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| **Bulletin No. 130**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by Lawlex on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1. [Recent Corporate Law and Corporate Governance Developments](file://pv-law-web/Inetpub/farcry-cms/farcry_cclsr/www/bulletins/LAWLEX%20Corporate%20Law%20Bulletin%20No%20130.htm#h1)
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| **1. Recent Corporate Law and Corporate Governance Developments**  |  | ext Section |

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| **1.1 Seminar - Continuous disclosure: key issues for companies and their advisers (Sydney and Melbourne)** Australia's continuous disclosure regime is regarded as critical to an informed market and the confidence of investors. The importance of the regime is reflected in the fact that the government has given ASIC its own power to impose financial penalties on companies where ASIC believes there has been a breach of the continuous disclosure rules. However, there are concerns about the operation of the regime such as whether it requires disclosure prematurely and thereby disadvantages companies.In addition, companies in breach of the continuous disclosure rules are potentially subject not only to enforcement action by ASIC but are also increasingly subject to civil claims by investors.In an important development, in late May 2008 it was announced that shareholders have reached a conditional settlement with Aristocrat Leisure in what is believed to be the largest payout by a company alleged to have breached the continuous disclosure rules. The payout is reported to be $140 million.The seminar brings together key speakers from ASX, IMF Australia (a litigation funder involved in funding investor actions based on alleged breaches of the continuous disclosure rules) and legal advisers to major corporations who regularly advise their clients on continuous disclosure matters.Speakers for the seminars are: David Barnett (Sydney seminar) General Manager, ASX Ltd; Malcolm Cooke (Melbourne seminar) Partner, Freehills; Quentin Digby (Sydney seminar) Partner, Freehills; James Gerraty (Melbourne seminar) Manager of Issuers, ASX Ltd; Marie McDonald (Melbourne seminar) Partner, Blake Dawson; Elizabeth Pakchung (Sydney seminar) Partner, Blake Dawson and John Walker (Sydney and Melbourne seminars) Managing Director, IMF (Australia) Ltd. Date:       16 July 2008 (Sydney) - 23 July 2008 (Melbourne)  Time:       5.30pm - 7.15pm (Sydney and Melbourne)Location:  **Sydney Seminar        Melbourne Seminar**                Freehills                       Freehills                Level 38                      Level 42                MLC Centre               101 Collins Street                19 Martin Place           Melbourne 3000                Sydney 2000                                                                                                                                                                            Cost:       $90 + $9 GST = $99RSVP:     Josephine Peters (03) 8344 5281 The flyer and registration form are available at: [http://cclsr.law.unimelb.edu.au/go/news/index.cfm](http://cclsr.law.unimelb.edu.au/go/news/index.cfm%22%20%5Ct%20%22_new)etailed Contents**1.2 Principles for sound liquidity risk management and supervision**On 17 June 2008, the Basel Committee on Banking Supervision issued for public comment enhanced global 'Principles for Sound Liquidity Risk Management and Supervision'. The principles support one of the key recommendations for strengthening prudential oversight set out in the 'Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience', which was presented to G7 Finance Ministers and Central Bank Governors in April 2008.  The draft principles represent a substantial revision of the Committee's liquidity guidance that was published in 2000 and reflect the lessons of the financial market turmoil. The work was drawn from recent and ongoing work on liquidity risk by the public and private sectors and is intended to strengthen banks' liquidity risk management and improve global supervisory practices. The principles underscore the importance of establishing a robust liquidity risk management framework that is well integrated into the bank-wide risk management process. The primary objective of this guidance is to raise banks' resilience to liquidity stress. Among other things, the principles seek to raise standards in the following areas:* Governance and the articulation of a firm-wide liquidity risk tolerance;
* Liquidity risk measurement, including the capture of off-balance sheet exposures, securitisation activities, and other contingent liquidity risks that were not well managed during the financial market turmoil;
* Aligning the risk-taking incentives of individual business units with the liquidity risk exposures their activities create for the bank;
* Stress tests that cover a variety of institution-specific and market-wide scenarios, with a link to the development of effective contingency funding plans;
* Strong management of intraday liquidity risks and collateral positions;
* Maintenance of a robust cushion of unencumbered, high quality liquid assets to be in a position to survive protracted periods of liquidity stress; and
* Regular public disclosures, both quantitative and qualitative, of a bank's liquidity risk profile and management.

The principles also strengthen expectations about the role of supervisors, including the need to intervene in a timely manner to address deficiencies and the importance of communication with other supervisors and public authorities, both within and across national borders.  The proposed guidance focuses on liquidity risk management at medium and large complex banks, but the sound principles have broad applicability to all types of banks. The document notes that implementation of the sound principles by both banks and supervisors should be tailored to the size, nature of business and complexity of a bank's activities. Other factors that a bank and its supervisors should consider include the bank's role and systemic importance in the financial sectors of the jurisdictions in which it operates. Further information is available on the [BIS](http://www.bis.org/%22%20%5Ct%20%22_new) website.etailed Contents**1.3 Liquidity risk management**On 17 June 2008, the Committee of European Banking Supervisors (CEBS) opened a public consultation on its advice on liquidity risk management: the second part of its response to the European Commission's Call for Technical Advice No 8. The consultation is open to all interested parties, including supervised institutions and other market participants.The consultation paper sets out CEBS's preliminary recommendations regarding the management of liquidity risk by credit institutions and investment firms and the supervision of liquidity risk by EEA prudential authorities. In elaborating its views, CEBS has analysed the 2007-2008 crisis, and benefited from input provided in regular meetings with experts representing a broad range of market participants and ad hoc meetings with banking associations and rating agencies. CEBS' recommendations to institutions call for credit institutions and investment firms to have adequate liquidity risk management for both normal and stressed times, including liquidity buffers, robust stress tests, and regularly tested contingency funding plans. The Board of Directors should approve a liquidity risk strategy and risk tolerance appropriate to the institution's funding profile and the sophistication of its liquidity risk management, taking into account all liquidity risks, including intra-day and contingent risks, as well as potential constraints on cross-border and intra-group flows. Appropriate responsibilities and incentives should be set by senior management through an internal cost/benefit transfer mechanism. CEBS' recommendations to supervisors call for a proportionate approach, allowing for recognition of internal methodologies on a case-by-case basis based on a thorough prior supervisory assessment, while acknowledging the benefits of a more standardised approach for institutions with a simpler liquidity risk profile.These proposals are generally consistent with the revised Sound Practices for Managing Liquidity in Banking Organizations published on 17 June 2008 for consultation by the Basel Committee on Banking Supervision (BCBS). The scope of the analysis might vary slightly as CEBS's report covers the issues listed in the Commission's Call for Advice. Moreover, CEBS's advice places special emphasis on the supervision of liquidity risk management.The consultation paper is available on the [CEBS](http://www.c-ebs.org/press/documents/CP19_Liquidity_000.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.4 Joint Treasury and ASIC consultation on cross border recognition of financial regulation**On 16 June 2008, the Australian Treasury and the Australian Securities and Investments Commission (ASIC) issued a joint consultation paper, 'Cross border recognition: Facilitating access to overseas markets and financial services'. The consultation paper invites comment on proposals for cross border recognition of financial markets, financial services and disclosure about investments.The last three decades have seen Australia's financial markets and services industries experience substantial changes owing to international trends in cross border capital flows and international regulatory reform. These events and the unrelenting pressure of global financial integration have led Treasury and ASIC to believe that it is timely to propose and refine measures to improve Australia's approach to safely harnessing the benefits of cross border capital flows. The joint consultation paper contains proposals to:* refine ASIC's current framework of unilateral recognition as stated in ASIC Regulatory Guide 54 Principles for cross border financial services regulation: Making the regulatory regime work in a cross border environment; and
* develop a mutual recognition framework for application in agreements between Australia and an overseas jurisdiction that ensures the integrity of financial markets and protects investors.

The consultation paper seeks to obtain the views of the users and providers of financial services, financial markets and those involved in raising capital about how the initiatives outlined in the consultation paper will assist Australian investors and enhance Australia's position in the global economy. Treasury and ASIC invite comments on the proposals set out in the joint consultation paper by 25 July 2008.The joint consultation paper process is separate to the process for reaching agreement with the United States Securities and Exchange Commission (SEC) on mutual recognition of securities regulation.The joint consultant paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Consultation_paper_98_Cross_Border_Recognition_v1.pdf/%24file/Consultation_paper_98_Cross_Border_Recognition_v1.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.5 Mutual recognition of securities offerings: Australia and New Zealand** On 13 June 2008, the New Zealand Commerce Minister Lianne Dalziel and Senator the Honourable Nick Sherry, Australian Minister for Superannuation and Corporate Law, brought into force a landmark agreement between Australia and New Zealand that will smooth the way for businesses to raise capital and for the public to invest with greater ease in both countries. The Agreement on the Mutual Recognition of Securities Offerings (MRSO) launched by both Ministers at a signing ceremony at the New Zealand Parliament, allows for the same securities offerings document to be issued in both countries. Under the regime, Australian issuers can extend an offer that is being made in Australia to New Zealand investors without being required to comply with most of the substantive requirements of New Zealand's capital raising laws.Legislation and regulations were recently introduced in each country by the respective Governments to bring this regime into effect. The New Zealand Securities Commission and the Australian Securities and Investments Commission (ASIC) have welcomed the announcement of the MRSO. The agencies have also published joint guidance to New Zealand and Australian issuers offering shares, debentures or managed or collective investment schemes in both countries. The guide explains what issuers have to do under the trans-Tasman mutual recognition scheme for offers of securities and the role of the regulators in both countries in relation to an offer. It also alerts issuers to the specific parts of Australian and New Zealand law that will continue to apply when offers are made under the MRSO, such as the prohibition on door-to-door selling in New Zealand and the securities hawking laws in Australia. The MRSO will be overseen by ASIC in Australia and the Companies Office and the Securities Commission in New Zealand. These agencies have developed protocols on cooperation and information-sharing to ensure the smooth running of the new regime. The regulatory guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg190.pdf/%24file/rg190.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.6 FSA introduces disclosure regime for significant short positions in companies undertaking rights issues**On 13 June 2008, the UK Financial Services Authority (FSA) announced that it is introducing provisions in its Code of Market Conduct, to come into effect from Friday 20 June 2008, which require the disclosure of significant short positions in stocks admitted to trading on prescribed markets which are undertaking rights issues. For this purpose the FSA is defining a significant short position as 0.25% of the issued shares achieved via short selling or by any instruments giving rise to an equivalent economic interest. The obligation will be to disclose positions exceeding this threshold to the market by means of a Regulatory Information Service by 3.30pm the following business day.    These provisions and, in particular, the threshold triggering a disclosure of a short position, will be kept under review and may be subject to change in the light of experience. Furthermore, the overall effectiveness of the measure will be considered as part of the wider review. In addition to the new disclosure regime, the FSA is also giving consideration to whether it might be necessary to take further measures in this area. The FSA is currently examining a number of options including the following: restricting the lending of stock of securities in rights issues for the purposes of enabling short selling; and restricting short sellers from covering their positions by acquiring the rights to the newly issued shares.According to the FSA, in current market conditions, there is increased potential for market abuse through short selling during rights issues. As a result, there has been severe volatility in the shares of companies conducting rights issues. This is potentially damaging not only to the issuers in question but also to confidence in the overall fairness and quality of the UK market. It can be particularly prejudicial to the interests of small investors. The problem is compounded by the length of time taken to complete rights issues.  The FSA views short selling as a legitimate technique which assists liquidity and is not in itself abusive. But it is also the case that the rights issue process provides greater scope for what might amount to market abuse, particularly in current conditions. The FSA considers that, in the first instance, improving transparency of significant short selling in such shares would be a good means of preventing the potential for abuse. In these circumstances non-disclosure of significant short positions gives the market a false and misleading impression of supply and demand in the securities concerned. Further information is available on the [FSA](http://www.fsa.gov.uk/pubs/press/PN0572008_instrument.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.7 Report on corporate long-tail liabilities: the treatment of unascertained future personal injury claims**On 12 June 2008, the Corporations and Markets Advisory Committee (CAMAC) published its report 'Long-tail Liabilities: The Treatment of Unascertained Future Personal Injury Claims'.The report puts forward proposals to improve the position of potential personal injury claimants whose claims against a company may not emerge for a long time. The adequacy of legal arrangements for the protection of these claimants was called into question in the Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation (September 2004) (the James Hardie inquiry). Following that inquiry, the former Government asked CAMAC to review and advise on a Proposal, accompanying the request, to extend existing creditor protections to future personal injury claimants in certain circumstances. CAMAC was asked to consider whether the Proposal would protect the interests of those claimants without unduly compromising corporate law and insolvency principles.The problem arises with claimants whose personal injury or illness only comes to light well after relevant activities - such as the sale of a product for which a company is responsible - have taken place. Their prospects of recovering damages will depend, apart from anything else, on the continuing existence and financial strength of a company over the period in question. The issue at stake is whether, and to what extent, special provision should be made for these claimants against the possibility of the company getting into financial difficulty. In developing its recommendations, CAMAC had to balance competing policy objectives as required by the terms of reference. Regard needed to be had to the effective ongoing management of a company, the interests of ordinary creditors where the company runs into financial difficulties and the interests of people who may turn out ultimately to have a personal injury claim against the company. The Committee also took into account the uncertainties inherent in determining the likely impact of future claims, the possibility that undue constraints on corporate management could undermine its ability to pay these claims as they arise and the need to ensure that any external administration can proceed efficiently and expeditiously.The report makes a series of recommendations, developed from the Proposal, to provide better protection for individuals who in the future may have personal injury claims against companies.* Solvent companies. The share capital reduction, buy-back and financial assistance provisions should be amended to require that a proposed transaction not materially prejudice the company's ability to pay its creditors or meet its contingent or other liabilities, including liabilities to future injury claimants. Also, a solvent company with anticipated liabilities of this nature that may render it insolvent at some future time should have the right to seek a court order confirming a plan to deal with these claims as they arise.
* Voluntary administration. A person representing future injury claimants should have standing to challenge in court a proposed deed of company arrangement on the basis that it would be unduly detrimental to the interests of these claimants.
* Schemes of arrangement. The scheme provisions should be amended to permit schemes involving a company and an identified class of these claimants.
* Liquidations. The court should have a power to order the setting aside of funds in trust for personal injury claimants, where the court considers that this is worthwhile, taking into account the distributable assets available for unsecured creditors.

The Committee did not support the suggestion in the Proposal that these protections should be available only where a mass future claim was afoot. Also, the Committee was not persuaded of the need for a specific anti-avoidance provision of the kind put forward in the Proposal. The report notes the importance of companies complying with their existing obligations to disclose contingent and other liabilities, which can include unascertained future personal injury claims. The proper identification and disclosure of these anticipated claims, whether or not related to personal injury, should be part of the responsible management of a company as required by applicable accounting standards.  The report is available on the [CAMAC](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal%2BReports%2B2008/%24file/Longtail_liabilities_Report.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.8 Analysis of the global commodities markets**On 12 June 2008, the UK Treasury published an analysis of the trends and drivers in the commodity markets that have led to recent price increases. The report is titled "Global commodities: long-term vision for stable, secure and sustainable global markets".The report, as well as analysing the trends and drivers behind recent price increases, also analyses the international impacts of volatility in the commodity markets. The report sets out a framework of six key principles which should guide policy on international, regional and national levels, and in the short, medium and long term:* Economic stability - anchoring inflation expectations and delivering sustainable economic growth thorough sound macroeconomic policies and well-targeted assistance from the International Financial Institutions;
* Openness - allowing markets to function effectively, removing tariff barriers and export subsidies and restrictions, promoting structural reform and allowing all countries to trade;
* Co-operation - reform to the shape and role of the international commodity, trade and financial institutions, greater transparency and a radically different level of dialogue between producers and consumers;
* Innovation and investment - stimulating the supply side growth through greater expenditure on research and technology;
* Fairness - working nationally and through international institutions to ensure that the poor and those hardest hit by higher and more volatile commodity prices receive affordable access to the basic commodities they require; and
* Climate change - recognising that no approach to commodities will succeed that does not consider the impact on climate change, including the need for an international agreement to limit greenhouse gas emissions, and the need to ensure that growth and development are climate resilient.

Further information is available on the [UK Treasury](http://www.hm-treasury.gov.uk/documents/international_issues/global_challenges/int_global_commodities.cfm%22%20%5Ct%20%22_new) website.etailed Contents**1.9 SEC proposes reforms to bring increased transparency to credit rating process** On 11 June 2008, the US Securities and Exchange Commission (SEC) voted to formally propose a series of credit rating agency reforms to bring increased transparency to the ratings process and curb practices that contributed to recent turmoil in the credit markets.  The proposed rulemaking continues the implementation of new regulatory authority that the SEC recently received from Congress to register and oversee nationally recognized statistical rating organizations (NRSROs). Since its authority went into effect in September 2007, the SEC has applied its new oversight to examine how credit ratings have been created and disseminated.  The regulatory program established by Congress through the Credit Rating Agency Reform Act allows the SEC to promulgate rules regarding public disclosure, recordkeeping and financial reporting, and substantive requirements designed to ensure that NRSROs conduct their activities with integrity and impartiality. These additional proposed rules supplement initial rules implemented by the Commission under the Act in June 2007. The Commission is proposing the rulemaking in three parts, with the first two portions being proposed on 11 June 2008 and the third portion to be considered on 25 June 2008. The first part of the Commission's rule proposal would:* Prohibit a credit rating agency from issuing a rating on a structured product unless information on assets underlying the product was available.
* Prohibit credit rating agencies from structuring the same products that they rate.
* Require credit rating agencies to make all of their ratings and subsequent rating actions publicly available. This data would be required to be provided in a way that will facilitate comparisons of each credit rating agency's performance. Doing this would provide a powerful check against providing ratings that are persistently overly optimistic, and further strengthen competition in the ratings industry.
* Attack the practice of buying favourable ratings by prohibiting anyone who participates in determining a credit rating from negotiating the fee that the issuer pays for it.
* Prohibit gifts from those who receive ratings to those who rate them, in any amount over US$25.
* Require credit rating agencies to publish performance statistics for 1, 3, and 10 years within each rating category, in a way that facilitates comparison with their competitors in the industry.
* Require disclosure by the rating agencies of the way they rely on the due diligence of others to verify the assets underlying a structured product.
* Require disclosure of how frequently credit ratings are reviewed; whether different models are used for ratings surveillance than for initial ratings; and whether changes made to models are applied retroactively to existing ratings.
* Require credit rating agencies to make an annual report of the number of ratings actions they took in each ratings class, and require the maintenance of an XBRL database of all rating actions on the rating agency's Web site. That would permit easy analysis of both initial ratings and ratings change data.
* Require the public disclosure of the information a credit rating agency uses to determine a rating on a structured product, including information on the underlying assets. That would permit broad market scrutiny, as well as competitive analysis by other rating agencies that are not paid by the issuer to rate the product.
* Require documentation of the rationale for any significant out-of-model adjustments.

The second part of the Commission's proposal would require credit rating agencies to differentiate the ratings they issue on structured products from those they issue on bonds, either through the use of different symbols, such as attaching an identifier to the rating, or by issuing a report disclosing the differences between ratings of structured products and other securities. The third set of recommendations for the Commission's proposal, to be considered on 25 June 2008, are being designed to ensure that the role the SEC has assigned to ratings in its rules is consistent with the objective of having investors make an independent judgment of risks and of making it clear to investors the limits and purposes of credit ratings for structured products.etailed Contents**1.10 Rules for annual and special reporting by US registered public accounting firms**On 10 June 2008, the US Public Company Accounting Oversight Board (PCAOB) adopted rules for annual and special reporting of information and events by accounting firms that are registered with the PCAOB. Section 102(d) of the Sarbanes-Oxley Act of 2002 provides that each registered public accounting firm must submit an annual report to the Board, and also may be required to report more frequently, to provide information specified by the Board. The reporting requirements in the new rules are the first such requirements adopted by the Board.  The reporting framework includes two types of reporting obligations. First, each registered firm must annually provide basic information about the firm and the firm's issuer-related practice over the most recent 12-month period. Information to be reported annually includes, among other things, information about audit reports issued by the firm during the year, certain disciplinary history information about persons who have joined the firm, and information about fees billed to issuer audit clients, in various categories of services, as a percentage of the firm's total fees billed. Second, the rules and forms adopted by the Board identify certain events that, if they occur with respect to a registered firm, must be reported by the firm within 30 days. These reportable events range from such things as a change in the firm's name or contact information to the institution of certain types of legal, administrative, or disciplinary proceedings against a firm or certain categories of individuals.  The Board will make each firm's annual and special reports available to the public on the Board's Web site, subject to exceptions for information that satisfies specified criteria for confidential treatment. The Board will submit the rules to the Securities and Exchange Commission for approval.  The rules will take effect 60 days after Commission approval.  Beginning then, firms will be subject to the special reporting obligations, with the earliest potential special reporting deadline for any firm being 90 days after Commission approval. For all firms, the first annual report will be due by 30 June 2009, for the 12-month period ending 31 March 2009. The Board plans to publish guidance for firms relating to compliance with the reporting requirements and interaction with the Board's new Web-based system for reporting. Further information is available on the [PCAOB](http://www.pcaobus.org/%22%20%5Ct%20%22_new) website.etailed Contents**1.11 European Commission issues recommendation on limiting audit firms' liability** On 6 June 2008, the European Commission issued a Recommendation concerning the limitation of auditors' civil liability. Its main purpose is to encourage the growth of alternative audit firms in a competitive market. The Recommendation responds to the increasing trend of litigation and lack of sufficient insurance cover in this sector. It aims to protect European capital markets by ensuring that audit firms remain available to carry out audits on companies listed in the EU. The Recommendation leaves it to Member States to decide on the appropriate method for limiting liability, and introduces a set of key principles to ensure that any limitation is fair for auditors, the audited companies, investors and other stakeholders. This initiative arises from a mandate in the 2006 Directive on Statutory Audit to examine the issue of limitation of financial liability and to present recommendations to Member States where appropriate. The Recommendation proposes three examples as possible methods but any other equivalent method might be used. The selected method should best suit the Member State's legal environment.  The Recommendation also introduces key principles to be followed by Member States when they select a limitation method:* The limitation of liability should not apply in the case of intentional misconduct on the part of the auditor;
* A limitation would be inefficient if it does not also cover third parties; and
* Damaged parties have the right to be fairly compensated.

The Recommendation is available on the [Europa](http://ec.europa.eu/internal_market/auditing/liability/index_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.12 Controls over inside information** On 5 June 2008, the UK Financial Services Authority (FSA) published Market Watch 27, an update of the thematic review of controls over inside information, following the publication of Market Watch 21 in July last year. The update includes a set of Principles of Good Practice ("The Principles") for the handling of inside information. The Principles were drawn up by industry practitioners representing different areas involved in M&A activity, such as issuers, corporate finance houses, lawyers, accountants, public relations firms and financial printers. The Principles, which highlight the importance of restricting access to price sensitive information, are voluntary to adopt, broad based and largely focused on the areas identified as requiring the most attention, as set out in Market Watch 21. Whilst the Principles are aimed at the unregulated community, aspects of them could also provide assistance to other market participants.  The areas highlighted in Market Watch 21 as requiring most attention to help mitigate the risk of leakage of inside information include the need for greater vigilance overall to restrict the number of insiders, proactiveness when leaks occur and the need to have robust IT controls. Work, in partnership with the industry, to reduce the leakage of price sensitive information relating to M&A activity therefore improving market cleanliness is a core part of the FSA's strategy for tackling market abuse.  Market Watch 27 also provides a detailed update on the follow up work that the FSA has undertaken with FSA regulated firms and contains examples where individual firms strengthened their controls.  It also reports on industry dialogue on two important topics: how to increase the focus at firms on the need to properly consider when to undertake internal leak enquiries, and whether more can be done to reduce the number of insiders on deals. The report is available on the [FSA](http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter27.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.13 Report on potential contagion in the global financial infrastructure**In a report published on 4 June 2008 by the Committee on Payment and Settlement Systems (CPSS), central bankers recommended a number of actions to address the risk-transmission channels brought by system interdependencies. The report, 'The Interdependencies of Payment and Settlement Systems', raises concern that the speed and multiplicity of potential disruption channels across the global payment system are not adequately reflected in stress-tests, risk controls, contingency funding plans, and crisis management procedures.The report documents how globalisation and other long-term developments have made the network of domestic and cross-border systems underpinning financial markets more interconnected. Although these interconnections bring many compelling benefits, they also create risks and vulnerabilities which need to be addressed.The report lays out a framework for analysing the risks of interdependencies, along with specific recommendations for the industry to address them. For instance, the report calls for more sophisticated business continuity testing practices that include interdependent parties on a national and cross-border basis.The report also recommends that central banks and other authorities review their policies in light of the increasingly integrated nature of the global financial infrastructure. Furthermore, the CPSS will review and, where necessary adapt, its internationally recognised standards for the management of payment and settlement risks, especially operational and liquidity risks, to reflect the evolving challenges posed by interdependencies.The report is available on the [CPSS](http://www.bis.org/publ/cpss84.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.14 Reform of Australia's financial services and credit regulation** On 3 June 2008, Senator the Honourable Nick Sherry, Australian Minister for Superannuation and Corporate Law, released the Government's Green Paper on reform of financial services and credit regulation. The Green Paper outlines a proposal for the Commonwealth and states to transfer the remaining financial services regulation from the State level. Under the plan, financial services, including mortgages, mortgage brokers, margin lending, non-bank lending and trustee companies, will move to the Federal level. **Options highlighted in the Green Paper**  **(a) Credit and mortgages**Maintain the status quo; or regulate all credit; or regulate mortgages (and consequently mortgage lenders and brokers).  There would be uniform rules for mortgages, including reverse mortgages, across all jurisdictions with a single body responsible for licensing brokers and a single body responsible for policing and enforcing standards. By taking over this area of financial services, the Australian Government would cover the most important forms of consumer credit, accounting for over 86 per cent of consumer credit on issue by amount.   **(b) Margin lending** Maintain the status quo; or include margin loans as a product under the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) Chapter 7 regime; or develop a separate Commonwealth regulatory regime for margin loans.  Defining a margin loan as a financial product will make the Chapter 7 disclosure regime applicable to margin lending products and make them subject to disclosure requirements such as Statement of Advice (SOA); and Product Disclosure Statements (PDS) requirements.   **(c) Trustee companies** Consumer protection supervision or prudential regulation. The Commonwealth would implement legislative amendments to the Corporations Act 2001 to provide for licensing and supervision of trustee corporations by ASIC.   **(d) Debentures/promissory notes** Harmonise regulation of promissory notes, regardless of value; extend licensing rules for debenture issuers; require debenture trustee companies to be licensed; and review duties of trustees.  There have been a number of high profile corporate collapses of property development companies, starting with Westpoint and followed by Fincorp, ACR and Bridgecorp. It is proposed to harmonise regulation of promissory notes so that all promissory notes issued to retail investors fall under the definition of debenture and therefore the regulatory regime applicable to debentures.  **(e) Property spruikers** Investigate issues relating to property investment advice, including property spruikers.  **(f) Other credit products** Regulate all credit products and services; or regulate only mortgages (and consequently mortgage lenders and brokers) and margin loans.  By regulating mortgages, the Australian Government will cover the overwhelming majority of the consumer credit market. According to the Green Paper, it appears there may be a legitimate and ongoing role for the States and Territories to continue regulating other forms of consumer lending.  The Green Paper is available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1381" \t "_new) website.etailed Contents**1.15 New protections for depositors and policyholders**On 2 June 2008, the Australian Treasurer, the Honourable Wayne Swan MP, announce a package of measures to further enhance the stability of the Australian financial system. The Government will introduce legislation to establish a Financial Claims Scheme (FCS). The FCS follows consideration by the Council of Financial Regulators dating from 2005, and reflects recommendations made by the HIH Royal Commission in 2003 and the global Financial Stability Forum earlier this year. The scheme can assist depositors and policyholders in the unlikely event that a financial institution fails. The Government has also accepted recommendations of the Council that a number of changes be made to the regulatory framework to allow better management of failing financial institutions. These measures will enhance regulators' ability to act comprehensively and decisively in relation to a failed financial institution. The measures will also enhance the regulators' capacity to recapitalise a distressed bank, credit union, building society (authorised deposit-taking institutions) or general insurer. Depositors in authorised deposit‑taking institutions (ADIs) already receive preference in any liquidation, which means they will almost certainly recover all of their funds eventually. However there is currently no mechanism to provide depositors or general insurance policyholders with timely access to at least some of their funds in the event of a failure.  Early access to funding is important to ensure that customers can continue to meet day to day costs while the liquidation of an institution is carried out. In light of the potential for delays to cause real hardship, and to further assist the management of a failing institution, the FCS will allow customers to quickly recover money in deposit accounts. Customers will be able to recover monies up to a specified cap, with the remainder likely to be recovered when the ADI is liquidated.  To avoid the need for ad hoc arrangements of the sort established in the wake of the HIH failure, the FCS will also provide compensation to policyholders who have valid claims with a failed general insurer. The FCS will not cover life insurance, superannuation or market-linked investment products or products offered by institutions which are not regulated by APRA.The Commonwealth Government, through APRA, will fund payments under the FCS, with the costs to be recovered through the liquidation of the failed entity.  In the unlikely event that the liquidation does not provide full recovery of the Government's costs, a levy may be applied to relevant financial institutions.etailed Contents**1.16 Australian response to international recommendations on financial market turbulence** On 2 June 2008, the Australian Treasurer, the Honourable Wayne Swan MP, outlined Australia's response to the recommendations of the Financial Stability Forum (Forum) Report on enhancing the resilience of financial markets and financial institutions. The response includes a table which highlights action that Australian financial authorities, namely the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission, the Reserve Bank of Australia and the Treasury, are undertaking to address each of five areas identified by the Forum. These areas are:* Strengthened prudential oversight of capital, liquidity and risk management;
* Enhancing transparency and valuation;
* Changes in the role and uses of credit ratings;
* Strengthening the authorities' responsiveness to risks; and
* Robust arrangements for dealing with stress in the financial system.

The response is available on the [Treasury](http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/063.htm&pageID=003&min=wms&Year=&DocType" \t "_new) website.etailed Contents**1.17 FRC to update the Combined Code** On 30 May 2008, the UK Financial Reporting Council announced that it will be updating the Combined Code to: * remove the restriction on an individual chairing more than one FTSE 100 company; and
* allow the chairman of a listed company below the FTSE 350 to be a member of, but not chair, the audit committee provided he or she was considered independent on appointment.

The revised Code will be published at the end of June, at the same time as new FSA Part 6 Rules implementing EU requirements relating to corporate governance statements and audit committees. The revised Code and new Rules will apply to accounting periods beginning on or after 29 June 2008. In practice, this means most companies will begin to apply them in 2009, and will report against them for the first time in 2010. The amendments follow a review of the impact and implementation of the Combined Code in 2007, which found that the Code continued to have a broadly beneficial impact and was seen as having contributed to higher overall standards of governance among UK listed companies and to more professional boards. Consultation on the amendments took place between December 2007 and March 2008. Further information on the changes to the code is available on the [FRC](http://www.frc.org.uk/corporate/2007review.cfm%22%20%5Ct%20%22_new) website.etailed Contents**1.18 Access to superannuation advice**  On 30 May 2008, the Australian Financial Services Working Group published a consultation paper on increasing access to simple superannuation advice. The paper seeks comment on regulatory and other steps that could be taken to improve Australians' access to low-cost financial advice within their superannuation fund. The advice would seek to answer member queries on issues including investment choice, insurance, contribution types, nominating beneficiaries and retirement income projections. The consultation paper was developed by the Financial Services Working Group - a joint initiative of Treasury, the Department of Finance and Deregulation and the Australian Securities and Investments Commission (ASIC). The Group's role is to look at key issues associated with financial product disclosure and advice. The consultation paper invites submissions from the financial services industry and the public. The paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Consultation_paper_97_Simple_superannuation_advice_1.pdf/%24file/Consultation_paper_97_Simple_superannuation_advice_1.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.19 IOSCO publishes recommendations to address subprime crisis**  On 29 May 2008, the International Organization of Securities Commissions (IOSCO) published the final report of its Technical Committee's Task Force on the Subprime Crisis. The report contains an analysis of the underlying causes of the subprime crisis, the implications for international capital markets and recommendations that address the issues facing securities regulators.  The report focuses on the market for structured finance products and the specific areas where failings were identified by the task force in November 2007. The paper contains an analysis of the particular problems encountered in the four key areas and contains recommendations by the Technical Committee for future IOSCO work to counter these issues in three of these areas.  These are: * issuer transparency and investor due diligence;
* firm risk management and prudential supervision; and
* valuation and accounting issues.

The work on the roles and duties of credit rating agencies has recently been completed by the Credit Rating Agencies Task Force. IOSCO's report complements the work undertaken by other regulatory and governmental bodies, including the Financial Stability Forum (FSF) and the Senior Supervisors Group (SSG).  The recommendations for future work by IOSCO's Technical Committee for each of these issues are outlined below. The work will be carried out by the Technical Committee's Standing Committees. **(a) Issuer transparency and investor due diligence**The Task Force has found that the recent market turmoil had relatively less effect on publicly traded structured finance products in some markets, and that secondary trading of structured finance products, for a variety of reasons, is opaque. The Task Force is recommending: * The Standing Committee on Multinational Disclosure and Accounting consult with market participants regarding the typical structures and disclosure practices for private placements of asset-backed securities to determine the degree to which these practices are as developed as they are for publicly traded asset-backed securities;
* The Standing Committee on Multinational Disclosure and Accounting review the degree to which existing IOSCO issuer disclosure standards and principles are applicable to publicly traded asset-backed securities and will develop international principles regarding disclosure requirements for  these securities if it finds that existing standards and principles are inapplicable to such offerings;
* The Standing Committee on Investment Management review the degree that investment managers who offer collective investment schemes to retail investors have invested in structured products, the type of due diligence typically conducted when making these investments, and the degree to which these investment managers have been affected by the current market turmoil;
* The Standing Committee on the Regulation of Secondary Markets, together with the financial service industry, examine the viability of a secondary market reporting system for different types of structured finance products.

**(b) Firm risk management and prudential supervision** The Task Force has found that many institutional investors and investment banking firms had inadequate risk modeling and internal controls in place to understand and address the risks they were assuming when buying many types of structured finance products, relied heavily (or even exclusively) on external credit ratings for their risk analysis, and had inadequate balance sheet liquidity even when adequately capitalized.The Task Force is recommending that: * The Standing Committee on Market Intermediaries survey members' experience on liquidity risk management and liquidity standards to assist and supplement the work being undertaken jointly with the Basel Committee on Banking Supervision;
* The Standing Committees on Market Intermediaries and Investment Management undertake a study of the internal control systems of financial firms and asset managers and develop principles to address any concerns identified;
* The Technical Committee ask originators and sponsors of securitization programs to develop best practices to reinforce their due diligence and risk management practices such that the quality of assets originated for transfer off their balance sheets is of the same quality and subject to the same evaluations as for those kept on their balance sheet; and
* The Standing Committee on Multinational Disclosure and Accounting or a Chairs Task Force consider whether additional guidance and disclosure relating to off-balance sheet entities would be valuable in meeting the needs of investors.

**(c) Valuation** The Task Force has found that concerns have been raised regarding the role fair value accounting principles have played in providing investors and regulators with adequate information about the strength of financial firms facing illiquid market conditions and that some financial firms appear to have inadequate human and technological resources to model their financial positions using fair value accounting principles under illiquid market conditions.The Task Force recommends that: * The Technical Committee's Standing Committee on Multinational Disclosure and Accounting or a Technical Committee Chairs Task Force consider whether additional guidance and disclosure related to measurement at fair value would be valuable in meeting the needs of investors; and
* The Standing Committees on Market Intermediaries and Investment Management explore whether, as a matter of internal control, registered intermediaries and investment advisers avail themselves of practitioners who are skilled or trained enough to model fair valuation adequately in illiquid market conditions.

The report of the Task Force on the Subprime Crisis is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD273.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.20 APRA releases Service Charter** On 28 May 2008, the Australian Prudential Regulation Authority (APRA) released the APRA Service Charter as part of its on-going commitment to enhance transparency and accountability to its stakeholders. The APRA Service Charter explains how APRA carries out its role and what those who deal with the prudential regulator can expect. APRA finalised the APRA Service Charter following consultation with industry and consumer groups, and government.  The Charter was a recommendation of the Report of the Taskforce on Reducing Regulatory Burden on Business which was endorsed by the Government in its Statement of Expectations for APRA. The APRA Service Charter is available from [APRA](http://www.apra.gov.au/aboutApra%22%20%5Ct%20%22_new) website. etailed Contents**1.21 Study: more poor performing CEOs staying put** On 28 May 2008, Booz and Company published the report "CEO Succession 2007: The Performance Paradox". The report finds little correlation between poor short-term performance and CEO dismissals over a ten-year period. In fact, the worst-performing CEOs actually faced a low probability of being forced out of office in the short term. The study looked at CEO turnover at the world's 2,500 largest publicly-traded corporations.  Over the range of years studied - 1995, 1998, and 2000 to 2007 - Booz & Company found that the average rate of a CEO getting fired specifically for poor performance was only 2.1%. In addition, a comprehensive analysis of data from all ten years of all 2,500 companies studied each year found that even CEOs of companies in the bottom ten percent of performance- defined as those whose two-year total shareholder returns had fallen by 25% in absolute terms and 45% relative to regional industry peers after two years - faced only a 5.7% chance of termination in the next year.  One reason boards are taking several years to replace underperforming CEOs may be a lack of candidates who are ready and able to take over the top spot, the report explains. This hypothesis is supported by the finding that North American and European boards continue to hire outsiders as CEOs, even though they have consistently underperformed CEOs who rise through the ranks. But fewer CEOs in general are leaving their posts. The overall rate of CEO turnover - which includes planned successions, dismissals, and merger-related departures-slightly decreased in 2007 to 13.8%, compared with 14.3% the year before. This carries on a downward trend from the peak seen in 2005 of 15.4%. In total, 345 CEOs left office last year, a 3.5% decrease from 2006, and a 10% decline from two years ago.  The slight downturn from the previous year's rate can be attributed to small decreases in global rates of merger-related and forced turnovers. CEO departures due to M&As dropped to 2.8% from a cyclical high of 3.2% in 2006. The rate of CEOs being fired fell slightly, yet remained high with 30.4% of departing CEOs forced to resign due to poor performance, an ethical lapse, or disagreements with the board.  Still, the rates of which CEOs are being forced out have generally stabilized. In 2007, for instance, 4.2% of all CEOs were dismissed. This is a much higher rate than the 1.1 to 2.0% rate seen in the 1990s, but only slightly above the average of the 3.8% of the 2000s.  The turnover rate for European CEOs is significantly higher than for their counterparts in other parts of world, but that is mainly attributed to more active succession planning. In 2007, the overall turnover rate for European CEOs was 17.6%, compared to 15.2% in North America, 10.6% in Japan, and 9.1% in the rest of the world. In addition, Europe has a planned succession rate of 8.3%, compared with 6.8% worldwide. Still, Europe is the toughest environment for CEOs. Over the 10 years of data studied, 37% of all European successions were forced out, compared with 27% in North America. In Japan, where forced successions are not customary, the 10-year average was 12%. The higher incidence of European CEO dismissals most likely reflects the impact of corporate governance reforms enacted since the late 1990s by many countries, including France, Germany, Italy, the Netherlands, and the United Kingdom.  The safest industries for CEOs include energy (5.8%) and industrials (8.8%). Industries with the highest level of turnover include telecommunications (21.7%), information technology (17.4%), and financial services (14.4%).  And a CEO who is also chairman is more secure than one who is not. Half of all CEOs who were forced to leave their companies in 2007 never held the title of chairman. This compares to 26% who held the title of chairman at the start of their tenures, and 34% who served as chairman at the end of their tenure.  Globally, of all CEOs departing in 2007 who never held the title of chairman, half were forced to leave, compared with 34% of those who held the title of chairman at the end of their tenure, and only 26% of those who held the title of chairman at the start of their tenure. In Europe, only 16.5% of CEOs leaving office in 2007 held both titles during their careers, compared to nearly 75% in North America.etailed Contents**1.22 CEIOPS publishes final advice to the European Commission for the framework directive proposal related to proportionality and insurance groups supervision** On 28 May 2008, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) published two Papers of Final Advice to the European Commission for the Solvency II project, on Aspects of the Framework Directive Proposal related to Proportionality and on Insurance Groups. The Draft Advice on Proportionality expands on what should be considered in the application of the proportionality principle and gives some first indications as to how proportionality could operate in practice. The advice develops ideas on how to gear the new risk-based regime to the nature, scale and complexity of an insurer's or reinsurer's risks, including small and medium-sized undertakings, thus aiming to ensure appropriate treatment of all undertakings. CEIOPS has proposed principles in its Advice under all three Pillars, including on internal models and group supervision. An Annex compiles the simplifications and proxies that are currently being tested under QIS4. CEIOPS' Final Advice on Insurance Groups concerns measures to facilitate their effective supervision. Part I relates to the Group Support Regime. It addresses the detailed content of the criteria to be satisfied for the application of the regime. According to the Framework Directive Proposal, insurance and reinsurance undertakings within an insurance group can be authorized to cover their Solvency Capital Requirement with group support declared by their parent undertaking when certain criteria are satisfied. In its Final Advice, CEIOPS advises the European Commission on the legal and economic criteria that need to be satisfied and verified, and on the specific requirements regarding public disclosure when the Group Support Regime is applied within an insurance group.Part II relates to the rights and duties of the Group Supervisor and Colleges of Supervisors. CEIOPS covers 30 proposals for implementing measures that relate to the co-operation, coordination and information exchange in the Colleges of Supervisors.  Further information is available on the [CEIOPS](http://www.ceiops.eu/content/view/26/30%22%20%5Ct%20%22_new) website.etailed Contents**1.23 EU study on financial exclusion**  Millions of Europeans face an increased risk of social exclusion through lack of access to basic financial services, according to a study published by the European Commission on 28 May 2008. It reveals that 2 in 10 adults in EU-15 and almost half in EU-10 (47%) do not have a bank account while many more have no savings and lack access to credit. Access to financial services is key to participation in economic and social life. Yet, in the EU-15 countries, two adults in ten lack access to transaction banking facilities; around three in ten have no savings and four in ten have no credit facilities, although rather fewer (less than one in ten) report having been refused credit. In contrast, one third of people in the new Member States (EU-10) are financially excluded, more than half have no transaction account, a similar proportion have no savings and almost three quarters have no immediate access to revolving credit. People living on low incomes are primarily affected, while living in a deprived area increases the likelihood of being financially excluded, as does living in a rural area in new Member States. Financial exclusion forms part of a much wider social exclusion, faced by some groups who lack access to quality essential services such as jobs, housing, education or health care.  The study on "Financial services provision and prevention of financial inclusion" provides data on the levels, causes and consequences of financial exclusion in the Member States. It also describes the diversity of policy responses developed in 14 different Member States in the field of transaction banking services, credit and savings. Finally, it proposes a series of potential policy responses.Further information is available on the [Europa](http://ec.europa.eu/employment_social/spsi/events_en.htm%22%20%5Ct%20%22_new) website. etailed Contents**1.24 IOSCO to implement changes to code of conduct for credit rating agencies**  On 28 May 2008, the International Organization of Securities Commissions (IOSCO) published the final report containing amendments to the Code of Conduct Fundamentals for Credit Rating Agencies (Code of Conduct).  The changes to the Code of Conduct have been introduced following a public consultation process involving regulators, credit rating agencies (CRAs) and financial market stakeholders. These changes are intended to address issues which have arisen in relation to the activities of CRAs in the market for structured finance products. Structured finance products backed by US subprime retail mortgages have figured prominently in the recent global market turmoil, and the quality of the credit ratings of these products - and the CRA policies and methodologies that resulted in these ratings - have been questioned by many securities regulators and market observers.  The amended Code of Conduct will assist CRAs in strengthening their processes and procedures to protect the integrity of the ratings process, ensure that investors and issuers are treated fairly and safeguard confidential material information provided.  The following amendments have been made to the Code of Conduct:  **(a) Quality and integrity of the rating process - section 1**  This section will be modified such that each CRA should: * prohibit CRA analysts from making proposals or recommendations regarding the design of structured finance products that the CRA rates;
* adopt reasonable measures so that the information they use is of sufficient quality to support a credible rating. If the rating involves a type of financial product with limited historical data upon which to base a rating, the CRA should make clear, in a prominent place, the limitations of the rating;
* establish and implement a rigorous and formal review function responsible for periodically reviewing the methodologies and models and significant changes to the methodologies and models it uses;
* take steps that are designed to ensure that the decision-making process for reviewing and potentially downgrading a current rating of a structured finance product is conducted in an objective manner;
* ensure that CRA employees that make up CRA rating committees have appropriate knowledge and experience in developing a rating opinion for the relevant type of credit;
* establish new products review functions to review the feasibility of providing a credit rating for a type of structure that is materially different from the structures a CRA currently rates;
* assess whether existing methodologies and models for determining credit ratings of structured products are appropriate when the risk characteristics of the assets underlying a structured product change materially; and
* ensure that adequate resources are allocated to monitoring and updating its ratings.

**(b) CRA independence and avoidance of conflicts of interest - section 2** This section will be modified such that each CRA should:* to discourage "ratings shopping," disclose in their rating announcements whether the issuer of a structured finance product has informed it that it is publicly disclosing all relevant information about the product being rated;
* disclose whether any one issuer, originator, arranger, subscriber or other client and its affiliates make up more than 10 percent of the CRA's annual revenue;
* establish policies and procedures for reviewing the past work of analysts that leave the employ of the CRA;
* conduct formal and periodic reviews of remuneration policies and practices for CRA analysts to ensure that these policies and practices do not compromise the objectivity of the CRA's rating process;
* define what it considers and does not consider to be an ancillary business and why.

**(c) CRA responsibilities to the investing public and issuers - section 3** This section will be modified such that each CRA should: * publish verifiable, quantifiable historical information about the performance of its rating opinions, organized and structured, and, where possible, standardized in such a way to assist investors in drawing performance comparisons between different CRAs;
* differentiate ratings of structured finance products from other ratings, preferably through different rating symbols;
* indicate the attributes and limitations of each credit opinion, and the limits to which it verifies information provided to it by the issuer or originator of a rated security;
* provide investors and/or subscribers (depending on the CRA's business model) with sufficient information about its loss and cash-flow analysis of structured finance products so that an investor allowed to invest in the product can understand the basis for the CRA's rating. CRAs should also disclose the degree to which they analyze how sensitive a rating of a structured financial product is to changes in the CRA's underlying rating assumptions;
* disclose the principal methodology or methodology version in use in determining a rating.

**(d) Disclosure of the code of conduct and communications with market participants - section 4** * A CRA should publish in a prominent position on its home webpage links to the CRA's code of conduct; a description of the methodologies it uses; and information about the CRA's historic performance data.

The Role of Credit Rating Agencies in Structured Finance Markets - Final Report, is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD270.pdf%22%20%5Ct%20%22_new) website.  The new version of the Code of Conduct Fundamentals for Credit Rating Agencies is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD271.pdf%22%20%5Ct%20%22_new) website. The Comments Received in Relation to the Consultation Report, The Role of Credit Rating Agencies in Structured Finance Markets, Report of the Technical Committee of IOSCO, are available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD272.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.25 FSA paper on increasing transparency in regulation**On 27 May 2008, the Financial Services Authority (FSA) published a discussion paper which explores the creation of a framework for determining what further information the regulator might publish about firms and industry sectors.The FSA recognises the importance of transparency and believes that increasing the amount of firm-specific and broader industry information it discloses could lead to better regulatory outcomes for firms, markets and consumers.However, the FSA recognises that stakeholders hold strong and often polarised views on transparency, which is why the regulator wants to initiate a full and open debate that involves all those who may be impacted by its proposals.In its discussion paper, the FSA sets out a code of practice which would provide a transparent mechanism for guiding FSA decisions about what additional information it might disclose. The paper also provides examples of the types of information the regulator may consider publishing.  Importantly, the paper draws a clear distinction between simply making information available, which could in some cases cause confusion and have a negative impact, and publishing information in a way that makes issues and practices clearer and therefore improves how markets function.The FSA already publishes a wide range of material about its activities and proposals, markets and sectors, and about the disciplinary action it takes against individuals and firms. The regulator also publishes a great deal of consumer-facing material, such as fact sheets and comparative tables.  The FSA invites comments on the proposals in its discussion paper by 29 August 2008.  Further information is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/DP/2008/08_03.shtml%22%20%5Ct%20%22_new) website.etailed Contents**1.26 IOSCO to expand review of audit services issues and releases report on regulators' contingency plans for audit service disruption** On 27 May 2008, the Audit Services Task Force of the IOSCO Technical Committee announced its agenda for the coming months.  The Task Force will expand the scope of its work to include a number of audit services-related issues. Specifically, the Task Force will focus on the following audit related issues:* Transparency and governance of audit firms, including the intersection of governance with both firm viability and audit quality;
* The scope of audit reports, including varying levels of assurance in  different circumstances, the possibility of enhanced disclosure of the bases for different levels of assurance, and the potential role of joint audits; and
* Potential expansion of allowable organizational structures and forms to allow for greater firm viability and industry competition.

Coincident with the determination of its agenda for the coming months, the Task Force released a paper intended to assist IOSCO members in considering and preparing for potential contingencies involving audit firms that may affect the delivery of audit services in the global capital markets. The paper was prepared as part of the Task Force's ongoing work on audit-related issues. It presents a collection of information about issues and experiences encountered in past events and conditions that affected the auditing of financial statements of public companies. This information is meant to help regulators anticipate and prepare for unforeseen events and conditions that may affect the delivery of audit services in the capital markets.  The paper contains suggested matters for consideration, rather than specific principles or prescriptions, as the legal frameworks, powers and responsibilities of securities regulators differ among IOSCO member jurisdictions. The Task Force acknowledges that in some jurisdictions, the securities regulator has few or no responsibilities regarding auditor oversight. For this reason, the paper does not intend to make suggestions on the allocation of auditor oversight responsibilities on the national level; rather, it addresses securities regulators only so far as they have a role in auditor oversight. The paper proceeds from the premise that while the individual facts and circumstances of each contingency situation will be unique and will necessitate a plan tailored to that event or condition, the use of preplanning and preventive measures can help reduce the risk of a crisis and can also facilitate speed and effectiveness in response if a crisis arises. In this regard, the paper contains suggestions securities regulators might consider in four key areas:* Contingency planning: As the independent audit function is a contributor to investor confidence in the capital markets, regulators can seek to minimize potential disruptions and thereby support confidence in the markets by anticipating issues and conditions that may arise and forming contingency plans.
* Planning and preventive measures: Informed dialogues in advance of crisis situations can raise awareness of risks and factors that contribute to occurrences of crises, thereby encouraging all stakeholders to take preventative action.
* Crisis management: The timely development and execution of action plans and the provision of relevant and timely information to others, with due regard for confidentiality obligations, enables securities regulators with responsibility for auditor oversight to act more effectively during times of crisis.
* Communications and confidentiality: The establishment of communications protocols before a crisis arises may help alleviate the problems that would otherwise impede the sharing of critical information in real time.

The Technical Committee paper is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD269.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.27 Proposed reform of settlement procedures for Australian equities** On 26 May 2008, the Reserve Bank of Australia published a report titled "Review of Settlement Practices for Australian Equities". On 29 and 30 January 2008, there were significant delays in the settlement of Australian equities. As a result of these delays, the Reserve Bank has undertaken an extensive review of settlement practices in the Australian equity market. The review published on 26 May sets out some possible modifications to current arrangements which might improve both the robustness of the settlement process and broader market functioning.  Settlement of most equities transactions in Australia occurs in a single daily batch process run by the Clearing House Electronic Sub-register System (CHESS), which is owned and operated by ASX. This batch process, which typically settles at around noon, reduces all scheduled securities transfers, including both novated and non-novated transactions, to a single net transfer per line of stock for each participant. Settlement occurs on a delivery-versus-payment basis, with associated interbank payment flows settled across Exchange Settlement accounts at the Reserve Bank, also on a net basis. Netting reduces the amount of equities and funds that need to change hands, providing benefits to participants. In late January, the inability of a participant to meet its payment obligations resulted in the batch being delayed on two occasions. Despite the delays, there was never any doubt that the central counterparty for equity transactions, the Australian Clearing House (ACH), would be able to meet its obligations. As part of the Review, the Reserve Bank has considered possible fundamental changes to current settlement arrangements. One option would be to split the current batch into two parts: one for transactions that are novated to ACH, and one for non-novated transactions. The Bank does not support this option, given that there are often close connections between novated and non-novated transactions. Another option would be to move to a system in which settlement occurs on a trade-by-trade basis. The Bank's view is that this type of settlement arrangement represents the first-best outcome from a pure risk-control perspective and that there is a strong case for moving to such a system over the medium term. In the meantime, the Bank has identified some possible modifications to the current batch settlement process for settling equities that might improve the robustness of the settlement process and improve market functioning. These include:* the introduction of an explicit window for completion of settlement - perhaps 12.30 pm to 2.30 pm;
* clarification of lines of communication and deadlines for decisions, including by settlement banks;
* an amendment to the cut-off time for new settlement instructions, so as to allow more time prior to the batch for participants to ensure that securities and funds are in place;
* changes to the settlement fails regime, including an increase in the fees applying to failed trades; and
* an increase in the transparency of securities lending activity.

The Bank will be working with ASX and industry participants over coming months to assess whether, and how, these changes might be implemented.The report is available on the [Reserve Bank of Australia](http://www.rba.gov.au/PaymentsSystem/StdClearingSettlement/Pdf/review_sttlmt_prac_aus_equities_052008.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.28 Societe Generale report on losses caused by unauthorised trading** On 23 May 2008, Societe Generale published a report of the board of directors on the causes of the losses by trader Jerome Kerviel. The losses have been estimated at Euro 4.8 billion and were first announced by the Bank in January 2008. The inquiry was conducted by a Special Committee of independent directors and was carried out alongside other investigations. The French Banking Commission conducted an audit. Criminal proceedings were launched on 28 January 2008. The French Financial Markets Authority opened an inquiry in February 2008 into the financial information and the market for Société Generale shares since 31 December 2006. On 4 February 2008, the French Minister of the Economy, Finance and Employment presented a report on these events to the Prime Minister.  Following is a brief extract from the report. The fraud consisted of the taking by the trader of unauthorized directional positions on equities or futures traded on regulated markets, which he concealed by a series of fictitious transactions having no other aim. These fictitious transactions for the purchase or sale of equities or warrants with deferred start dates, futures transactions with a pending counterparty, or forwards with an internal Group counterparty, were used according to three categories of concealment techniques:* entry and subsequent cancellation prior to market transaction control measures, concealing the positions' market risks and latent earnings;
* entry of pairs of fictitious reverse trades concerning equal quantities of the same underlying asset for different off-market prices, hiding earnings generated following the unwinding of positions; and
* booking of intra-monthly provisions that temporarily cancel the latent or realized earnings.

When faced with questioning further to controls, the trader gave untruthful replies, occasionally supported by forged e-mails. The conclusions of the report show that the trader's maneuvers and skill in concealing his positions, risks and earnings allowed him to evade detection of his massive directional positions by his hierarchy and the control services up until January 2008. However, the conclusions of the Bank's General Inspection department, on the one hand, and of PricewaterhouseCoopers, on the other hand, also show that the fraud was facilitated or its detection delayed by weaknesses in the supervision of the trader and in the controls over market activities. The trader's hierarchy, constituting the first level of control, proved deficient in the supervision of his activities. The direct supervisor lacked trading experience and was not given a sufficient degree of support in his new role; he demonstrated an inappropriate degree of tolerance in relation to the taking of intraday directional positions and neither he, nor his own supervisor, carried out an adequate review of the trader's activities on the basis of the available figures and reports or reacted to the alerts that would have allowed them to identify the concealed positions. The control services (in particular, Back and Middle Offices, the risk control department, the financial and accounts departments, and the compliance department) generally carried out their assignments in accordance with procedures. However, these controls did not allow the fraud to be identified until 18 January 2008, not only because of the efficiency and diversity of the fraudulent concealment techniques used by the trader, but also because of certain weaknesses highlighted in the course of this investigation: * difference between the growth in the means (including information systems) available to control and support services and the very strong growth in transaction volumes within the equities division;
* lack of certain controls able to identify the fraudulent mechanisms, such as the control of the positions' nominal value or of the transactions used by the perpetrator of the fraud in order to conceal his positions;
* fragmentation of controls between several units, with an insufficiently precise division of tasks, lack of a systematic centralization of reports and of feedback to the appropriate hierarchical level;
* priority given to the correct execution of trades, which appears to be the primary concern of Back and Middle Offices, in the absence of an adequate degree of sensitivity to fraud risks; and
* insufficient level of responsiveness for the implementation of the corrective actions identified as necessary by internal audit bodies.

The report also indicates what steps Societe Generale has taken to improve its systems.  The report is available [here](http://www.socgen.com/%22%20%5Ct%20%22_new).etailed Contents**1.29 Reporting to shareholders: a good practice guide** In May 2008, the Group of 100 (representing the senior finance executives of the major Australian companies) and Ernst & Young published "Reporting to shareholders: a good practice guide". It is stated in the guide that there has been a marked increase in companies communicating with shareholders on financial performance outside of statutory reports. Given this trend, the Group of 100 and Ernst & Young perceived a need for practical guidance to support the shareholder reporting process. In order to identify good practice, a working party was established to review reports to shareholders issued by a number of Australian companies, as well as guidance issued by local and international shareholder, regulatory and investor relations bodies. The good practice guide has been developed from the findings of this review. This publication focuses on best practices in this area. The result of the study is a set of guidelines that the Group of 100 and Ernst & Young believe constitute best practice in the preparation of reports to shareholders and other users.  The topics dealt with in the guide are (1) background; (2) what is the purpose of annual reports?; (3) reporting principles; (4) summary of the guidelines; (5) the guidelines in detail; (6) concluding comments; and (7) appendix - examples of good practice. The guide is available on the [Group of 100](http://www.group100.com.au/%22%20%5Ct%20%22_new) website.etailed Contents |

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| **2.1 ASIC review of voluntary administrations**On 13 June 2008, the Australian Securities and Investments Commission (ASIC) released the results of a review of reports prepared by voluntary administrators.The [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) requires an administrator in a voluntary administration to investigate (section 438A) and report to creditors (section 439A) about the company's business, property, affairs and financial circumstances.The reports are a statutory requirement to enable creditors to make a fully informed decision about the future of a company. ASIC reviewed all reports prepared between July 2006 and March 2007 where creditors had agreed to accept a deed of company arrangement (DOCA) proposal. Where a DOCA is proposed, creditors need to know whether it will result in a better return for creditors than if the company was immediately wound up. Creditors rely on the independence, competence and professionalism of the administrator in preparing the report. ASIC found that in the majority of reports, administrators either did not undertake an adequate investigation or fully report to creditors on the results of that investigation. This finding does not conclude that had all the information been provided in the report that creditors would have made a different decision on any particular DOCA proposal.ASIC has suggested eight improvements for administrators to keep in mind when preparing reports to ensure creditors are better informed.ASIC's review refers to the Insolvency Practitioners Association of Australia (IPA) Statement of Best Practice, which was current at the time of this review. ASIC notes that the IPA's new Code of Professional Practice, released two weeks ago, significantly improves the clarity and extent of the guidance provided to practitioners in the area of section 439A reports.The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_129_v2.pdf/%24file/REP_129_v2.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.2 Results of ASIC's audit inspection program**On 12 June 2008, the Australian Securities and Investments Commission (ASIC) released the latest results of its audit inspection program. ASIC's general observations are that Australia has a skilled audit profession committed to independence and audit quality.The report summarises the results of ASIC's audit regulation activities from 1 July 2006 to 31 December 2007, which included audit inspections of 19 firms. ASIC significantly increased the number of audit and review engagements selected for review compared to prior periods, reflecting the evolving focus of the audit inspection program. ASIC noted that most firms inspected more than once by ASIC have committed resources and further enhanced quality control systems and processes to ensure compliance with the legislative requirements for auditor independence and audit quality. In contrast, some firms visited for the first time had not taken a proactive approach to planning and implementing effective policies, systems and processes. According to ASIC, specific areas of focus in the next inspection period will include technical consultations, using the work of experts, particularly in relation to fair value measurements, sectors that are at risk given the current market turbulence and using the work of other auditors.ASIC will also continue to liaise with the Public Company Accounting Oversight Board of the United States of America (PCAOB) and other international audit oversight bodies with the intention to conduct work jointly with them or on their behalf to minimise the regulatory burden on Australian audit firms.ASIC's audit inspection program commenced after the passing of the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "Default) (CLERP 9). Since then, ASIC has published public reports on its inspection program to better inform firms, the investing public, companies, audit committees and other interested stakeholders. The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_130_v2.pdf/%24file/REP_130_v2.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

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| **3.1 Continued improvement in corporate governance reporting**On 18 June 2008, the Australian Securities Exchange (ASX) published its latest review of reporting against the ASX Corporate Governance Council's Principles and Recommendations. The review shows that listed entities, both companies and trusts, continue to improve their corporate governance reporting.  ASX reviewed the FY07 annual reports of 1,291 listed entities that reported with a 30 June balance date. This represented approximately 67% of all listed entities at the time. Overall reporting levels - the aggregate of adoption of recommended practices and of 'if not, why not' reporting - rose slightly in 2007 to 90.5%, up from 90% last year. This is the highest level since ASX began the annual review in 2004.For the top-500 listed entities the overall reporting level was 94%. The overall reporting level for listed trusts was 93%, up from 85% last year. The number of Recommendations with overall reporting levels over 80% increased to 26 out of 28 Recommendations.  In 2006 it was 23 out of 28. Among top-500 listed entities all 28 Recommendations achieved reporting levels of over 80%. For listed trusts 27 out of 28 Recommendations achieved reporting levels over 80%. Further information is available on the [ASX](http://www.asx.com.au/%22%20%5Ct%20%22_new) website.etailed Contents |

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| **4.1 Inherent power of the court: whether a member of a company in liquidation can bring proceedings on behalf of the company** (By Xanthe Ranger, Mallesons Stephen Jaques) Clifford John Carpenter v Pioneer Park Pty Limited [2008] NSWSC 551, New South Wales Supreme Court, Barrett J, 5 June 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/june/2008nswsc551.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/june/2008nswsc551.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case considered the circumstances in which a court may exercise its inherent power to permit a member of a company in liquidation to bring proceedings on behalf of that company.  The decision of Barrett J in the New South Wales Supreme Court indicates that a court will consider the following factors when determining whether to exercise its discretion:* the merits of the proceedings and whether they present a reasonable prospect of success;
* the attitude of the liquidator; and
* whether practical considerations support the initiation of proceedings, in particular ensuring the financial protection of the liquidator and the company estate.

**(b) Facts****(i)   Orders under Part 2F.1A of the Corporations Act**In September 2004, Mr Carpenter sought leave under Part 2F.1A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"), in particular section 237 of the Act to bring proceedings on behalf of Pioneer Park Pty Limited ("Pioneer"), a company in liquidation. In November 2004, the New South Wales Supreme Court gave orders that granted Mr Carpenter leave to bring proceedings on behalf of Pioneer against the Australia and New Zealand Banking Group Limited ("ANZ") in relation to claims arising from the termination of Pioneer's accounts with ANZ and the subsequent appointment of liquidators.  Pioneer claimed that it had been wrongfully placed in liquidation by ANZ.Following the orders given in November 2004, Mr Carpenter brought the proceedings before Einstein J in the New South Wales Supreme Court on behalf of Pioneer (see Pioneer Park Pty Ltd v Australia and New Zealand Banking Group Ltd [2006] NSWSC 1176). The claim was unsuccessful and dismissed in its entirety with costs orders later made against Pioneer.**(ii) The application to appeal**In March 2008, Mr Carpenter filed an interlocutory process seeking to appeal the unsuccessful claim on Pioneer's behalf.  Mr Carpenter argued that the court had the power to grant him leave to appeal in one of two ways. Mr Carpenter argued that the order given in November 2004 under section 237 of the Act and as a result of the inherent jurisdiction of the court, allowed him to further pursue the appeal on behalf of Pioneer. In the alternative, Mr Carpenter sought a new order granting leave for him to prosecute the appeal on behalf of Pioneer.**(c) Decision****(i)   Jurisdiction under which the court could grant leave**On 8 April 2008, the Court of Appeal published its decision in Chahwan v Euphoric Pty Ltd [2008] NSWCA 52 ("Chahwan"). The Court of Appeal held that leave could not be granted under section 237 of the Act so as to enable a person within section 236(1)(a) to bring proceedings on behalf of a company that was in the course of being wound up. The court held that in that situation, the decision of whether a company should bring proceedings was to be made by the liquidator. However, it was noted that a court could choose to exercise its inherent jurisdiction if it saw fit to authorise the bringing of proceedings by a contributory or creditor in the name of the company, even if the liquidator was unwilling to do so. In light of this decision, section 237 of the Act could no longer be relied upon as a basis for the leave granted in November 2004 or as a source of jurisdiction to grant further leave. Barrett J held that the initial leave granted that Mr Carpenter was seeking to rely on could only be depended upon to the extent that it was granted in exercise of the court's inherent jurisdiction. His Honour also stated that any new order to grant leave could only be granted as a result of the inherent jurisdiction.  **(ii)  Extension of the orders granted in November 2004 to the appeal**Mr Carpenter submitted that the initiation of the appeal was within the scope of the leave granted to him in November 2004 and, as such, should be extended to allow him to pursue the appeal on behalf of Pioneer.  Barrett J stated that in order to determine whether the proceedings were within the scope of leave granted in November 2004 the court should construe the orders previously made.  The order given in November 2004 referred in terms to apply to 'proceedings in relation to the claims' that Pioneer has against ANZ for matters concerning specified events and transactions. Mr Carpenter argued that since the appeal was concerned with the same subject matter as the original proceedings, it should be considered a proceeding 'in relation to the claim'. Barrett J stated that whilst the proceedings before Einstein J in 2006 were clearly within the intended scope, this appeal was not. His Honour stated that as a matter of policy and common sense, an appeal must be regarded as a new and separate proceeding as it will address matters different from those addressed in a proceeding at first instance  His Honour thus held that the leave granted to Mr Carpenter in November 2004 under the court's inherent jurisdiction did not extend to allow him to further appeal on behalf of Pioneer.**(iii)     Application for fresh exercise of the inherent jurisdiction of the court** Mr Carpenter also invited the court to exercise its inherent jurisdiction and grant a new order for leave. Barrett J was quick to acknowledge that even though Mr Carpenter had successfully obtained leave to bring the first instance proceedings on behalf of Pioneer; this was irrelevant for the purposes of the new application.  His Honour considered the case law and identified three main matters the court should consider when exercising its discretion: whether the proceedings to be pursued have a solid foundation and present a reasonable prospect of success; the attitude of the liquidator, and whether the practical considerations of the matter support the initiation of the proceedings, paying particular attention to maintaining financial protection of the liquidator and the estate of the company by means of indemnity and security if required. His Honour further stated that the court is called upon to exercise its general equitable jurisdiction which is discretionary.   **(iv)     Were reasonable prospects of success shown?**His Honour was critical of the evidence before him and stated that there was nothing upon which he could base any independent finding about the prospects of success or strength of Pioneer's case on appeal.  His Honour further added that it was difficult to assess whether the case had merits as only limited evidence had been provided to the court.  Despite the decision of the Federal Magistrates Court in *ANZ v Carpenter 2007 FMCA 1589* suggesting that a genuine and arguable ground of appeal existed, his Honour limited this to the context of litigation between ANZ and Mr Carpenter personally and was not indicative of Pioneer's prospects of success in this instance.  **(v)  Attitude of the liquidator**His Honour then considered the attitude of the liquidator as relevant to whether Mr Carpenter should be permitted to prosecute the appeal for Pioneer.  In this instance, the liquidator was not in a position to continue with the appeal itself and had no prospects of obtaining financial assistance. The liquidator was concerned about potential financial exposure of the company's estate should Mr Carpenter be allowed to proceed. A judgment had been ordered in 2006 against Pioneer in favour of ANZ for $62,036.22. This remained unpaid and appeared unlikely to be paid. It was highly likely that the financial burdens would only increase if leave sought was granted. The possibility of an applicant indemnifying a company against further exposure to any debt resulting from further proceedings was raised but was not feasible in this instance.  Mr Carpenter himself was the subject of a successful adjournment application for sequestration under bankruptcy legislation and would offer no reasonable protection to Pioneer. The liquidator also added that the administration would have been completed long ago had it not been for the litigation which Mr Carpenter had caused Pioneer to engage in.**(vi) Practical considerations**The final point considered was whether any practical considerations supported the initiation of the proceedings.  Barrett J indicated that the types of things that may be looked at were whether granting leave would jeopardise the financial position of the liquidator or the estate of the company.  Mr Carpenter submitted that his personal impecuniosity would not prejudice the company or its creditors, arguing that given Pioneer had no assets and the creditors were unlikely to receive payment of the debt, it would make no difference that further liabilities were added.  Barrett J was critical of Mr Carpenter's unwillingness or inability to afford financial protection to Pioneer in respect of adverse costs orders.  It was suggested that should the other criteria be satisfied, it may be practical to look at the capacity of an applicant to provide the company with financial protection when determining whether leave should be granted. If this was an option, Barrett J stated that orders to secure such financial protection would be an appropriate measure to ensure compliance. However in this instance, given Mr Carpenter's inability to guard Pioneer against further exposure, his Honour did not consider it appropriate to allow leave to be granted. Barrett J touched briefly on whether the interests of Pioneer would be served by allowing Mr Carpenter to prosecute the appeal on behalf of the company.  His Honour determined that their interests would not be best served especially considering the financial burden the ongoing litigation continued to place on the company and the lack of protection Mr Carpenter offered. **(d) Conclusion**Mr Carpenter sought an order granting leave for him to appeal on behalf of Pioneer, a company in liquidation. Barrett J took the view that whilst the decision to grant leave was ultimately in the court's inherent power and was thus discretionary; three main factors were to be considered in the determination. First, the merits of the case were to be assessed.  Second, whether the liquidator thought leave should be granted and finally, whether it would be appropriate to allow an applicant to proceed with an appeal.  Practical considerations appear to be based on the possible exposure of the estate of the company and also the liquidator and whether the applicant can provide adequate financial protection.  The court did not find in favour of Mr Carpenter.  In his Honour's opinion, there was not enough evidence provided to allow him to accurately assess the merits of the case or that the risk of further financial constraints being placed on the company were not too great.**(e) Result**The court was unwilling to accept that leave granted to Mr Carpenter in November 2004 extended to this appeal.  The court also chose not to exercise its inherent jurisdiction and grant a new order of leave to Mr Carpenter.The interlocutory process was dismissed and Mr Carpenter was ordered to pay the costs of Pioneer and its liquidator of, and incidental, to the interlocutory process.etailed Contents**4.2 Compulsory redemption of units in a unit trust - equity to the rescue**(By Adam Charles, Freehills) Accurate Financial Consultants Pty Ltd (ACN 007 294 206) and Steven John West (in his capacity as Trustee for the S & J Family Trust) v Koko Black Pty Ltd (ACN 106 330 616) (in its capacity as Trustee of the Koko Black Unit Trust), Shane Anthony Hills and Oldday Pty Ltd (ACN 098 814 594) [2008] VSCA 86, Victorian Court of Appeal, Ashley, Dodds-Streeton JJA and Forrest AJA, 28 May 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/may/2008vsca86.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/may/2008vsca86.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** This decision concerned an appeal from the Supreme Court of Victoria. The principal issue was whether Accurate Financial Consultants Pty Ltd and Steven John West (in his capacity as Trustee for the S & J Family Trust) ('the Appellants'), who are minority unit holders in a unit trust, could restrain the corporate trustee of that trust, which is controlled by the majority unit holder, from acting on notices for the compulsory redemption of their units, served approximately three and a half years after the establishment of the unit trust, in circumstances where (although the trust deed confers an unqualified power of compulsory redemption), the majority unit holder induced the Appellants' investments by representing that it would be for the "long term".  In considering this matter, Dodds-Streeton JJA, with whom Ashley JA and Forrest AJA agreed, had occasion to consider whether:* the representation of the investments being for the "long term" was sufficiently certain to found estopppel;
* the redemption would amount to a fraud on a power or a breach of trust; and
* the principles of *Ebrahimi v Westbourne Galleries Ltd [1973] AC 360* ('Ebrahimi') would operate in these circumstances to treat the unit trust as a quasi-partnership, such as to prevent the redemption.

**(b) Facts**  The Appellants are minority unit holders in the Koko Black Unit Trust ('Unit Trust'), the assets of which comprise a successful business operating a factory and chain of high quality speciality chocolate shops. The first respondent, Koko Black Pty Ltd, is the corporate trustee of the Unit Trust ('Trustee'). The second respondent, Shane Hills, is the sole director of the Trustee in which his family trust indirectly owns the shareholding. Mr Hills owns, directly or indirectly, the majority of the units in the Unit Trust.  When starting the business in 2002 Mr Hills invited a number of parties to invest funds in the business and to participate in the development and management of the business by contributing their particular skills ('Investors'). From the outset Mr Hills emphasised to the Investors that any investment would be long term, that capital growth rather than the payment of dividends would be the form of return and that a minimum two year commitment by Investors would be required.  At the first meeting of the proposed board of management, a possible structure for the business was discussed. One of the Investors proposed a unit trust. In September 2003, Mr Hills incorporated the Trustee, of which he was the sole director and, indirectly, the sole shareholder. The structure and the amounts to be invested by the Investors had not been finalised, however, it was agreed that the business would operate through a unit trust. The Investors subsequently paid for units in the Unit Trust or were issued units without financial investment and the trust deed for the Unit Trust was executed in about November 2003. Whilst the trust deed provided for a compulsory redemption mechanism, the trial judge found that the unit holders variously did not read the trust deed or did not appreciate its effect.  In about June 2005 Mr Hills prepared a 2005 Annual Report for the Unit Trust, which canvassed the "start-up silent partners" selling down their holdings, a share allocation to Mr Hills and all shareholders providing personal guarantees or establishing other arrangements. Mr Hills admitted in evidence that at the time of the 2005 Annual Report he wanted the other Investors out and considered that he was bearing too much of the risk of the business via a number of personal guarantees. Relations between the Investors subsequently broke down in the months following the 2005 Annual Report, with Mr Hills failing to satisfy requests to hold meetings or permit the involvement of the Investors in the management of the business. In November 2005 Mr Hills sought the advice of a professional consulting firm as to franchising opportunities for the business, which produced a report in this regard ('Franchising Report'). In about October 2006 Mr Hills learned for the first time that the trust deed contained a compulsory redemption provision. In December 2006 Mr Hills commissioned a formal valuation of the business with a view to redeeming some or all of the units under the trust deed. Mr Hills informed the valuer of the Franchising Report that he had decided not to proceed with the franchising of the business and accordingly the valuer instructed Mr Hills that he did need to have regard to the Franchising Report. The valuer contacted each of the Investors who were given the opportunity to make submissions, but none of them elected to do so. At the annual meeting of unit holders on 16 December 2006 the unit holders were informed that the Trustee would compulsorily redeem their units at a price based on the valuation pursuant to the trust deed.  In the decision at first instance the trial judge dismissed the Appellants' claim to a permanent injunction on the operation of the compulsory redemption notices, rejecting each of the alternative bases on which the Appellants' claim was put.  The Appellants appealed to the Victorian Court of Appeal.  **(c) Decision**  On appeal Dodds-Streeton JJA, with whom Ashley JA and Forrest AJA agreed, considered each of the bases on which the Appellants' claim was put and overturned the decision at first instance. Ultimately, it was held that the appeal should be allowed on the ground that the trial judge erred in failing to hold that the Trustee should have been estopped from acting on the notices of compulsory redemption.  **(i) Fraud on a power** At trial the Appellants' contended that the Trustee's exercise of the compulsory redemption power constituted fraud on a power because it was contrary to the purpose for which the power was considered in the context of the assumed long term nature of the investments. Dodds-Streeton JA held that to succeed on this basis, the Appellants needed to establish, as they did in respect of their estoppel argument, that the long term had not arrived when the notices were served. Given that the Appellants' were held to succeed on the basis of estoppel, her Honour held that it was unnecessary to consider further the question of fraud on a power.  **(ii) Quasi-partnership in corporate form** In the decision at first instance the trial judge rejected the Appellants' argument that the Unit Trust should be treated as a quasi-partnership between the unit holders in which there was a breakdown of mutual trust and confidence, thereby enlivening an equitable jurisdiction to restrain the Trustee from acting on the compulsory redemption notices. On appeal the Appellants argued that, in a novel extension of the principles in Ebrahimi, a fiduciary duty between the Investors justified an injunction restraining the exercise of the compulsory acquisition power. Dodds-Streeton JA considered the decision in Ebrahimi stood for the proposition that the underlying fiduciary obligations of a partnership survived despite the adoption of the corporate form, such that a breach of a fundamental understanding on which the incorporation was founded would preclude the use of a legal power to expel the minority, and rather would lead to the dissolution of the association. It was held that the reliance upon the Ebrahimi principles was inappropriate where, such as here, the dissolution of the association was not sought.  **(iii) Breach of trust** The Appellants contended that the trial judge erred in failing to hold that the notices of compulsory redemption were vitiated by a breach of trust because the Trustee did not provide the Franchising Report to the valuer. Her Honour rejected this argument and held that there was no basis for concluding the Trustee had breached either its duty of good faith or care, skill and diligence in failing to provide the Franchising Report to the valuer.  **(iv) Estoppel** The trial judge rejected the Appellants' argument that the Trustee was estopped from redeeming the units pursuant to the compulsory redemption notices on the basis of the long term assumption. The decision at first instance appeared to implicitly accept that all elements necessary for proprietary estoppel, other than a sufficiently clear and unambiguous representation, were established. On appeal it was argued that the trial judge erred in finding that the long term assumption was too vague and ill-defined to found an estoppel. After considering a number of authorities that were not brought to the attention of the trial judge by counsel, it was held that a representation that is insufficiently certain or complete to create a contract may found proprietary estoppel and that equity will construe a representation robustly in context to determine its meaning as reasonably understood by the addressee.  Her Honour concluded that the "long term" representation when considered in context and by reference to a number of relevant circumstances indicated that the meaning conveyed was that Investors would be entitled to retain their investment until either successful expansion of a substantial scale was achieved, substantial capital gain secured and the routine investment of all profit was no longer required, or, at least, until there had been a reasonable opportunity to achieve those goals. It was held that in light of all of the circumstances the premature expulsion would have been unconscionable and that the Trustee should be estopped from acting on the compulsory redemption notices.etailed Contents**4.3 The right of a former director to inspect the company's books for the purpose of a proposed legal proceeding under section 198F(2) of the Corporations Act**(By Tina Samardzija, Blake Dawson) Asciak v Australian Secured and Managed Mortgages Pty Ltd [2008] FCA 753, Federal Court of Australia, Goldberg J, 23 May 2008The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/may/2008fca753.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/may/2008fca753.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** The plaintiff, Mr Stephen Asciak, applied to the court pursuant to section 198F(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Corporations Act') for orders that he be permitted to inspect and take copies of the books of each of the four defendant companies for the financial years ending 30 June 2004, 30 June 2005 and 30 June 2006.  The plaintiff sought the orders for the purpose of proposed proceedings in the Family Court to set aside property settlement consent orders entered into by his former wife, Suzanna Asciak, and himself. Goldberg J found that the proposed proceedings in the Family Court were not brought in good faith because the proceeding was bound to fail.  The plaintiff sought to rely on communications made during the course of Family Court settlement negotiations. Such communications are inadmissible, rendering the factual foundation for the proposed claim inadmissible. The plaintiff's originating motion was dismissed.   **(b) Facts** The plaintiff and Ms Asciak were married on 28 December 1985.  In June 2003 they decided to commence a mortgage origination and management business to be called AS Mortgage Managers. The four defendants were involved in the business. On 2 November 2005 the marriage broke down irretrievably.  Ultimately on 1 March 2006 the plaintiff agreed to cease his active involvement in the business of the first defendant.  On 9 March 2006 Ms Asciak issued an application in the Family Court seeking orders for dissolution of the marriage.   On 30 August 2006 a conciliation conference was held at the Family Court of Australia at which the plaintiff and Ms Asciak were represented by their legal advisers.  All financial matters between the parties were resolved at the conference and final property orders were made requiring, inter alia, the plaintiff do all that is necessary to transfer to his wife his interests in the four defendant companies and resign as director of those companies.  On or about 12 October 2006 the plaintiff resigned as director and transferred his shareholding in those companies to Ms Asciak pursuant to the consent orders. Resulting from events which occurred subsequent to the consent orders, the plaintiff alleged Ms Asciak procured his consent by misrepresenting the tax liabilities of the companies and thus the value of his interest in them.  Accordingly, he proposed to bring proceedings under section 79A(1) of the [Family Law Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6863" \t "Default), which provides:(1) Where, on application by a person affected by an order made by a court under section 79 in property settlement proceedings, the court is satisfied that: (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance; or (b) .the court may, in its discretion, vary the order or set the order aside and, if it considers appropriate, make another order under section 79 in substitution for the order so set aside. The plaintiff made requests to inspect and take copies of the books of the four defendant companies from the solicitors for the defendant but those requests were refused.  The plaintiff then applied to the Court pursuant to section 198F(2) of the Corporations Act for orders that he be permitted to inspect and take copies of the requested documents, contending that the documents were necessary for the preparation of the proposed proceedings in the Family Court of Australia.   Section 198F(2) of the Corporations Act provides:A person who has ceased to be a director of a company may inspect the books of the company (including its financial records) at all reasonable times for the purposes of a legal proceeding: (a)     to which the person is a party; or(b)     that the person proposes in good faith to bring; or(c)     that the person has reason to believe will be brought against them. This right continues for 7 years after the person ceased to be a director of the company. The plaintiff submitted that he agreed to settle the property dispute with Ms Asciak at the conciliation conference in reliance on an email from the defendants' external accountant and representations from Ms Asciak's representatives concerning the defendants' tax liabilities and financial position.   **(c) Decision** **(i) Admissibility of communications at conciliation conference** Goldberg J was satisfied that evidence the plaintiff sought to rely on regarding what occurred at the conciliation conference was inadmissible according to subsection (a) of section 131 of the [Evidence Act 1995 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6191" \t "Default) ('Evidence Act') which provides:(1)     Evidence is not to be adduced of:(a)      a communication that is made between persons in dispute, or between one or more persons in dispute and a third party in connection with an attempt to negotiate a settlement of the dispute; or(b)      a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute. The communications which occurred were clearly made between persons in dispute as the conciliation conference was an attempt to negotiate a settlement of the property dispute between the plaintiff and Ms Asciak.  **(ii) Whether plaintiff had identified books sought to be inspected with sufficient particularity** Goldberg J agreed with the observations of Emmett J in *Hardcastle v Advanced Mining Technologies Pty Ltd [2001] FCA 1846* at par [24], where Emmett J said the section requires a person seeking to inspect books to identify at least specific categories or classes of books, which have some bearing on the relevant legal proceeding. Goldberg J was satisfied the ultimate formulation of the order sought by the plaintiff identified the books sought to be inspected with sufficient particularity.   **(iii) Whether plaintiff was proposing to bring the proceeding in good faith** It was noted that the plaintiff's ability at the present time to establish the factual foundation for his proposed proceeding in the Family Court was relevant to determining the question whether he proposed to bring the proceeding in good faith.  Goldberg J was not satisfied the plaintiff had established this.  The critical information which the plaintiff relied on was the taxation liability of the defendant companies in 2006. He was not able to lead evidence that the tax liability representations were made because they were inadmissible under section 131(1) of the Evidence Act. Although the plaintiff wanted to bring the proceeding he was bound to fail because of his inability to rely on this evidence. Under these circumstances the Court was not satisfied the plaintiff proposed to bring the proceeding in good faith.etailed Contents**4.4 Relief for a publicly listed company failing to issue a cleansing notice to the market after the placement of securities**(By Courtney Dixon and William Frost, Clayton Utz)Diversified, in the matter of Diversified United Investment Ltd [2008] FCA 720, Federal Court of Australia, Gordon J, 20 May 2008The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/may/2008fca720.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/may/2008fca720.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**In this case, Diversified United Investment Ltd ("Diversified"), a publicly listed entity, applied for a court order granting relief for a procedural irregularity under section 1322(4) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act").  In brief, the company secretary of Diversified had failed to comply with section 708A(6)(a) which required a notice to be given to the Australian Securities Exchange Limited ("ASX") in relation to the placement of 15,350,000 ordinary shares by Diversified within 5 business days after the day on which the securities were issued.Gordon J found that it was appropriate to grant Diversified the relief sought.  The failure by Diversified to issue a cleansing notice within the required time period was inadvertent and would not have conveyed any more information to the market than was already available by way of continuous disclosure.**(b) Facts**Section 707 identifies the relevant general disclosure requirements of the Act for offers of the sale of securities in particular circumstances. Specifically, section 707(3) has the affect that an offer of a body's securities for sale within 12 months after their issue needs disclosure to investors unless sections 708 or 708A dictate otherwise. In this case, the placement was made to sophisticated and professional investors to whom disclosure was not required under section 708(8) and (11).  Section 708A relates to offers for sales of securities which were originally issued without full disclosure under the Act.  Under section 708A(1) and (5), an offer to sell the securities issued by Diversified did not require a disclosure statement if Diversified gave the ASX a notice (known as a "cleansing notice") which complied with section 708A(6), within 5 business days after the day on which the securities were issued. The importance of issuing a cleansing notice is to detail "excluded information".  According to section 708A(7) and (8), excluded information is information:(a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is to be given;(b) that investors and their professional advisers would reasonably require for the purpose of making an informed assessment of:(i)  the assets and liabilities, financial position and performance, profits and losses and prospects of the body; or(ii) the rights and liabilities attaching to the relevant securities.(c) that it is reasonable for investors and their professional advisers to expect to find in a disclosure document.Diversified did not provide a cleansing notice for the purpose of section 708A(6)(a), which had the effect that a placee could not on-sell their shares without themselves issuing a disclosure statement.  Gordon J noted that a further consequence for Diversified was that some of the securities the subject of the sale offer may have been traded without the placee themselves issuing a disclosure statement.  In an attempt to remedy the situation, Diversified applied first to the Australian Securities & Investments Commission ("ASIC") for an exemption under section 741. ASIC did not grant the exemption. Diversified subsequently filed an Originating Process the subject of these proceedings and served copies of the Originating Process and supporting affidavit on ASIC, the ASX and Dixon Advisory & Superannuation Services Pty Ltd ("Dixon"), which had been retained by Diversified to assist with the placement.  Gordon J noted that none of ASIC, ASX or Dixon opposed the application or appeared before the court.   In her judgment, Gordon J cited the judgment of Gyles J in Charter Hall Limited, in the matter of Charter Hall Limited [2007] FCA 1316 ("Charter Hall").  In Charter Hall (where a similar application was considered), Gyles J was satisfied that there was no "excluded information" that should have been disclosed and that compliance in the circumstances would not have improved the position of a purchaser.  Gyles J further held that the conditions of section 1322(6) to an order for relief under section 1322(4) had been satisfied, there being no question of dishonesty or substantial injustice and that it was just and equitable for the order to be made.  A proviso to the order of Gyles J was that a party who claimed to have suffered substantial injustice by reason of the orders could apply to vary or discharge them within a limited period.**(c) Decision**Gordon J applied the principles and approach taken in Charter Hall to the facts in Diversified and in doing so held that it was appropriate that Diversified be granted the relief sought. The power of the court to make the orders sought was not in issue. Gordon J was of the view that the failure by Diversified to issue a cleansing notice was inadvertent. The judge also noted that, within a few days of the defect being detected, Diversified had sought to regularise the defect. It was further held that it was unlikely any substantial injustice would result because the cleansing notice that should have been issued would not have conveyed any information to prospective purchasers from the placees that was not already in the market by virtue of continuous disclosure.  However, Gordon J ordered (as did Gyles J in Charter Hall) that any interested party would have liberty to apply within 28 days of the orders being made, to revoke or vary them. The purpose of this order was to provide a form of protection to any purchaser who might suffer a substantial injustice as a result of the granting of the relief.In respect of the 15,350,000 ordinary shares in Diversified issued on 5 March 2008, the period of five business days after the day of issue of the relevant securities in which to issue a cleansing notice was extended to the second business day after the day on which the orders were entered.The cleansing notice given to the ASX in respect of the relevant securities was deemed to take effect as if it had been given on 6 March 2008.etailed Contents**4.5 What is the status of a deed administrator's right to recover fees and costs?**(By Justin Fox and Antoine Smiley, Corrs Chambers Westgarth) Wellnora Pty Limited v Fiorentino [2008] NSWSC 483, New South Wales Supreme Court, Barrett J, 20 May 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/may/2008nswsc483.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/may/2008nswsc483.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary** This case involved an application by Wellnora Pty Limited for an order under section 459G of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), setting aside a statutory demand served by the administrators of a deed of company arrangement, for the payment of their fees and costs. The statutory demand was based on an order made by the Federal Court under section 449E, to the effect that the deed administrators were entitled to unpaid remuneration of approximately $21,000.  Wellnora sought to have the statutory demand set aside, on the basis that there was a 'genuine dispute' as to the existence of the debt.  The court granted the order and set aside the statutory demand, on the basis that the legal arguments advanced by Wellnora were not "patently feeble". The arguments for which the court found support, included the propositions that:* the order made by the Federal Court was a mere declaration of the administrators' 'entitlement' and not a judgment debt which could form the basis of a statutory demand;
* the deed administrators' entitlement gave rise to proprietary rights in equity, to be reimbursed or indemnified out of the property of the company;
* once the relevant property was exhausted, the sole means of satisfying the right of reimbursement or indemnity is lacking; and
* section 459G of the Corporations Act may operate to prevent provisions of a deed of company arrangement which purport to confer new rights after the deed has terminated, from having operative force.

**(b) Facts** The plaintiff company was Wellnora Pty Ltd. The defendants were administrators under a deed of company arrangement executed by the company.  The deed had been fully performed. The deed administrators alleged that they were owed a debt constituted by an order of the Federal Court of Australia under section 449E, which affirmed that the deed administrators were entitled to be paid $21,000 in remuneration by the company.  The deed administrators issued a statutory demand for that debt. The company sought to have the statutory demand set aside on the basis that there was a "genuine dispute" about the existence of the debt. The company argued in particular, that the administrators' right to recover their remuneration was limited by the terms of the deed of company arrangement. The deed of company arrangement provided for the creation of a "Creditor's Fund" of $65,000, which the administrators could distribute according to a specified scale of priorities. "Administrator's remuneration and costs' were highest priority, but could only be taken from the "Creditor's Fund" and not the property of the company. The administrators were further indemnified under the deed out of the "Property of the Company" as at the "Fixed Date" being 18 January 2006 and the "Creditor's Fund" for such remuneration and costs. The Creditor's Fund was created shortly after 17 February 2006. Distribution of the fund was completed by 21 June 2006 and as a result the deed of company arrangement terminated by operation of section 445(c). The company argued that the administrators' remuneration was recoverable only from the specific sources identified in the deed of company arrangement and that there was no payment obligation on the company once those sources had been exhausted. **(c) Decision** For the purposes of establishing a 'genuine dispute', Barrett J held that it was "strongly arguable' the judgment of the Federal Court under section 449E did not constitute a judgment debt but was rather a mere quantification of the 'entitlement' of the administrators under section 449E(1)(b). Barrett J concluded that an 'entitlement' under section 449E(1)(b) did not create a debt, but rather gave rise to an equitable interest in and a lien over the property of a company. Barrett J observed that the Corporations Act does not specify the means of satisfying the deed administrators' entitlement under section 449E(1). This is in contrast to the position of administrators under a voluntary administration (who have a specific right to indemnity out of the property of the company under section 443D) and liquidators (who have a statutory priority under section 556). Barrett J held that the entitlement of a deed administrator to remuneration is instead protected by an equitable right to be indemnified out of and a lien over identified property of the company.  In coming to that conclusion, Barrett J agreed with the conclusions of Austin J in Cresvale Far East Ltd v Cresvale Securities Limited [2001] NSWSC 791, that a deed administrator was entitled to an equitable right to an indemnity and lien as a result of ordinary principles of fiduciary law. Barrett J accepted Austin J's comments in the Cresvale case that the equitable right can be excluded, limited or modified by the deed of company arrangement, which is given binding force under statute.  In the current case however, Barrett J concluded that the deed administrators' right to be indemnified out of the Creditors' Fund and Property of the Company (as those rights were expressed in the deed) was an explicitly stated version of the equitable rights identified by Austin J in Cresvale,  Significantly, Barrett J concluded it was "strongly arguable" that the equitable right is proprietary in nature and attaches only to the particular property identified (being, in this case, the property of the company as at 18 January 2006). That property having been exhausted, the equitable right of indemnity is "devoid of further utility" as the sole means of satisfying it is lacking. The administrators put forward a further argument that clause 14.2 of the deed of company arrangement was a separate and distinct source of a debt for remuneration arising after the deed was terminated. Clause 14.2 provided that termination of the deed would not affect the "priorities given by this Deed to the Administrator's Remuneration and Costs" and that the administrators' remuneration and costs up to the date of the termination of the deed were to be paid in full by the company as soon as possible after the termination.   Barrett J noted that a deed of company arrangement has statutory force only while the deed remains on foot. Once the deed has been terminated, that statutory force no longer attaches to give effect to previously operative provisions. To the extent therefore that clause 14.2 purported to confer new rights on the deed administrators after the deed had terminated, clause 14.2 could have no effect. In contrast, if the effect of clause 14.2 was to preserve a pre-existing right, section 445H may operate to preserve those rights. Barrett J thought it unnecessary to determine this issue for purposes of establishing a 'genuine dispute' under section 459G. The court found that a genuine dispute existed and set aside the statutory demand.etailed Contents**4.6 Custodial sentence for market manipulation**(By Owen Wolahan, Freehills) Scook v The Queen [2008] WASCA 114, Supreme Court of Western Australia, Court of Appeal, McLure, Buss, Miller JJA, 19 May 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/may/2008wasca114.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/may/2008wasca114.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary**The appellant was sentenced to 14 months imprisonment for instigating a scheme and coordinating the buying and selling of millions of shares on the Australian Stock Exchange in Intrepid Mining NL. He applied for leave to appeal against his sentence on four grounds, including delay and severity of the sentence. McLure JA, Buss and Miller JJA agreeing, granted leave to appeal and dismissed each ground of appeal. **(b) Facts**   The appellant appealed against his sentence on 158 counts of breaching section 998(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Section 998(1) prohibited a person from creating, or doing anything that is intended or likely to create, a false or misleading appearance of active trading in any securities on a stock market. The counts concerned trading on the Australian Stock Exchange (ASX) in shares in Intrepid Mining NL (Intrepid) between 2 January and 27 February 1998. The appellant coordinated the trading of more than 11 million Intrepid shares during this period through 13 share trading accounts and a group of six traders who placed buy and sell orders with their brokers at his direction. The appellant acted through associated entities, employing 'wash trades', 'matched trades' and 'end of trade crossings' to create the appearance of considerable investor interest in Intrepid, as well as the appearance of transaction volume on the market. The appellant intended to profit from the resultant increase in the price of the shares and the profit he would make, particularly from placement shares. He was assisted by Jeffrey Braysich of Paul Morgan Securities, who transacted the sales of shares held by Walthamstow Pty Limited for Challiston Pty Limited, one of the companies associated with the appellant. 'Wash trades' are on market trades that involve no change in beneficial ownership of the shares. 'Matched trades' are where there is an offer to buy or sell shares at a specified price knowing that another person proposed to offer or sell substantially the same number at a price which was substantially the same. 'End of trade crossings' are transactions completed within minutes of the close of trading which set the market price for the next day. In February 1998, the ASX referred to the Australian Securities and Investments Commission the possibility that the appellant had failed to lodge a substantial shareholder notice relating to his shareholding in Intrepid. ASIC conducted investigations and charged the appellant and Mr Braysich with breaches of section 998 of the Corporations Act on 18 December 2002. Mr Braysich unsuccessfully claimed that the Supreme Court lacked jurisdiction. He then sought a separate trial from the appellant. He was successful, but the State appealed and the decision was overturned. The appellant's trial commenced on 22 October 2007 and he was sentenced on 23 November 2007. The sentencing judge specified a term of imprisonment for each offence, depending on the number of shares traded: 6 months for transactions involving under 50,000 shares; 12 months for transactions involving between 50,000 and 100,000 shares; and 2 years for transactions of more than 100,000 shares. The appellant received a head sentence of 3 years' imprisonment, to be released after serving 14 months upon entering into a recognisance of $5,000 to be of good behaviour for the balance of the term. There were four grounds of appeal:* the sentencing judge relied on the probability of innocent investors being disadvantaged as an aggravating factor, when such a finding had not been established beyond reasonable doubt (Ground 1);
* the sentencing judge failed to give sufficient weight to the effect of the delay between the commencement of the investigation and the conclusion of the matter (Ground 2);
* the sentencing judge found that the appellant could have brought the matter to a conclusion at a much earlier stage, thereby penalising the appellant for exercising his right to trial (Ground 3); and
* the sentences were manifestly excessive, and a non-custodial sentence ought to have been imposed (Ground 4).

**(c) Decision**  McLure JA, with Buss and Miller JJA agreeing, granted leave to appeal and dismissed each ground of appeal. Buss JA, with Miller JA agreeing, made additional comments on the issue of delay.**(i) Ground 1**The sentencing judge merely made an observation that a number of innocent investors may have been disadvantaged, and did not take it into account as an adverse or aggravating factor.  The sentencing judge acknowledged that he could not take into account an adverse matter established only on the balance of probabilities when he said, 'It is not possible to identify the adverse consequences of your behaviour on the investing community generally'. **(ii) Ground 2**The relevance of delay between commission or detection of an offence and sentencing depends on the circumstances of the case, and will not of itself justify a reduction in sentence. Delay may have a mitigating effect where such delay is unreasonable: *R v Schwabegger [1998] 4 VR 649, R v Merret (2007) 14 VR 392*, *Duncan v The Queen (1983) 47 ALR 746*. The delay between commission or detection and laying of charges was reasonable having regard to the nature and extent of the appellant's offending, the factual complexity of the case, and the need to obtain evidence on each count. The delay between the appellant being charged and sentence was due largely to the appellant's co-defendant, Mr Braysich's, interlocutory applications. Delay may result in progress towards rehabilitation and will therefore be relevant to the deterrence factor of the sentence.  This was considered in the context of Ground 4. **(iii) Ground 3**The sentencing judge commented that it was open to the appellant to bring the matter to a much earlier conclusion, but this was in the context of considering the mitigatory effect of delay, rather than punishing the appellant for exercising his right to trial. Delay may be relevant to sentencing where the defendant has been left in a state of uncertain suspense as to what is to happen. The sentencing judge merely observed that in these circumstances a defendant has the power to make early factual admissions or admissions of liability, should he or she wish to lift this state of uncertain suspense. **(iv) Ground 4**To determine whether a sentence is manifestly excessive, it is necessary to view it in perspective of the maximum sentence prescribed by law for the crime, the standards of sentencing normally imposed for the crime, how serious the crime was compared with crimes of that type, and the personal circumstances of the offender: *Chan v The Queen (1989) 38 A Crim R 337, 342*. The maximum penalty for each offence under section 998(1) of the Corporations Act was a fine of $20,000 or 5 years' imprisonment or both. The appellant was 41 at the time of the offences and 51 at the time of sentencing. He had no prior or subsequent convictions, and produced references and character evidence that spoke of his honesty, personal integrity, social and charitable contributions and works including in relation to the welfare and advancement of Aboriginals in the Northern Territory. He ceased share financing and trading in Intrepid in April 1998, and was automatically disqualified from managing a corporation for 5 years from the date of his release from prison. Although difficult to reconcile the evidence of good character with his offending, there was little if any likelihood he would re-offend. A sentence of immediate imprisonment is not consistent with the type of sentences normally imposed for this type of offence: *R v Austin (2001) 38 ACSR 27*, *Brown v The Queen (2006) 202 FLR 98*, and *R v Lloyd (1996) 19 ACSR 528*. However, current values and circumstances justify such a sentence. Section 998 of the Corporations Act is intended 'to protect the market for securities against . manipulatiom' and 'that the market reflects the genuine forces of supply and demand': *North v Marra Developments Ltd (1981) 148 CLR 42, 59* (Mason J). The appellant's offending was at a high level of seriousness for offences of this type. It involved considerable effort and guile and was done with the intention of increasing the share price and misleading the investing community to increase the appellant's profit. There must be a strong incentive to deter others.etailed Contents**4.7 Application to bring double derivative action under the Corporations Act** (By Sabrina Ng and Katrina Sleiman, Corrs Chambers Westgarth)Oates v Consolidated Capital Services Ltd [2008] NSWSC 464, Supreme Court of New South Wales, Barrett J, 15 May 2008The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/may/2008nswsc464.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/may/2008nswsc464.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**Mr Oates, a former director of Consolidated Capital Services Pty Ltd ("CCAust"), was denied leave under section 237 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act") to act on behalf of CCAust, and a former subsidiary of that company, Consolidated Capital Ltd ("CCEng"), in pursuing litigation against current directors of CCAust and CCEng as persons liable to account or render compensation for breaches of directors' duties owed to CCAust and CCEng.**(b) Facts** CCAust is an Australian company registered under the Corporations Act. All the shares in CCAust were held and beneficially owned by an Irish company, Consolidated Capital Acceptances Ltd ("CCI"), until CCI was dissolved. CCAust has a wholly owned subsidiary of its own, CCEng, a company incorporated in England and Wales. All three companies were brought into existence in 2001 for the purposes of business ventures of Mr Oates, Mr Tyne, Mr Hawkins and Mr Mallin. Mr Oates' complaint is that Mr Tyne and Mr Hawkins appropriated to themselves (or to companies they controlled) commercial advantages (intellectual property and business opportunities) properly belonging to CCAust or CCEng.Mr Tyne and Mr Hawkins were directors of both CCAust and CCEng at the time of the alleged events and continue to be directors of those companies.  Mr Oates had been a director of each company but ceased to be in office shortly before the events in question.   In his capacity as a former director of CCAust, Mr Oates sought leave to bring action against Mr Tyne and Mr Hawkins (and their personal companies) by CCAust and CCEng for breaches of directors' duties.  However, the problem which Mr Oates faced was that he was no longer a director of CCAust or CCEng and although Mr Oates had a 20% shareholding interest in CCI (held for him by a nominee), while that company remains non-existent, he cannot exercise rights attaching to those shares. **(c) Decision** In considering whether Mr Oates could pursue an action on behalf of CCEng, the question considered by Barrett J was whether someone who has, by virtue of leave granted under section 237, the capacity to "bring proceedings on behalf of" CCAust, can cause CCAust to sue not for its own benefit but as nominal plaintiff under a procedural device by which CCAust, as the shareholder of CCEng, asserts and pursues the cause of action vested in CCEng. Accordingly, the real point to be considered in relation to Mr Oates' desire to bring a 'double derivative' action for the benefit of CCEng, was whether Mr Oates would be bringing those proceedings "on behalf of" CCAust. His Honour considered that because the benefit and/or relief from such action would accrue to CCEng, the action is not brought 'on behalf of' CCAust.  Barrett J considered that sections 236 and 237 of the Corporations Act "do contemplate a form of 'double derivative action', but make it clear that this is unavailable to someone who is merely an officer or former officer".Accordingly, Mr Oates was refused leave to bring a double derivative action on behalf of CCEng because such proceedings would not be brought 'on behalf of' CCAust.In deciding whether Mr Oates could pursue an action on behalf of CCAust, Barrett J considered that prima facie, there was a right for Oates to sue on behalf of CCAust.  The two questions to be addressed were factual questions - whether there was a serious question to be tried (section 237(2)(d)) and whether the cause of action for breach of directors' duties, if there is one, is vested in CCEng rather than CCAust. As a matter of fact, Oates relied on CCEng acting as an agent for CCAust as its undisclosed principal.  However, Barrett J found that the possibility an agency model was adopted was "entirely implausible" and as such Barrett J found that "Mr Oates has not succeeded in showing that there is any arguable basis for his contention that CCEng operated as an agent of CCAust."  As a result, Mr Oates was unable to provide evidence for a finding that it was CCAust, rather than CCEng, which "owned" the commercial advantages said by him to have been wrongfully diverted by Mr Hawkins and Mr Tyne to themselves or their associated interests.  Accordingly, Mr Oates was denied leave to bring a derivative action on behalf of CCAust because the there was no serious question to be tried in terms of section 237(2)(d) of the Corporations Act.etailed Contents**4.8 Duty of liquidator to protect trust assets when liquidating company acting as trustee** (By Paul Lamb, DLA Phillips Fox) Porter v Miller Street Pty Ltd [2008] FCAFC 77, Full Court of the Federal Court of Australia, Sundberg, Jacobsen and Gordon JJ, 14 May 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/may/2008fcafc77.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/may/2008fcafc77.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** The principle stated in Re Crest Realty Pty Ltd (In Liq) and the Companies Act (1977) 1 NSWLR 664 at 672 ("Crest Realty"), that a liquidator of a company holding property as trustee of a trust has a duty to take reasonable steps to protect the trust assets, has been reaffirmed. **(b) Facts** The appellant, Porter, was the liquidator of Taycorp Three Pty Ltd ("liquidator", "Taycorp"), which had previously been the trustee of the Tayles Discretionary Trust No 3 ("the Trust").  Taycorp had been the registered proprietor of valuable office property, which was leased out for income ("the property"), and the Trust had been the beneficial owner of the property.  The Trust's significant assets of around $5 million far outweighed its liabilities. On a failure to pay a debt of $69,000 relating to land tax on the property, Taycorp was wound up by order of the Federal Court, and the liquidator was appointed.  The respondent, Miller Street Pty Ltd ("Miller Street") was appointed as the new trustee of the trust. Miller Street, as the new trustee, took action against the liquidator for allegedly failing to take reasonable steps to protect the assets of the Trust, under the principles stated in *Cresty Realty and Re GB Nathan & Co Pty Ltd (In Liq) (1991) 24 NSWLR 674* at 688 ("Nathan").  It argued that the liquidator had failed to:* transfer title to Miller Street in a timely way, thus preventing a re-structure of an important loan and causing penalty interest to become payable under that loan; and
* appoint a real estate agent to re-lease the property, leading to a loss of revenue to the Trust when part of the property was without a tenant for several months.

At first instance, Finkelstein J of the Federal Court did not accept the first contention on the transfer of title, but accepted the second, in relation to the re-leasing of the property.  The liquidator appealed against this finding, and Miller Street cross-appealed the finding on the failure to transfer title. **(c) Decision** **(i) Re-lease of property** Their Honours restated the principle in Crest Realty, that the liquidator of a company holding property on trust must "act in a responsible way in the administration of the trust in the name of the company". The liquidator raised a number of arguments about the timing of the lease, including that the company he was controlling, Taycorp, had not been the trustee of the Trust at the time the property was without a tenant.   On the facts, their Honours rejected these arguments.  It noted the critical finding of the trial judge that if a real estate agent had been engaged at a certain time (January 2005), there would have been no time when the property was without a tenant.  At that time, it noted, Taycorp had been both the registered proprietor of the property and the trustee of the Trust.  Accordingly, it rejected the liquidator's appeal. **(ii) Transfer of title** On this point, there was a significant dispute as to the facts.  Miller Street contended that the liquidator's delay in transferring title had meant that the re-structure of the key loan had been delayed and that penalty interest was therefore payable under the previous loan terms.  At first instance, Finkelstein J had found that while the liquidator's delay had been "inordinate and inexcusable", it had not been the cause of the delay to the re-structure of the loan. Sundberg, Jacobsen and Gordon JJ reviewed the evidence, taking into account the further contentions of each party and giving due weight to the views of the trial judge, as it was obliged to do (*Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd (2001) 117 FCR 424*). On the evidence, it found that the re-structure of the loan would, in any case, have been delayed well beyond the time at which the liquidator transferred title to Miller Street.   Therefore, their Honours dismissed both appeals.  In obiter, their Honours also suggested that the findings of the trial court that the liquidator's delay had been "inordinate and inexcusable" disregarded certain evidence and was outside the ambit of the relevant proceedings, and "would have been better left unsaid".etailed Contents**4.9 Backing out of a scheme of arrangement**(By Peter Sise, Clayton Utz)  Anzon Energy Ltd (No 2) [2008] FCA 672, Federal Court of Australia, Lindgren J, 14 May 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/may/2008fca672.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/may/2008fca672.htm%22%20%5Ct%20%22_new)or<http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp> **(a) Summary** The court had ordered that Anzon Energy Ltd convene a meeting of its ordinary members to consider a scheme of arrangement. Anzon had also convened by notice an extraordinary general meeting associated with the scheme of arrangement. Both meetings had been commenced but adjourned.   Following the adjournments of the meetings, Anzon decided not to proceed with the scheme of arrangement and sought orders that both the scheme meeting and EGM be dissolved and not resumed. Lindgren J made those orders pursuant to section 1319 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (in the case of the scheme meeting) and section 233 (in the case of the EGM). His Honour made the orders on the basis that neither meeting served any utility now that the scheme of arrangement had been abandoned and it would hence be a waste of resources, contrary to the interests of Anzon shareholders, to reconvene the meetings simply to adjourn them indefinitely. **(b) Facts and issues**  On 5 March 2008, Lindgren J ordered pursuant to section 411(1) of the Corporations Act that Anzon Energy Ltd ("Anzon") convene a meeting of its ordinary shareholders to occur on 18 April 2008 to consider a scheme of arrangement ("Scheme Meeting").  If the scheme of arrangement ("Scheme") were approved, Anzon and Nexus Energy Ltd ("Nexus") would merge and Anzon shareholders would receive Nexus shares or a combination of cash and Nexus shares in consideration for their Anzon shares.  A scheme booklet was despatched to Anzon shareholders on 13 March 2008.  Following the despatch, Anzon announced new results in relation to a drilling program at the Basker 6 and Basker 6 ST1 wells which it was involved in.  Nexus and Anzon decided that the Scheme Meeting should be adjourned to allow further time to assess these new results.  Consequently, Lindgren J ordered on 11 April 2008 that the Scheme Meeting be adjourned to a date set by the chairperson.   The Scheme Meeting thus commenced on 18 April 2008.  The chairperson informed Anzon shareholders that the Scheme Meeting would be adjourned so that Anzon and Nexus could assess the new results.  An extraordinary general meeting of Anzon shareholders, which was related to the Scheme ("EGM"), also occurred on 18 April 2008.  Like the Scheme Meeting, it commenced but was adjourned to a later date.Anzon and Nexus then decided not to proceed with the Scheme as they could not agree whether revised merger terms were necessary following the developments in relation to the Basker 6 and Basker 6 ST1 wells.  Anzon sought orders that the Scheme Meeting and EGM be dissolved and not resumed. **(c) Decision** **(i) Scheme Meeting** Section 1319 of the Corporations Act provides:           "Where, under this Act, the court orders a meeting to be convened, the court may, subject to this Act, give such directions with respect to the convening, holding or conduct of the meeting, and such ancillary or consequential directions in relation to the meeting, as it thinks fit." Lindgren J referred to other cases where the orders for the convening of a scheme meeting had been revoked.  In those cases, the meeting had not yet occurred. His Honour still thought that section 1319 was wide enough to allow an order that a scheme meeting, which had already commenced, be dissolved. Lindgren J noted that the Scheme Meeting could be reconvened and adjourned indefinitely but to do so would be a waste of money as the Scheme Meeting no longer had any utility given that Anzon and Nexus had decided not to proceed with the Scheme. On that basis, his Honour made an order pursuant to section 1319 that the Scheme Meeting be dissolved and not resumed. **(ii) EGM** Section 1319 only applies where the court has ordered a meeting to be convened under the Corporations Act.  As the EGM had not been ordered by the court, section 1319 did not apply to it (Lindgren J does not explicitly say this but it is implicit). According to Anzon's constitution, the EGM could only be adjourned indefinitely if a majority of shareholders present at the EGM voted for it to be adjourned. His Honour thought that it would not be in the interests of Anzon's shareholders for the EGM to be reconvened and adjourned in that way as the EGM no longer had any utility (given that the Scheme had been abandoned) and would therefore be a waste of resources.   As section 1319 did not apply, section 233 (the oppression remedy) was used as the basis for dissolving the EGM. Section 233(1) says that the "Court can make any order under this section that it considers appropriate in relation to [a] company" and then provides a non-exhaustive list of orders the Court may make.  This non-exhaustive list does not include an order to specifically dissolve a meeting.  An application for an order under section 233, can be made by, amongst others, a member of the company (see section 234(a)). In this case, the application was made by the company secretary and CFO of Anzon who was also a member of Anzon. Lindgren J concluded that section 233(1) gave the court the power to order that an EGM, which had already commenced, be dissolved in circumstances where it had lost its utility.  His Honour accordingly made an order that the EGM be dissolved and not resumed. **(d) Comment** Another recent decision, which was not referred to by Lindgren J as it was published after Lindgren J's decision, is *Re Symbion Health Limited (No 4) [2007] VSC 571*. In that case, Robson J made an order under section 1319 that an earlier order to convene a scheme meeting be vacated. The scheme meeting had become futile as a condition precedent (a favourable tax ruling) to the scheme could not be fulfilled. Unlike Anzon (No 2), the scheme meeting in Re Symbion Health Limited (No 4) had not yet commenced. etailed Contents**4.10 Examination power under section 596B of the Corporations Act an incidental but valid exercise of judicial power** (By Marnie O'Brien, Mallesons Stephen Jaques) Re Sons of Gwalia Ltd (administrators appointed) [2008] WASC 75, Supreme Court of Western Australia, Le Miere J, 14 May 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/may/2008wasc75.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/may/2008wasc75.htm%22%20%5Ct%20%22_new)or<http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp>**(a) Summary** In this case, Le Miere J of the Supreme Court of Western Australia held that the examination power in section 596B of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") validly confers on the court a judicial power. **(b) Facts**  The Deed Administrators of the Sons of Gwalia and its subsidiaries (the SOG group) brought an application under section 596B of the Act requesting the court to issue an examination summons to Mr Duncan Price, the Chief Operating Officer of Portman Ltd (Portman). The Administrator sought this information to conduct investigations into the affairs of the SOG group.A dispute arose over entitlements to iron ore royalties.  The administrators argued that Burmine Exploration NL (a company in the SOG group) was entitled to royalties on iron ore which was produced from mining leases in Mount Jackson mining areas which were owned by Portman Iron Ore Ltd (Portman Iron Ore) (a subsidiary of Portman).The Administrators sought information regarding the Mount Jackson mining areas from Portman and Portman Iron Ore.  This information was relevant not only to the royalty dispute but also to provide the Administrators with an understanding of the potential value of this asset to the SOG group.  Attempts by the Administrators seeking Portman and Portman Iron Ore to provide the iron ore mining information had been unsuccessful.The Administrators brought an application under section 596B of the Act requesting the court to issue a summons examination to elicit this information from Mr Price.  The Respondents, Mr Price, Portman and Portman Iron Ore argued that the court should refuse to grant the application.  They argued that section 596B was constitutionally invalid because it confers on the court non-judicial powers to permit an examination of a person so as to assist a Deed Administrator.**(c) Main Issue**The main issue before the court was whether, under section 596B of the Act, the court was validly granted a judicial power to issue a summons for examination where the applicant is a Deed Administrator, or whether the section invalidly conferred a non-judicial power on the court.   **(d) Decision**Le Miere J held that section 596B validly confers on the court a judicial power to order an examination summons in favour of a Deed Administrator.  Chapter III of the Commonwealth Constitution prevents the Commonwealth Parliament from conferring on a court powers that are not either judicial or ancillary to the exercise of judicial power.Le Miere J recognised the difficulties in defining the parameters of a judicial power.  He cited Attorney General (Cth) v Alinta [2008] 242 ALR 1 at [93] where Hayne J stated that the issue of characterisation requires regard to a number of factors. This includes considerations such as whether the power conclusively determines an issue, the historical treatment of the power and the body exercising the power.Le Miere J observed the need for flexibility in defining the parameters of a judicial power. This is captured in his statement at [31] that ".functions that stand outside the common understanding of judicial power will be regarded as part of that power if they are incidental to the exercise of judicial power'.  Le Miere J drew on the legislative history of the examination power. Numerous companies statutes have long granted courts the power to issue a summons for examination similar to that granted under section 596B of the Corporations Act.Traditionally, the examination order has been issued to assist in investigations into the internal affairs of a company, such as in a winding up. However, his Honour observed that there has been a relatively recent judicial recognition of section 596B as a power which extends beyond winding up, and to also assist in the external administration of the company: *Re Compass Airlines Pty Ltd (1992) 35 FCR 447*, 452-3. Le Miere J was guided by the legislative history and case authority which have judicially considered the nature of the examination power. His Honour paid particular attention to the High Court decision in *Gould v Brown (1998) 193 CLR 346*.In line with that decision, his Honour concluded that the examination power under section 596B is, in itself, not a judicial power. This is because the power to order and conduct an examination, divorced from association with a judicial proceeding, lacks the core elements of the judicial process such as the finding of facts, the making of value judgments and binding determinations as to legal rights and obligations.However, his Honour held, the power to issue a summons ordering the examination of a person to assist a Deed Administrator conducting investigations into the affairs of the company is a function incidental or ancillary to the court's exercise of judicial power and therefore valid. He noted that courts in Australia and in the United Kingdom have long exercised jurisdiction with respect to the bankruptcy of individuals and insolvency of companies. Their procedures in relation to those matters have been recognised as being judicial and the exercise of powers in relation to those matters have been recognised to be an exercise of judicial power.  He drew an analogy with the court's role where the company was in administration, which, although different to the court's role in the winding up situation, was similarly judicial in nature.The exercise of the power to summon a person for examination in aid of a process of external administration of a corporation under a deed of company arrangement is, therefore, similarly to the power to summon and conduct the examination of persons in a winding up process, incidental to the exercise of judicial power.His Honour then proceeded to order the examination summons against Mr Price.etailed Contents**4.11 Whether directors of a company abused provisions of Part 5.3A of the Corporations Act**(By Julia Abouaf and Aidan Douglas, Blake Dawson)Chief Commissioner of State Revenue v Rafferty's Resort Management Pty Ltd (in liq) [2008] NSWSC 452 New South Wales Supreme Court, Austin J, 12 May 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/may/2008nswsc452.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/may/2008nswsc452.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Background**An application for winding up Rafferty's Resort Management Pty Ltd (Company) was brought by the Chief Commissioner of State Revenue (Commissioner) on 20 September 2007.On 29 January 2008, directors of the Company appointed voluntary administrators, which administrators were replaced by new administrators (Administrators) following the first meeting of creditors on 8 February 2008.When the winding up proceedings returned on 29 February 2008, Barrett J granted an order that:* the administration be terminated;
* the Company be wound up in insolvency, or alternatively, pursuant to provisions of section 459A of the Act, the Company be wound up in insolvency; and
* the section 513C day in relation to the administration is the day on which the originating process was filed.

The court adjourned the application for relief.**(b) Issues for determination*** Whether directors of the Company abused the provisions of Part 5.3A so as to warrant an order to termination of the voluntary administration.
* Whether, when administrators are appointed after filing a proceeding to wind up a company, and subsequently the administration is terminated and an order to wind up the company is made, section 447A of the Act authorises the court to make an order to backdate the section 513C day to the date on which the winding up proceedings was filed.
* Whether, under section 513(b) of the Act, the company is under administration immediately before making an order to wind up the company if the court orders the termination of the administration and then order the winding up.

**(c) Judgment****(i) When was the relation back date?**His Honour found that section 447A of the Act permits the court to make an order terminating an administration, but that the section does not authorise the court to make a winding up order.  Consequently, the winding up order was made pursuant to section 459A of the Act, and as such under section 513A(b) of the Act, the winding up was taken to have been commenced on the section 513C day in relation to the administration.As there was no winding up in progress, even though there was a pending application to wind up, the section 513C day was the day on which the administration commenced. **(ii) Were there grounds for changing the relation back date?**His Honour considered the following factors in determining whether it was desirable to change the relation back date:* there would be substantial benefits to the creditors in doing so;
* adequate attempts had been to contact affected parties; and
* there was an abuse of process by directors of the Company to use the voluntary administration procedure for the purpose of deferring the relation-back date and therefore potential recovery of unfair preference payments (particularly as the directors stood to benefit from that deferral).

**(iii)     Was there the power to alter the relation back date?****Section 447A(1)**His Honour considered 3 reasons why section 447A(1) cannot be invoked in circumstances where a liquidator seeks an order which affects the definition of the section 513C day, or in the alternative an order having the effect that the administration is taken to have commenced on the day the origination process was filed.Firstly, the order sought could not be characterised as an order about how Part 5.3A is to operate in relation the Company, particularly given the operation of sections 513A(b) and 513C which are located in Division 1A of Part 5.6 and not Part 5.3A.Further, the proposed alternative order would result in creating a fiction that the directors had resolved to appoint administrators months prior to the actual date of their appointment. In His Honour's view, that fiction is not authorised by section 447A(1).Secondly, section 447A(1) should not be used to alter accrued rights. The winding up order made at first instance resulted in certain persons who received unfair preference payments from being immune from challenge by liquidators. An order to backdate the relation back date would deprive those persons of their immunity which would be contrary to High Court observations. Lastly, an order to alter the section 513C day or day of commencement of administration is an order which affects past events rather than how Part 5.3A is to operate in the future.**Rule 36.17 Uniform Civil Procedure Rules (2005) (Slip Rule)**His Honour noted that an order could not be made under the Slip Rule as, even if Barrett J had made an order terminating the administration before making an order for winding up, section 513A(b) of the Act would still have applied and the relation-back day would still have been 29 January 2008.  As such the position of the Company would not have been relevantly different.  **(d) Conclusion**Austin J concluded that the court did not have the power to alter the relation-back date. His Honour noted that section 513A(b) has an "unfortunate application" in the case where an origination process for the winding up proceedings is filed before the date on which administrators are appointed.  Its application results in the relation-back date being only backdated to the time of appointment of the administrators, whereas if there had been no intervening administration, the relation-back date would have been the date of filing the originating process. His Honour noted that since the administration ends once the winding up order has been made, the correct result in terms of policy ought to be that the relation-back date is determined by the commencement of the winding up proceedings.Further, his Honour noted another anomaly, being that the application of section 513(b) permits recovery of the disposition of property but would exclude the recovery of unfair preferences which position would be reversed if section 513A(b) does not apply.etailed Contents**4.12 A 'person aggrieved' under section 601AH(2) of the Corporations Act**  (By Kathryn Finlayson, Minter Ellison) In the matter of Newfront Pty Ltd (Deregistered) (ACN 053 228 489) [2008] SASC 127, Supreme Court of South Australia, Gray J, 12 May 2008The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2008/may/2008sasc127.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2008/may/2008sasc127.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**A person will be a 'person aggrieved' for the purposes of section 601AH(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) if the deregistration will deprive them of a right of recovery to which they would otherwise be entitled.**(b) Facts**Newfront Pty Ltd was deregistered by the Australian Securities and Investments Commission on 13 January 2008 for failure to pay an annual fee.  Grenfell Securities Ltd was the plaintiff in a Supreme Court proceeding brought against several parties including Newfront. On 1 April 2008, those proceedings settled and Newfront filed a consent to judgment in favour of Grenfell. On 2 April 2008, the solicitors for Grenfell discovered that Newfront had been deregistered. On 3 April 2008, Grenfell filed an application pursuant to section 601AH(2) of the Corporations Act 2001 (Cth) seeking an order that the Australian Securities and Investments Commission reinstate the registration of Newfront.On 4 April 2008, the Australian Securities and Investments Commission indicated that it would not oppose Grenfell's application for reinstatement provided that certain procedural conditions were met. **(c) Decision** Justice Gray held that Grenfell was a 'person aggrieved' for the purposes of section 601AH(2) of the Corporations Act 2001 (Cth) as Newfront's deregistration deprived Grenfell of its right of recovery from Newfront in respect of the Supreme Court proceeding.  His Honour also held that, in circumstances where the deregistration was trigged by a procedural defect or oversight, there was no opposition to the reinstatement and there was no suggestion that anyone would be prejudiced by the reinstatement, it was just that Newfront's registration be reinstated. Accordingly, Justice Gray ordered that the Australian Securities and Investments Commission reinstate the registration of Newfront.etailed Contents**4.13 Security for costs available to defendant insurer in case involving litigation funding** (By Paul Lamb, DLA Phillips Fox) Martin John Green in his capacity as liquidator of Arimco Mining Pty Ltd (in liquidation) v CGU Insurance Ltd [2008] NSWSC 449, Supreme Court of New South Wales, Einstein J, 9 May 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/may/2008nswsc449.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/may/2008nswsc449.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** Security for costs may, on the exercise of a court's discretion, be recovered by a defendant insurer where the plaintiff has an agreement with a litigation funder. Significant delay in the bringing of an application for this kind of order may result in the order being made only over future anticipated costs, so that no protection is available for costs expended to date. **(b) Facts** The liquidator of Arimco Mining Pty Ltd ("liquidator", "Arimco") brought proceedings against the former directors of Arimco ("directors"), seeking to recover moneys in relation to debts that the directors alleged permitted Arimco to incur while Arimco was insolvent or there were reasonable grounds for suspecting that it was insolvent, or would become insolvent by incurring those debts.   The liquidator joined CGU Insurance Limited ("CGU") to this action, using litigation funding from an external funder to do so. The terms of the funding agreement were such that the liquidator could call on the funder to indemnify it against costs and against orders for security for costs and to provide a bank guarantee in support of that indemnity.  The directors eventually reached a settlement with the liquidator, and CGU became the sole defendant. At a late date, some three years after it might have first sought such an order, CGU sought security for costs from the liquidator. CGU had incurred around $1.5 million in costs at that point, and anticipated that its costs at the end of any trial would be in the order of $2.5 million. **(c) Decision** **(i) Restatement of principle** Einstein J reasserted a number of general principles on the making of orders for security for costs, noting among other things that:* there is a broad discretion available to the court regarding an order for the provision of security for costs;
* the primary purpose of such an order is to protect a party by protecting an award of costs in its favour (Oshlack v Richmond River Council (1998) 193 CLR 72 at 97); and
* the court must weigh the benefit of this protection to a defendant against the potential injustice to a plaintiff should an order unnecessarily shut it out or prejudice it in the proceedings (Idoport Pty Ltd v National Australia Bank Limited [2001] NSWSC 744 at [47]).

In relation to the present case, Einstein J also noted that the fact that the plaintiff is a liquidator does not of itself prevent an order being made against that plaintiff (Greener v E Kahn & Co Ltd [1906] 2 KB 374 at 376 and later cases). His Honour also noted the law in relation to orders for security for costs where a litigation funder stands behind a plaintiff, restating the principle that any consideration of whether the plaintiff's case would be stultified should take into account whether the litigation funder is unable (not unwilling) to provide security for costs (Fiduciary Ltd v Morningstar Research Pty Ltd (2004) 208 ALR 564 at 584, among other cases). **(ii) Application in present case** The court noted that:* the liquidator had provided no evidence to suggest that the proceeding would be stultified by the order sought;
* the litigation funding agreement required the litigation funder to indemnify the liquidator against such orders, and provide a bank guarantee in support of the indemnity; and
* the liquidator had provided no evidence on the financial position of the litigation funder.

Accordingly, Einstein J elected to make an order for security for costs. In doing so, his Honour rejected the liquidator's argument that orders for costs were not appropriate where the defendant was an insurer with a policy which appeared on its face to be applicable, following Irwin Alsop Services v Mercantile Mutual Insurance Co Ltd [1986] VR 61. **(iii) Effect of delay on quantum of order** In response to the "tremendous delay" by CGU in bringing its application for the order, in which time the parties had incurred significant costs, Einstein J exercised the broad discretion available to his Honour and ordered that the security would apply only over the future anticipated costs of CGU, not to costs already expended.etailed Contents |

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