence obtained by ASIC under these invalid notices was excluded under section 138 of the Evidence Act.etailed Contents**4.9 Circumstances where a meeting is convened for a "proper purpose" and the validity of resolutions adopted**(By Katie Tatoulis, DLA Phillips Fox)Dhami v Martin [2010] NSWSC 770, New South Wales Supreme Court, Barrett J, 13 July 2010The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/770.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/770.html%22%20%5Ct%20%22_new) **(a)  Summary**The decision by Barrett J in the New South Wales Supreme Court concerned the composition of the board of directors of Ace Developments Pty Ltd ("Ace"). Barrett J considered firstly whether the notice and convening of a general meeting was for a "proper purpose" pursuant to section 249Q of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/default.asp?cid=56482&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) ("the Act"), and secondly whether the appointment of the new directors and certain resolutions purportedly passed by the board of Ace were valid.**(b)  Facts**Mr Rajinder Dhami (plaintiff), Mr Bruce Martin (first defendant) and Mrs Supanee Martin (second defendant) had an equal the shareholding and voting power in Ace. Ace was a creditor of Toukley Waters Pty Ltd ("Toukley"), whose directors were Mr and Mrs Martin, and the shareholders were Mr Martin and Mr Dhami. Toukley was subject to voluntary administration under Part 5.3A of the Act, and owed Ace approximately $740,000 for monies borrowed and overdue. Ace had liabilities to La Trobe Finance for moneys borrowed, guaranteed by the plaintiff and first and second defendants. Mr Dhami and Mr and Mrs Martin were directors of Ace, however, Mr Dhami's office became vacant on 22 July 2009 after his disqualification from managing corporations pursuant to Part 2D.6 of the Act.On 15 April 2010, Mr Dhami, in light of his shareholding in Ace, convened a general meeting of the company pursuant to section 249F of the Act. The notice proposed two resolutions and specified that two new directors, Mrs Kay Dhami and Mr Norman Brien, were to be appointed.  The meeting was held at 10am on 14 May 2010, and Mr Dhami was the only member present. The requirement under Ace's Constitution that each meeting have a quorum of two members was not achieved and consequently the meeting was adjourned to 10am on 28 May 2010. At this second meeting Mr Dhami was again the only member present. However, as Ace's Constitution provided for a special circumstance where the "members present" at a second meeting could constitute a quorum if a meeting had already been adjourned as a result of the lack of a quorum, Mr Dhami's presence satisfied this requirement and the meeting proceeded. Mr Dhami then proceeded alone to adopt the two resolutions specified in the notice of meeting:To appoint two new directors (being Kay Dhami and Norman Brien) to provide balance in the direction of the company and to protect the interests of the shareholders as permitted by Article 75 of the Company's Articles of Association or otherwise. The shareholders direct that the directors must: - Do everything in their power to have the liquidator of Toukley repay all debts outstanding to the Company and its shareholders in full; and- On repayment of the debts to the Company, such monies will be immediately distributed to the shareholders as dividends in accordance with their respective shareholding in the Company.The first and second defendants contended that the meetings were not convened for a "proper purpose" pursuant to section 249Q of the Act, nor were some of resolutions adopted valid.**(c)  Decision****(i) Whether the proposed resolutions in the notice were inconsistent with section 249Q of the Act**Barrett J first considered whether the resolutions proposed by Mr Dhami in the notice of meeting were inconsistent with section 249Q of the Act, more specifically whether the meeting was "held for a proper purpose", in particular regarding the appointment of two new directors.Barrett J held that the second proposed resolution was beyond the competence of Ace's members (as it was not consistent with Ace's Constitution) and hence it could not be a proper purpose of a general meeting to seek to do such a thing.The first and second defendants further submitted that the election of Mrs Dhami and Mr Brien as directors was not for a "proper purpose" on the basis that they would act in accordance with Mr Dhami's direction and would protect his personal interest, in an attempt to circumvent Mr Dhami's disqualification from managing corporations under Part 2D.6 of the Act. They also contended that Mr Dhami would consequently be enabled to contravene section 206A(1) of the Act by participating in the management of a corporation when disqualified.Barrett J held that there was insufficient evidence before the court to support these claims. Similarly, there was insufficient evidence to support the "unclean hands" defence raised by Mr and Mrs Martin. Accordingly, his Honour held that the meeting was convened for a "proper purpose", and consequently the resolution appointing Mrs Dhami and Mr Brien as directors of Ace was valid. **(ii)  Whether Mr Martin ceased to be a director**Barrett J then considered whether Mr Martin ceased to be a director of Ace on (or before) 21 May 2010 pursuant to Article 45 of the company's Constitution. This was a "retirement by rotation" provision that applied at the "ordinary general meeting" each year. His Honour held that the relevant meeting was not an "ordinary general meeting" for the purposes of Article 45 as it was not held at a location nor at a time decided by Ace's directors, and thus was not an occasion where a retirement by rotation under Ace's Constitution could arise. Furthermore, regardless of Mr Dhami's assertion that Mr Martin's office had become vacant at some stage prior to 21 May 2010, Barrett J confirmed that Article 88 of the Constitution operated to re-install Mr Martin as a director in all of the circumstances. On this basis, his Honour held that Mr Martin remained a director of Ace. **(iii)  Whether Mrs Dhami was validly appointed as Ace's authorised agent**Barrett J next considered the validity of various resolutions purportedly adopted by Mrs Dhami and Mr Brien at a directors meeting held on 26 May 2010 (notice of the meeting having been given by Mrs Dhami on 21 May 2010). Only Mrs Dhami and Mr Brien attended this meeting, and various resolutions were purportedly passed, the key resolution being that Bruce Martin was to stand down as a director of Ace and that Mrs Dhami be appointed the agent of Ace for various purposes.Mrs Dhami did not identify the latter item as an item of business in the notice of meeting, although other items were identified. Barrett J noted that although Mrs Dhami went beyond the legal requirement in outlining the meeting's business, by doing so it could be assumed that the meeting's business would be confined to the agenda outlined. Barrett J held that if all four directors had been present at the board meeting, this appointment would not have occurred as both Mr and Mrs Martin would have cast a negative vote, with one having a casting vote as Chairman. As Mrs Dhami had not notified the other directors of this item of business and yet proceeded with it knowing that Mr and Mrs Martin would most likely have objected and voted against it, Barrett J held that the notice was misleading. This in turn "infected" the purported appointment of Mrs Dhami, which was invalid. Furthermore although Mr and Mrs Martin were invited to the meeting and were allegedly informed of the outcome, Barrett J held that there were clear reasons why they did not attend, including that they were of the belief that Mrs Dhami and Mr Brien did not validly hold office as directors and that the meeting was only convened for confined purposes. Barrett J therefore dismissed the application by Mr Dhami that Mrs Dhami was validly appointed as agent. **(d) Conclusion** Barrett J made the following orders:That Mrs Dhami and Mr Brien were validly appointed as directors of Ace on 21 May 2010. That the claim of Mr Dhami for a declaration that Mrs Dhami was validly appointed the agent of Ace on issues concerning the debt owed to that company by Toukley Waters Pty Limited be dismissed. That the claim of Mr Dhami for a declaration that Mr Martin is no longer a director of Ace be dismissed. That the "cross-application" of Mr Martin and Mrs Martin filed on 2 July 2010 be dismissed. That the costs of the proceedings to date be reserved and that each party have liberty to apply in respect of costs. Barrett J directed that the balance of the originating process be stood over to a date to be fixed.etailed Contents**4.10 Appointment of provisional liquidator appropriate for chaotic company which was probably insolvent** (By Alex Bowen, Mallesons Stephen Jaques) ASIC v Tax Returns Australia Dot Com Pty Ltd [2010] FCA 715, Federal Court of Australia, Dodds-Streeton J, 8 July 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2010/715.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/715.html%22%20%5Ct%20%22_new) **(a) Summary** The court approved ASIC's application to appoint a provisional liquidator to the defendant company, which had been badly managed, was probably insolvent, and was subject to an application for winding up.  There was a particular risk of dissipation of the company's assets and harm to the public interest because its accounts were so disorderly. **(b) Facts** The defendant company ran an online tax return business which involved processing tax returns and in some cases collecting tax refunds on behalf of clients. It was a family business and poorly managed, and the evidence was that necessary accounting records and reconciliations were not prepared, and the director of the company didn't know how the company's money was managed. There were several complaints from clients who had not received their tax refunds and allegations that client funds had been misused by the company to purchase a property in Queensland. Some clients attempted to get their money back, by drawn-out correspondence with the company, obtaining default judgments, etc. Some succeeded and were paid but others failed and in the end it was likely that after distributions of "profit" being made to family members, the company did not have enough money to pay its creditors. An application to wind up had been filed by ASIC, and this was an application to appoint a provisional liquidator pending the outcome of that application. **(c) Decision** The court explained that a provisional liquidator is appointed to preserve a company's assets and maintain the status quo while a winding up application is determined. A provisional liquidator should not be appointed if a less intrusive measure could satisfactorily address the circumstances of the case. Insolvency is not a requirement for the court to appoint a provisional liquidator, but 'apparent or probable insolvency frequently accompanies the problems typically invoking provisional liquidation'. In bringing this sort of application, ASIC is protecting the public interest by 'ensuring that limited liability companies do not remain operative when capacity to pay their debts in full has been compromised'. In this case, a provisional liquidator was 'uniquely apt and necessary to preserve effectively and expeditiously the status quo, prevent the dissipation of the assets prior to the final hearing of the winding up application and to ensure, in the public interest, that an independent official liquidator investigates and identifies the companies' records, transactions, assets and liabilities.' This was the case particularly because the company's affairs had been conducted in such a chaotic manner that it was clearly in the public interest that they be subjected to urgent independent examination.etailed Contents**4.11 Secondary trading - validation and relief from liability following the issue of a defective prospectus** (By Chris Taylor and Tanja Golding, Corrs Chambers Westgarth) Elemental Minerals Ltd, In the matter of Elemental Minerals Ltd [2010] FCA 687, Federal Court of Australia, Gilmour J, 30 June 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2010/687.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/687.html%22%20%5Ct%20%22_new) **(a) Summary** Elemental Minerals Ltd (Elemental) applied to the court for declaratory relief under section 1322 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/default.asp?cid=56482&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) (the Act) after it had issued a defective prospectus that had been intended to enable secondary trading of shares previously issued under a placement. As soon as Elemental became aware of the defect, it halted trading and issued a revised prospectus.  However, for six days between these events, some shares were sold, potentially contravening section 707(3) of the Act.  Elemental applied to the court under section 1322 of the Act for both validation of the offer and issue of shares under the defective prospectus and relief from any potential civil liability. Justice Gilmour granted the declaratory relief sought, holding that Elemental's failure to comply with the Act was procedural in nature and an honest mistake.  Gilmour J considered that while some people had sold shares without a valid prospectus being issued, these people had relied in good faith on Elemental's inadvertent mistake and it was unlikely that any person who sold or acquired shares in the period were adversely affected by Elemental's failure to comply with the Act. **(b) Facts**  On 4 February 2010, Elemental made a placement of 25,000,000 fully paid ordinary shares allotted at an issue price of $0.35 (the Placement) to selected individuals.  Ordinarily, Elemental would have been able to facilitate secondary trading of the shares by issuing a cleansing notice pursuant to section 708A(5) of the Act.  However, because trading in ordinary shares of Elemental had been suspended for longer than five days in the previous 12 months, it was unable to issue a cleansing notice (section 708A(5)(b) of the Act).  Elemental instead issued a cleansing prospectus (the Prospectus) under section 708A(11) of the Act.  No shares were to be offered under the Prospectus other than the shares already issued under the Placement. Elemental lodged the Prospectus with the ASX on 12 February 2010.  On 17 February 2010, ASIC rejected the Prospectus on the basis that it did not comply with section 708A(11)(c) of the Act, which requires that 'the prospectus is for an offer of securities issued by the body that are in the same class of securities as the relevant securities'.  Elemental immediately requested that the ASX halt trading of Elemental securities.  The ASX confirmed on 17 February 2010 that at Elemental's request, Elemental securities would be placed in pre-open pending a release of an announcement by Elemental.  The following day, Elemental prepared and lodged with the ASX a revised prospectus to facilitate the secondary trading of the shares previously issued under the Placement and in addition, offered to issue 100 new shares at $0.35 (the Revised Prospectus).  However, a number of the shares received in the Placement had been sold during the period between the lodging of the Prospectus on 12 February 2010 and the subsequent lodgement of the Revised Prospectus on 18 February 2010.   The original Prospectus did not comply with section 708A(11)(c) of the Act and Elemental had potentially contravened section 707(3) of the Act, which provides that an offer of securities for sale within 12 months after issue needs disclosure if the original securities were issued without disclosure:and the purpose of issue was on-sale (presumed if on-sale occurs within 12 months); and no relevant exemption applied. Accordingly, Elemental brought an application in the Federal Court seeking the following orders under section 1322(4) of the Act:validation of the offer for sale of the shares in the six day period; and relief from any civil liability arising from Elemental's contravention of section 707(3) the Act. **(c) Decision**  Justice Gilmour concluded that in the circumstances, the orders sought should be made and granted the declaratory relief sought by Elemental.   **(i) Jurisdiction and standing** Justice Gilmour first considered the jurisdiction granted to the court under section 1322 of the Act.  Relevantly, sections 1322(2)-(6) of the Act allow an interested person, if no substantial injustice has occurred, to make an application to the court for an order that any act purporting to have been done under the Act is not invalid by reason of a contravention, if the court is satisfied that the act was essentially of a procedural nature, the persons concerned acted honestly or it is just and equitable to make the order.  In addition, the court is able, under section 1322(4)(c) of the Act, to relieve a person from any civil liability in respect of the contravention if the court is satisfied that the person acted honestly.   In the present case, citing the decision of French J in *Re Wave Capital Ltd* (2003) 47 418, Gilmour J noted that section 1322 of the Act is remedial in nature and that while the requirements of the Act are not to be set aside lightly and that each case must be considered on its own merits, section 1322 of the Act should be given a liberal interpretation.   **(ii) Procedural act** Elemental was required to establish that its actions had been procedural in nature. Referring to the decision of Palmer J in *Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd* [2005] NSWC 1005, Gilmour J considered that the requirement of a disclosure document was a procedure intended to regulate the offer of securities and that Elemental's actions were procedural as they had 'merely departed from the prescribed manner in which the offer of securities was done.' **(iii) Honesty** Justice Gilmour then turned his attention to the component of honesty in section 1322 of the Act.  He noted that a person who incorrectly interprets legal requirements can still be acting honestly (*Primelife Corp Ltd v Aevum Ltd* (2005) 53 ACSR 283) and that the concept of acting honesty can be both 'active but incorrect consideration of a legal issue, as well as failure to consider the issue at all'. Elemental had engaged a solicitor to prepare the Prospectus and the solicitor incorrectly interpreted the requirements in section 708A(11)(c) of the Act.  As soon as Elemental became aware of the defective Prospectus, it acted quickly to remedy the error by producing a Revised Prospectus.  Accordingly, Gilmour J considered that Elemental had acted honestly. **(iv) Justice and equity** In the six days between 12 February 2010 and 18 February 2010, a number of people had sold their shares.  Gilmour J considered that these people were reasonably relying upon the understanding that any secondary trading of those shares had been facilitated by Elemental lodging a valid Prospectus, and that it was just and equitable to relieve any seller or acquirer of shares from any adverse consequences of Elemental's inadvertent failure to comply with section 708A(11) of the Act. **(v) No substantial injustice** Citing the decision of Owen J in *Elderslie Finance Corp Ltd v Australian Securities Commission* (1993) 11 ACSR 157, who held that the concept of 'injustice' requires the court to consider real, and not merely insubstantial or theoretical prejudice, and the comments of Santow J in *Super John Pty Ltd v Futuris Rural Pty Ltd* (1999) 32 ACSR 398 that the interests of those who had been affected must be considered, Gilmour held that it was unlikely that any person who sold or acquired shares in the six day period between the lodgement of the Prospectus and the Revised Prospects was adversely affected by Elemental's actions and accordingly there was no, nor was there likely to be, any substantial injustice.etailed Contents**4.12 Contract of guarantee: Acknowledgment of personal liability by a director constitutes enforceable guarantee**(By Dylan Barber, Blake Dawson) Burrell & Family Pty Ltd v Harris [2010] SASC 184, Supreme Court of South Australia, White J, 24 June 2010 The full text of this judgment is available at:[http://www.courts.sa.gov.au/judgments/Judgments2010/0712-SASC-184.htm](http://www.courts.sa.gov.au/judgments/Judgments2010/0712-SASC-184.htm%22%20%5Ct%20%22_new) **(a) Summary** This judgment concerned monies loaned by the plaintiff to Hardel Pty Ltd (Hardel).  A written loan agreement signed by the defendant as director of Hardel contained an acknowledgment of personal liability by the defendant.  The document did not, however, provide for the signing of the document by Mr Harris in two capacities. The plaintiff sought to recover money from the defendant on that basis that the written loan agreement constituted a guarantee.  Justice White found in favour of the plaintiff's claim that the relevant agreement was executed by Mr Harris in his personal capacity and that the relevant clause constituted a valid personal guarantee provided by Mr Harris to the plaintiff.  In doing so, the court paid particular attention to the circumstances in which the relevant agreement was brought about as well as the presumed intention of the parties on entering into the agreement. **(b) Facts** **(i) Loans made by the plaintiff** The plaintiff was a family owned company with Mr Burrell's wife its sole director.  Mr Burrell was its principal agent in relation to these proceedings.  At all relevant times Mr Harris was Hardel's sole director. Mr Burrell and Mr Harris came to know each other through their social engagements and, following requests by Mr Harris, the plaintiff loaned Hardel various sums of money.  Five loans agreements were entered into by the parties for advancement of loans from January 2005 to May 2006 totalling $1,320,000.  Some loans were provided under written loan agreements which were prepared by Mr Burrell without obtaining legal assistance.  Some loan amounts, however, did not have any written loan agreements.  All of the loans were unsecured. Despite the terms of the loans being for a number of months or, in some cases, up to a year, Hardel did not make any payments of interest or principal during 2006.  Following Mr Burrell pressing Mr Harris for repayment, in November 2006 it was agreed that the plaintiff and Hardel should enter into a new agreement consolidating the plaintiff's loans to Hardel together with accrued interest.  Despite making some repayments during 2007, Hardel did not conform to the terms of the agreement which contemplated the repayment of the outstanding amount within two months of the date of the agreement. **(ii) The 2008 Agreement** In April 2008 the plaintiff and Hardel entered into an updated loan agreement which concerned the balance of the outstanding amounts owed by Hardel to the plaintiff.  The agreement required the repayment in full of the consolidated loan amount on or before 1 June 2008 (2008 Agreement). The 2008 Agreement was an "Agreement for Loan" between the plaintiff and Hardel and included the following clause:"Clause 4(d): The director of the borrowing entity also acknowledges personal liability for all debt remaining after the loan repayment date inclusive of all interest and recovery costs." The 2008 Agreement was based on the agreement entered into by the parties dated November 2006.  The 2008 Agreement was signed by Mr Harris at the end of the document under the words "Executed by Hardel Pty Ltd".  Underneath his signature Mr Harris' name was printed and followed by "Director". Following execution of the 2008 Agreement, Hardel made only one additional payment to the plaintiff of $3,000 in August 2008.  In these proceedings the plaintiff sought to recover more than $2 million from the defendant in reliance on the 2008 Agreement.  The plaintiff contended that the 2008 Agreement contained an acknowledgment of personal liability by Mr Harris of the debts of Hardel.  Hardel was placed into liquidation on 15 June 2009. **(c) Decision**  **(i) The execution of the 2008 Agreement** The court considered that it was apparent that the personal relationship between Mr Burrell and Mr Harris was central to the manner in which the loans were made by the plaintiff to Hardel.  This was important in explaining why the loans were made as well as the form in which they were made. In looking at the construction of commercial contracts generally, Justice White held that regard should be had to the language of the parties, the commercial circumstances of the 2008 Agreement as well as the objects which the contract was intended to secure (*McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579).  This assessment required an objective determination of the parties' beliefs and intentions which did not involve reference to their subjective understandings (*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165). In making this assessment, the court considered the contract as a whole and not just its manner of execution.  Although counsel for the defendant advanced arguments to the effect that Mr Harris was not a party to the 2008 Agreement and that his signing of the 2008 Agreement as "Director" demonstrated the capacity in which he intended to sign the document, Justice White held that this could also be seen as an identification of Mr Harris for the purposes of clause 4(d).  Although the 2008 Agreement stated that it was "executed by Hardel", this amounted to an indication that Mr Harris was signing on behalf of Hardel but did not provide that he was only signing in that capacity.  From the 2008 Agreement, when considered as a whole and particularly when considering the wording of the relevant clause, it could be inferred that the parties intended that Mr Harris' signature should have the effect of binding Mr Harris personally as well as Hardel. In reaching his conclusion, Justice White drew on authority that provided that qualification to a signature may be found by the terms of a document as well as its surrounding circumstances (*Scottish Amicable Life Assurance Society v Reg Austin Insurances Pty Ltd* (1985) 9 ACLR 909).  Correspondence concerning the draft of the 2008 Agreement indicated that Mr Harris must have been aware of the relevant clause and there was no evidence led by him protesting the nature of clause 4(d) at that time. Justice White held that it was significant that the 2008 Agreement was prepared without the benefit of legal assistance.  In addition, the nature of the relationship between Mr Burrell and Mr Harris made the inference of a personal responsibility to repay the loans more readily acceptable.  A reasonable person would have considered that Mr Harris, upon entering the contract, intended to be personally bound. As such, it was found that Mr Harris was bound in his personal capacity by the 2008 Agreement. **(ii) The 2008 Agreement constituted an enforceable guarantee** It was submitted by counsel for Mr Harris that, even if he was bound in his personal capacity by the 2008 Agreement, the relevant clause should be construed as no more than an acknowledgment by him of the company's indebtedness and not as a guarantee. In rejecting this contention, the court considered the wording of the relevant clause.  Although a guarantor's offer must be clear and certain, the ordinary meaning of the word "acknowledgment" included the acceptance of a matter as having legal force.  Proper construction could only be given to the relevant clause if it was found that it constituted an effective and enforceable commitment by Mr Harris to pay Hardel's outstanding debts to the plaintiff.  Construing clause 4(d) as a mere acknowledgment by Mr Harris of the existing indebtedness of Hardel would not give proper effect to the clause. It was not significant that the parties did not use the word "guarantee".  Other words had been used which resulted in the same effect and there was no reason to not give the relevant clause the meaning which the words used suggest.etailed Contents**4.13 Court approves administrators transferring shares from members**  (By Jemma Rowe and Jennifer Ball, Clayton Utz) Darren Gordon Weaver, Andrew John Saker and Martin Jones in their capacity as Joint and Several Deed Administrators of Midwest Vanadium Pty Ltd v Noble Resources Ltd [2010] WASC 182, Supreme Court of Western Australia, Martin CJ, 18 May 2010The full text of this judgment is available at: [http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/PDFJudgments-WebVw/2010WASC0182/$FILE/2010WASC0182.pdf](http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/PDFJudgments-WebVw/2010WASC0182/%24FILE/2010WASC0182.pdf%22%20%5Ct%20%22_new) **(a) Summary** Weaver, Saker and Jones in their capacities as joint and several administrators of a deed of company arrangement made application to the court for leave to transfer the shares of Midwest Vanadium Pty Ltd (receivers and managers appointed) (MVPL) under section 444GA of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/default.asp?cid=56482&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default).  This section provides that:"(1)  The administrator of a deed of company arrangement may transfer shares in the company if the administrator has obtained: (a)  the written consent of the owner of the shares; or (b)  the leave of the court.(3)  The court may only give leave under subsection (1) if it is satisfied that the transfer would not unfairly prejudice the interests of members of the company."The interests that are required to be taken into consideration are those of the members generally and not just the member whose shares are proposed to be transferred.  It is the interests of members in their capacity as members rather than creditors to which section 444GA(3) is directed. The court was satisfied that the members would not suffer any unfair prejudice in the event of the transfer of the shares.  The facts demonstrated that:MVPL had no residual value; the claims of the secured creditors alone substantially outweighed the realisable assets of the company; if the recapitalisation had failed (and the shares were not transferred) the value of the members' equity position would have been negative; and the shares in the company could have only been restored if the recapitalisation proceeded but that could only have proceeded if those who were to invest the capital acquired all of the shares in the company. **(b) Facts** **(i) Background** MPVL owned and operated a vanadium mine at Windimurra in Western Australia.  MVPL had two shareholders, one of which held 9999 shares, being 9.999% of the issued capital. In the first half of 2008, MVPL experienced a series of cost overruns as a result of both rising steel prices and an underestimation of the scope of the redevelopment required. On 18 February 2009, Darren Gordon Weaver, Andrew John Saker and Martin Jones were appointed as administrators of MVPL by the secured creditors pursuant to section 436C of the Corporations Act 2001 (Cth) (Act).  On the same date, Martin Madden and Brian McMaster were appointed joint and several receivers and managers of MVPL.  On 24 February 2010, MVPL executed a "holding" deed of company arrangement pursuant to a creditors' resolution passed at a Second Meeting of Creditors.   **(ii) Attempt to recapitalise or sell the assets** In May 2009, the receivers engaged Macquarie Capital Advisers Ltd (Macquarie) to commence a formal process of recapitalisation or sale of the shares or assets of MVPL.  The receivers undertook a comprehensive process intended to either achieve a sale of the assets or shares of MPVL or a recapitalisation.  In an attempt to avoid liquidation of MVPL, the receivers engaged in discussions with MRL, which owned the crushing and beneficiation plant situated on the MVPL tenement.  On 20 November 2009, MRL submitted an offer on behalf of itself and Atlantic Ltd (Consortium).  One of the key elements of the offer was the restructuring of the existing equity in MVPL so that the Consortium could acquire 100% of the shares in MVPL. The majority shareholder consented to the transfer of its shares in MVPL. However, the minority shareholder did not.  On 19 April 2010, the deed administrators received a letter from the minority shareholder stating that, as an unsecured creditor and shareholder, it was not expecting to receive any distribution under the MRL offer and did not understand the justification for what was, in its view, an unfair discriminatory proposal.  Specifically, the minority shareholder stated to the administrators, "You assert there to be a negative debt/asset residual value in MVPL at this point of time in the life of the project, though the recapitalisation plan itself is evidence of an inferred value of shares at some value above nil.  Put another way, if the shares had no value, the Consortium would not be seeking, as a term of the transfer, the compulsory confiscation of [the minority shareholder's] shares in the company". Martin CJ found that the minority shareholder's conclusion did not follow commercial practice.  His rationale is explained below. **(iii) Consequences of recapitalisation v liquidation** The deed administrators outlined to the court that if the minority shareholder's shares in MVPL were not transferred, the varied deed of company arrangement would fail, the recapitalisation would not proceed and MVPL would inevitably be put into liquidation.  The recapitalisation proposal would not repay the secured debt or the unsecured debt in full and there would be a shortfall of approximately $49.8 million to secured creditors and $292 million to unsecured creditors. In the alternative, if recapitalisation did not proceed and MVPL was wound up, the return to creditors would be less than under the recapitalisation proposal in that there would be a shortfall of approximately $107.2 million to secured creditors and $292 million to unsecured creditors. It was clear that the debts of MVPL exceeded its realisable assets by approximately $400 million. **(c) Decision**  Martin CJ found that the critical consideration in this case was that the evidence satisfied him that the shareholders would suffer no prejudice in the event of the transfer of their shares. He ordered that the shares be transferred pursuant section 444GA.  In making his decision, Martin CJ considered the CAMAC Report and the explanatory memorandum which was issued in the relation to the Corporations Amendment (Insolvency) Bill which introduced section 444GA.  He stated that the sentiments embodied were that prejudice to a shareholder would arise if there was some residual equity in the company.  If there was no residual equity or value in the company, it is difficult to see how shareholders could be prejudiced unfairly or fairly: "If the shares have no value, if the company has no residual value to the members and if the members would be unlikely to receive any distribution in the event of a liquidation, and if liquidation is the only alternative to the transfer proposed, then it is difficult to see how members could in those circumstances suffer any prejudice, let alone prejudice that could be described as unfair."etailed Contents |

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