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|  | |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  | | --- | --- | | **Bulletin No. 135**  Editor: [Professor Ian Ramsay](mailto:i.ramsay@unimelb.edu.au" \t "_new), 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/" \t "_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/" \t "_new), the [Australian Securities Exchange](http://www.asx.com.au/" \t "_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/" \t "_new), [Clayton Utz](http://www.claytonutz.com/" \t "_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/" \t "_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/" \t "_new), [Freehills](http://www.freehills.com/" \t "_new), [Mallesons Stephen Jaques](http://www.mallesons.com/" \t "_new).   1. 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Recent Corporate Law and Corporate Governance Developments** |  |  | | |  | | |  | | --- | | **1.1 G-20 summit on financial markets and the world economy**   On 15 November 2008, the leaders of the Group of Twenty countries (G-20) met in Washington to discuss the state of the world economy and the financial markets. The leaders issued a declaration that proposes a series of reforms.     **(a) Causes of the crisis**  The declaration includes the following comments on the causes of the current crisis:  "During a period of strong global growth, growing capital flows, and prolonged stability earlier this decade, market participants sought higher yields without an adequate appreciation of the risks and failed to exercise proper due diligence. At the same time, weak underwriting standards, unsound risk management practices, increasingly complex and opaque financial products, and consequent excessive leverage combined to create vulnerabilities in the system. Policy-makers, regulators and supervisors, in some advanced countries, did not adequately appreciate and address the risks building up in financial markets, keep pace with financial innovation, or take into account the systemic ramifications of domestic regulatory actions.   "Major underlying factors to the current situation were, among others, inconsistent and insufficiently coordinated macroeconomic policies, inadequate structural reforms, which led to unsustainable global macroeconomic outcomes. These developments, together, contributed to excesses and ultimately resulted in severe market disruption."   **(b) Common principles for reform of the financial markets**  The declaration states that the G-20 countries commit to implementing policies consistent with the following common principles for reform.   * Strengthening Transparency and Accountability: We will strengthen financial market transparency, including by enhancing required disclosure on complex financial products and ensuring complete and accurate disclosure by firms of their financial conditions. Incentives should be aligned to avoid excessive risk-taking. * Enhancing Sound Regulation: We pledge to strengthen our regulatory regimes, prudential oversight, and risk management, and ensure that all financial markets, products and participants are regulated or subject to oversight, as appropriate to their circumstances. We will exercise strong oversight over credit rating agencies, consistent with the agreed and strengthened international code of conduct. We will also make regulatory regimes more effective over the economic cycle, while ensuring that regulation is efficient, does not stifle innovation, and encourages expanded trade in financial products and services. We commit to transparent assessments of our national regulatory systems. * Promoting Integrity in Financial Markets: We commit to protect the integrity of the world's financial markets by bolstering investor and consumer protection, avoiding conflicts of interest, preventing illegal market manipulation, fraudulent activities and abuse, and protecting against illicit finance risks arising from non-cooperative jurisdictions. We will also promote information sharing, including with respect to jurisdictions that have yet to commit to international standards with respect to bank secrecy and transparency. * Reinforcing International Cooperation: We call upon our national and regional regulators to formulate their regulations and other measures in a consistent manner. Regulators should enhance their coordination and cooperation across all segments of financial markets, including with respect to cross-border capital flows. Regulators and other relevant authorities as a matter of priority should strengthen cooperation on crisis prevention, management, and resolution. * Reforming International Financial Institutions: We are committed to advancing the reform of the Bretton Woods Institutions so that they can more adequately reflect changing economic weights in the world economy in order to increase their legitimacy and effectiveness. In this respect, emerging and developing economies, including the poorest countries, should have greater voice and representation. The Financial Stability Forum (FSF) must expand urgently to a broader membership of emerging economies, and other major standard setting bodies should promptly review their membership. The IMF, in collaboration with the expanded FSF and other bodies, should work to better identify vulnerabilities, anticipate potential stresses, and act swiftly to play a key role in crisis response.   **(c) Action plan to implement principles for reform**  The action plan outlines a plan to implement the five agreed principles for reform.    **(i) Strengthening transparency and accountability**  **Immediate actions by 31 March 2009**   * The key global accounting standards bodies should work to enhance guidance for valuation of securities, also taking into account the valuation of complex, illiquid products, especially during times of stress. * Accounting standard setters should significantly advance their work to address weaknesses in accounting and disclosure standards for off-balance sheet vehicles. * Regulators and accounting standard setters should enhance the required disclosure of complex financial instruments by firms to market participants. * With a view toward promoting financial stability, the governance of the international accounting standard setting body should be further enhanced, including by undertaking a review of its membership, in particular in order to ensure transparency, accountability, and an appropriate relationship between this independent body and the relevant authorities. * Private sector bodies that have already developed best practices for private pools of capital and/or hedge funds should bring forward proposals for a set of unified best practices. Finance Ministers should assess the adequacy of these proposals, drawing upon the analysis of regulators, the expanded FSF, and other relevant bodies.   **Medium-term actions**   * The key global accounting standards bodies should work intensively toward the objective of creating a single high-quality global standard. * Regulators, supervisors, and accounting standard setters, as appropriate, should work with each other and the private sector on an ongoing basis to ensure consistent application and enforcement of high-quality accounting standards. * Financial institutions should provide enhanced risk disclosures in their reporting and disclose all losses on an ongoing basis, consistent with international best practice, as appropriate. Regulators should work to ensure that a financial institution's financial statements include a complete, accurate, and timely picture of the firm's activities (including off-balance sheet activities) and are reported on a consistent and regular basis.   **(ii) Enhancing sound regulation - regulatory regimes**  **Immediate actions by 31 March 2009**   * The IMF, expanded FSF, and other regulators and bodies should develop recommendations to mitigate pro-cyclicality, including the review of how valuation and leverage, bank capital, executive compensation, and provisioning practices may exacerbate cyclical trends.   **Medium-term actions**   * To the extent countries or regions have not already done so, each country or region pledges to review and report on the structure and principles of its regulatory system to ensure it is compatible with a modern and increasingly globalized financial system. To this end, all G-20 members commit to undertake a Financial Sector Assessment Program (FSAP) report and support the transparent assessments of countries' national regulatory systems. * The appropriate bodies should review the differentiated nature of regulation in the banking, securities, and insurance sectors and provide a report outlining the issue and making recommendations on needed improvements. A review of the scope of financial regulation, with a special emphasis on institutions, instruments, and markets that are currently unregulated, along with ensuring that all systemically-important institutions are appropriately regulated, should also be undertaken. * National and regional authorities should review resolution regimes and bankruptcy laws in light of recent experience to ensure that they permit an orderly wind-down of large complex cross-border financial institutions. * Definitions of capital should be harmonized in order to achieve consistent measures of capital and capital adequacy.   **(iii) Enhancing sound regulation - prudential oversight**  **Immediate actions by 31 March 2009**   * Regulators should take steps to ensure that credit rating agencies meet the highest standards of the international organization of securities regulators and that they avoid conflicts of interest, provide greater disclosure to investors and to issuers, and differentiate ratings for complex products. This will help ensure that credit rating agencies have the right incentives and appropriate oversight to enable them to perform their important role in providing unbiased information and assessments to markets. * The international organization of securities regulators should review credit rating agencies' adoption of the standards and mechanisms for monitoring compliance. * Authorities should ensure that financial institutions maintain adequate capital in amounts necessary to sustain confidence. International standard setters should set out strengthened capital requirements for banks' structured credit and securitization activities. * Supervisors and regulators, building on the imminent launch of central counterparty services for credit default swaps (CDS) in some countries, should: speed efforts to reduce the systemic risks of CDS and over-the-counter (OTC) derivatives transactions; insist that market participants support exchange traded or electronic trading platforms for CDS contracts; expand OTC derivatives market transparency; and ensure that the infrastructure for OTC derivatives can support growing volumes.   **Medium-term actions**   * Credit ratings agencies that provide public ratings should be registered. * Supervisors and central banks should develop robust and internationally consistent approaches for liquidity supervision of, and central bank liquidity operations for, cross-border banks.   **(iv) Enhancing sound regulation - risk management**  **Immediate actions by 31 March 2009**   * Regulators should develop enhanced guidance to strengthen banks' risk management practices, in line with international best practices, and should encourage financial firms to re-examine their internal controls and implement strengthened policies for sound risk management. * Regulators should develop and implement procedures to ensure that financial firms implement policies to better manage liquidity risk, including by creating strong liquidity cushions. * Supervisors should ensure that financial firms develop processes that provide for timely and comprehensive measurement of risk concentrations and large counterparty risk positions across products and geographies. * Firms should reassess their risk management models to guard against stress and report to supervisors on their efforts. * The Basel Committee should study the need for and help develop firms' new stress testing models, as appropriate. * Financial institutions should have clear internal incentives to promote stability, and action needs to be taken, through voluntary effort or regulatory action, to avoid compensation schemes which reward excessive short-term returns or risk taking. * Banks should exercise effective risk management and due diligence over structured products and securitization.   **Medium -term actions**   * International standard setting bodies, working with a broad range of economies and other appropriate bodies, should ensure that regulatory policy makers are aware and able to respond rapidly to evolution and innovation in financial markets and products. * Authorities should monitor substantial changes in asset prices and their implications for the macroeconomy and the financial system.   **(v) Promoting integrity in financial markets**  **Immediate actions by 31 March 2009**   * National and regional authorities should work together to enhance regulatory cooperation between jurisdictions on a regional and international level. * National and regional authorities should work to promote information sharing about domestic and cross-border threats to market stability and ensure that national (or regional, where applicable) legal provisions are adequate to address these threats. * National and regional authorities should also review business conduct rules to protect markets and investors, especially against market manipulation and fraud and strengthen their cross-border cooperation to protect the international financial system from illicit actors. In case of misconduct, there should be an appropriate sanctions regime.   **Medium -term actions**   * National and regional authorities should implement national and international measures that protect the global financial system from uncooperative and non-transparent jurisdictions that pose risks of illicit financial activity. * The Financial Action Task Force should continue its important work against money laundering and terrorist financing, and the G-20 members support the efforts of the World Bank - UN Stolen Asset Recovery (StAR) Initiative. * Tax authorities, drawing upon the work of relevant bodies such as the Organization for Economic Cooperation and Development (OECD), should continue efforts to promote tax information exchange. Lack of transparency and a failure to exchange tax information should be vigorously addressed.   **(vi) Reinforcing international cooperation**  **Immediate actions by 31 March 2009**   * Supervisors should collaborate to establish supervisory colleges for all major cross-border financial institutions, as part of efforts to strengthen the surveillance of cross-border firms. Major global banks should meet regularly with their supervisory college for comprehensive discussions of the firm's activities and assessment of the risks it faces. * Regulators should take all steps necessary to strengthen cross-border crisis management arrangements, including on cooperation and communication with each other and with appropriate authorities, and develop comprehensive contact lists and conduct simulation exercises, as appropriate.   **Medium -term actions**   * Authorities, drawing especially on the work of regulators, should collect information on areas where convergence in regulatory practices such as accounting standards, auditing, and deposit insurance is making progress, is in need of accelerated progress, or where there may be potential for progress. * Authorities should ensure that temporary measures to restore stability and confidence have minimal distortions and are unwound in a timely, well-sequenced and coordinated manner.   **(vii) Reforming international financial institutions**  **Immediate actions by 31 March 2009**   * The FSF should expand to a broader membership of emerging economies. * The IMF, with its focus on surveillance, and the expanded FSF, with its focus on standard setting, should strengthen their collaboration, enhancing efforts to better integrate regulatory and supervisory responses into the macro-prudential policy framework and conduct early warning exercises. * The IMF, given its universal membership and core macro-financial expertise, should, in close coordination with the FSF and others, take a leading role in drawing lessons from the current crisis, consistent with its mandate. * The G-20 should review the adequacy of the resources of the IMF, the World Bank Group and other multilateral development banks and stand ready to increase them where necessary. The IFIs should also continue to review and adapt their lending instruments to adequately meet their members' needs and revise their lending role in the light of the ongoing financial crisis. * The G-20 should explore ways to restore emerging and developing countries' access to credit and resume private capital flows which are critical for sustainable growth and development, including ongoing infrastructure investment. * In cases where severe market disruptions have limited access to the necessary financing for counter-cyclical fiscal policies, multilateral development banks must ensure arrangements are in place to support, as needed, those countries with a good track record and sound policies.   **Medium -term actions**   * The Bretton Woods Institutions must be comprehensively reformed so that they can more adequately reflect changing economic weights in the world economy and be more responsive to future challenges. Emerging and developing economies should have greater voice and representation in these institutions.  The IMF should conduct vigorous and even-handed surveillance reviews of all countries, as well as giving greater attention to their financial sectors and better integrating the reviews with the joint IMF/World Bank financial sector assessment programs. On this basis, the role of the IMF in providing macro-financial policy advice would be strengthened. * Advanced economies, the IMF, and other international organizations should provide capacity-building programs for emerging market economies and developing countries on the formulation and the implementation of new major regulations, consistent with international standards.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.2 Regulation of short selling**   On 13 November 2008, Senator Nick Sherry, the Australian Minister for Superannuation and Corporate Law, announced the details of the final Bill, introduced into Parliament on 13 November, to better regulate the use of short selling in the Australian financial market.   The [Corporations Amendment (Short Selling) Bill 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=104532" \t "Default) includes:   * a legislative ban on naked short selling; * an enhanced regime for permitted covered short selling, including placing a positive obligation on brokers to enquire of a client whether a sale is a covered short sale when a client places an order, and a direct obligation on market operators to publicly disclose short selling information they obtain from brokers; * an expansion of ASIC's powers to enable it to impose regulations on transactions that are substantially similar in effect to short selling and a clarification of ASIC's general powers by explicitly stating that ASIC has the power to limit, prohibit or impose additional conditions on short selling transactions; and * a legislative confirmation of ASIC's previous declarations temporarily banning covered short selling and requiring the disclosure of permitted covered short sales to provide both ASIC and industry participants with certainty over the scope of ASIC's powers in relation to short selling.   The Corporations Amendment (Short Selling) Bill 2008 and Explanatory Memorandum are available on the [Australian Parliament](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=;group=;holdingType=;id=;orderBy=priority,title;page=2;query=Dataset:billsCurBef%20SearchCategory_Phrase:%22bills%20and%20legislation%22%20Dataset_Phrase:%22billhome%22;querytype=;rec=9;resCount=" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.3 Regulation of credit rating agencies and research houses**   On 13 November 2008, Senator Nick Sherry, the Australian Minister for Superannuation and Corporate Law, announced significant reforms to the regulation of credit rating agencies (CRAs) and research houses, following a review conducted at the request of the Government by Treasury and the Australian Securities and Investments Commission (ASIC).   As part of the reforms, ASIC will remove the current exemption held by CRAs that means they do not need to hold an Australian Financial Services Licence (AFSL). All research houses will be required to have an AFSL.    In addition to being required to hold an AFSL, CRAs will now also be required to issue an Annual Compliance Report outlining in detail to ASIC how they have complied with the recently updated International Organisation of Securities Commissions (IOSCO) Code of Conduct Fundamentals for CRAs. This will also ensure uniform international regulation.   ASIC will also require research houses to issue a similar annual compliance report which will cover management of conflicts of interest and the procedures, methodologies and assumptions that result in research house advice.   In addition, the Government will:   * convene a roundtable of key investor organisations in Australia to discuss the role they can play in developing initiatives to drive improvements in the development, due diligence assessment and usage of ratings, and ensure they are active in investor-side initiatives at the international level; and * provide the G-20/Financial Stability Forum (FSF) with the new Australian Annual IOSCO Code Compliance Report model as a proposed model mechanism for jurisdiction reporting that will then allow national regulators to conduct a coordinated annual comparative global monitoring review of IOSCO Code compliance.   The Treasury/ASIC Joint Report is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf" \t "_new) website.  The Treasury discussion of Australian actions to address the Financial Stability Forum recommendations on CRAs is available [here](http://minscl.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/077.htm&pageID=003&min=njs&Year=&DocType" \t "_new).    The IOSCO Code of Fundamentals for CRAs is available on the [IOSCO](http://www.iosco.org/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.4 European Commission adopts proposal to regulate credit rating agencies**    On 12 November 2008, the European Commission (Europa) put forward a proposal for a Regulation on credit rating agencies. This proposal is part of a package of proposals to deal with the financial crisis and adds to Commission's proposals on Solvency II, Capital Requirements Directive, Deposit Guarantee Schemes and accounting. The new rules are designed to ensure high quality credit ratings which are not tainted by the conflicts of interest which are inherent to the ratings business.    The proposal introduces a registration procedure for credit rating agencies to enable European supervisors to control the activities of rating agencies whose ratings are used by credit institutions, investment firms, insurance, assurance and reinsurance undertakings, collective investment schemes and pension funds within the EU.    Credit rating agencies will have to comply with rules to make sure:   * that ratings are not affected by conflicts of interest; * that credit rating agencies remain vigilant on the quality of the rating methodology and the ratings; and * that credit rating agencies act in a transparent manner.   The proposal also includes a surveillance regime whereby European regulators will supervise credit rating agencies.  The new rules include the following:   * Credit rating agencies may not provide advisory services. * They will not be allowed to rate financial instruments if they do not have sufficient quality information on which to base their ratings. * They must disclose the models, methodologies and key assumptions on which they base their ratings. * They will be obliged to publish an annual transparency report. * They will have to create an internal function to review the quality of their ratings. * They should have at least three independent directors on their boards whose remuneration cannot depend on the business performance of the rating agency. They will be appointed for a single term of office which can be no longer than five years. They can only be dismissed in case of professional misconduct. At least one of them should be an expert in securitization and structured finance.   Some of the proposed rules are based on the standards set in the International Organisation of Securities Commissions (IOSCO) code. The proposal gives those rules a legally binding character. Other parts of the proposed rules are stricter than the IOSCO code.    The proposal is available on the [European Commission](http://ec.europa.eu/internal_market/securities/agencies/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.5 CEO turnover study**   Turnover of Australian Securities Exchange (ASX) 200 CEOs reached 18% in 2007 according to the annual CEO turnover study released on 11 November 2008 by Booz & Company. This figure is up from 13.4% the previous year, well above the global average CEO turnover of 13.8% and the highest in the study's eight-year history. At 18%, the rate of CEO departures from listed companies in Australia in 2007 was among the highest in the world. Australian CEOs also spend less time in the job than their international counterparts. According to the study, Australian CEOs who departed in 2007 had spent an average 5.7 years in the role, close to the long-term average Australian CEO tenure of 5.9 years since 2000. Globally, average CEO tenure was 7.2 years in 2007, down slightly from the long-term average global CEO tenure of 8 years since 2000. While the average tenure of Australian CEOs is relatively short, their performance legacy on departure - as measured by total shareholder returns during their tenure - continues to improve.    The study is available [here](http://www.booz.com/media/file/CEO_Turnover_anzsea.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.6 Bank guarantee developments**   As noted in the October issue of the Corporate Law Bulletin, the Australian Federal Government announced that a $1 million threshold limit will apply in respect of eligible guaranteed deposits from 28 November 2008. Up until that date, all deposits eligible for the guarantee will be guaranteed without charge. After that date, deposits of over $1 million will only be guaranteed if the relevant fee is paid.    The Government guarantee of deposits only applies to protected accounts with Authorised Deposit Institutions (ADIs). The [Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=104192" \t "Default) defines a protected account as an account that is kept by an account-holder with an ADI that is either:   * prescribed by regulation; or * an account, or covered financial product, that is kept under an agreement between the account-holder and the ADI requiring the ADI to pay the account-holder on demand, or at an agreed time, the net credit balance.   Pursuant to s. 5(8) of the [Banking Act 1959](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6665" \t "Default), the Minister may declare that a specific financial product is a covered financial product for the purposes of the Government guarantee. A declaration has since been made, the Banking Act 1959 - Declaration of Covered Financial Products.  Under the Declaration, various deposit accounts such as saving, call, current, debit card, transactions, or mortgage offset accounts that are separate deposit accounts are declared to be covered financial products.  The Banking Act 1959 - Declaration of Covered Financial Products is available on the [ComLaw](http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/asmade/bytitle/C7E3D1640BD9F7A4CA2574F8001DD3B0?OpenDocument" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.7 APRA proposes revised audit requirements for ADIs**  On 7 November 2008, the Australian Prudential Regulation Authority (APRA) released a consultation package on proposed revisions to its requirements for the external auditor of an authorised deposit-taking institution (ADI).   APRA is proposing to amend Prudential Standard APS310 Audit and Related Arrangements for Prudential Reporting to take account of changes in ADI group structures, developments in audit-related prudential standards applied to other APRA-regulated institutions and, importantly, changes in ADI prudential reporting requirements flowing from the introduction of the Basel II Capital Framework in Australia.   The proposed amendments seek to harmonise ADI auditor requirements with comparable APRA requirements in the general insurance and life insurance industries, to the extent practical.   It is intended that the final prudential standard will be released in December 2008 and will become effective on 1 January 2009.     The consultation package, comprising a draft revised prudential standard and a discussion paper is available on the [APRA](http://www.apra.gov.au/policy/APS-310-November-2008.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.8 Professional Oversight Board publishes arrangements for regulating audit firms from outside the European Union**    On 6 November 2008, the UK Professional Oversight Board published the detailed requirements to give practical effect in the UK to European requirements for the regulation of the auditors of companies from outside Europe that have issued securities on regulated markets within the EU. The requirements derive from the Statutory Audit Directive, which was agreed in 2006. The Board estimates that in the UK there are some 570 such issuers from 50 countries audited by around 150 third country audit firms.    The detailed forms and guidance reflect the Decision by the European Commission published on 31 July 2008 setting out transitional arrangements that are available to audit firms from specified countries in respect of the audits of accounts for financial periods starting between 29 June 2008 and 1 July 2010. Such firms are exempted from most of the regulatory requirements, reducing substantially the regulatory obligations the Directive otherwise imposes.    The UK forms and guidance also follow in most material respects a common format agreed by Member States; and they reflect points made in response to the UK consultation carried out between May and July this year, while meeting UK statutory requirements.    The consultation is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/Consdoc%2028%2005%2008%20FINAL2.pdf" \t "_new) website.   The European Commission decision is available on the [European Commission](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:202:0070:0073:EN:PDF" \t "_new) website.   The requirements are available on the [FRC](http://www.frc.org.uk/pob/regulation/auditors.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.9 Latest IMF world economic outlook**    On 6 November 2008, the International Monetary (IMF) published its latest World Economic Outlook (WEO). The IMF is urging countries to stimulate their economies in the face of a bigger-than-expected slowdown in the global economy triggered by recent financial turmoil. In its latest forecast for world economic growth, the IMF sharply revised its growth projections downward, saying that "global activity is slowing quickly."   It said that world output is projected to expand by 2.2 percent in 2009, down by some ¾ percentage point of GDP relative to the projections in the October WEO. In advanced economies, output is forecast to contract on a full-year basis in 2009, the first such fall in the post-war period. In emerging economies, growth is projected to slow appreciably but still reach 5 percent in 2009.    But the IMF noted that these projections were based on currently announced policies, and advocated further policy actions to sustain demand. "Global action to support financial markets and provide further fiscal stimulus and monetary easing can help limit the decline in world growth," the outlook said.    The updated World Economic Outlook is available on the [IMF](http://www.imf.org/external/pubs/ft/weo/2008/update/03/pdf/1108.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.10 Governance of insurance firms**   On 4 November 2008, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) published an issues paper containing the first draft of its views concerning Level 2 implementing measures on the system of governance established by the Solvency II Framework Directive proposal. The matters dealt with in the paper include general governance requirements; fitness and propriety; risk management; internal control; internal audit; actuarial function; and outsourcing.   The paper is intended to give stakeholders the opportunity to comment on the views expressed by CEIOPS before CEIOPS issues its formal Level 2 advice for consultation. CEIOPS notes that the paper may also serve to prompt thought on what types of issues could be considered suitable for Level 3 guidance. Comments are invited by 12 January 2009.   The paper, which is titled "Implementing Measures on System of Governance", is available on the [CEIOPS](http://www.ceiops.eu/media/docman/public_files/consultations/IssuesPaper-on-Governance.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.11 EU framework for investment funds: management company passport**  On 31 October 2008, the Committee of European Securities Regulators (CESR) published its advice to the European Commission (Commission) on the EU framework for investment funds (UCITS) management company passport (Ref. CESR/08-867). The advice follows a short public consultation carried out in the first half of October, as well as a call for evidence published in July.    The Commission requested assistance from CESR on 16 July 2008 on supervisory issues which would arise in the event that a UCITS was managed by a management company situated in another Member State (the management company passport). The request followed publication of the Commission's proposals for an improved EU framework for investment funds, to be introduced via revisions to the UCITS Directive. The Commission's request to CESR is designed to facilitate the development of provisions permitting the introduction of a management company passport under conditions that are consistent with a high level of investor protection. The Commission has stated that, following receipt of CESR's advice, it aims to come forward with an appropriate legislative proposal in time for its adoption during the current legislature.  A number of key points covered under the different sections of CESR's advice are:   Definition of domicile: CESR sets out detailed provisions designed to ensure clarity on the home Member State of the management company, the UCITS and the depositary. This section includes the introduction of a new concept, that of the local point of contact, which should be put in place for remotely managed contractual funds.  Applicable law and supervisory responsibilities: CESR's advice includes detailed provisions on the applicable law and allocation of responsibilities both in the case of free provision of services and services provided via a branch. This section also sets out provisions designed to facilitate co-operation between competent authorities, including mutual delegation of supervisory tasks and the possibility to establish colleges of supervisors.  Authorisation procedure for UCITS funds whose management company is established in another Member State: The advice sets out the procedure to be followed when a UCITS is authorised under the framework of the management company passport. This includes provisions on the conditions under which the competent authority of the UCITS home Member State should approve the choice of the management company.   On-going supervision of the management of the fund: CESR's advice sets out detailed provisions on the flow of information from the entities involved to the competent authorities, and among the entities themselves. There are also provisions relating to the role of auditors in the context of the passport.  Dealing with breaches of rules governing the management of the fund: The advice covers circumstances in which a competent authority wishes to take enforcement action against an entity established in a different Member State. There are also specific provisions designed to ensure fair treatment of unit-holders in the case of an infringement.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.12 IASB publishes educational guidance on the application of fair value measurement when markets become inactive**  On 31 October 2008, the International Accounting Standards Board (IASB) published educational guidance on the application of fair value measurement when markets become inactive.    The educational guidance takes the form of a summary document prepared by IASB staff and the final report of the expert advisory panel established to consider the issue.          The summary document sets out the context of the expert advisory panel report and highlights important issues associated with measuring the fair value of financial instruments when markets become inactive. It takes into consideration and is consistent with recent documents issued by the US Financial Accounting Standards Board (FASB) on 10 October and by the Office of the Chief Accountant of the US Securities and Exchange Commission (SEC) and FASB staff on 30 September.   The report of the expert advisory panel is a summary of the seven meetings of experts who are users, preparers and auditors of financial statements, as well as regulators and others. In the report, the panel identifies practices that experts use for measuring the fair value of financial instruments when markets become inactive and practices for fair value disclosures in such situations. The report provides information and educational guidance about the processes used and judgments made when measuring and disclosing fair value.   The IASB has also used the work of the panel to address the issues of disclosure, an area identified by the Financial Stability Forum (FSF) along with fair value measurement and off balance sheet accounting. The feedback from the panel was incorporated in the preparation of the exposure draft proposing improvements to IFRS 7 Financial Instruments: Disclosures published on 15 October and will be used in the development of the forthcoming standard on fair value measurement. The IASB expects to publish an exposure draft of that standard in 2009.    The educational guidance is available on the [IASB](http://www.iasb.org/expert-advisory-panel" \t "_new) website.   A summary of the IASB response to the credit crisis is available on the [IASB](http://www.iasb.org/credit+crisis" \t "_new) website.    The final report is available on the [IASB](http://www.iasb.org/NR/rdonlyres/0E37D59C-1C74-4D61-A984-8FAC61915010/0/IASB_Expert_Advisory_Panel_October_2008.pdf" \t "_new) website.   The staff summary is available on the [IASB](http://www.iasb.org/NR/rdonlyres/F3AFDA4D-6605-42CE-858F-23BBB9044355/0/IASB_Staff_Summary_October_2008.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.13 European framework for response to financial crisis**   On 29 October 2008, the European Commission published a Communication titled "From financial crisis to recovery: A European framework for action". The paper sets out a three part approach which will be developed into an overall EU recovery action plan/framework:   * a new financial market architecture at EU level; * dealing with the impact on the real economy; and * a global response to the financial crisis.   The Commission presents the communication as a contribution to ongoing debate inside the EU and with its international partners on how best to respond to the current crisis and its aftermath.    According to the Commission, in order to reduce the risk of a recurrence of financial crises in the future, a series of measures to reform the global financial architecture should be pursued. These should relate broadly to the following areas:   * strengthening the international consistency and quality of regulatory standards, including implementing reforms (as reflected in the ECOFIN roadmaps and FSF recommendations) and extending them at the global level; * strengthening international coordination among financial supervisors; * strengthening macroeconomic surveillance and crisis prevention, bringing together macro- and micro-prudential aspects, enhancing financial stability and developing early warning systems; and * further developing the capacity to deal with financial crises and resolution capacities at the national, regional and multilateral levels.   The Communication is available on the [European Commission](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0706:FIN:EN:PDF" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.14 2008 Australian census of women on boards and in executive leadership**   On 28 October 2008, the Australian Government's Equal Opportunity for Women in the Workplace Agency (EOWA) published its 2008 Australian Census of Women in Leadership. The study reveals that the number of women on boards and in executive management positions has declined since 2006, and in some cases reverted to pre-2004 levels. Australia now trails the USA, UK, South Africa and New Zealand.    The EOWA Census shows the number of women executive managers in the ASX200 has declined to 10.7% from 12% in 2006 and 11.4% in 2004. The number of companies with no women executive managers has risen sharply to 45.5% from 39.5% in 2006.    54.5% of ASX200 companies have at least one woman in an executive management position, which is lower than the USA (85.2%), Canada (65.6%), UK (60%) and South Africa (59.3%). In only 16.5% of ASX200 companies, women comprise 25% or more of the executive management team, down from 18% in 2006.    At the time of the Census, women held only four CEO positions (2%). Harvey Norman Holdings Limited, Macarthur Coal Limited, Macquarie Airports and Singapore Telecommunications Limited were the only ASX200 companies led by women.   At board director level there were more than 10 men to every one woman and at CEO level there were 49 male CEOs for every female CEO in the ASX200.   Women chaired just four boards (2%) and held 8.3% of board director positions, a decline from 8.7% in 2006 and just 0.1 percentage point higher than in 2004. This is lower than other comparable countries and the EC average  (10.3%). Just over half of all ASX200 boards have no women board directors. In 6% of ASX200 companies, 25% or more of the board directors are women, a decrease from 12% in 2006 and 7.1% in 2004.    There are just a handful of companies among the ASX200 where women make up 50% or more of the senior management team. Only one company has a 50% female board and 57.1% of its executive managers are female.   The report is available on the [EOWA](http://www.eowa.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.15 Additional funding for Australian regulators**   On 28 October 2008, the Australian Government announced additional funding for the Australian Prudential Regulation Authority (APRA), the Australian Securities and Investments Commission (ASIC) and the Department of the Treasury.    The additional funding to APRA will also enable it to respond to applications from entities seeking to become authorised deposit-taking institutions (ADIs), where they are able to meet Australia's prudential regulatory requirements. As ADIs these entities would be able to take deposits and would be eligible for the Government guarantee on deposits. The additional funding totals $83 million over four years with $21.5 million in 2008-09, $43.5 million in 2009-10, $9 million in 2010-11 and $9 million in 2011-2012. Of this additional funding, APRA will receive $9 million in 2008-09 and $18.5 million in 2009-10, and $9 million in each of 2010-11 and 2011-12 to enable it to manage the effects of the global financial crisis. This funding will be provided from the Budget, rather than being recovered from levies on the financial sector. These arrangements will be reviewed in the 2009-10 Budget context and in light of developments in global financial markets.   Of the additional funding, ASIC will receive $10 million in 2008-09 and $20 million in 2009-10 to help it manage the domestic and international implications arising from the global financial crisis.   This funding will provide ASIC with additional 'front-line' resources for market monitoring and enforcement activities to further strengthen confidence in Australia's financial markets.   Of the additional funding, Treasury will receive funding of $2.5 million in 2008-09 and $5 million in 2009-2010 to ensure Australia's regulatory environment continues to be world's best practice and to pursue reform of the global financial architecture, through the G20 and other international forums.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.16 Legislation criminalising cartels**   On 27 October 2008, the Australian Assistant Treasurer and Minister for Competition Policy and Consumer Affairs announced a package of measures providing criminal sanctions for serious cartel conduct.  **(a) Elements of the criminal offences**   The Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 makes it an offence for a corporation to make or give effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict outputs, divide or share markets, or rig bids.   The Government has decided that the offences should no longer include the words 'with the intention of dishonestly obtaining a benefit', and instead apply fault elements under the Criminal Code (intention, and knowledge or belief) to the offences.    This will ensure that the burden of proof is high enough to catch only really serious offenders but also ensures the fault element is not used as an escape clause in the law.     **(b) Criminal penalties**  The maximum penalties for the offences are:   * for an individual: a maximum term of imprisonment of 10 years and/or a maximum fine of $220,000; and * for a corporation: a fine that is the greater of $10 million or three times the value of the benefit from the cartel, or where the value cannot be determined, 10 per cent of annual turnover.   **(c) Parallel civil prohibitions**  With the removal of the dishonesty element from the criminal offences, the Government will introduce a parallel scheme of civil prohibitions on serious cartel conduct that contain the same elements as the new criminal offences.   The differentiating factors are that the criminal offences require proof of the elements of the offence beyond reasonable doubt, and that certain 'fault' elements are automatically applied under the Commonwealth Criminal Code.  As parallel criminal and civil prohibitions could give rise to double jeopardy concerns, the Government will also enable civil proceedings to be postponed until criminal proceedings are completed. If the defendant is convicted, the civil proceedings would be terminated.   **(d) Cartel provisions**   The Government has changed the tests that apply in determining whether a provision of a contract, arrangement or understanding qualifies as a cartel provision and is prohibited.   For a breach comprising price fixing, the test now provides that the provision must have had the purpose, effect or likely effect, of directly or indirectly fixing prices.   For a breach comprising other forms of serious cartel conduct (output restrictions, market sharing and bid rigging), the test now provides that the provision must have had the purpose of directly or indirectly restricting outputs, sharing markets or rigging bids.   These amendments bring the tests in line with tests that apply under the existing civil prohibitions in the [Trade Practices Act 1974](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) upon which the new cartel prohibitions have been modelled.   **(e) Telephone interception powers**   Cartels are generally covert arrangements.  Discovery and proof of the existence of a cartel is more difficult than other forms of corporate misconduct, justifying such powers to penetrate the cloak of secrecy.   The Government has therefore decided to amend the [Telecommunications (Interception and Access) Act 1979](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8268" \t "Default) to enable telecommunications interception powers to be used in addition to other available tools to investigate breaches of the cartel offence.   Increasing the penalty for individuals to a 10 year jail term brings the cartel offences within the threshold requirements for accessing such powers.  **(f) Joint venture defence**    The Bill provides a defence to criminal and civil actions if:   * the parties to the contract are, or will be, carrying on a joint venture for the production or supply of goods or services; and * the cartel provision is for the purposes of that joint venture.   The final Bill proposed for introduction into Parliament is available on the [Treasury](http://www.treasury.gov.au/home.asp?ContentID=521" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.17 Top 100 CEO pay research**    **(a) Overview**  Since 2001 the Australian Council of Superannuation Investors (ACSI) has monitored the CEO Pay in the top 100 Australian listed companies. On 27 October 2008, ACSI released its latest research.   Over the period from 2001 to 2007, median fixed remuneration increased by 96.4 percent in total, or 11.9 percent per annum compound, even allowing for the slight decrease in median CEO fixed pay in 2007. Over the same period, average adult weekly ordinary time earnings increased by 32.3 percent, while the consumer price index increased by 17.7 percent.   In the 2007 year 69 companies were analysed. Not all the S&P/ASX 100 constituents were included because:   * Some CEOs were appointed mid-way through the financial year, and so their disclosed remuneration was for less than 12 months. These CEOs were removed from the analysis so as not to distort the figures. * Some of the entities in the S&P/ASX 100 index are trusts, 'managed investment schemes', or stapled securities rather than companies, that do not have executives; instead, they are managed by a fund management company, 'responsible entity', or some other external manager. * One company is a New Zealand based company, where remuneration disclosure requirements differ from those in Australia. Under the New Zealand requirements, only the total remuneration figure need be disclosed. As such, the components of remuneration could not be broken out, which required the exclusion of this company.   For the 69 CEOs included in the survey, average total pay was $5.53 million, up from $4.56 million in 2006 and $3.77 million in 2005. Median Top 100 CEO pay also increased substantially to $4.17 million in 2007, up from $3.27 million in 2006 and $3.09 million in 2005.  **(b) Fixed pay**  Few companies provide shareholders with explanations of fixed pay increases beyond generic disclosures stating fixed pay is reviewed annually with regard to movements in pay at other companies of a similar size.  ACSI believes that as base salary and other aspects of fixed remuneration are (by definition) not explicitly tied to the company's performance, companies should disclose clearly the reason or reasons behind a significant increase in base salary.  **(c) Short term incentives (STI)**  Most Top 100 companies have a short-term incentive plan (STI) for their senior executives, designed to reward executives for performance across a single financial year (or in some cases, achieving milestones against strategic targets set over several years).   In 2007 - 88.4 percent of CEO's received a STI payment.    It is not common for a STIP's performance measures to relate to the company's share price or total shareholder return. Such plans usually have performance indicators relating to: (a)   'quantitative' metrics such as company-wide accounting performance (such as earnings before interest, depreciation, tax and amortisation), business-division performance, successful completion of major projects, etc; and (b)   'qualitative' metrics such as customer or employee satisfaction. An increasing trend has been for companies to also include measures relating to sustainability (such as occupational health and safety) in annual bonus programs (the most striking example is Westpac, where the former CEO, David Morgan, had part of his annual bonus assessed against Westpac retaining its ranking in an index of sustainable finance companies).  In 2007, the percentage of Top 100 companies CEOs who received an annual bonus dropped from 94.6 percent (the highest in the history of the ACSI longitudinal study, recorded in 2006) to 88.4 percent.  Whilst the number receiving bonus decreased the amount of bonuses increased:   * 2002-aggregate bonus paid to the 60 CEOs who received an STI was $54.2 million. * 2007-aggregate bonus received by the 61 executives who received an STI was $132.87 million.   The amount of shareholders' money paid as annual bonuses to CEOs in the Top 100 companies has more than doubled over five years and the proportion of CEOs receiving a bonus has risen by 14.9 percent.  The increased number of CEOs receiving larger STI's between 2002 and 2007 has also coincided with increased shareholder scrutiny of the terms of equity grants made to CEOs.  In assessing annual bonuses most companies only provide general comments about the types of measures used in assessing requirements despite the requirements of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for them to provide a "detailed summary" of hurdles to all aspects of performance pay.   ACSI believes that as annual bonuses that are usually paid in cash, they should be linked to clear key performance requirements and targets and that where commercial confidentiality applies to performance objectives and targets, shareholders should be informed of the parameters adopted in the financial year for the bonus arrangements.  **(d) Long term incentives**  In 2007, median total remuneration (including long-term incentives) was $4.17 million, up 27.3 percent on the 2006 median of $3.27 million. The average total remuneration of a Top 100 CEO increased in 2007 by 21.4 percent, from $4.56 million to $5.53 million. On an ex-News Corp basis, total average CEO pay has more than doubled since 2001.  The total pay including long-term incentive payments ranged from $404,062 to $33.49 million in 2007. The data indicates that 50 CEOs were paid less than $5.34 million, below the mean figure; 16 CEOs were paid above the average but below $13.88 million while three CEOs - Alan Moss of Macquarie, Phil Green of Babcock & Brown and Frank Lowy of Westfield - received considerably more remuneration ($15.89 million or more) than their peers.  When examining total pay including the value of long-term incentives, the accounting treatment of long-term incentives should be borne in mind. Australian accounting standards (reflecting IFRS) require the value of long term equity incentives to be calculated in the year they are granted, and then allocated pro-rata in each remuneration report during the vesting period.  ACSI believes that the performance conditions for long-term incentive schemes should reward executives for contributing to long-term, above average corporate performance with forward-looking dual performance hurdles i.e. TRS and EPS hurdles which measure the Corporation's performance on an absolute and relative basis, to be satisfied before any share options or other long-term incentive instruments vest. Vesting periods should also be between 2 and 5 years.  **(e) Reform proposals**  ACSI seeks the following minimum reforms to remuneration structures:  1. As base salary and other aspects of fixed remuneration are (by definition) not explicitly tied to the company's performance; companies should disclose clearly the reason or reasons behind a significant increase in base salary. 2. As annual bonuses are usually paid in cash, they should be linked  to clear key performance requirements and targets and where commercial confidentiality applies to performance objectives and targets, shareholders should be informed of the parameters adopted in the financial year for the bonus arrangements. 3. The performance conditions for long-term incentive schemes should reward executives for contributing to long term, above average corporate performance with forward-looking dual performance hurdles which measure the corporation's performance on an absolute and relative basis, to be satisfied before any share options or other long term incentive instruments vest. 4. All grants of all share incentives to key management personnel, irrespective of whether they are newly issued or acquired on market should be approved in advance by shareholders.  5. Any payments or benefits that accrue to a member of key management personnel on cessation of employment, that are greater than 12 months fixed pay (based on average fixed pay over the duration and service in that position) be approved by shareholders after cessation of employment has occurred. 6. The Corporations Act require the disclosure of a dollar figure of the maximum amount that could be paid by a company, should a board exercise all its discretion in favour of a member of key management personnel on cessation of employment. 7. There be compulsory disclosure of remuneration consultants who advise companies and the other arrangements the remuneration consultants have with the company.  The full research report is available on the [ACSI](http://www.acsi.org.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.18 Assessment of Australia's clearing and settlement facilities and consultation on variations of the financial stability standards**   On 24 October 2008, the Reserve Bank published its 2007/08 assessment of Australia's licensed clearing and settlement facilities against the Financial Stability Standards. Under these standards, which were determined by the Reserve Bank in 2003, licensed facilities are required to take all reasonable steps to promote the stability of the Australian financial system. The Reserve Bank is required to assess licensed facilities against these standards at least once a year.   The Reserve Bank also released two consultation papers on variations to the Financial Stability Standards. The proposed variations will have the effect of:   * improving the transparency of securities lending in the Australian equity market; and * establishing a framework for the regulation of overseas central counterparties operating in Australia.   **(a) 2007/08 assessment of clearing and settlement facilities in Australia**   It is the Reserve Bank's assessment that all four clearing and settlement facilities operated by the Australian Securities Exchange (ASX) - the Australian Clearing House; the SFE Clearing Corporation; ASX Settlement and Transfer Corporation; and Austraclear - complied with the relevant Financial Stability Standards over 2007/08.    The assessment acknowledges the challenges in the operating environment over this period, noting the increase in market volatility and rising volumes and values traded in several markets. Given these developments, the assessment pays particular attention to the facilities' policies for monitoring participants and managing financial risks. The report highlights important enhancements to the risk-management processes of the ASX central counterparties, while also identifying a number of areas for further consideration over the period ahead.   **(b) Consultation on disclosure of equities securities lending**   This consultation paper follows the Reserve Bank's earlier Review of Equities Settlement Practices in Australia, conducted in response to settlement delays in late January 2008. Under the changes proposed, the ASX will be required to collect and publish data on the lending of equities. This initiative, together with the complementary work being undertaken by the Australian Securities and Investments Commission (ASIC) and the ASX to improve the transparency of short selling of equities, will promote the efficiency, stability and integrity of the Australian equity market.   The Reserve Bank is proposing to introduce the disclosure requirement by modifying the Financial Stability Standard for Securities Settlement Facilities. The proposed variation will make it clear that to comply fully with the Standard, a licensed facility will need to collect and publish data on securities lending. The consultation document discusses a number of practical considerations in implementing this requirement.   **(c) Consultation on oversight of overseas clearing facilities**   The Reserve Bank is also proposing a modification to the Financial Stability Standard for Central Counterparties to establish a framework for regulation of overseas central counterparties. Where a facility is subject to a sufficiently equivalent overseas regulatory regime, the Reserve Bank will explicitly take into account the facility's compliance with this regime in assessing whether it is contributing to the overall stability of the Australian financial system. The proposed regulatory framework will help to ensure that any foreign central counterparty operating in Australia promotes financial stability in Australia while, at the same time, avoiding unnecessary regulatory burden.   The report on assessment of clearing and settlement facilities is available on the [RBA](http://www.rba.gov.au/PaymentsSystem/StdClearingSettlement/Pdf/2007_08_report_clrg_settlement_facilities.pdf" \t "_new) website.   The transparency of securities lending consultation paper is available on the [RBA](http://www.rba.gov.au/PaymentsSystem/StdClearingSettlement/Pdf/cdesl_102008.pdf" \t "_new) website.   The framework for the regulation of overseas central counterparties consultation paper is available on the [RBA](http://www.rba.gov.au/PaymentsSystem/StdClearingSettlement/Pdf/coof_102008.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.19 CESR and ESCB consult on recommendations for securities clearing and settlement systems and central counterparties in the European Union**   On 23 October 2008, the Committee of European Securities Regulators (CESR) and the European System of Central Banks (ESCB) published "Draft recommendations for securities clearing and settlement systems and draft recommendations for central counterparties in the European Union" for public consultation in the context of the joint work being undertaken by the ESCB and the CESR in the field of securities clearing and settlement. Part 1 of the consultation paper contains 19 recommendations, which deal with central securities depositaries (CSDs), and Part 2 contains 15 recommendations regarding central counterparties (CCPs), which aim to increase the safety, soundness and efficiency of securities clearing and settlement systems and CCPs, respectively.    Further information is available on the [CESR](http://www.cesr.eu/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.20 FSA publishes contracts for difference feedback statement**   On 23 October 2008, the UK Financial Services Authority (FSA) published its feedback statement on disclosure for contracts for difference (CfDs).    After receiving extensive feedback from a broad spectrum of interested parties on its November 2007 CfDs Consultation Paper, and as announced in its policy update of July 2008, the FSA has decided to implement a general disclosure regime for long CfD positions as the most effective way of addressing concerns in relation to voting rights and corporate influence. Existing share and CfD holdings, in the same company, should be aggregated for disclosure purposes. The initial disclosure threshold will be at 3%, in line with the existing disclosure rules. The FSA is proposing an exemption for CfD writers which act as intermediaries, similar to the UK Takeover Panel's Recognised Intermediary exemption, to reduce unnecessary disclosures.   The Feedback Statement contains draft rules to implement the position described above. Although the position has now been finalised, the FSA will accept technical comments on the rules to ensure they are effective. The deadline for such comments will be 23 January 2009 with the aim of issuing final rules in February 2009 to come into effect on 1 September 2009.   The feedback statement is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/CP/2008/08_17.shtml" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.21 SEC announces fiscal 2008 enforcement results**   On 22 October 2008, the US Securities and Exchange Commission (SEC) announced that the second-highest number of enforcement actions in agency history took place in fiscal year 2008. For the second year in a row, the SEC also returned more than US$1 billion to harmed investors through Fair Fund distributions.  The SEC brought 671 enforcement actions during the just-completed fiscal year, with the number of insider trading and market manipulation cases up more than 25 percent and 45 percent respectively over the previous year. In addition, the SEC has more than 50 ongoing investigations relating to the subprime market.  The Division of Enforcement also reached preliminary settlements in principle with six of the largest firms in the auction rate securities market. Although not included in these FY 2008 enforcement statistics, these settlements, which are subject to final approval by the Commission, would be the largest in the history of the SEC and would return more than US$50 billion to investors.  The SEC took a record number of enforcement actions against market manipulation in FY 2008, including charges against a Wall Street short seller for spreading false rumours, and charging 10 insiders or promoters of publicly traded companies who made stock sales in exchange for illegal kickbacks.   Among the major fraud cases brought by the SEC in FY 2008, the SEC sued two Bear Stearns hedge fund managers for fraudulently misleading investors about the financial state of the firm's two largest hedge funds. The agency also charged five former employees of the City of San Diego for failing to disclose to the investing public buying the city's municipal bonds that there were funding problems with its pension and retiree health care obligations and those liabilities had placed the city in serious financial jeopardy.  The SEC brought the highest number ever of insider trading cases in FY 2008, including charging former Dow Jones Board Member David Li and three other Hong Kong residents in a US$24 million insider trading enforcement action, and charging the former chairman and CEO of a division of Enron Corp. with illegally selling hundreds of thousands of shares of Enron stock based on non-public information.   Combating accounting fraud, including illegal stock option backdating, also was a priority for fiscal year 2008. During the year, the SEC charged eight public companies and 27 executives with providing false information to investors based on improper accounting for backdated stock option grants.  Another growth area is cases against US public companies that use corporate funds to bribe foreign officials, an activity precluded by the Foreign Corrupt Practices Act (FCPA). In fiscal year 2008, the SEC filed 15 FCPA cases. Since January 2006, the SEC has brought 38 FCPA enforcement actions - more than were brought in all prior years combined since FCPA became law in 1977.  Further information is available on the [SEC](http://www.sec.gov/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.22 PCAOB proposes new auditing standards related to the auditor's assessment of and responses to risk**   On 21 October 2008, the US Public Company Accounting Oversight Board (PCAOB) voted to propose for public comment a suite of seven new auditing standards related to the auditor's assessment of and responses to risk and related conforming amendments. The proposed standards would supersede the Board's interim auditing standards related to audit risk and materiality, audit planning and supervision, consideration of internal control in an audit of financial statements, audit evidence, and performing tests of accounts and disclosures before year end.   The proposed standards would establish requirements and provide direction on audit procedures performed throughout the audit, from the initial planning stages through the evaluation of the audit results in forming the opinions in the auditor's report. The proposals build upon and attempt to improve the existing framework for risk assessment by, among other things, taking account of improvements in risk assessment methodologies, enhancing the integration of the risk assessment standards with the Board's standard for the audit of internal control over financial reporting, emphasizing the auditor's responsibilities for considering the risk of fraud as being a central part of the audit process, and reducing unnecessary differences with the risk assessment standards of other auditing standard setters.    The proposed risk assessment standards are as follows:   * Audit risk in an audit of financial statements. This proposed standard describes the components of audit risk and the auditor's responsibilities for reducing audit risk to an appropriately low level in order to obtain reasonable assurance in an audit of financial statements. * Audit planning and supervision. This proposed standard describes the auditor's responsibilities for planning the audit, including assessing matters that are important to the audit, and establishing an appropriate audit strategy and audit plan. The proposed standard also describes the responsibilities of the engagement partner and other engagement team members for supervising and reviewing the work of the engagement team. * Identifying and assessing risks of material misstatement. This proposed standard describes the auditor's responsibilities for identifying and assessing risks of material misstatement. The risk assessment process discussed in the proposed standard includes information-gathering procedures to identify risks (e.g., obtaining an understanding of the company, its environment, and its internal control) and analysis of the identified risks. * The auditor's responses to the risks of material misstatement. This proposed standard sets forth the auditor's responsibilities for responding to the risks of material misstatement in the general conduct of the audit and specific audit procedures. * Evaluating audit results. This proposed standard describes the auditor's responsibilities regarding the process of evaluating the results of the audit in order to form the opinion(s) to be presented in the auditor's report. This process includes evaluating uncorrected misstatements and control deficiencies identified during the audit. * Consideration of materiality in planning and performing an audit. This proposed standard sets forth the auditor's responsibilities for applying the concept of materiality, as described by the federal securities laws, in planning the audit and determining the scope of the audit procedures. * Audit evidence. This proposed standard sets forth the auditor's responsibilities regarding designing and applying audit procedures to obtain sufficient appropriate evidence to support the opinion(s) in the auditor's report. In particular, it discusses the principles for determining the sufficiency and appropriateness of audit evidence.   The proposing release, text of the proposed auditing standard, and related amendments to PCAOB standards are available on the [PCAOB](http://www.pcaobus.org/Rules/Docket_026/index.aspx" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.23 IAIS issues supervisory papers on solvency assessment**   On 17 October 2008, the International Association of Insurance Supervisors (IAIS) announced it had adopted six supervisory papers on solvency assessment.    The papers identify certain key features which supervisors should consider in their particular solvency regimes in establishing and maintaining well-regulated insurance industries. The papers aim at enhancing and improving transparency, comparability and convergence of the assessment of insurer solvency internationally.   The papers cover:   * standard and guidance on the structure of regulatory capital requirements; * standard and guidance on enterprise risk management for capital adequacy and solvency purposes; and * standard and guidance on the use of internal models for regulatory capital purposes.   The papers are available on the [IAIS](http://www.iaisweb.org/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.24 Regulators and government agencies annual reports**   In the past month, several regulators and other government agencies with responsibility for corporate law and corporate governance have released their annual reports for 2007-2008.   They include:   * [Australian Office of Financial Management Annual Report 2007-08](http://www.aofm.gov.au/content/publications/reports/AnnualReports/2007-2008/index.asp" \t "_new); * [Australian Prudential Regulation Authority Annual Report 2007-08](http://www.apra.gov.au/AboutAPRA/Annual-Report-2008.cfm" \t "_new); * [Australian Securities and Investments Commission Annual Report 2007-08](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Annual%20reports" \t "_new); * [Commonwealth Treasury Annual Report 2007-08](http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=1430" \t "_new); * [Companies Auditors and Liquidators Disciplinary Board Annual Report 2007-08](http://www.caldb.gov.au/CALDB/CALDBWeb.nsf/byheadline/Annual+Reports?opendocument" \t "_new); * [Corporations and Markets Advisory Committee Annual Report 2007-08](http://www.camac.gov.au/CAMAC/camac.nsf/0/4873391D9063AD4ECA256B6C007FFD41?opendocument" \t "_new); * [Financial Reporting Council (FRC) Annual Report 2007-8 and the FRC annual report on auditor independence](http://www.frc.gov.au/reports/" \l "Reports" \t "_new); and * [Takeovers Panel Annual Report 2007-08](http://www.takeovers.gov.au/display.asp?ContentID=1474" \t "_new).   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.25 Governance of firms that audit public interest entities**  The Market Participants Group (MPG) was established by the UK Financial Reporting Council (FRC) to advise it on its work on Choice in the UK Audit Market. The MPG has published its first consultation paper.  The Audit Firm Governance project is the result of Recommendation 14 of the October 2007 report of the MPG. It stated that, 'Every firm that audits public interest entities should comply with the provisions of a Combined Code-style best practice corporate governance guide or give a considered explanation.'   The Institute of Chartered Accountants in England and Wales (ICAEW) was invited by the FRC to support the implementation of Recommendation 14 by drawing up a code. The independent Audit Firm Governance Working Group was formed by the ICAEW to carry out this work.  The Audit Firm Governance Code will only be applicable to firms that audit public interest entities.  The MPG is consulting on what definition of 'public interest entities' to use. Primarily, public interest entities are listed companies and possibly other significant entities whose financial condition is considered to be a 'major public interest'. The MPG is also consulting on whether there should be distinction between the different firms that audit public interest entities. The code will not be applicable to other audit firms.  The consultation paper is available on the [ICAEW](http://www.icaew.com/index.cfm/route/161379/icaew_ga/en/Home/Institute_of_Chartered_Accountants_in_England_and_Wales" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.26 Corporate governance role of company secretaries**    In October 2008, the UK Institute for Chartered Secretaries and Administrators (ICSA) published a new guidance note on the corporate governance role of the company secretary.   The guidance notes that responsibility for promoting and maintaining good corporate governance has fallen largely on company secretaries and that the UK Combined Code explicitly recognises the role of company secretaries in promoting good corporate governance. It outlines the main responsibilities which company secretaries should assume to assist with compliance with the Combined Code.  The guidance considers the role of the company secretary in ensuring compliance with statutory and regulatory requirements relating to corporate governance (for example, implementing procedures to deal with insider information and share dealing and to help directors comply with their duties). The guidance also considers the role of the company secretary in the area of corporate responsibility.   The guidance note is available on the [ICSA](http://www.icsa.org.uk/assets/files/pdfs/081020%20-%20Corp%20Gov%20role%20of%20co%20sec.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.27 EU Shareholder Rights Directive and the UK Companies Act 2006**   In October 2008, the UK Department for Business Enterprise and Regulatory Reform (BERR) published a consultation paper on the UK implementation of the EU Shareholder Rights Directive. The Directive aims to improve shareholder information and participation rights in relation to company meetings.   It is proposed that the new requirements will apply to meetings where notice is given on or after 3 August 2009.    **(a) Main proposed changes for listed companies**    Notice periods for EGMs: The minimum notice period for listed company EGMs for both ordinary and special resolutions will be extended to 21 days instead of the 14 days currently permitted in the 2006 Act. The period can be reduced to 14 days if two conditions are met. First, the company must allow shareholders to vote "by electronic means accessible to all shareholders". Second, shareholders must pass a resolution every year approving the shortening of the notice period.     Adjournments: There is a new requirement that when a meeting is adjourned the same length of notice for reconvening the meeting must be given as for the original meeting.    Circulation of members' resolutions at an AGM - It is proposed that a listed company will have to pay the costs of circulating the resolution whenever it is received (which can be after the notice has been sent out). Currently the company only has to pay the costs if the requisition is received before the company's financial year end.     Asking questions at meetings: There will be a new right for shareholders to ask questions at meetings which the company must answer unless one of the stated exceptions applies (which include if the chairman considers it would be undesirable in the interests of good order of the meeting that the question be answered).     New information requirements: There will be new requirements for additional information to be included in notices of meeting (e.g. notice of the new right to ask questions - see above) and additional information to be made available on the company's website before the meeting (e.g. details of the company's share capital).    **(b) Main proposed changes for all companies**   Requisitioning EGMs: Members holding at least 5% of the voting rights will be able to requisition an EGM. Currently the required percentage is 10% for public companies (and for private companies it is 5% so long as there has been no requisition in the last 12 months).     Voting by electronic means and by post: Companies will be permitted to allow shareholders to participate in a general meeting by electronic means. Companies will also be permitted to allow shareholders to vote by correspondence in advance of a meeting without having to appoint a proxy.    The consultation paper is available on the [BERR](http://www.berr.gov.uk/files/file48662.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1)  **1.28 2009 Melbourne Law Masters: Corporate and Commercial Law**  Melbourne Law School's graduate program recognises the importance of corporate law and securities regulation at a national and global level.    Melbourne Law School will offer over 140 graduate law subjects in 2009, including more than 30 totally new subjects in the program. The program's extensive subject offerings enable participants to tailor a program to complement their professional expertise and career goals.    Courses and subjects are available to both law and non-law graduates and may meet Continuing Professional Development (CPD) or Continuing Legal Education (CLE) requirements. All subjects are also available on a single subject enrolment basis. Courses cover 21 specialist legal areas, including:   * Banking and Financial Services Law; * Commercial Law; and * Corporate and Securities Law.   Around 90 percent of subjects are taught on an intensive basis over one week of study, making it easier for busy professionals as well as interstate visitors to participate. High calibre teaching by local experts and international guest lecturers, combined with small class sizes, ensure an outstanding learning experience.    Below are some of the subjects available in 2009 in the commercial law specialisation:   **Corporate and general commercial law**   * Accounting for Commercial Lawyers * Anti-Discrimination Law at Work * Commercial Deals in Asia * Corporate Governance and Directors' Duties * Corporate Insolvency and Reconstruction * Corporate Social Responsibility and the Law * Current Controversies in the Law of Remedies * Electronic Commerce Law * Equity and Commerce * Equity in Real Property Law * International Securities Regulation * OTC Derivatives: US and International Practice, Regulation and Policy Issues * Principles of Corporate Law * Privacy Law * Regulation of Securities Offerings * Schemes of Arrangement * Shareholder's Rights and Remedies * US Corporate Law   **Finance**   * Banking and Finance in Asia * Consumer Banking * Insurance Regulation: Law and Practice * International Commercial Banking Law * International Financial Transactions: Law and Practice * Law of Secured Finance * Managed Investments Law * Project Finance * Securitisation   **Competition Law**   * Cartels and Competition Law * Economics for Competition Lawyers * International and Comparative Competition Law * Law and Economics of Access Regulation * US Competition Law and Policy   **Construction Law**   * Advanced Construction Contracts * Construction Contracts * Construction Dispute Resolution * Construction: Principles into Practice * Construction Risk: Allocation and Insurance * Design and Construct: Specialised Construction Contracts * Infrastructure Delivery B: Public Private Partnerships * Payment Matters in Construction Projects * Principles of Construction Law * Rights and Liabilities in Construction   **Dispute Resolution**   * Advanced Evidence * Alternative Dispute Resolution * International Commercial Arbitration * Public Interest Litigation * Transnational Commercial Litigation   **Environment, Energy and Resources Law**   * Climate Change Law * Environmental Law: Science and Regulation * International Petroleum Transactions * Mineral Law * Petroleum Law * Water Law   **Intellectual Property Law**   * Copyright Law * Designs Law and Practice * Intangible Asset Valuation: Law and Practice * International and Comparative Trade Mark Law * International Issues in Intellectual Property * Interpretation and Validity of Patent Specifications * Licensing Law and Technology Transfer * Patent Law * Patent Practice * Trade Mark Practice * Trade Marks and Unfair Competition   **International Economic Law**   * International Economic Law * International Investment Law and Arbitration * International Trade Law * WTO Law and Dispute Settlement   **Media Law**   * Communications Law * Entertainment Law   **Sports Law**   * Racing Industry Law and Regulation * Sport, Commerce and the Law * Sports Marketing Law   **Taxation**   * Advanced International Tax: Offshore Entities * Asian Comparative Tax Law Systems * Australian Income Tax System * Capital Gains Tax: Problems in Practice * Corporate Taxation A (Shareholders, Debt and Equity) * Corporate Taxation B (Companies and Consolidation) * Goods and Services Tax Principles * International Aspects of US Income Tax * International Taxation: Principles and Structure * State Taxes and Duties * Tax Administration: Penalties, Prosecutions and Ethics * Taxation of Business and Investment Income A * Taxation of Small and Medium Enterprises * Taxation of Superannuation * Tax Effective Writing: Written Advocacy * Tax Treaties * Transfer Pricing: Practice and Problems * UK Taxation: Principles and New Developments   Applications are currently being accepted for 2009. For further details on the program and the application process, please contact the Melbourne Law Masters Office.   Melbourne Law Masters Office Tel (03) 8344 6190 Email [law-masters@unimelb.edu.au](mailto:law-masters@unimelb.edu.au)   Further information is available on [The Melbourne Law Masters](http://www.masters.law.unimelb.edu.au" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  |  | | |  | | |  | | --- | | **2.1 Requirements for disclosure and reporting of short sales**   On 12 November 2008, the Australian Securities and Investments Commission (ASIC) announced its latest requirements for disclosure and reporting of short selling.  On 19 September 2008, (ASIC) implemented a disclosure and reporting regime in relation to short sales in Australia.   On 21 September, ASIC banned covered short selling of all securities, managed investment products and stapled securities quoted on licensed markets in Australia subject to certain exceptions. Since 21 September, where covered short selling is permitted, the short selling transaction needs to be disclosed in accordance with the disclosure and reporting regime introduced on 19 September.   On 21 October 2008, ASIC announced it expected to lift the ban on covered short selling of non-financial stocks from 19 November 2008. The ban in relation to covered short selling of financial stocks is to remain in place. When the ban is partially lifted on 19 November as expected, there will be an increased focus on disclosure and reporting of covered short sales and ensuring a covered short seller has a presently exercisable and unconditional right to vest the securities in the buyer.   The purpose of ASIC's advice is to provide further information to assist brokers and their clients meet disclosure and reporting requirements.  The key points are:   * these requirements apply to sales made on market and to off-market crossings; * a broker is required to establish whether a client's sale is a long sale, short sale or an exempt covered short sale and clients are obliged to inform their broker whether their requested sale is a long sale, short sale or an exempt covered short sale; * clients can assist by stating at the time of placing a sell order that it is for a long sale, short sale or an exempt covered short sale and can provide this information electronically or verbally in phone orders; * if clients do not volunteer what type of sale order they are requesting, brokers are required to ask for this information; * brokers who are market participants need to advise clients of the disclosure requirements before a client makes a sell order after 19 November and, if asked by ASX, inform ASX in writing what steps it has taken in this regard. The broker's representative providing this information to ASX must be a senior officer of the broker; * obligations to disclose allowable short sales under subsection 1020B(5) of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) or in relation to exchange traded options continue; and * brokers will report each day's short sales (covered short sales and certain naked short sales) by security to ASX via an online facility by 9am the following day. That information will be collated and a market figure by security will be released each day by ASX.   In order to streamline compliance, ASIC has provided information about the fields available in commonly used dealing systems that may assist brokers and direct market access users to specify and receive sale order types. Clients will need to have confirmed to their broker their understanding of the Australian short selling requirements and those terms in order to use this streamlined process.   Further information is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/Requirements+for+disclosure+and+reporting+of+short+sales+from+19+November+2008?openDocument" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h2)  **2.2 Relief to warrant issuers from out-of-use notice provisions**   On 4 November 2008, the Australian Securities and Investments Commission (ASIC) announced class order relief to issuers of warrants offered under a Product Disclosure Statement (PDS) or Supplementary PDS covering two or more warrant products.   The relief is from the requirement in the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) to notify ASIC when a warrant ceases to be available in certain circumstances.   Under Class Order [CO 08/781] Warrants: Out-of-use notices a warrant issuer will only need to lodge an out-of-use notice with ASIC when all the warrants to which the PDS or Supplementary PDS relates are no longer available.   ASIC also released Regulatory Guide 197 Warrants: Out-of-use notices (RG 197) which further explains the relief given in CO 08/781.    CO 08/781 was registered on the Federal Register of Legislative Instruments on 31 October 2008 and commenced on that date.    Class Order [CO 08/781] Warrants is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co08-781.pdf/$file/co08-781.pdf" \t "_new) website.   The Regulatory Guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg197.pdf/$file/rg197.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h2)  **2.3 ASIC facilitates withdrawals from frozen mortgage funds**   **(a) Background**  On 31 October 2008, the Australian Securities and Investments Commission (ASIC) announced measures that will facilitate operators of mortgage funds providing early withdrawal for members where there is hardship.   Mortgage funds, along with other forms of unlisted investments such as unlisted property trusts, provide an important source of investment capital to the economy. Although these vehicles are outside the recently announced guarantee for bank deposits, they are regulated under the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Protection for investors comes from the need for product disclosure statements and, more recently, ASIC has issued guidelines for additional disclosure to investors against certain benchmarks. These benchmarks assist investors to better understand their investments and to assess on an ongoing basis their risks and returns.   The risks and returns of these products have been, and will continue to be, affected by market conditions. Recently, a number of mortgage trusts have deferred redemptions for a period of time (referred to as 'frozen').   The deferral of redemptions means that unit holders or members cannot access funds in the same way as previously. Once redemptions are deferred, the operators must follow procedures set out in the Corporations Act for withdrawals. Withdrawal from the trusts can only be in accordance with that Act:   * members must be treated equally; and * non-liquid withdrawal process must be followed which means operators may only provide periodic offers to members to withdraw when money becomes available to satisfy those offers. The offers need to be made to everyone, be open for at least 21 days and if there are insufficient funds to satisfy all members who want to withdraw, members' requests are satisfied proportionately.   **(b) ASIC's relief**   ASIC has decided to advise fund operators that ASIC will consider applications to modify the operation of these provisions of the Corporations Act so that the operators can allow withdrawals by members on hardship grounds. This relief will generally only be given on a case-by-case basis for mortgage trusts.   **(c) What are hardship grounds?**  Generally, hardship withdrawals will only be permitted where the member is able to satisfy the operator that they meet one of the following criteria:   * where the member is unable to meet reasonable and immediate family living expenses; * on compassionate grounds (e.g. medical costs for serious illness, funeral expenses, to prevent foreclosure); and * in the case of permanent incapacity.   **(d) What conditions apply?**  In allowing earlier access to some members and not to others, ASIC has balanced hardship against the interests of other members. Therefore ASIC considers that there should be a cap on withdrawals on hardship grounds. The hardship withdrawal cap would be the lesser of:   * the specific amount requested under the hardship withdrawal request; or * $20,000 per member plus 50 per cent of the balance of the member's investment in the scheme. For example, if a member has an investment value of $100,000, the member may access $60,000 under this proposal.   This cap means that hardship members will, along with other members, continue (but on a reduced basis) to participate in the risks and rewards of these investments.    This relief will generally only be given on a case by case basis for mortgage trusts.   The relief is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/challenger-howard.pdf/$file/challenger-howard.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h2)  **2.4 Report on relief applications**   On 31 October 2008, the Australian Securities and Investments Commission (ASIC) released a report outlining recent decisions on applications for relief from the corporate finance, financial services and managed investment provisions of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) between 1 April and 31 July 2008.    The report, "Overview of decisions on relief applications (April to July 2008)" provides an overview of where ASIC has exercised, or refused to exercise, its exemption and modification powers from the financial reporting, managed investment, takeovers, fundraising and financial services provisions of the Act.    The report also highlights instances where ASIC decided to adopt a no-action position regarding specified non-compliance with the provisions and features an appendix detailing the relief instruments it executed.    **Background**  ASIC can exempt or modify the Act under the provisions of Chapters 2D (officers and employees), 2J (share buy-backs), 2L (debentures), 2M (financial reporting and audit), 5C (managed investment schemes), 6 (takeovers), 6A (compulsory acquisitions and buy-outs), 6C (information about ownership of entities), 6D (fundraising) and 7 (financial services) of the Act.    ASIC uses its discretion to vary or set aside certain requirements of the law, where the burden of complying with the law significantly detracts from its overall benefit, or where business can be facilitated without harming other stakeholders.    ASIC publishes a copy of most of the exemption and/or modification instruments issued in the ASIC Gazette   The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep142-relief-applications-April-July-08.pdf/$file/rep142-relief-applications-April-July-08.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h2)  **2.5 New account switching service**  On 31 October 2008, the Australian Securities and Investments Commission (ASIC) announced that switching bank accounts to obtain a better deal is now easier following the introduction of a new account switching service.   Authorised Deposit-taking Institutions (ADIs), which include banks, credit unions and building societies, would now provide account-switching services to consumers that are switching their personal transaction accounts.  The new services, available from 1 November 2008, have been developed by banks, building societies, credit unions and other groups in a project coordinated by the Australian Payments Clearing Association (APCA).  Under the account-switching package, a customer's existing ADI will provide the customer with a list of their direct debit, direct credit and other automatic payments going back 13 months. The customer's new ADI, in return, will assist the customer with re-establishing these direct debits and credits.  The general obligations for ADIs under the account-switching package are contained in the new Part D of the Electronic Funds Transfer Code of Conduct (EFT Code). The EFT Code is a voluntary industry code of practice, adopted by virtually all ADIs, covering all forms of consumer electronic payment transactions such as ATM and EFTPOS transactions, and telephone and Internet banking transactions. It provides consumer protection in areas such as product disclosure, dispute resolution and liability allocation for unauthorised transactions. ASIC administers the EFT Code.  Technical aspects of the account-switching package are detailed in the Bulk Electronic Clearing Systems Procedures, administered by APCA.    Further information is available on the [APCA](http://www.apca.com.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  |  | | |  | | |  | | --- | | **3.1 Review of trading by directors**  On 31 October 2008, the Australian Securities Exchange (ASX) released its latest review of disclosure of Directors' Interest Notices lodged by listed entities.  The review was conducted by ASX Markets Supervision (ASXMS) on all Directors' Interest Notices lodged between 1 July and 30 September 2008 (Q3 2008). The notices cover a director's appointment, changes to a director's interests and ceasing to be a director.  ASXMS completed a similar review of notices lodged between 1 January and 31 March 2008 (Q1 2008).  Of the 4,318 notices lodged during the latest three-month period:   * 278 or 6.4% breached the ASX listing rule because of incompleteness or failure to disclose to the market within five business days. This indicates that 93.6% of Q3 notices were lodged correctly and on time.   This is an improvement on Q1 results, where 538 or 13% of the 4,137 notices lodged breached the rule, with 87% in compliance.  Of the 278 Q3 breaches:   * 74 (1.7% of total notices lodged) concerned active or 'on market' trades by directors; * 115 (2.7%) also potentially breached the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) by failing to disclose to the market within 14 calendar days (289 in Q1); * 30 of these 115 were 'on market' trades; and * all 115 potential breaches of the Corporations Act have been referred to ASIC.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Corporate Law Decisions** |  |  | | |  | | |  | | --- | | **4.1 Employees fail in their attempt to hide behind section 444DA of the Corporations Act**   (By Charles Slattery, DLA Phillips Fox)  Fitzgerald, in the matter of Advance Healthcare Group Ltd (Administrators Appointed) [2008] FCA 1604, Federal Court of Australia, Finkelstein J 28 October 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/october/2008fca1604.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/october/2008fca1604.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   This case concerned a successful application by the administrators of a publicly listed company under section 444DA(5) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) for approval by the court of a deed of company arrangement that did not give priority to employee creditors.   Section 444DA of the Act requires that a deed of company arrangement preserve the priority that is afforded employee creditors in the winding up of a company unless a majority of the employees agree to waive their priority, or the court permits otherwise.    The court can only make such an order under section 444DA(5) if it is satisfied that the "non-inclusion" of the provision protecting the priority of the employee creditors would (under the proposed arrangement) be likely to result in the same or better outcome for eligible employee creditors as a whole than would result from an immediate winding up of the company.    **(b) Facts**    Advance Health Care Group Ltd (the Company) operated in the pharmaceutical industry through its trading subsidiary, Pharmeasy Pty Ltd (Pharmeasy). On 28 April 2008, Fitzgerald and Dixon (the Administrators) were appointed joint administrators of the Company.   The Administrators concluded that the Company was insolvent and should be wound up, as inter alia, the Company had a shortfall of assets over liabilities that exceeded $8 million. Its creditors were as follows:   * Falcrum Equity (secured creditor)- $3,400,000; * Employees (priority creditors)- $377,740; and * Unsecured creditors- $7,430,687.   The Administrators considered that the employees and the unsecured creditors would receive nothing in the winding up of the Company. This was because, in their view, a liquidator would have no claims against the directors for insolvent trading or breach of duty and the Company had not entered into any illegal transactions.   The Administrators received a proposal from a syndicate of investors that, if implemented, would require the Company to execute a deed of company arrangement (DOCA) that would result in all the creditors' claims being compromised but the Company would survive and be re-listed on the ASX.   The Administrators put the proposal to the creditors of the Company. One important aspect of the proposal concerned the priority given to the employee creditors. Under the DOCA, the employee creditors would be entitled to an amount equal to what they would receive under the General Employee Entitlements and Redundancy Scheme (GEERS), plus an additional 10%.  Under the Scheme money provided by the Commonwealth Government is distributed to employees in the following circumstances:   * The employee's employment has been terminated because their employer is insolvent; * The employer has insufficient assets to pay the employee's entitlements; and * There is no other source of funds available to pay those entitlements to the employee.   The Company had three employee creditors, Atkinson, Law and McGinn. The amounts they were owed were, respectively, $288,676, $55,856 and $33,140.    The fund to be created by the investors was sufficient for these debts to be paid in full if the employee priority in section 444DA was recognised. Under the proposed DOCA the amount that Atkinson would receive was between $85,796 and $11,166, Law would receive between $24,799 and $12,059 and McGinn would receive between $23,267 and $9,411.   In a separate meeting with the Administrators, the employee creditors voted down the DOCA, claiming that the company had to be wound up.  Their reasons for voting down the DOCA were not disclosed. One employee, McGinn, stated that she was prepared to write off all her entitlements to ensure that a Director of Falcrum Pty Ltd, the secured creditor, received nothing in the liquidation.    The DOCA was approved by the general body of creditors in a separate meeting and the Administrators sought court approval of the DOCA pursuant to section 444DA(5) of the Act.   **(c) Decision**     Finkelstein J held that section 444DA(5) had been satisfied and approved the DOCA.   His Honour held that the employee creditors would be in a better position under the DOCA than they would have been in the winding up of the Company. Had the Company been wound up, the maximum amount the employee creditors could recover from the Company would be their entitlements under GEERS. Under the DOCA the employee creditors would be guaranteed to receive 10% above this amount and the Company would survive.    His Honour was scathing of the employee creditors voting down the DOCA, describing their actions as holding the Company to ransom and amounting to commercial blackmail and warned that there will be an increase in cases where the maintenance of priorities under Part 5.3A of the Act will thwart attempts to revive ailing companies in the future.   In considering the operation of section 444DA of the Act, his Honour stated that it had long been a public policy objective to protect employee entitlements in the insolvency of the employer. However, his Honour noted that Part 5.3 of the Act does not apply to companies being wound up. The main objective of Part 5.3 of the Act is to keep corporations alive and this object will be compromised if, by the operation of section 444DA, a company in a difficult financial circumstance cannot be saved because priority must be given to its employees.    Finkelstein J was satisfied that the DOCA afforded the employee creditors a better outcome than they would have received from an immediate winding up of the company and, accordingly, approved the DOCA.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h4)  **4.2 Absence of reasonable grounds by Commissioner of Taxation for suspecting insolvency under section 588FG(2)(b) of the Corporations Act**   (By Gabrielle Hirsch, DLA Phillips Fox)   Dean-Willcocks v Commissioner of Taxation [2008] NSWSC 1113, New South Wales Supreme Court, Barrett J, 24 October 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/october/2008nswsc1113.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/october/2008nswsc1113.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   Dean-Willcocks and another liquidator brought an action, as liquidators of Fashion Warehouse Pty Ltd, for the recovery of payments made to the Commissioner of Taxation under section 588FF(1) of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).    After considering the evidence adduced by the Commissioner of Taxation, Barrett J of the NSW Supreme Court held that the Commissioner had proved that, at the time of the payments, he did not have reasonable grounds for suspecting that Fashion Warehouse was insolvent or would have become insolvent through the making of those payments. The court was also satisfied that the Commissioner had proved that, at the time of each of the payments, a reasonable person in the Commissioner's circumstances would have had no such grounds for so suspecting.    Accordingly, Barrett J held that the Commissioner had succeeded in establishing an entitlement to the protection given by section 588FG(2) and that the court was precluded from making an order under section 588FF that the Commissioner return the payments.   **(b) Facts**   This case concerned an application brought by Dean-Willcocks and another liquidator, the liquidators of Fashion Warehouse (the Company), for the recovery of a number of payments made by the Company to the Commissioner of Taxation (the Commissioner) shortly before it went into voluntary liquidation on 31 August 2004.   Some three years earlier, in August 2001, Fashion Warehouse had been placed in voluntary administration pursuant to Part 5.3A of the Corporations Act and had executed a deed of company arrangement on 18 September 2001.    The deed of company arrangement (the Deed) made provision for the creation of an administration fund and the payment of Fashion Warehouse's creditors, including the Commissioner of Taxation. Once creditors had been paid their full entitlements, their debts existing as at 5 August 2001 would be extinguished. The Deed also imposed a prohibition preventing creditors, prior to the termination of the Deed, from bringing an action to recover any debt incurred before 5 August 2001.    The Deed was approved by the meeting of creditors and was noted in the Australian Taxation Office's computer records on 3 September 2001.    From the time that the Deed was entered into until 22 March 2004, Fashion Warehouse duly and punctually discharged all post-deed tax liabilities. However, shortly after there was a default in payment of GST and income tax withholdings, both of which should have been paid in April.    On 10 May 2004, the managing director of Fashion Warehouse sent a fax to Australian Tax Office (ATO) officer, Peter Gregory, requesting an instalment payment arrangement due to a short term "cashflow problem." Another officer of the ATO was told by a Fashion Warehouse employee that "trading has been slow". Mr Gregory subsequently accepted Fashion Warehouse's proposal for an instalment payment agreement and Fashion Warehouse made several payments to the Commissioner of Taxation in the period 22 March 2004 to 23 July 2004.     On 31 August 2004, Fashion Warehouse entered voluntary liquidation, one day after full effectuation of the Deed.    Following the appointment of the liquidators, the first plaintiff (Dean-Willcocks) and second plaintiff (Fashion Warehouse) brought an application under section 588FF(1) of the Corporations Act 2001 for an order directing that the Commissioner of Taxation return to the Company the payments it received between 22 March 2004 and 23 July 2004.   588FF(1) of the Corporations Act 2001 provided that the court may make an order on the application of a company's liquidator for the reimbursement of money, properties or benefits to a company where it is satisfied that the transaction was voidable because of section 588FE. The plaintiffs asserted that the payments to the Commissioner constituted an "unfair preference" within the meaning of section 588FE and were accordingly an "insolvent transaction".   In response, the Commissioner asserted that it was entitled to rely on section 588FG(2) which precludes the court from making an order for payment in circumstances where the transaction was not an unfair loan to the company, or an unreasonable director-related transaction of the company, and where the following criteria are proved:   * The transaction was entered into in good faith (paragraph (a)); * The person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as a result of the payment (paragraph (b)(i)); * A reasonable person in the person's circumstances would have had no such grounds for so suspecting (paragraph (b)(ii)); and * The person had provided valuable consideration or had changed his/her position in reliance on the transaction (paragraph (c)).   At the outset, the court accepted that the transactions were not within the concepts of unfair loan or unreasonable director-related transaction and that the Commissioner had provided valuable consideration as required by paragraph (c) of section 588FG(2), being the discharge of a liability to pay tax. The court also accepted that the Commissioner became party to the transaction in good faith as required by section 588FG(2)(a).   However, the liquidator argued that the Commissioner was not entitled to rely on section 588FG(2) as the circumstances would have engendered relevant suspicion on the part of the Commissioner and a hypothetical reasonable person. Accordingly, the plaintiff asserted that the Commissioner could not meet the requirements of section 588FG(2)(b).   **(c) Decision**   Barrett J held that the Commissioner had succeeded in establishing an entitlement to the protection given by section 588FG(2) and that the court was precluded from making an order under section 588FF that the Commissioner return the payments.   In reaching this decision, the court accepted that the "reasonable person" to whom regard was to be had was a "reasonable business person" and that the concept of "suspicion" was a positive feeling of actual apprehension or mistrust without sufficient evidence. According to the court, this suspicion was to be one of actual and existing insolvency, as distinct from impending or potential insolvency.   On the evidence, Barrett J was satisfied that the knowledge or information held by the ATO officers was not, taken alone or cumulatively, "sufficient to engender any rational and well based suspicion that a state of present and actual insolvency existed". Rather, the evidence given by ATO officers in cross-examination simply emphasised the need to take account of all relevant information in coming to a view about solvency or insolvency.    The court held that the Commissioner was aware that the deed of company arrangement precluded action to recover pre-August 2001 debts while the deed was in force and that, upon full effectuation of the deed, all those debts would be extinguished. As there was no suggestion that the deed would not be fully effectuated, the reasonable and rational expectation was that pre-August 2001 debts could be ignored in judging solvency.   In Barrett J's opinion, the default in making payments to the ATO in April and the request for an instalment payment arrangement coupled with the explanations as to a "short term cash flow problem", indicated no more than an inability to pay the sums due in April 2004. The deed of arrangement and previous on-time payment of all post-deed tax liabilities were consistent with an understanding that solvency was not compromised.    Further, the default in lodging tax returns for 2003 and 2004 was not sufficient to ground a suspicion of insolvency. Instead, the court held that this default indicated a need to inquire. The inquiring ATO officer (Mr Gregory) was given a plausible explanation by Fashion Warehouse's external accountant regarding "loans in the books and records input by previous" accountants. The court held that there was no reason why this should not be taken at face value. While tax returns were overdue, there was a rational and reasonable explanation for this unrelated to any state of insolvency.   While Barrett J noted that there was some ambiguity over whether the Commissioner's state of mind was required to represent the sum total of all of his officers' knowledge, his Honour declined to pursue this matter on the basis that there was no indication that there were any other officers with knowledge of or exposure to the case.    Accordingly, Barrett J was satisfied that Commissioner had proved that, at the time of the payments, he had no reasonable grounds for suspecting that Fashion Warehouse was insolvent or would have become insolvent through the making of those payments. The court was also satisfied that, at the time of each of the payments, a reasonable person in the Commissioner's circumstances would have had no such reasonable grounds for so suspecting. As a result, the court was precluded from making an order under section 588FF for the recovery of the payments and the plaintiff's application was dismissed.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h4)  **4.3 Exercise of the court's discretion under section 81 of the Trustee Act 1925 (NSW)**   (By James Davies, Mallesons Stephen Jaques)   Trust Company Fiduciary Services Ltd v Challenger Managed Investments Ltd [2008] NSWSC 1155, New South Supreme Court (Equity Division), Rein J, 24 October 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/october/2008nswsc1155.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/october/2008nswsc1155.htm" \t "_new)   or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**    The central question before the court was whether section 81 of the [Trustee Act 1925 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "Default) (the Act) allowed the court to confer power on a trustee to partially surrender or release trust property (in this case security interests) in return for property (in this case security interests with superior credit ratings) to be created by new trusts with the same trustee and beneficiaries.  The court held that, in principle, this was allowable.   **(b) Facts**    Trust Company Fiduciary Services Ltd (TCF) held certain property in the nature of security interests on trust for the benefit of holders of equity securities issued by an entity which was ultimately held by Macquarie Airports Limited. TCF wished to substitute the property (by a process known as defeasance) held as security, with property of a higher credit rating, which would ultimately have the effect of enhancing the value of the securities. Pursuant to section 81 of the Act, TCF sought the conferral upon it by the court, of power to permit the substitution of the relevant property.   In the absence of any power vested in the trustee by the instrument creating the trust, section 81 of the Act allows the court, if the court decides that the action is "expedient", in respect of the "management or administration of any property vested in trustees, any sale, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction", to confer the necessary power on the trustee with any conditions the court deems fit.    **(c) Decision**    Rein J reasoned that three key issues fell for consideration by the court.   **(i) Did the trustee possess the necessary power to release the security and substitute a new security?**    This question needed to be answered before any attention was directed to the provisions of the Act, because, if the instrument creating the trust bestowed sufficient power upon the trustee to replace the security, then the court would not have to consider section 81 of the Act.   The court considered the relevant provisions within the trust instrument, holding that the power was not wide enough to permit what TCF proposed.  The instrument only contemplated an "alteration, modification or addition" of a guarantee and did not refer to the security held.  In any case, even if the "alteration, modification, or addition" did apply to the property held as security, in the court's opinion, the "alteration, modification, or addition" permitted by the trust instrument would not allow the trustee to "release" the security as was the plan with the defeasance proposal.   **(ii) Did the proposed defeasance fall within section 81 of the Act?**    For the court to be able to exercise its discretion under section 81, the proposed defeasance had to involve the "management or administration" of property vested in TCF and concern a "sale, lease, mortgage, surrender, release or disposition" of the trust property.  If the defeasance proposal could not be characterised in line with these requirements, then the court would not be able to invoke section 81 of the Act as requested by TCF.   His Honour cited the High Court authority of *Riddle v Riddle* (1952) 85 CLR 202 in support of the proposition that section 81 of the Act uses very wide language and should not be read down by implications that are not expressed.  Such a view is also supported by the wording within section 81 itself, as it expressly empowers the "surrender, release or disposition" of property.   Previous cases reflect this view, and have allowed, for example, the transfer of all of the units held by a trust to a new company and the issuance of shares in the company to unit holders. Further, in *Hornsby v Playoust* (2005) 11 VR 522, it was held that either "management or administration" are not confined to the continued holding of property and that assets could be transferred to a new legal entity.   However, could the defeasance proposal be properly characterised in this manner, or did it go further and alter or extend what was originally contemplated by the purpose of the trust? The court's view in this respect was that the underlying purpose of section 81 of the Act is not to permit the substantive alteration of a trust or its termination, but to give a trustee the power to administer the trust in a more satisfactory and effective way. In this case, the court held that the replacement of trust property remained in line with the purpose of the trust, which was to hold security interests which were sufficient to protect the interests of the holders of the equity securities.   **(iii) Was the proposed defeasance "expedient" having regard to sound business considerations, and advantageous to the holders of units in the trust?**    The evidence presented to the court clearly suggested that the defeasance proposal would result in a superior outcome for holders of the equity securities related to the security interests held by the trustee. The market price of the securities had increased on news of the proposed substitution, and the property which was proposed to be held by the trust possessed a superior credit rating over the present property. This, the court considered, amounted to a "clear commercial advantage". Interestingly, in reaching this conclusion, his Honour paid particular attention to the current financial and economic climate, positively noting that the property intended to be held as security could be regarded as "conservative" in respect of exposure to risk, and that it would benefit from the Australian Government's guarantee of deposits of Australian banks.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h4)  **4.4 Second Circuit appellate court limits US securities litigation against Australian companies by Australian plaintiffs**  (By Jonathon Redwood, Victorian Bar)  Morrison v National Australia Bank, 2008 WL4660742, United Sates Court of Appeal, Second Circuit, 23 October 2008  **(a) Introduction**   In Morrison v National Australia Bank No. 07-0853-cv, 2008 WL 4660742 (2d Cir. 23 October 2008) ("NAB"), the United States Court of Appeals for the Second Circuit, which sits in New York City, limited the ability of US courts to hear claims in US courts based on alleged breaches of US securities laws on behalf of Australian investors who purchased shares on the ASX (so-called "foreign-cubed claims"). Eschewing a "bright-line rule" precluding the exercise of subject matter jurisdiction over such claims, the Second Circuit held that, in general, a US court does not have subject matter jurisdiction over foreign-cubed claims when the acts that constituted the alleged fraud and directly caused the alleged harm emanated from outside the United States.    Under this approach, the court concluded, subject matter jurisdiction does not exist over a foreign-cubed claim when the Australian company's executives: (a) made decisions concerning the content of alleged misstatements to investors from Australia and (b) issued those statements from Australia.   The decision represents a significant narrowing of the availability of class actions against Australian companies for alleged breaches of US securities laws.   Paradoxically, however, the decision may prove a stimulus for the commencement of class actions before Australian courts under Australian rules governing representative proceedings for breach of similar anti-fraud Australian securities laws. As such, the decision may constitute an additional contextual consideration adding to the momentum of securities class actions in Australia at a time when United States courts and regulators are winding back the availability of securities class actions.    **(b) Background**   One distinctive feature of US securities regulation is that the potential for large securities law civil suits in the United States is appreciably higher than in other jurisdictions. As a general matter, the heightened liability risk in the United States is not so much a product of more investor friendly securities laws (or "law on the books" in the words of Professor John Coffee of Columbia University), but differences of legal culture and methods of enforcement of securities laws. It is well known that the United States is a litigious culture and this extends to securities laws. This litigious culture is fed by the widespread historical use of class actions as a form of private enforcement of securities laws and the generally more permissive and flexible laws providing for the use of such class actions, the costs system (i.e. costs do not follow the event as in Australia), the availability of contingency fees, and the size and coordination of the securities litigation bar.    Class actions in the United States are also facilitated by the fraud on the market doctrine, which has hitherto not been embraced by Australian courts. Under this theory, plaintiffs are entitled to a rebuttable presumption that class members had relied on the integrity of the trading market in deciding to sell their shares and are not required to prove direct reliance in order to establish causation.    The principal legal source of civil liability for misleading statements conveyed to investors under US securities laws is Rule 10b-5 promulgated under the Securities and Exchange Act of 1934. Most relevantly, Rule 10b-5 proscribes making any untrue statements of material fact or failing to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. Its legal contours are thus, speaking generally, analogous to s 52 of the [Trade Practices Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) for misleading and deceptive conduct and analogous provisions in ss 670 and 728 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Apart from the private enforcement through class actions, another distinctive feature of Rule 10b-5 is its extraterritorial reach. A number of decisions prior to NAB had established subject matter jurisdiction for Rule 10b-5 claims concerning non-US companies where it could be established that the conduct in the United States was more than merely preparatory and had some discernible effect in the United States.   Distinguished US securities regulation academic, Professor John Coffee, in a recent paper, has been highly critical of the extra-territorial operation of Rule 10b-5 so as to extend its reach to a predominantly extraterritorial class of foreign investors. He has cogently argued (Coffee, "The Law and the Market: The Impact of Enforcement (2007)) that the availability of securities class actions should be restricted to US nationals and foreign residents because allowing foreign non-resident investors to be included within a class not only forces US courts to serve as "policemen to the world", but also discourages foreign companies from cross-listing. The influential Committee on Capital Markets Regulation has also criticized the availability and proliferation of class actions against foreign issuers in respect of largely extra-territorial conduct. They contend it has had a corrosive impact on the competitiveness of US capital markets because the spectre of becoming embroiled in a US class action discourages foreign companies from raising capital in the United States.    It is against this background that the Second Circuit rendered its decision in NAB.   **(c) Facts**   In NAB, US plaintiffs who purchased National Australia Bank ("NAB") American Depository Receipts on the New York Stock Exchange and Australian plaintiffs who purchased NAB ordinary shares on the ASX brought a securities fraud class action based on Rule 10b-5 against NAB in the Southern District of New York. To connect the alleged fraud to the United States, and thus to provide a basis for the US court to exercise jurisdiction over their foreign-cubed claims, the Australian plaintiffs alleged that employees of HomeSide, NAB's US mortgage service provider subsidiary, knowingly created models that falsely inflated the value of its Mortgage Servicing Rights (MSRs). HomeSide employees then allegedly transmitted these inflated values to NAB executives in Australia, who allegedly participated in the fraud by including that information in NAB's ASX financial disclosures. When the inflated MSR values became apparent, NAB took large write-downs, allegedly causing a decline in NAB's share price.   The district court dismissed the Australian plaintiffs' claims for lack of subject matter jurisdiction, holding that because the claims concerned alleged public misstatements, the "heart" of the alleged fraud had occurred in Australia, where NAB executives determined the content of, and issued NAB's public disclosures. The underlying conduct by HomeSide employees, while part of the chain of events that ultimately caused the alleged losses, was insufficient to establish the right of the Australian plaintiffs to bring suit in the United States. This conduct, at most, amounted to a link in the chain of a scheme that culminated at NAB's nerve centre of operations in Melbourne.   **(d) The Second Circuit decision**   The Second Circuit affirmed the decision of the District Court and reaffirmed that a US court generally has jurisdiction to hear foreign-cubed claims only if activities in the United States "were more than merely preparatory to a fraud and culpable acts or omissions occurring here directly caused losses to investors abroad". The court said this determination is not mechanical but contextual and fact-intensive, and ultimately "depends on what and how much was done in the United States and on what and how much was done abroad."   The Second Circuit emphasized that because the US securities laws focus on disclosures, a US court should not exercise jurisdiction where primary responsibility for the content of the disclosures and the issuance of the disclosures occurred abroad. Accordingly, the Second Circuit rejected the proposition that a US court can exercise jurisdiction over foreign-cubed claims solely because certain conduct contributing to the creation of the alleged misstatements occurred in the United States. At the same time, the Second Circuit was not persuaded that the bringing of such claims would bring US securities laws into conflict with those of other jurisdictions, since the anti-fraud rules and enforcement objectives of other countries were broadly similar. A bright-line rule, therefore, precluding foreign-cubed claims was not warranted.    Conscious, however, that it is not a world court charged with policing securities fraud globally, the Second Circuit concluded that its existing doctrinal framework, which focuses on the locus of the conduct said to comprise the heart of the alleged fraud, appropriately balanced the competing policy goals of avoiding conflict with foreign securities laws, on the one hand, and preventing the export of fraud from the United States on the other hand.   As applied to the facts of NAB, the Second Circuit  held that (1) because the US plaintiffs had not appealed the district court's dismissal of their claims, there were no allegations of any effect on US investors or US markets, (2) none of the alleged misstatements were made from the United States but were made from NAB's headquarters in Melbourne, which took primary responsibility for NAB's public filings and its communications with investors and the outside world, and (3) the lengthy chain of causation between Homeside's actions and the statements that reached investors, amounted to a conclusion that the total "mix of factors" meant that that US courts lacked subject matter jurisdiction.    It is unclear whether the appellants will seek certiorari to appeal to the US Supreme Court.   **(e) Implications for Australian companies and class actions**   The NAB decision has several implications for Australian companies whose securities trade in the United States or that conduct extensive business in the United States. First, NAB should limit the exposure of Australian companies to foreign-cubed claims in United States courts, especially those arising out of the current credit crisis and collapse in the share price of most Australian public companies. Second, NAB suggests that Australian companies can reduce the risk of foreign-cubed claims by taking steps to ensure that the decisions about the content of their disclosures, as well as the issuance of those disclosures, occur outside the United States. Third, NAB suggests that Australian companies could improve the strength of their jurisdiction defences against foreign-cubed claims by limiting public disclosures made by high-ranking company officials within the United States thereby limiting unnecessary links between their public disclosures and the United States.  Finally, NAB may have the consequence of simply diverting class action claims by Australian plaintiffs against Australian companies that otherwise might have been pursued in the US - because of the favourable legal environment for shareholder class actions in the United States - to class actions pursued before Australian courts (or proceedings brought by ASIC on behalf of shareholders). This seems likely given the more favourable legal environment for class actions in Australia in recent years. At a time when the US is winding back on the availability of securities class actions, through a combination of a series of recent narrowing Supreme Court decisions and Congressional restrictions, in recognition of the damaging impact of class actions on the competitiveness of the US capital markets and the health of the national economy, the emergence of litigation funders (bolstered by the High Court's decision in Fostif), publicly-listed law firms and the liberalisation of the rules governing representative proceedings has seen Australia move in the opposite direction toward an environment more conducive to the bringing of large shareholder class actions.    The NAB decision is illustrative of the inherently cross-jurisdictional operation of securities laws in a world of interdependent global capital markets and how decisions of courts and regulators in one jurisdiction, especially United States decisions, often have a reverberating effect in other jurisdictions. As the current financial crisis highlights, the trans-national operation of securities laws presents challenging issues for domestic securities regulators and ASIC and the ASX will surely follow with interest any appeal to the US Supreme Court because of the impact it may have on the domestic incidence of class actions in Australia for breach of its own securities laws.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h4)  **4.5 Final dividend payment and declaration of best and final offer**  (By Narelle Thomas, Freehills)  CEMEX Australia Pty Ltd v Takeovers Panel [2008] FCA 1572, Federal Court of Australia, Stone J, 23 October 2008  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/october/2008fca1572.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/october/2008fca1572.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   After announcing its revised offer price, CEMEX indicated that the revised offer was its "best and final" offer (subject to receipt of a superior proposal). Rinker subsequently announced it would pay a final dividend of $0.25 per share, following which, CEMEX announced that it would not deduct the dividend from its best and final offer price.  The Takeovers Panel made a declaration of unacceptable circumstances on the basis that this conduct departed from the "best and final offer" statement made by CEMEX previously and ordered CEMEX to pay Rinker shareholders who had disposed of shares during the period between the declaration of the best and final offer and the announcement that the shareholders would be able to retain the dividend, the amount of the dividend.   CEMEX sought judicial review of the decision on the basis that the Panel's declaration and orders were invalid on several grounds, including that making the declaration of unacceptable circumstances was an improper exercise of the Panel's power under section 657A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).   The court rejected CEMEX's arguments and upheld the Panel's decision.   **(b) Facts**    On 30 October 2006, CEMEX Australia Pty Ltd (CEMEX) made an off-market takeover offer for Rinker Group Limited (Rinker). The Rinker Board recommended that shareholders reject CEMEX's offer.    On 10 April 2007 Rinker and CEMEX reached an agreement increasing the offer price. CEMEX made an announcement to ASX advising of the increased price and stating that this was its best and final offer in the absence of a superior proposal. The announcement also stated that Rinker must not pay a dividend other than annual and half yearly dividends without CEMEX's consent and without prejudice to CEMEX's right to revise to offer price.     On the same day, CEMEX also filed a notice of variation with ASIC which stated that CEMEX would not exercise its right to adjust the revised offer price in respect of the interim dividend (although it might exercise those rights with respect to any subsequent dividend).    On 27 April 2007 Rinker announced that it would pay a final dividend of $A0.25. On 7 May 2007, CEMEX announced to ASX that Rinker shareholders would be entitled to a final dividend of $A0.25 per share if they accepted the offer and CEMEX would not deduct the dividend from its best and final offer price.   On 13 June 2007 ASIC applied to the Panel for a declaration of unacceptable circumstances under section 657A(2)(a) of the Act on the basis that CEMEX's conduct departed from its "best and final" offer.    On 12 July 2007 the Takeovers Panel (Panel) made a declaration that CEMEX's conduct between 10 April and 7 May 2007 constituted "unacceptable circumstances" and ordered that CEMEX pay affected shareholders $0.25 per share for the Rinker share sold during that period. CEMEX sought review of the Panel's decision.   **(c) Decision of the review Panel**   The review Panel found that CEMEX's 10 April 2007 announcement included a best and final statement which did not clearly, unambiguously and proximately reserve CEMEX's right to improve the offer consideration other than in the event of a superior proposal. Allowing the Rinker shareholders to retain the dividend was an improvement in the offer consideration, in the absence of a superior proposal. Therefore the announcement made on 7 May 2007 was inconsistent with the announcement made by CEMEX on 10 April 2007.    CEMEX's departure from the 10 April 2007 announcement amounted to unacceptable circumstances as CEMEX's conduct was contrary to its best and final statement. The Panel rejected CEMEX's submission that the terms of its best and final offer should be construed as retaining its discretion whether or not to deduct the amount of the dividend paid to Rinker shareholders. The Panel made no finding that CEMEX had contravened the law.    The review Panel ordered that CEMEX pay any person who disposed of a beneficial interest in Rinker shares between 10 April 2007 and 7 May 2007 (Affected Shareholder) $0.25 per share for the number of Rinker shares the Affected Shareholder disposed of during that period.   **(d) Decision of the court**    **(i) Review of the Panel declaration**   CEMEX argued that making the declaration was an improper exercise of power conferred by section 657A of the Act.    Section 5(2) of the [Administrative Decisions (Judicial Review) Act 1977](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7119" \t "Default) provides that an improper exercise of power includes taking into account an irrelevant consideration in the exercise of the power and failing to take into account a relevant consideration. CEMEX argued that by failing to consider whether CEMEX's conduct gave rise to a contravention of Chapters 6, 6A, 6B or 6C of the Act or was otherwise contrary to the law, the Panel ignored a consideration it was bound to take into account. Her Honour found that the conclusion reached by the review Panel was open to it and there was no error in reaching that conclusion, particularly as breach of the law was not a mandatory consideration the Panel was required to consider in deciding whether unacceptable circumstances had arisen.   CEMEX also submitted that the Panel misconstrued the bidder's statement, its best and final offer statement made on 10 April 2007, the notice of variation of the offer made on 10 April 2007 and the supplementary bidders statements dated 17 and 18 April respectively. CEMEX argued its best and final offer statement had reserved to itself a discretion to decide in respect of each and every dividend declared by Rinker whether or not it would deduct the amount of any such dividend from payments made to Rinker shareholder for each share sold to CEMEX. The review Panel had rejected this argument.    Her Honour found that this ground amounted to a challenge to the Panel's finding of fact and was not open to challenge, although her Honour did find that the Panel had correctly interpreted CEMEX's best and final offer statement as being a statement that the offer would not be increased except in the event of a higher offer. CEMEX's statement on 7 May 2007 offered Rinker shareholders an additional sweetener by allowing them to retain the benefit of the dividend of $0.25 per share. This was an increase in the consideration for the shares and was contrary to the position advanced in CEMEX's best and final offer statement. Her Honour approved the reasoning of the review Panel in relation to this point.    **(ii) Review of the Panel's orders**   The grounds for review of the orders made by the review Panel presented on behalf of CEMEX raised three issues:   * the Panel's power to order CEMEX to pay Affected Shareholder $0.25 in respect of each share sold during the period in the absence of a finding that the shareholder had suffered loss; * whether the orders involved impermissible delegation of power to AISC; and * whether the orders invalidly attempted to protect rights or interests that no longer existed.   Her Honour rejected CEMEX's submission that the Panel could not make an order that payment be made to individuals in the absence of evidence they had suffered financial loss on the basis that this construction limited the Panel's powers to a point where it could not effectively perform the role envisaged for it by Parliament - in particular its power to make orders to protect the rights or interests of a person affected by unacceptable circumstances. Her Honour also found that there was no error in the process the Panel followed in coming to its decision that unacceptable circumstances existed and had resulted in a misinformed market as to the status of CEMEX's offer and it was within the Panel's power to order CEMEX to pay each Affected Shareholder $0.25 per share sold even though there had not been a finding that each affected shareholder had suffered financial loss.   CEMEX's allegation that the orders involved an impermissible delegation of power to ASIC in giving ASIC the power to determine authoritatively whether a person is an Affected Shareholder and is therefore entitled to the payment was also rejected.    CEMEX argued that section 6657D(2) requires that any orders made by the Panel be appropriate to protect rights and interests, those must be protective rather than compensatory and that the Panel erred in concluding that an order could be made to protect rights or interests which no longer exist at the time the order is made. On the basis of the decision in *ASIC v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 and submissions made by ASIC on this point, her Honour rejected this argument.    On the basis of the above, CEMEX's application was dismissed. No orders as to costs were made, although argument was to be heard.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h4)  **4.6 Can administrators deal with the Public Trustee as the creditor entitled to represent, vote on behalf of, and exercise the other powers of the creditors under a trust deed?**  (By Sev Thomassian, Blake Dawson)   PFL Ltd formerly known as Palandri Finance Ltd (Administrators Appointed) v The Public Trustee of Queensland [No 2] [2008] WASC 234, Supreme Court of Western Australia, Heenan J, 21 October 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/october/2008wasc234.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/october/2008wasc234.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   Two originating summons were heard together because they involved common issues in respect of the voluntary administrations of the plaintiffs PFL Ltd (formerly Palandri Finance Ltd) (administrators appointed) (Palandri Finance) and PWL Ltd formerly Palandri Wines Ltd) (administrators appointed) (Palandri Wines).     The plaintiffs sought directions pursuant to section 447D of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Corporations Act) regarding whether the administrators may deal with the Public Trustee of Queensland as the creditor entitled to represent, vote on behalf of, and exercise the other powers of the creditors under three trust deeds.   Heenan J refused to make any of the declarations sought and adjourned each originating summons indefinitely.   **(b) Facts**    Palandri Wines was at all material times the responsible entity of six separate managed investment schemes, all of which were related to the business of vineyard establishment, grape production, viticulture, wine production, wine marketing, associated financial activities and property investments. Palandri Finance is a related company of Palandri Wines which provided financial support in relation to the wine making activities of Palandri Wines. The parties acknowledged that all of the schemes are insolvent and that the responsible entity, Palandri Wines, is also insolvent.     At a meeting of the creditors of each company, the creditors of the companies would be asked to vote on motions to either put each of the companies into liquidation or to approve a proposed deed of company arrangement (DCA).     It was acknowledged that if the proposed DCA was accepted it would result in the secured creditors receiving less than 100 cents in the dollar for their claims. This would enable the unsecured creditors, who would not be expected to receive any anything in the winding up of either company, to receive approximately $1 million. The DCA also purported to wind up each of the managed investment schemes. The decision to approve or reject the DCA at the creditors' meeting would be made by the vote of the majority in number and the majority in value of the creditors admitted to vote at each meeting. Accordingly, the votes of the secured creditors would rank equally with the votes of the unsecured creditors.   **(c) Decision**     The issue before the court was who was entitled to vote as, or on behalf of, any secured creditor or creditors under the Debenture Trust Deed, Palandri Note Trust Deed and the Wine Bond Trust Deed. The administrators of the Public Trustee contended that as trustee for the secured debenture holders or note holders, it was exclusively entitled to vote on behalf of all the debenture holders and note holders. The defendants contended that each individual debenture holder or note holder is a creditor entitled to vote at creditors' meetings and to exercise the other rights of a creditor, to the exclusion of the Public Trustee.   Heenan J acknowledged that some of those individual debenture holders and note holders had lodged individual proofs of debt with the administrators, to assert that each was entitled to vote at creditors' meetings. The administrators refused to accept the individual proofs of debt and instead treated the Public Trustee as being solely entitled to vote on behalf of all secured creditors.   Accordingly the administrators pressed for directions pursuant to section 447D of the Corporations Act. Relevantly, the directions sought were that the court direct that the administrators may pursuant to the Debenture Trust Deed and Note Trust Deed, treat the Public Trustee exclusively as the person who is:   * entitled to vote at the meetings of the creditors of the first plaintiff; * entitled to lodge proof of debt in respect of the first plaintiff; * entitled to appoint a proxy for the purposes of meetings of creditors of the first plaintiff; * qualified to be a member of a committee of creditors for the purposes of section 436G of the Corporations Act; and * qualified to be a member of a committee of inspection for the purposes of chapter 5, Part 5.6, Division 5 of the Corporations Act.   The plaintiffs acknowledged that even if such directions were made, they would not constitute any authoritative determination in respect of the issue regarding who was entitled to vote at the creditors' meetings. The plaintiffs sought such directions on the basis that they were merely procedural and would afford protection to the administrators for any subsequent allegations of breach of duty in relation to their conduct of the administration. The plaintiffs contended that an application for directions is an administrative non-adversary proceeding which protects the liquidator against subsequent allegations of breach of duty if the liquidator has made full disclosure, although the determination will be non-binding.   Heenan J held that such directions are readily granted in instances where they are truly procedural, that is, where no directions would result in any determination of substantive rights.  His Honour referred to the decision of Finkelstein J in Re Media World Communications Ltd; Crosbie v Naidoo [2005] FCA 51; which involved an application for directions under section 447D of the Corporations Act. In that case, the administrator sought direction from the court in regard to whether shareholders of the company, who claimed damages for false statements contained in a prospectus under which they had subscribed for shares, could be treated as creditors for the purpose of the administration, and if so, if the shareholders had a right to vote at subsequent creditors' meetings.    Finkelstein J considered that an application for directions under section 447D of the Corporations Act is commonly used by administrators when asking for guidance from the court. However, his Honour concluded that a determination regarding who was entitled to vote at a meeting of creditors would directly affect the substantive rights of the shareholders, and also that it would affect the rights of other shareholders and creditors who were not parties to the proceedings.   Heenan J considered that the administrators have recourse to other avenues of relief if a dispute regarding the eligibility of voters at a creditors' meeting were to arise. Creditors would have the opportunity to attend such a meeting and assert their right to vote and a decision can then be made by the administrators regarding their right to vote. If a claimant is dissatisfied with the outcome, it can challenge the administrators decision. Alternatively, if a claimant threatens to challenge the validity of the vote, the administrators would be entitled to seek a declaration from a court.  His Honour considered that although the issue was not without doubt, the present proceedings were incapable of resolving the issue and that directions under section 447D of the Corporations Act would not alter that situation.   For the reasons outlined above, Heenan J refused to make any of the declarations sought and adjourned each originating summons indefinitely.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h4)  **4.7 The legitimacy of the appointment of an administrator by a single director**   (By Laura Keily and Paul Lewis, Corrs Chambers Westgarth)   HPI Australia Pty Ltd [2008] NSWSC 1106, New South Sales Supreme Court, Equity Division, Barrett J, 21 October 2008    The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/october/2008nswsc1106.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/october/2008nswsc1106.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   Mr Cathro (Applicant) sought orders from the court declaring that his appointment as administrator of each of six companies was valid. The Applicant was concerned that the appointments might be defective as each company only had one director in office at the time of the appointment and so may not have formed the necessary quorum for appointing an administrator by board resolution under section 436A(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act). In each case, for varying reasons, the court made an order either to confirm or cure the appointment of the administrator despite there being only a sole director in office at the time.  In so doing, his Honour (1) commented on the construction of certain clauses of company constitutions in the context of the appointment of an administrator; (2) considered the factors which would justify an order under section 447A of the Corporations Act to correct a defect in the appointment of an administrator and (3) considered the operation of sections 447A, 447C and 1322(4) of the Corporations Act.   **(b) Facts**    The Applicant was appointed as the administrator, under Part 5.3A of the Corporations Act, of each of the following six companies: Ce'Nedra Pty Ltd (Ce'Nedra); North Ryde Hotel Pty Ltd (North Ryde Hotel); Australian Hotel Acquisition Pty Ltd (Australian Hotel); HPI Australia Pty Ltd (HPI Australia); HPI Parramatta Pty Ltd (HPI Parramatta) and North Ryde Property Pty Ltd (North Ryde Property).   The Applicant was initially appointed with his partner, Mr Cussen, on 27 August 2008. At the second meeting of creditors, Mr Cussen resigned but the Applicant was confirmed as the sole administrator for the six companies. At the time of the appointment, Mr Urwin was the sole director of each of the six companies but nevertheless purported to take the action described by section 436A of the Corporations Act as a "board resolution". This was despite the constitutions of five of the companies requiring a quorum of two directors for any meeting. Accordingly, the Applicant applied to the court seeking orders that put his appointment beyond doubt.   **(c) Decision**   In each case the court made an order declaring that the appointment was valid, despite being made by a sole director. However, the justification for the orders differed depending on whether or not the constitution of the relevant company provided for single director resolutions "in the case of emergency".   **(i) Orders under section 447C, including where constitutions provided for single directors to act in the case of emergency**   The constitutions of Ce'Nedra and North Ryde Hotel each had provisions that allowed a single director to act on behalf of the company when facing a situation of "emergency" that required them to act.  His Honour held that the need to appoint administrators because of insolvency or expected insolvency should be regarded as a situation of "emergency" for the purpose of such provisions.  Barrett J stated that such a situation called for "immediate and decisive action in the interest of creditors in order that exposure to danger may be addressed".   Barrett J found that Australian Hotel was a Single Director Company within the meaning of its constitution and that it could validly act and operate with one director.   Accordingly, Barrett J made declarations under section 447C of the Corporations Act in each case that the appointments of the administrator in these circumstances were valid.  These orders were not curative in nature but confirmed a finding that no aspect of the appointment needed to be cured.   **(ii) Orders under section 447A, where constitutions did not provide for single directors to act in the case of emergency**   His Honour undertook a different analysis with respect to HPI Australia, HPI Parramatta and North Ryde Property.     HPI Australia and HPI Parramatta had adopted constitutions that required a minimum of two directors for a quorum at a meeting of directors and which made no provision for a single director to take any action on behalf of the company in the case of "emergency". His Honour distinguished clauses which enabled the remaining directors to act to increase the number of directors to a number sufficient to constitute a quorum or to convene a general meeting.  As there was no ability for the sole director to act, Barrett J noted that the appointment of the administrator for HPI Australia and HPI Parramatta would "stand as a nullity unless an order of the court alters its character".   In the case of North Ryde Property, Barrett J noted that the content of the company's constitution had not been made available to the court.  Corporate records were submitted that established that there were six directors in the year to 30 June 2006 and that two directors had ceased to hold office on 28 July 2008.  His Honour noted that these records appeared to indicate that, should a constitution exist, it was likely to require multiple directors.  Given this, and the fact that the replaceable rules in section 248F of the Corporations Act required the presence of two directors for a quorum at a meeting of directors, Barrett J considered North Ryde Property together with HPI Australia and HPI Parramatta.   Barrett J took into account a number of factors in determining whether the appointment of the Applicant as administrator was valid for these three companies. Firstly, his Honour considered the circumstances in which the companies came to have only one director. In particular, his Honour noted that the corporate group of which these companies were part had entered into a settlement agreement in the context of a liquidation and the settlement agreement required changes to the number of directors of HPI Australia and HPI Parramatta such that there would only be two directors. However, while Mr Urwin consented to act as director, the second nominated person did not consent to the appointment. The members of the company had not seen fit to take steps to change the current situation. Secondly, as Mr Urwin was left as the sole director and he clearly desired the appointment of the administrator, there was no evidence to suggest that the action by Mr Urwin represented anything other than the "corporate will" of each company. Thirdly, his Honour took into account evidence from Mr Cussen that the decision had been taken in a considered and rational manner and that the appointment of an administrator was a sensible next step. Barrett J noted that the creditors had not voiced objection to the appointment and that it had in fact been ratified by the creditors at the second meeting on 8 September 2008. Finally, his Honour made a brief reference to the fact that it appeared no-one would be prejudiced by the appointment being upheld by the court.   Given these factors, Barrett J was of the opinion that any defect in the appointment should be cured by the court by an appropriate order and therefore considered the appropriate order to make.  Cases were referred to in which such an order had been made under section 1322(4) of the Corporations Act which confers power on the court to make an order "declaring that any act . purporting to have been done . under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation". However, his Honour noted the need to consider the range of matters specified in section 1322(6) in order for relief under section 1322(4) to be available.   Whilst not suggesting relief would not be available under section 1322(4), his Honour instead took the view that, in any event, such an order was within the scope of section 447A of the Corporations Act which provides for the court to make an order which "it thinks appropriate about how this Part [5.3A] should operate". His Honour noted the broad scope of section 447A, as confirmed by the High Court in Australasian Memory Pty Ltd v Brien [2000] HCA 30; (1999) 200 CLR 260, including its capacity in the case of a subsisting or purported administration to have retrospective curative effect.     His Honour made orders under section 447A in relation to HPI Australia, HPI Parramatta and North Ryde Property such that Part 5.3 operated in relation to those companies as if a purported resolution of the relevant company's board was, for the purposes of an appointment of an administrator under section 436A(1), valid and effectual and a purported instrument of appointment under section 436A(1) was, for the purposes of that section, a valid and effectual instrument of appointment.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h4)  **4.8 Litigation funding agreement for responsible entity**   (By Stephen Magee)   ASIC v Knightsbridge Managed Funds Ltd (No 3) [2008] WASC 231, Supreme Court of Victoria, EM Heenan J, 20 October 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/september/2008wasc231.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/september/2008wasc231.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   A responsible entity of a managed investment scheme was give leave to enter into a funding agreement to litigate an appeal.   **(b) Facts**   Knightsbridge Managed Funds Ltd was the responsible entity of a managed investment scheme. The scheme involved the establishment of a fund which was then lent out on security. A liquidator was appointed to the scheme in 2001 and to Knightsbridge Managed Funds Ltd in 2002.   Knightsbridge had lent money on security to Meadow Springs. Meadow Springs had subsequently gone into liquidation and its liquidator began a legal action against a third party. That action was settled by the payment of a large sum of money to Meadow Springs. The responsible entity claimed that its security gave it a priority claim to the proceeds of the action. This claim was resisted and the matter went to litigation.   Knightsbridge's liquidator obtained leave of the court (under section 477(2B) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)) to enter into a funding agreement to litigate this dispute.  At first instance, Knightsbridge was largely successful. It was held to have priority over the bulk of the recovery. Both sides appealed. Knightsbridge's liquidator now sought leave under section 477(2B) to enter into a litigation funding agreement to cover the cost of defending the appeal and prosecuting its own cross appeal.  **(c) Decision**  **(i) Amount payable to litigation funder**   Under the original litigation funding agreement, Knightsbridge's liquidator had agreed to pay 35% of any recovery to its litigation funder. For the appeal and cross-appeal, it was proposed that percentage would be lifted by 1% for each $9,596 of funding provided by the litigation funder for the appeals.   As the court noted, this decoupled the litigation funder's entitlements from the direct outcome of the appeal and cross appeal. However, it also noted that the outcome of the appeal and cross-appeal were either neutral or had downside for Knightsbridge and the litigation funder:   * if Knightsbridge's cross appeal succeeded, it would recover only a small addition to the sum it had already recovered; and * on the other hand, if the other party's appeal succeeded, Knightsbridge could lose its entitlement to the bulk of the recovery - and the litigation funder could therefore lose its ability to recover its entitlements under the original funding agreement (and potentially become liable for the other side's costs in the appeal).   In the court's view, this meant that the litigation funder's entitlement under the proposed funding agreement was "not unreasonable having regard to the potential losses and liabilities which [the litigation funder] would incur if the litigation were to fail".  **(ii) Was fresh leave necessary?**  The court held that fresh leave was required for the liquidator to enter into the litigation funding agreement.  **(iii) Should the litigation funding agreement be approved?**  The court adapted criteria applied by Barrett J to statutory derivative actions:   * Do the proposed proceedings have some solid foundation, in that they exhibit such a degree of merit as to be neither vexatious nor oppressive and to present reasonable prospects of success? * Would the proposed proceedings be in the interests of the entity and those affected by its winding up?   On the second point, the court noted that the affected parties would include:   * the creditors and members of Knightsbridge (whose interests would not really be affected by the litigation and who were represented by the liquidator); and * the members of the managed investment scheme (who were not directly represented, because the liquidator was applying in his capacity as liquidator of the Knightsbridge responsible entity).   To protect the interests of members of the managed investment scheme, the court approved the litigation funding agreement subject to a condition that those members be notified of the agreement and given liberty to apply to have the terms of the agreement varied.  For its part, the litigation funder undertook to abide by any direction or order of the court to vary the terms of the litigation funding agreement, subject to its right to be heard and any rights of appeal.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h4)  **4.9 Mining tenement and royalty payments as unfair preferences in liquidation**   (By Steven Rice, Freehills)   McKern v Minister administering the Mining Act 1978 (WA); Re Centaur Mining and Exploration Ltd [2008] VSC 416, Supreme Court of Victoria, Robson J, 15 October 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/october/2008vsc416.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/october/2008vsc416.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   This decision by Robson J is authority that the so-called "landlord's defence", an instance of the "ultimate effect" doctrine, survived the 1992 amendments to the then-Corporations Law and may thus operate as a defence to an unfair preference claim in relation to lease payments. It is also authority that the "landlord's defence" potentially applies to royalty payments where the payment of the royalty is a condition of a lease.   **(b) Facts**   The plaintiff was a mining company and held a lease in relation to mining tenements in Western Australia. It was insolvent at the end of 2000, but in early 2001 paid the State of Western Australia over $1.6 million in total in respect of rent in advance for the lease of the tenements, and for royalties. Shortly after these payments, receivers and managers were appointed to the plaintiff. The receivers and managers subsequently sold the mines for $66 million on behalf of the secured creditors of the plaintiff.   Liquidators were appointed to the plaintiff and sought recovery of the rent and royalty payments on the basis that these payments were unfair preferences under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The defendant, the Minister Administering the Mining Act 1978 (WA) (representing the State of Western Australia), resisted the liquidators' claim on the basis that the payments were not unfair preferences because the "landlord's defence" applied to them. The liquidators asserted that the "landlord's defence" did not survive amendment to the then-Corporations Law in 1992 (and this defence was therefore not available to the Minister), but if the defence did survive, then the rent and royalty payments made here did not attract it.   **(c) Decision**   **(i) The "landlord's defence" and the 1992 amendments**   His Honour considered the nature of the "landlord's defence". His Honour held that the "landlord's defence" was part of the "ultimate effect" doctrine examined by the High Court of Australia in *Airservices Australia v Ferrier* (1996) 185 CLR 483. Airservices Australia is authority that the relevant issue in the case of a payment to a creditor to secure ongoing services from that creditor is whether the effect of giving a creditor a preference, priority or advantage over other creditors is such that it would result in a decrease in the net value of the other assets available for the creditors. These principles have been applied in cases such as Re Discovery Books Pty Ltd (1973) 20 FLR 470 which held that a rental payment said to be an unfair preference needs to be considered in light of the need to make that payment to retain possession of the premises and the benefit derived from retaining possession.   Robson J then moved to address whether the "landlord's defence" survived the 1992 amendments to the then-Corporations Law. His Honour noted that the unfair preference provisions currently found in the Corporations Act 2001 (Cth) had their origins in the former Corporations Law by way of amendments enacted under the [Corporate Law Reform Act 1992 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12036" \t "Default), and that prior to this amendment those provisions were incorporated from the [Bankruptcy Act 1966 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "Default). The court then cited Ormiston JA (Winneke P and Tadgell JA agreeing) in *VR Dye v Peninsula Hotels* [1999] 3 VR 201 as authority that the amendments did nothing to alter the identification of unfair preferences, a process which had previously recognised the "ultimate effect" doctrine. Robson J held that in making the amendments it was "unlikely that parliament intended to materially alter the preference laws", and that the law reform process which preceded the amendments (the Harmer Committee) had decided the policy underlying the unfair preference provisions should not be altered (at [26]). From this, Robson J concluded the "landlord's defence" and the "ultimate effect" doctrine were not extinguished by the 1992 amendments to the Corporations Law and were available in response to an unfair preference claim under section 588FA of the Corporations Act 2001 (Cth).   **(ii) The "landlord's defence" and the rental payments**   The court held that the "landlord's defence" was available to the defendant in relation to the rental payments made by the plaintiff to the defendant. The defendant submitted that if the plaintiff had failed to pay the rent then the tenements could have been forfeited, and that the value of the tenements to the plaintiff equalled or exceeded the value of the rent. His Honour found that the burden to establish that the payments decreased the net value of the defendant fell on the liquidators, and that they had not done so. Accordingly, this aspect of the liquidators' claim failed.   **(iii) The "landlord's defence" and the royalty payments**   The court held that the "landlord's defence" also applied to the royalty payments made by the plaintiff to the defendant. His Honour again applied Airservices Australia in examining whether the payments resulted in a net benefit to creditors, and found that this was the case. The value of the plaintiff's assets was subject to these payments, and making the payments avoided the forfeiture of the tenements. In making these findings, Robson J distinguished a number of cases (in the context of poker machine royalties, sales tax and the like) which had held to the contrary, his Honour finding that the payment of the royalties should be viewed similarly to the payment of rent because their payment was a condition of the lease.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h4)  **4.10 Resolving multiple similar class actions - represented group member's interests are paramount**  (By Kristian Imbesi, Mallesons Stephen Jaques)   Kirby v Centro Properties Limited [2008] FCA 1505, Federal Court of Australia, Finkelstein J, 10 October 2008   The full text of this judgment is available at:   [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/october/2008fca1505.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/october/2008fca1505.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   Justice Finkelstein considered whether three representative class actions raising similar issues, arising from a common body of facts, should all be permitted to proceed. Acknowledging that there was no legislation in Australia that spelt out correct procedure in the context of multiple class actions with overlapping issues, his Honour considered the factors that should be taken into account in consideration of how to proceed in such a situation.    His Honour declared that the best interests of the large class of group members represented in the proceedings was the only important factor for consideration. However, he also acknowledged that the court was not in a position to know those views without the aid of some form of common informed voice of represented group members.   His Honour dismissed the application for stay of one of the proceedings. Instead, he suggested the formation of a common litigation committee, whose role would be to oversee each action and make informed decisions on behalf of the classes of group members whose interests were at stake. Leave was given to the parties to make submissions as to the appropriate construction, role and powers of such a committee.   **(b) Facts**   Three representative actions were brought against various entities within the Centro Group (being Centro Properties Ltd, CPT Manager Ltd, Centro Retail Ltd and Centro MCS Manager Ltd). Mr Richard Kirby was the named applicant in two of those applications and was represented by Maurice Blackburn Pty Ltd ("the Kirby actions"). Mr Nicholas Vlachos, Monatex Pty Ltd and Ramon Franco ("the Vlachos action") issued the third proceeding, in which the applicant group was represented by Slater & Gordon.    In each matter, ASX listed securities in two of the Centro Group entities, which were stapled units in trusts also related to the Centro Group, were purchased by named applicants and the group members whom they represented. The price of those securities fell substantially, and the purchasers allegedly lost hundreds of millions of dollars in value. As stated by Finkelstein J, the three actions had substantially identical claims, causes of action, and had "the same nucleus of operative facts". It is true that there were some differences between the actions (e.g. the investors represented by the Kirby actions were a closed class while the Vlachos investors class was open). However, the three actions were the same in essence.    The applicants brought actions to recover their losses. They accused the respondent companies of making misleading statements to the market about their financial positions, and also of failing to meet disclosure requirements as stipulated by the ASX Listing Rules. Such conduct was alleged to have overly inflated the price of the securities. At issue was whether all three actions should be permitted to proceed.   **(c) Decision**   **(i) Preliminary comments and discussion of options**   Finkelstein J commented that each of the representative class actions in question was an example of the "relatively new phenomenon" of lawyer driven litigation.    His Honour acknowledged that litigation of this kind is beneficial in that it allows clients to obtain redress in situations where they otherwise would not have redress - as well as situations where they may not have even known redress was available. However, he also made mention of the risk involved in this type of litigation - that the actions and decisions of lawyers involved may not be adequately monitored by members of the represented class. In this regard, his Honour referred to the US Private Securities Litigation Reform Act 1995, which addresses this concern through the requirement of the appointment of a 'lead plaintiff' (who is typically a sophisticated and resource bearing institutional investor) in all securities fraud class actions.   Turning back to the issue at hand, his Honour stated that it was 'undesirable' that multiple class actions which covered the same or similar issues be tried separately. To avoid giving potentially inconsistent judgments, and to enable the parties to benefit from the 'obvious efficiencies' of resolving common questions at the one time, Finkelstein J stated simply and clearly that 'something must be done'. Acknowledging that there was no legislation in Australia that spelt out procedure in the context of multiple overlapping class actions, his Honour discussed what he considered to be the three ordinary ways in which an Australian court should deal with such a situation.   First, his Honour said that a court may nominate one or more actions to continue on to trial, with other proceedings stayed until the initial matter(s) had been decided. Such a process would typically require the party applying for the stay to give an undertaking to abide by the first-in-time decision: *Cameron v McBain* [1948] VLR 245.    Second was the option to consolidate the actions into one proceeding - a process which can prove particularly cumbersome and difficult, especially if each consolidated plaintiff has separate legal representation (however, without leave, separate representation is not typically permitted on the plaintiff's side: *Lewis v Daily Telegraph Ltd (No 2)* [1964] 2 QB 601).    Last, a joint trial could be ordered, in which separate representation of each plaintiff is possible. His Honour noted that a joint trial would not avoid problems associated with separate pleadings, separate discovery, and separate interlocutory hearings, however he also noted that flexibility exists in regards to an order for joint trial, and that if functioning without benefit, joint trials can be split: *Horwood v Statesman Publishing Co* (1929) 98 LJKB (NS) 450.   **(ii) What the lawyers did**   Before deciding which method of dealing with the multiplied proceedings was the most appropriate, his Honour spent some time considering the positions of the parties leading into the present interlocutory proceeding.    Maurice Blackburn, on becoming aware that Slater & Gordon were planning to issue a class action similar to the proceeding Maurice Blackburn had already initiated, initially advised Slater & Gordon that they would fund Slater's & Gordon's clients if they joined the Kirby actions, however this proposal never eventuated. Later, Freehills (who act for members of the Centro Group) wrote to the parties suggesting that either of the proceedings be stayed. However, neither party appeared to be interested in staying their respective clients' action.    Discussions between the parties as to what should be done continued. Maurice Blackburn communicated to Freehills that, despite earlier statements to the contrary, it supported a stay of the Vlachos proceeding and further advised that, if the Vlachos proceeding were stayed, it would amend the group definition in the Kirby proceedings to allow Vlachos group members to become a part of the member class represented in the Kirby proceedings. As a result of the discussions, the respondents, with the active support of Mr Kirby, sought a stay of the Vlachos action based on section 33ZF of the [Federal Court of Australia Act 1976](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "Default) and the assertion that the stay would ensure that 'justice is done'.    **(iii) The section 33ZF stay application**   Justice Finkelstein began his consideration of the stay application by acknowledging that the decision as to which matter should be stayed was "fraught with difficulty".  Approaching first the factors that he considered were not relevant to determining which matter should be stayed, his Honour stated that he would ignore the fact that the respondents had suggested that the Vlachos action should be stayed, as well as the fact that this decision was achieved with agreement of the parties. Also, the assertion that the Kirby proceedings should be stayed because it was the action with the greater number of group members was poorly founded, and was thus equally irrelevant.   Further, his Honour proposed to give no weight whatsoever to the interests of lawyers or litigation funders in the proceedings. Further still, his Honour saw as irrelevant to the decision the fact that the Kirby proceedings were the first commenced. He considered that this approach was dangerous and was one that may lead to "hastily drafted pleadings, poorly supported allegations" and an disproportionate amount of settled class actions.   In considering which factors should be taken into account in resolving this issue, his Honour acknowledged that the most important interests were those of the large group of members represented in the Kirby proceedings (there being some 955). He stated that: "The decision that I am asked to make will likely have such an impact on group members in each action that I am reluctant to make it without knowing their views." His Honour said that agreement of group members by acquiescence was insufficient in the context. Finkelstein J then used the flexibility provided by section 33ZF to make orders that none of the parties had suggested, as discussed below.   **(iv) Knowing the interests of the group members - a litigation committee**   In response to the concerns discussed above, Finkelstein J declared that the appointment of an independently-selected litigation committee was the best method for protecting, and providing to the court, the views of the group, and ensuring that 'justice was done', as the court was able to do under section 33ZF. His Honour stated that this committee would be able to oversee and monitor each action, and would be in a strong and informed enough position to make decisions about what was in the best interests of the group. Without this committee, his Honour said that he would be unable to know where the best interests of the group members lay - interests which he reiterated were "the only important factor" in determining which of the actions should proceed and which should be stayed.   **(d) Conclusion**   His Honour dismissed the stay application and granted 21 days leave to the parties of each of the three proceedings to file written submissions on whether, and if so how, a litigation committee should be appointed, as well as what powers to give to that committee. A common directions hearing was scheduled for all three proceedings towards the end of the period for submissions.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h4)  **4.11 Reinstatement of a company under section 601AH of the Corporations Act**  (By Mark Cessario and Emily Bell, Corrs Chambers Westgarth)   Stone v ACN 000 337 940 Pty Ltd [2008] NSWSC 1058, New South Wales Supreme Court, Barrett J, 9 October 2008    The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/october/2008nswsc1058.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/october/2008nswsc1058.htm" \t "_new)   or   [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   The plaintiff had already commenced proceedings against the defendant company in the NSW Dust Diseases Tribunal, seeking damages for asbestos related injuries allegedly caused during the plaintiff's employment with the company.   The defendant company had previously been deregistered and the plaintiff sought an order under section 601AH(2) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) directing ASIC to reinstate the company's registration. The application was opposed on the grounds that the plaintiff had adequate protection under section 601AG of the Act, which enables a person to recover from an insurer of a deregistered company.   In considering whether an application under section 601AH should be granted, the availability of a cause of action under section 601AG was relevant. The availability of such a cause would make it unnecessary to reinstate the company under section 601AH.  However, Barrett J held that the requirements of section 601AG of the Act were not satisfied, and the plaintiff had no cause of action under that provision.   His Honour considered that the plaintiff was "a person aggrieved" by the company's deregistration and it was, in all the circumstances, just for the registration of the company be reinstated.     **(b) Facts**    The defendant company was known as Rigby Jones Pty Ltd until 2002 ("Company"). On 20 May 2006 the Company was deregistered pursuant to section 509 of the Act, upon completion of a members voluntary winding up.    On 13 June 2008 the plaintiff, an employee of the Company between 1972 and 1990, purportedly commenced proceedings against the Company in the Dust Diseases Tribunal of NSW.  The plaintiff sought damages for harm he allegedly sustained through exposure to asbestos whilst at work.    The plaintiff's solicitors had inquired into insurances held by the Company with respect to liability for injuries of employees. They were informed that an insurance company currently in liquidation "was on risk in 1975" although "there [were] no actual underwriting documents".   The plaintiff applied for an order under section 601AH(2) of the Act, directing ASIC to reinstate the registration of the Company. The application was opposed by a Mr Ingate, the sole director of the Company at the time of deregistration.   **(c) Decision**    The plaintiff applied for an order under section 601AH(2) of the Act, directing ASIC to reinstate the registration of the Company. Section 601AH(2) provides:   "The court may make an order that ASIC reinstate the registration of a company if: (a) an application for instatement is made to the Court by: (i) a person aggrieved by the deregistration.         . and (b) the court is satisfied that it is just that the company's registration be reinstated."   **(i) Section 601 AG**   For the Company, it was submitted that an order directing the reinstatement of the Company's registration should not be made as the plaintiff had adequate protection under section 601AG of the Act. Section 601AG provides:  "A person may recover from the insurer of a company that is deregistered an amount that was payable to the company under the insurance contract if: (a) the company had a liability to the person; and (b) the insurance contract covered that liability immediately before deregistration".   Barrett J referred to Del Borrello v ASIC [2008] WASC 48, in which Beech J explained that the purpose and effect of section 601AG is to enable a person to proceed directly against an insurer of deregistered company, without the need to obtain that company's reinstatement.  Barrett J also noted *Almario v Allianz Australia Workers Compensation (NSW) Insurance Ltd* [2005] NSWCA 19, in which the Court of Appeal stated that "Section 601AG creates a new cause of action. The action is not a claim for damages.  It is for an amount that was payable to the deregistered company under the relevant insurance contract."   Barrett J went on to note that, in an action for damages, whether or not the two conditions specified in section 601AG are satisfied will depend on:   * the time at which the relevant cause of action for damages was complete; and * the terms of the relevant insurance policy.   Here, there was no evidence of the terms of the relevant insurance. It was not even certain that there was an insurance contract which covered the whole or any relevant period of the plaintiff's employment.  It was also not possible to determine when the plaintiff's cause of action became complete. Thus, Barrett J held that it was not possible to conclude that circumstances existed so as to allow the plaintiff to proceed under section 601AG.  **(i) Section 601AH**  Barrett J noted that the availability of an action under section 601AG was directly relevant to consideration of an application for reinstatement under section 601AH.  If a plaintiff had a cause of action under section 601AG, there would be no need to reinstate the company and a person would not be "a person aggrieved" by the deregistration.   Given his Honour's findings in relation to section 601AG of the Act, it was necessary to consider whether the circumstances of this case justified the Company's reinstatement under s601AH of the Act.     His Honour considered that the plaintiff was "a person aggrieved" by the deregistration because any prospect that he had of obtaining satisfaction from an insurer of the Company depended on his bringing an action to establish liability of the Company.   In considering whether the reinstatement of the Company's registration was "just", it was necessary to consider the impact restoration would have on interested and affected persons. From the perspective of the plaintiff, it would enable him to pursue an action in damages.     It was also necessary to take into account the future stewardship of the Company.  As the company was subject to a members voluntary winding up at the time of deregistration, a liquidator would need to be appointed should the company be reinstated.  Barrett J said that ordinarily, it is desirable that the previous liquidator be put back in office.     Consideration was also given to the effect any reinstatement would have on the members of the Company. Section 601AH(5) of the Act provides that, upon reinstatement, "the company is taken to have continued in existence as if it had not been deregistered". Barrett J considered that this meant the Company continued in the same form prevailing at the time of its deregistration - that is, a company that had been duly subjected to a winding up. As such, any members who received distributions in the course of the voluntary winding up would not be prejudiced by the reinstatement.   On the basis of these considerations, Barrett J held that it was just that the registration of the Company be reinstated.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h4)  **4.12 The court's role under a compromise or arrangement under the Co-operatives Act is not the same as a compromise or arrangement under the Corporations Act**   (By Vince Battaglia, Blake Dawson)   Australian Co-operative Foods Ltd [2008] NSWSC 1063, New South Wales Supreme Court, Barrett J, 8 October 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/october/2008nswsc1063.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/october/2008nswsc1063.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   The plaintiff, Australian Co-operative Foods Limited (ACF), applied to the New South Wales Supreme Court for a date to be set for the court to hear an application to approve a compromise or arrangement regarding ACF under section 344 of the [Co-operatives Act 1992 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3882" \t "Default) (the Co-operatives Act). As part of the application, the plaintiff submitted a large number of documents, including a scheme booklet, a scheme booklet supplement, a voting guide, the implementation agreement and related deed poll, along with written submissions.     Barrett J took the view that "[t]he real purpose of ACF's approach to the court, despite the form of the application, is to obtain some form of advance appraisal or evaluation of the proposal and of a number of potentially difficult matters that seem to arise". His Honour held that the court's role at that stage was only to set a date for hearing, and that, under the Co-operatives Act, it is not the court's role to approve or pre-vet the explanatory statement, or to give an opinion on the submitted material. The court's only order was to set down a date for the hearing.   **(b) Facts**   ACF is a body registered under the Co-operatives Act as a co-operative, trading under the name "Dairy Farmers". ACF negotiated with National Foods Limited with a view to carrying into effect an acquisition transaction involving a compromise or arrangement under Part 13 of the Co-operatives Act under which all the shares in ACF will cease to be held by ACF's current members and come to be held by National Foods Limited. As such, the envisaged compromise or arrangement is between ACF and its members (as distinct from an arrangement between ACF and its creditors).    ACF applied to the court to fix a date for hearing an application for the court's approval of the compromise or arrangement under section 344 of the Co-operatives Act.   **(c) Decision**   The court ordered that 18 November 2008 be set as the date for the hearing of the application under section 344(1) of Co-operatives Act. This decision evidently "pose[d] no difficulty" for the court.  Of significance, however, were Barrett J's observations regarding the differences between a court-approved compromise or arrangement under Part 13 of the Co-operatives Act and a compromise or arrangement under Part 5.1 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Corporations Act).   Section 344(1) of the Co-operatives Act states that a compromise or arrangement will be binding only if it is approved by order of the court and also approved by the members concerned by special resolution passed by means of a special postal ballot, for which provision is made in the Co-operatives Act. The necessary approval of members is thus to be achieved by a process that does not require any meeting of members.    Barrett J stated that, under the Co-operatives Act, the court is not cast in a role analogous with that provided for in section 411(1) of the Corporations Act. Under section 411(1) of the Corporations Act, the court can order that a meeting or meetings be convened to consider a compromise or arrangement under Part 5.1 of that Act between a company and its members or a class of them; and to approve the explanatory statement required by section 412(1)(a) in such a case.   The court observed that ACF approached the court at a time when no special postal ballot had yet been conducted and no step has been taken to place the proposed compromise or arrangement before the members for decision. Whilst ACF's only formal application before the court was that it fix a date for the hearing of an application for an order under section 344(1), Barrett J stated that "t]he real purpose of ACF's approach to the court, despite the form of the application, is to obtain some form of advance appraisal or evaluation of the proposal and of a number of potentially difficult matters that seem to arise." His Honour stated that he saw "no foundation for embarking on any non-statutory course which is tantamount to the giving of an advisory opinion on matters concerning the proposed compromise or arrangement that may become controversial if and when the court is asked to exercise the statutory approval function." That is, the role of the court under the process provided in Part 5.1 of the Corporations Act is different to the role of the court under Part 13 of the Co-operatives Act.   Barrett J held that, in the context of Part 5.1 of the Corporations Act, the court is given by the legislation a specific role to play before members are invited to pronounce upon a proposed compromise or arrangement, and that under the Co-operatives Act it is not given this role. In taking this view, Barrett J did not embark upon the course indicated in *F T Eastman & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd* (1977) 3 ACLR 69 at 72 and other cases.    His Honour also dismissed an argument that the court must embark upon some form of advance scrutiny of the proposed compromise or arrangement based on section 368 of the Co-operatives Act. Section 368 states that the jurisdiction of the court under Part 13 of the Co-operatives Act "is intended to complement the court's jurisdiction under the Corporations Act (as applied under this Act) and should be exercised in harmony with that jurisdiction". Barrett J noted that section 368 "does not direct some general assimilation of the court's approach to a compromise or arrangement under Part 13 of the Co-operatives Act to the approach taken to a compromise or arrangement under Part 5.1 of the Corporations Act", and that the exercise of the court's jurisdiction under the Co-operatives Act "has nothing to do with the anterior process of placing materials before members for the purposes of the necessary ballot". The court is not invested by section 368 of the Co-operatives Act or otherwise with any jurisdiction analogous with that created by section 411(1) of the Corporations Act. Rather, section 355 of the Co-operatives Act states that the explanatory statement accompanying the meeting must be approved by the Registrar referred to in section 5B of the Co-operatives Act, and not by the court. As such, the court held that the Co-operatives Act creates a specific and particular pre-vetting and appraisal process in which the court plays no part.     The court noted that a number of evidently extensive written and oral submissions were made about the compromise or arrangement, including details of the proposed compromise or arrangement, a consideration of issues arising under Chapter 6 of the Corporations Act, the way instructions are proposed to be given concerning voting on the special postal ballot, and the exemptions that have been obtained under certain provisions of the Co-operatives Act. Barrett J stated that he only "skim[med] . in a preliminary way" some of the many documents submitted, as the role of the court was not to "pass some form of judgment or express some form of opinion on the various difficult and complex matters raised in written and oral submissions", but only to set a hearing date.     His Honour held that, except as statute may otherwise allow (see, for example, section 63 of the [Trustee Act 1925 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "Default)), "it is not part of the judicial function to give advisory opinions, as distinct from determining litigated controversies (including by declaratory judgment) or exercising some other clearly conferred jurisdiction".   All that the court could do at that stage was to appoint a hearing date, which it so ordered.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h4)  **4.13 Set-off provisions of section 553C apply to voidable preferences**   (By Stephen Magee)   Jetaway Logistics Pty Ltd (receivers and managers appointed) (in liquidation) v The Deputy Commissioner of Taxation [2008] VSC 397, Supreme Court of Victoria, Robson J, 7 October 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/october/2008vsc397.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/october/2008vsc397.htm" \t "_new)   or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   A creditor defendant to a voidable transaction claim can raise a set-off under section 553C.   **(b) Facts**    Jetaway was a transport company which used a significant amount of diesel fuel. It was, therefore, entitled to diesel fuel grants administered by the Australian Tax Office. When Jetaway got into arrears with its tax remittances, the ATO agreed to credit its diesel fuel grants towards the unpaid tax.    Jetaway ultimately went into liquidation. The liquidator began an action to recover the diesel credits as a preference from the Deputy Commissioner of Taxation, under section 588FA of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).   The Commissioner argued that section 553C was applicable in this situation. Section 553C requires that, when a company is wound up, any debts it owes to a creditor are to be set off against any mutual debts that the creditor owes the company. The Commissioner argued that this meant that any outstanding tax that Jetaway had owed at the time of the alleged preference was to be set off against the alleged amount of the preference.    The liquidator argued that section 553C was inapplicable to the preference provisions in Part 5.7B. Part 5.7B was, said the liquidator, a code, and section 553C was not part of that code.   **(c) Decision**    The court rejected the liquidator's argument. It said that section 553C and Part 5.7B incorporated the longstanding concept of "ultimate effect". The object of the provisions was to ensure that a creditor received no more than it would have received in a winding up. If the ATO had not paid or applied the diesel grant, when Jetaway went into liquidation, the ATO would have been required to set-off the diesel grant against Jetaway's tax liabilities. By applying the diesel grant to the tax liabilities before winding up, the Commissioner was in "no better position than if the transaction had not taken place".   The liquidator then relied on section 553C(2). Section 553C(2) says that set-off is not available if the creditor had notice of the company's insolvency at the time of giving credits to the company.   This raised two questions for the court:   * who bears the onus of proving that the creditor had notice of the company insolvency? * what type of knowledge constitutes "notice" of the company's insolvency?   The court held that the person who raises the issue bears the onus under section 553C(2). In this case, that was the liquidator, because it was the liquidator who had raised section 553C(2) as an issue.    On the second question, the court held that the test in section 553C(2) is not the same as the defence in section 588FG(2) (which requires the creditor to have had no reasonable ground for suspecting that the company was insolvent). Section 553C(2) required notice of the fact that the company was insolvent. For that purpose, the court applied the test of knowledge under the second limb of Barnes v Addy:   * actual knowledge; * wilfully shutting one's eyes to the obvious; * wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; or * knowledge of circumstances which would indicate the facts to an honest and reasonable person.   Mere negligent failure to make inquiries was not sufficient.   Applying this test, the court held that the Commissioner had not had notice of the fact that Jetaway was insolvent.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Contributions** |  |  | | |  | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20135.htm%23h1) | | |  |

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