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| **Bulletin No. 150**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1. [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#h1)
2. [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#h2)
3. [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#h3)
4. [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#h4)
5. [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#h5)
6. [Contributions](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#6)
7. [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)
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| **Detailed Contents**  | own |

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| [1. Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#1)[1.1 CEBS publishes its high level principles for risk management](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#011)         [1.2 Australia should boost productivity through better regulation says OECD](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#012)[1.3 Wide ranging reforms needed to strengthen the not-for-profit sector](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#013)[1.4 APRA releases annual superannuation figures to 30 June 2009](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#014)[1.5 Referral of consumer credit powers to the Commonwealth](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#015)[1.6 Legislation to reform the supervision of Australia's financial markets](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#016)[1.7 CESR consults on extensions to major shareholding notifications](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#017)   [1.8 Changes to share register access](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#018)[1.9 CPSS - IOSCO review of standards for payment, clearing and settlement systems](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#019)[1.10 APRA releases guidance on the management of security risk in information and information technology](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#0110)[1.11 Survey of risks facing banking institutions](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#0111)[1.12 Consultation on guidance to report transactions on OTC derivative instruments in Europe](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#0112)[1.13 FSA outlines latest steps to address corporate governance at firms](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#0113)[1.14 Survey of FTSE executives' pay](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#0114) [1.15 UK Joint Parliamentary Committee report on human rights and the private sector](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#0115)[2. Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#2)[2.1 Guidance on disclosure of credit ratings in Australia](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#021)[2.2 ASIC issues report on relief applications decided between April and July 2009](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#022)[2.3 Margin lending licensing commences](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#023)[3. Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#3)[3.1 Algorithmic trading and market access arrangements: ASX review](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#031)[3.2 Reports](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#032)[3.3 ASX information paper:  Capital raising in Australia](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#033)[3.4 Rule amendment - Transfer service - ASTC Settlement Rule amendments](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#034)[3.5 Review of trading by directors in 'blackout' period - Q3 2009](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#035)[3.6 Update to clearing and settlement arrangements for potential operators of trade execution platforms for CHESS-eligible ASX-quoted securities](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#036)[4. Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#4)[4.1 Panel publishes revised Guidance Notes](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#041)[5. Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#5) [5.1 CSR demerger stumbles at first court hearing: section 411](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#051)[5.2 ASX announcements and directors' duties: Misleading statements in relation to financial products](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#052)[5.3 Protecting confidential information from potentially competing employees](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#053)[5.4 Implementing the restructure of a managed investment scheme - application of the statutory power to amend and the scope of members' powers](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#054)[5.5 Director subject to banning order can prevent publication through AAT review](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#055)[5.6 Irregular expert report insufficient hurdle to compulsory acquisition under Part 6A.2 of the Corporations Act](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#056)[5.7 Quantum meruit liabilities in the context of section 588G of the Corporations Act](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#057) [5.8 Oppression (issues of liability and valuation considered); fiduciary duty owed by director to shareholders](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#058)[5.9 Credit and debit cards - when are cards "of the same kind"?](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#059)[5.10 Directors' liability for insolvent trading - when is a debt incurred and when is a company insolvent?](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#0510)[5.11 Directions sought on the proposed restructure of a managed investment scheme](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#0511)[5.12 Does soliciting funds from contingent creditors constitute a managed investment scheme?](http://www.law.unimelb.edu.au/bulletins/150%20February%202010.htm#0512)  |

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

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| **1.1 CEBS publishes high level principles for risk management**          On 16 February 2010, the Committee of European Banking Supervisors (CEBS) published its high level principles for risk management. These principles should be considered both by institutions and supervisors within the supervisory review framework under Pillar 2. In responding to the call of the EU Economic and Financial Committee (EFC) for CEBS to develop enhanced guidance to strengthen banks' risk management practices, CEBS has conducted an analysis of its existing risk management guidelines. This analysis showed that in general the EU and international supervisory bodies have produced a comprehensive set of guidelines. However, it also revealed areas where the coverage of risk management practises was somewhat fragmented. CEBS has therefore provided guidance to some of these areas where weaknesses have emerged during the financial crisis, such as:(i) governance and risk culture; (ii) risk appetite and risk tolerance; (iii) the role of the Chief Risk Officer and risk management functions; (iv) risk models and integration of risk management areas; and (v) new product approval policy and process. CEBS expects its Members to implement the high level principles into their procedures by 31 December 2010 at the latest. The high-level principles for risk management are aimed mainly at large and complex institutions. However, according to the principle of proportionality, they can be adapted to any institution under review, taking into account its size, nature, and complexity.Further information is available on the [CEBS](http://www.c-ebs.org/%22%20%5Ct%20%22_new) website.etailed Contents**1.2 Australia should boost productivity through better regulation says OECD** Strong regulatory frameworks and sound policies have helped Australia weather the global crisis better than most Organisation for Economic Co-operation and Development (OECD) countries. But further efforts are needed to harmonise regulations, strengthen competition and streamline infrastructure regulation if Australia is to reduce unnecessary costs to business and boost productivity, according to a new OECD report published on 15 February 2010. The report titled 'Australia: Towards a Seamless National Economy' says lifting regulatory constraints and removing bottlenecks in some infrastructure sectors would enable Australia to take full advantage of the rapid rebound of some Asian economies, notably China. The report argues for the need to maintain the current commitment to regulatory reform. Recent initiatives include Commonwealth fiscal reforms that give greater autonomy to states, a sharper focus on States performance and financial incentives to the States to undertake reforms over a five year period. This reform agenda is likely to yield substantial economic benefits in the years to come, says the report. Success will depend on continued co-ordinated actions by a number of agencies at state level, as well as Australian parliaments passing and amending state laws. Productive Commonwealth-state relationships are therefore crucial for the reform agenda. The report also recommends that Australia should:* Ensure national institutional arrangements can support ongoing regulatory reform, including by developing formal arrangements for ongoing consultation with business;
* Strengthen the development of regulation through regulatory impact analysis and benchmarking across jurisdictions;
* Promote competition in core infrastructure sectors. Tackle remaining exemptions and special regimes to complete the National Competition Policy legislation review;
* Introduce reforms to the quarantine inspection system, as recommended in the Beale report; and
* Enhance Australia's open markets by harmonizing free trade agreements; reducing and rationalizing government assistance for industry and services and harmonizing Australian and international standards.

In the future, the challenge will be to co-ordinate regulation of national markets. This needs to ensure that new barriers are not created and so that all jurisdictions regulate with regard to the national interest without requiring the current financial incentives, maintaining a seamless national economy. Australia is among 26 OECD and non OECD countries to undergo a broad review by the OECD of its regulatory practices and reforms. Set within a macroeconomic context, this review presents a general picture of Australia's regulatory achievements and challenges, including regulatory quality at the Commonwealth level as well as across sub national levels of government, competition policy and market openness. It also includes a special focus on state-federal relationships.The report is available on the [OECD](http://www.oecd.org/document/63/0%2C3343%2Cen_2649_34141_44529023_1_1_1_1%2C00.html%22%20%5Ct%20%22_new) website. On 15 February 2010, the Australian Minister for Finance and Deregulation responded to the OECD report and the response is available on the [Minister's](http://www.financeminister.gov.au/media/2010/mr_042010.html%22%20%5Ct%20%22_new) website.etailed Contents**1.3 Wide ranging reforms needed to strengthen the not-for-profit sector**On 11 February 2010, the Australian Productivity Commission released a research report titled "Contribution of the Not-for-Profit Sector". According to the Commission, there is a need for wide-ranging reforms to remove unnecessary burdens and costs faced by the not-for-profit sector and improve its accountability. Better regulation, improved funding arrangements and enhanced opportunities for innovation would improve outcomes for the community and the public's confidence in the sector. To consolidate regulatory oversight and enhance transparency, the Commission proposes a "one-stop shop" for Commonwealth-based regulation in the form of a Registrar for Community and Charitable Purpose Organisations. An Office for Sector Engagement should also be established to drive reform and policy development at the Commonwealth level. Australia has 600,000 not-for-profit organisations which contributed $43 billion to Australia's GDP, growing at an annual rate of 7.7 per cent since 2000. If the contribution of 4.6 million volunteers, with an imputed value of $15 billion is counted, this would make it a similar contribution to the retail industry. The report makes a number of other recommendations aimed at:* building a better knowledge base, through a national measurement framework and a Centre for Community Service Effectiveness to act as a clearinghouse to promote best practice evaluation;
* smarter regulation, including a more coherent endorsement process for tax status, to be administered by the proposed Registrar, and a new definition of charities;
* promoting giving through broader scope of gift deductibility, the promotion of planned giving and nationally harmonised fundraising regulation;
* facilitating innovation and sector development through a variety of initiatives; and
* reforming government purchasing and contracting arrangements.

The report is available on the [Australian Productivity Commission](http://www.pc.gov.au/projects/study/not-for-profit/report%22%20%5Ct%20%22_new) website.etailed Contents**1.4 APRA releases annual superannuation figures to 30 June 2009**  On 10 February 2010, the Australian Prudential Regulation Authority (APRA) released its Annual Superannuation Bulletin for the financial year to 30 June 2009.  Total superannuation assets fell during the year by $66.4 billion, or 5.8 per cent, to $1.07 trillion. Small funds, which have fewer than five members, were the only funds to experience an increase in assets over the year, with 0.5 per cent growth to $334.3 billion.  Assets of industry funds fell by 4.7 per cent to $191.8 billion, corporate funds by 9.5 per cent to $54.0 billion, retail funds by 9.6 per cent to $304.7 billion and public sector funds by 10.3 per cent to $153.0 billion.   In the year to 30 June 2009, the average rate of return (ROR) for large funds (more than four members) was - 11.7 per cent. Corporate funds recorded an ROR of - 10.0 per cent, followed by industry and retail funds with - 11.7 per cent and public sector funds with - 12.3 per cent. In the ten years to June 2009, the average ROR for large funds was 3.4 per cent per annum. For the year to 30 June 2009, contributions to all superannuation entities totalled $112.2 billion, with employers contributing $71.1 billion and members $39.9 billion.  Contributions to large funds totalled $76.9 billion, of which retail funds received 36.8 per cent ($28.2 billion), industry funds 31.1 per cent ($23.9 billion), public sector funds 26.5 per cent ($20.3 billion) and corporate funds 5.7 per cent ($4.4 billion). Total accumulation retirement benefits are estimated to be 81.3 per cent of total assets, or $571.8 billion, at 30 June 2009 (excluding small funds), with 18.7 per cent or $131.7 billion in defined benefits. The Bulletin also includes, for the first time, features on member age profiles and on operating expenses. The feature 'Member age, investment mix and fund performance' examines the link between average member age and the financial characteristics of funds, including net returns, volatility of returns and investment allocation. The data shows that within the for-profit funds sector, funds have essentially identical returns with near identical volatility across the full range of average member ages. By contrast, within the not-for-profit funds sector, funds earn more as average member age increases, with no material change in volatility. The second Bulletin feature, 'Operating expenses', investigates the relationship between operating expenses and fund size and fund type. The data show that operating expenses are driven by fund size in terms of assets and the number of members. The Annual Superannuation Bulletin is available on the [APRA](http://www.apra.gov.au/Statistics/Annual-Superannuation-Publication.cfm%22%20%5Ct%20%22_new) website.etailed Contents**1.5 Referral of consumer credit powers to the Commonwealth** On 15 February 2010, the Australian Government introduced legislation into the parliament that will give effect to the referral of responsibility for consumer credit to the Commonwealth. Passage of the [National Consumer Credit Protection Amendment Bill](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=112128" \t "Default) is the final step for the Commonwealth in creating a single, standard, national regime for the regulation of consumer credit.  As the Commonwealth's legislative powers alone are not sufficient to enact a nationally comprehensive consumer credit regulatory framework the States have agreed to refer their powers to the Commonwealth, under section 51 of the Constitution, by passing relevant referral legislation in their respective Parliaments.  This is an integral element of the reform.  In response to state concerns raised in December last year, the Commonwealth and State Governments agreed to modify the terms of the amendment power in the Referral Bills (the Bills to be enacted by the States to refer power to the Commonwealth) to allow certain subject matters (such as State taxation) to be excluded from the scope of the amendment power.  To give effect to that agreement this Bill amends the [National Consumer Credit Protection Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "Default) (the Credit Act) to enable an effective reference of State power to be made either with or without exclusions to that power.  The amendments in the Bill will also allow the States to refer their regulatory powers in relation to consumer credit by 'adopting' the Commonwealth's legislation and referring an amendment power.  This will ensure the constitutional soundness of the referral of consumer credit powers. These amendments provide the flexibility sought by the States to enable them to refer their powers for consumer credit regulation to the Commonwealth.  Following the Commonwealth's enactment of the Bill, the States wishing to refer powers excluding certain subject matters or using the adoption approach will be able to do so.  Following enactment of the Referral Bills, the States will be able to repeal their state laws in time for the commencement of the National Credit legislation on 1 July 2010.  This will end the state-based credit regime that had formally applied inconsistently across eight different jurisdictions. Further information regarding the Reform Package is available on the [Treasury](http://www.treasury.gov.au/consumercredit%22%20%5Ct%20%22_new) website. Further information is also available on the [ASIC](http://www.asic.gov.au/credit%22%20%5Ct%20%22_new) website.etailed Contents**1.6 Legislation to reform the supervision of Australia's financial markets** On 10 February 2010, the Australian Government introduced legislation into Parliament that will reform the way financial markets in Australia are supervised.  The [Corporations Amendment (Financial Markets Supervision) Bill 2010](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=112122" \t "Default) contains three key measures:* The Bill removes the obligation on Australian market licensees to supervise their markets.
* The Bill provides ASIC with the function of supervising domestic Australian market licensees.
* The Bill provides ASIC with additional powers, including the power to make rules with respect to trading on such markets and additional powers to enforce such rules.

Following public consultation, a number of changes have been made to the Bill, including: * the maximum penalty for a breach of a market integrity rule for either an individual or a corporation has been reduced to $1 million; and
* the maximum pecuniary penalty payable when entering into an arrangement with ASIC to avoid civil proceedings has been lowered from 4/5th of the maximum a court can order to 3/5th of the maximum a court can order.

Further detail of how the new regime will work will be contained in regulations and ASIC's market integrity rules, which are currently being developed.etailed Contents**1.7 CESR consults on extensions to major shareholding notifications**    On 9 February 2010, the Committee of European Securities Regulators (CESR) published a consultation paper on CESR's proposal to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares. CESR recognises that these instruments may potentially be used to acquire or exercise influence in a company with shares admitted to trading on a regulated market, or allow for creeping control. Instruments that create a similar economic effect to holding shares and entitlements to acquire shares effectively create a long economic exposure to the issuer. Currently these instruments are outside the legal scope of the Transparency Directive (TD). CESR intends to widen this scope to include all instruments referenced to shares that allow the holder to benefit from an upward movement of the price of these shares. There is a range of instruments that can be used to create a similar economic effect, and a long economic exposure, to those financial instruments already captured under the TD without giving legal title to or the legal right to acquire the underlying shares, including certain options, equity swaps and Contracts for Difference (CfD). Several member states have taken or are planning to take steps to broaden the scope of their national regime for the reporting of major holdings to include such instruments or to establish specific disclosure rules regarding them. The minimum harmonisation required by the Transparency Directive allows for these national initiatives. While seeking to broaden the scope of the TD's major shareholding disclosure regime, CESR does not seek to change the general principles underlying the current regime. The scope of the broadened disclosure regime is to remain limited to instruments referenced to shares to which voting rights are attached, already issued, of an issuer whose shares are admitted to trading on a regulated market. The consultation paper is available on the [CESR](http://www.cesr.eu/popup2.php?id=6481" \t "_new) website. etailed Contents**1.8 Changes to share register access** On 3 February 2010, the Australian Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, released proposals designed to prevent predatory share offers to vulnerable and unsuspecting shareholders.According to the Minister, the reforms will also reduce the compliance costs for business by reducing the amount of resources needed to respond to requests for copies of member registers.The Access to Registers and Related Issues proposals paper outlines planned changes to the law, including the requirement that companies only provide access to their share registers when requested for a "proper purpose".The paper outlines proposals for reform developed from submissions in response to the options paper, Access to Share Registers and the Regulation of Unsolicited Off-market Offers. Under the Government's proposals, companies will be authorised to refuse requests for access to their share registers unless the request is made for a "proper purpose". Any person seeking a copy of a company's share register would be required to specify in their request the purpose for which the information will be used. A non-exhaustive list of "improper purposes" will be specified in the [Corporations Regulations 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default) and will specifically include the use of a copy of the register for the purpose of making an unsolicited share offer to members of a listed company. Genuine takeover bids will be exempt from the access regime. The Australian Securities and Investments Commission (ASIC) will also produce guidance material on what purposes can generally be considered proper. New offences will be established that relate to issues such as improper use of register information and false or misleading applications. The proper purpose test will not apply to applications to view a share register. The proposals paper also outlines proposals to:* set down a three‑tiered fee structure for obtaining access to a company's register, with the fee chargeable to be based on the number of members contained in the register;
* require a company to provide an electronic copy of its register in a format prescribed in the Corporations Regulations; and
* reduce the cost burden on companies by allowing a register be viewed on a computer instead of the current obligation of printing a hard copy for applicants who only wish to view the register.

The paper is available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1716" \t "_new) website.etailed Contents**1.9 CPSS - IOSCO review of standards for payment, clearing and settlement systems**  On 2 February 2010, the Committee on Payment and Settlement Systems (CPSS) and the Technical Committee of the International Organization of Securities Commissions (IOSCO) launched a review of their existing standards for financial market infrastructures such as payment systems, securities settlement systems and central counterparties. There are three sets of standards involved:* the 2001 Core principles for systemically important payment systems;
* the 2001/2 Recommendations for securities settlement systems; and
* the 2004 Recommendations for central counterparties.

Financial market infrastructures generally performed well during the recent financial crisis, and did much to help prevent the crisis becoming even more serious than it actually was. Nevertheless, the committees believe that there are lessons to be learned from the crisis and, indeed, from the experience of more normal operation in the years that have passed since the standards were originally issued. It is therefore timely to review the standards with a view to strengthening them where appropriate.  The review will be led by representatives of the central banks that are members of the CPSS and those of the securities regulators that are members of the IOSCO Technical Committee. The International Monetary Fund and the World Bank are also participating in the review. The review is part of the Financial Stability Board's work to reduce the risks that arise from interconnectedness in the financial system.  The committees will coordinate with other relevant authorities and communicate with the industry, as appropriate, as the work progresses. They aim to issue a draft of all the revised standards for public consultation by early 2011. Separately, as announced in the press release on 20 July 2009, the CPSS and the Technical Committee of IOSCO are already in the process of providing guidance on how the 2004 Recommendations for central counterparties should be applied to CCPs handling OTC derivatives. The guidance will also cover other relevant infrastructures handling OTC derivatives such as trade repositories. This aspect of the work has been put on a fast track because of the new CCPs for OTC derivatives and trade repositories that have recently started, or are about to start, operating. A consultative document on the guidance will be issued within the next few months. This new guidance will not entail amendments to the existing recommendations for CCPs but will be incorporated into the general review of the standards that has now begun.  Further information is available on the [Bank for International Settlements](http://www.bis.org/cpss%22%20%5Ct%20%22_new) website.etailed Contents**1.10 APRA releases guidance on the management of security risk in information and information technology**  On 1 February 2010, the Australian Prudential Regulation Authority (APRA) published a prudential practice guide (PPG) on the management of security risk in information and information technology (IT) by institutions supervised by APRA. A draft PPG and discussion paper on this topic were released for public consultation on 8 May 2009 as Prudential Practice Guide PPG 234 Management of IT Security Risk. Response to the consultation package was positive and no material issues were raised.    The final PPG aims to target areas where APRA's ongoing supervisory activities continue to identify weaknesses. Topics addressed include the importance of an overarching framework, systematic IT asset life-cycle management, effective monitoring processes and robust IT security reporting and assurance mechanisms.The PPG is designed to provide guidance to senior management, risk management and IT security specialists (management and operational). It does not seek to provide an all-encompassing framework nor to replace or endorse existing industry standards and guidelines.  The Guide is available on the [APRA](http://www.apra.gov.au/Policy/upload/PPG_PPG234_MSRIT_012010_v7.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.11 Survey of risks facing banking institutions** The greatest risk now facing the banking industry is not financial but political, according to the latest 'Banking Banana Skins' survey conducted by CSFI in association with PricewaterhouseCoopers and published on 1 February 2010.  The annual poll of banking risk puts "political interference" at the top of a list of the 30 most serious risks to banks during this period of financial crisis. The poll is based on responses from 450 senior figures from the financial world in 49 countries.  Respondents, who include practising bankers as well as close observers of the financial scene and regulators, said that the "politicisation" of banks as a result of bail-outs and takeovers posed a major threat to their financial health. This view was shared by all types of respondents in all the major banking regions, though for different reasons. Bankers saw politics distorting their lending decisions. Non-bankers said that political rescues had damaged banks by encouraging reckless attitudes. Regulators worried that governments would withdraw their support from banks before they had time to rebuild their financial strength, precipitating another collapse.  "Political interference" has never appeared as a risk in 15 years of "Banana Skins" surveys. The top risk is closely linked to the No 3 risk, "Too much regulation", and the concern that banks will be further damaged by over-reaction to the crisis.  Many of the risks identified by the survey notably credit risk at No 2 stem from concern about the effects of the recession on the banking industry. The bulk of respondents were gloomy about the outlook, fearing a "double dip" recession with a further wave of bad debts hitting the banks. The mood was particularly dark in the Asia Pacific region where respondents are worried that a new asset bubble may burst, bringing about a collapse of confidence in the credit markets. The poll also reflects concern about the banks' ability to manage themselves safely. Issues such as the quality of risk management, corporate governance and management incentives all feature prominently as potential sources of risk.  But some risks are also seen to be easing as the world pulls out of the crisis. A number of financial risks - liquidity, derivatives, credit spreads and equities are down on the previous poll in 2008. A striking fall is the risk from hedge funds, down from No 10 to No 19, as their threat is seen to diminish. "Financial plumbing" risks are also seen to be low: back office, payments systems etc. All performed well in the crisis. Environmental risk is at an unchanged No 25 position despite the heat generated by the Copenhagen Summit.  Further information is available on the [CSFI](http://www.csfi.org.uk/%22%20%5Ct%20%22_new) website.etailed Contents**1.12 Consultation on guidance to report transactions on OTC derivative instruments in Europe** On 29 January 2010, the Committee of European Securities Regulators (CESR) published a consultation paper on guidance on how to report transactions on OTC derivative instruments. The consultation paper is accompanied by a feedback statement on the consultation on "Classification and identification of OTC derivative instruments for the purpose of the exchange of transaction reports amongst CESR Members" and a second paper summarising the CESR decision on the technical standards for classification and identification of OTC derivative instruments for the purpose of the exchange of transaction reports amongst CESR members. The consultation paper is available on the [CESR](http://www.cesr.eu/popup2.php?id=6479" \t "_new) website.etailed Contents**1.13 FSA outlines latest steps to address corporate governance at firms** On 28 January 2010, the UK Financial Services Authority (FSA) issued a Consultation Paper (CP) on effective governance standards within firms. As part of its supervisory enhancement program, the FSA places greater emphasis on the role of senior management at firms. Since adopting this approach in 2008, the FSA has carried out 332 significant influence functions (SIF) interviews, with 25 candidates withdrawing from the process. The FSA has issued a number of publications in this area, including a 'Dear CEO' letter in October 2009, which clarified its approach to approving and supervising persons performing SIFs. This CP explains this more intensive process in greater detail, but also makes clear that the intention is not to deter strong candidates from pursuing senior roles in firms. **(a) Walker review**The proposals implement the FSA-specific recommendations in Sir David Walker's review of corporate governance published in November 2009. Where appropriate, listed banks and insurers are now strongly encouraged to establish board risk committees and appoint top executives as chief risk officers.  **(b) Enhancing the SIF regime**Underpinning this intrusive approach, the paper consults on extending the scope of the SIF regime and introduces a new, more detailed framework of controlled functions. These will make clearer the exact role an individual is performing within a firm and increases the FSA's ability to vet and track individuals as they move role. The FSA is also extending the regime to capture more individuals from parent companies who exert significant influence upon a UK regulated firm. The FSA hopes to have final rules in place during the third quarter of 2010.      The consultation paper is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/CP/2010/10_03.shtml%22%20%5Ct%20%22_new) website. etailed Contents**1.14 Survey of FTSE executives' pay** PricewaterhouseCoopers LLP (PwC's) annual report of FTSE remuneration, 'Executive Compensation - Review of the Year 2009', released on 21 January 2010, shows that median increases in base salary for FTSE 100 and FTSE 250 executives fell to 1% and 0%, respectively, in 2009 and were outstripped by the national average earnings base pay increase (2.5%) for the first time in a decade. In 2008, increases were 6% for both the FTSE 100 and FTSE 250 while the national earnings pay increase was also higher at 3.7%. PwC's research also found that median maximum bonus potential for CEOs remained stable at 150% of salary in the FTSE 100, equivalent to around GBP 1.2m, and 100% in the FTSE 250, which would equate to around GBP 425,000 if paid out in full. But, actual bonus payments decreased by 20% in 2009 reflecting business performance and the economic climate. The median bonus payout for CEOs in the FTSE 100 and FTSE 250, respectively, were GBP 525,000 and GBP 217,000. The number of executives receiving nil bonuses doubled in the FTSE 100 last year and increased by 40% in the FTSE 250. In practice, this means one in six executive directors in the FTSE 100 and FTSE 250 did not receive a bonus in 2009. This statistic is significantly influenced by banks, which in many cases did not pay bonuses in 2009. Median total long-term incentive grants values fell slightly at CEO level with the median economic value of awards now at 140% of salary - roughly equivalent to just over £1m. This compares with 150% in 2008. Companies experiencing significant falls in share price have scaled back award levels by anything between 20% and 40% in response to shareholder pressure. The most common plans remain performance share plans, deferred bonus plans and share options. Notwithstanding this moderation, shareholder opposition to remuneration proposals grew, with 20% of FTSE 100 companies have more than one in five of their shareholders withhold support for the remuneration report, up from 3% in 2008. The majority of contentious AGMs arose outside the banking sector. There is wide-spread use of deferred bonuses in the FTSE 100, which is consistent with the prescriptions set out for the banking sector by the FSA. Some 72% of FTSE 100 companies (46% in FTSE 250) operate a deferred bonus plan, in which executives defer some of their annual cash bonus into shares. Around three quarters (two thirds in FTSE 250) of these have a compulsory element to deferral. Median FTSE 100 chairman fees stand at GBP 300,000 and director fees at GBP 62,000. Median additional fees for an audit committee chair are GBP 18,000 while typical membership fees in the FTSE 100 remain between GBP 5,000 and GBP 10,000. Senior independent director fees are now GBP 12,500. The review is available on the [PricewaterhouseCoopers](http://www.ukmediacentre.pwc.com/Media-Library/Executive-Compensation-Review-of-the-Year-2009-65d.aspx%22%20%5Ct%20%22_new) website.etailed Contents**1.15 UK Joint Parliamentary Committee report on human rights and the private sector** On 16 December 2009, the UK House of Lords and House of Commons Joint Committee on Human Rights published a report titled "Any of our business? Human rights and the UK private sector". It is stated in the report that businesses must have regard to human rights in several different contexts. In the UK, businesses which perform a public function have duties under the Human Rights Act. The regulation of UK firms may be intended to ensure that the UK complies with its international human rights obligations. The operations of UK firms overseas may have an impact on human rights, for example the rights of indigenous people. Difficult issues arise if there are weaker governance mechanisms for protecting human rights overseas, or if firms take different approaches to the protection of certain human rights in the UK and elsewhere. The report considers this complex range of issues, starting from the position that the UK should play a leadership role to ensure that all firms respect human rights wherever they operate. Issues dealt with in the report include the work of the UN Secretary General's Special Representative on human rights and transnational corporations and other business entities and the OECD guidelines on multinational enterprises. The report is available on the [UK Parliament](http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

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

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| **2.1 Guidance on disclosure of credit ratings in Australia**On 4 February 2010, the Australian Securities and Investments Commission (ASIC) released guidance in the form of an information sheet clarifying how credit ratings issued by licensed credit rating agencies (CRAs) may be disclosed in Australia.On 12 November 2009, ASIC outlined changes to the regulation of CRAs in Australia (refer MR09-224).Information Sheet 99: Disclosure of credit ratings in Australia (INFO 99) explains the circumstances in which a person may and may not disclose a credit rating in: * a retail disclosure document or PDS; and
* other documents and communications (using some examples).

The information sheet also outlines how restrictions on disclosure of credit ratings interact with a person's other obligations (including continuous disclosure obligations). Further information is available on the [ASIC](http://www.asic.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents**2.2 ASIC issues report on relief applications decided between April and July 2009** On 4 February 2010, the Australian Securities and Investments Commission (ASIC) released a report outlining recent decisions on applications for relief between 1 April and 31 July 2009 from the corporate finance, financial services and managed investment provisions of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).The report, "Overview of decisions on relief applications (April 2009 to July 2009)" (REP 184) provides an overview of a range of the applications where ASIC has considered, exercised, or refused to exercise, its exemption and modification powers from the financial reporting, managed investment, takeovers, fundraising and financial services provisions of the Act.REP184 also highlights examples where ASIC decided to adopt a no-action position regarding specified non-compliance with the provisions, and features an appendix detailing the relief instruments it executed.The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP184.pdf/%24file/REP184.pdf%22%20%5Ct%20%22_new) website. etailed Contents**2.3 Margin lending licensing commences**Issuers and advisers of margin lending facilities will be able to apply for an Australian Financial Services licence (AFSL), or a variation to an existing licence, from 1 February 2010 until 30 June 2010, according to a media release published by ASIC on 1 February 2010.Existing margin lenders and advisers on margin loans must apply to ASIC for an AFSL authorisation within this timeframe if they intend to continue to provide a margin lending financial service after the application period closes on 30 June 2010. Industry participants who fail to do so will have to cease providing such services. This follows the passage of the [Corporations Legislation Amendment (Financial Services Modernisation) Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=110243" \t "Default) late last year which provides for the regulation of margin lending facilities. Amongst other things, the Act requires: * issuers and advisers of margin lending facilities to be licensed by ASIC under an AFSL;
* advisers to only provide advice that is appropriate to the client's individual circumstances;
* margin lenders to meet new responsible lending requirements;
* consumers to have access to external dispute resolution services; and
* clarity around responsibility for notifying clients in the case of a margin call.

The new conduct and disclosure requirements for issuers and advisers of margin lending facilities, and the new responsible lending and margin call notification requirements, will take effect from 1 January 2011.The same licensing, conduct and disclosure requirements that currently apply to financial services will apply to providers and financial advisers in relation to margin lending facilities. The changes are part of the Government's plan to regulate credit nationally.Further information is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/Margin%2Blending?openDocument" \t "_new) website.etailed Contents |

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

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| **3.1 Algorithmic trading and market access arrangements: ASX review** On 8 February 2010, the Australian Securities Exchange (ASX) released the findings of its review of algorithmic trading and market access. The review commenced in July 2009 and sought to examine the impact and likely growth of algorithmic trading activities in Australia, and identify ways to meet demand for alternative access arrangements to ASX's markets without creating new risks to market integrity.  Since ASX commenced the review, overseas jurisdictions have undertaken similar activities to understand the impact of algorithmic trading. The review is available on the [ASX](http://www.asx.com.au/about/pdf/20100211_review_algorithmic_trading_and_market_access.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.2 Reports**On 3 February 2010, ASX released the following reports:* the ASX Group Monthly Activity Report; and
* the SFE Monthly Volume and Open Interest Report for January 2010.

The ASX group monthly activity report is available on the [ASX](http://www.asx.com.au/about/pdf/ma_030210_monthly_activity_report_jan2010.pdf%22%20%5Ct%20%22_new) website.  The SFE monthly volume and open interest report is available on the [SFE](http://www.sfe.com.au/content/notices/2010/notice2010_017.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.3 ASX information paper: Capital raising in Australia** On 29 January 2010, ASX released an information paper on capital raising in Australia and some other major markets during the global financial crisis.  The paper aims to be a timely contribution to improving understanding of the overall capital raising process. It describes the framework for capital raising, the methods used by companies, and how these methods were employed throughout the GFC. It also examines the criticisms levelled at particular capital raising mechanisms. The information paper is available on the [ASX](http://www.asx.com.au/about/pdf/20100129_asx_information_paper_capital_raising_in_australia.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.4 Rule amendment - Transfer service - ASTC Settlement Rule amendments** On 22 January 2010, ASX made amendments to the ASTC Settlement Rules to facilitate the provision by ASTC of a transfer service.  The transfer service allows financial products listed on a licensed market (other than ASX) to be established in CHESS and transferred between ASTC Participants. The Bulletin 019/10 on is on the [ASX](https://www.asxonline.com/intradoc-cgi/groups/clearing_and_settlement/documents/communications/asx_026189.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.5 Review of trading by directors in 'blackout' period - Q3 2009** On 21 January 2010, ASX released its latest review of securities trading by directors during the 'blackout' period. For the purposes of the review, the blackout period is defined as between the close of a listed entity's financial period and the announcement of its half-year or full-year results. The ASX Markets Supervision (ASXMS) review examined trading by directors during this period for possible contraventions of the publicly disclosed trading policy of the entity concerned. The review was conducted by ASX Markets Supervision (ASXMS) on all Directors' Interest Notices lodged between 1 July 2009 and 30 September 2009 (Q3 2009). The review of directors' trading during the blackout period is available on the [ASX](http://www.asx.com.au/about/pdf/mr_210110_blackout_trading_q3_2009.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.6 Update to clearing and settlement arrangements for potential operators of trade execution platforms for CHESS-eligible ASX-quoted securities** ASX has released additional documentation outlining clearing and settlement arrangements for potential operators of trade execution platforms for CHESS-eligible ASX-quoted securities.  Further information is available on the [ASX](http://www.asx.com.au/professionals/trade_acceptance_service/index.htm%22%20%5Ct%20%22_new) website. etailed Contents |

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| **4. Recent Takeovers Panel Developments** |  | ext Section |

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| **4.1 Panel publishes revised Guidance Notes**On 11 February 2010, the Takeovers Panel published revised versions of Guidance Notes 7, 12, 14 and 17.This is part of the Panel's planned process of simplification and includes a review of the currency and consistency of the guidance notes. The Panel issued a consultation draft of the guidance notes in May 2009. It received 5 submissions and has taken them into account and made further changes. Some of the more important changes are identified below.  **(a) Guidance Note 7: Lock-up devices**Guidance Note 7 deals with the Panel's approach to lock-up arrangements in control transactions.Following consultation, it has been made clearer that the guidance note applies to any control transaction. The section on break fees makes explicit the need for the triggers for payment of the fee to be reasonable, and refers to "naked no vote" break fees. As well, the 1% guideline for break fees has been clarified.The section on restriction agreements has been re-written to reflect that different types of restrictions and safeguards can be brought together in combination, which can change the overall impact of the agreement.**(b) Guidance Note 12: Frustrating action**Guidance Note 12 deals with the Panel's approach to actions of a target or potential target company that may lead to an offer lapsing, being withdrawn or not proceeding. The Panel has clarified that shareholders may be given a choice in different ways. It has also made it clear that, if the choice is by waiting to see if the bid will succeed before undertaking the frustrating action, the time that must be allowed for that may be affected by the length of the bid period or the status of any bid conditions.  Following consultation, more examples have been included in the guidance note. **(c) Guidance Note 14: Funding arrangements** Guidance Note 14 provides guidance on funding arrangements for the cash component of bid consideration. The rewrite reduces the amount of internal cross-referencing and brings related subjects together.  The consultation draft asked for comments on whether:* it was necessary to require a bid condition to the effect that payment cannot be made earlier than transfer of the shares; and
* off-market bids that are conditional on finance should be required to include a condition that precisely matches the financing conditions of the financier.

Based on the responses received, the Panel decided it was not necessary to make these changes. However, the Panel did expand on the requirements for disclosure of an accountant's certificate as to funding and exchange rate risk management. **(d) Guidance Note 17: Rights issues** Guidance Note 17 provides guidance on circumstances that the Panel is likely to declare to be unacceptable in relation to rights issues. As well as updating references, the rewrite removes concepts of presumption and onus, and instead outlines factors relevant to the Panel's consideration of unacceptable circumstances. Following consultation it has been made clearer that the Panel looks at the effect of the rights issue beyond what is reasonably necessary for fundraising. The Guidance Notes are available on the [Panel](http://www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=GN" \t "_new) website.etailed Contents |

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| **5. Recent Corporate Law Decisions** |  | ext Section |

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| **5.1 CSR demerger stumbles at first court hearing: section 411** (By Xuelin Teo and Evelyn Tadros, Clayton Utz) CSR Limited, in the matter of CSR Limited [2010] FCA 33, Federal Court of Australia, Stone J, 3 February 2010 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2010fca33.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2010fca33.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** CSR Limited ("CSR") sought orders pursuant to section 411(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act") to convene a shareholders' meeting to consider a scheme of arrangement ("Scheme") relating to CSR's proposed demerger of its sugar and renewable energy business as well as orders for the approval of the explanatory statement summarising the Scheme for dispatch to shareholders. Stone J dismissed CSR's application because: * her Honour was not satisfied that the potential prejudice to asbestos claimants arising from the Scheme was consistent with commercial morality; and
* the explanatory statement did not provide adequate disclosure about the ability of CSR to meet future asbestos claims following a demerger.

**(b) Facts**  CSR sought to implement, by way of a capital reduction and Scheme, a demerger resulting in two separate and independent ASX listed companies.  A new company named "Sucrogen" would be created and take the sugar and renewable energy business out of CSR, which would leave the existing company ("New CSR") with the building product, property and aluminium business. Only the assets of New CSR would be available to meet current and future asbestos liabilities of CSR following the demerger. Numerous objectors, including ASIC, James Hardie, the Asbestos Injuries Compensation Fund Limited and the Attorney-General for NSW, opposed the Scheme because they were concerned about the potential prejudice to present and future asbestos claimants.  The hearing was concerned with the first of three stages in the promulgation of a scheme of arrangement under Part 5.1 of the Act.  The second and third stages are, respectively, the members' meeting(s) and the second court hearing at which the Court's approval of the Scheme would be sought. **(c) Decision**  **(i) Should the impact of the proposed capital reduction on asbestos claimants be considered at the first hearing?**  CSR submitted that the proposed capital reduction was not part of the Scheme and therefore the court need not consider the merits of nor approve the capital reduction. Stone J held that the proposed capital reduction was a condition precedent to the Scheme and, given that nexus, it was appropriate for the Court to consider the impact of the proposed capital reduction on asbestos claimants.  As a matter of public policy, commercial morality and fair disclosure to shareholders, it was appropriate to consider the capital reduction in the context of the Scheme. She was also satisfied that it was appropriate to consider the impact of the proposed capital reduction on asbestos claimants at the first hearing and such consideration did not need to wait until the time of the second hearing, noting that it is not in the interests of justice to expose a company to additional effort and expense that could have been avoided by more timely intervention. **(ii) Should the orders sought be granted?**  Stone J was inclined to the view that, unless the court was satisfied that the Scheme was not consistent with public policy and commercial morality or did not provide adequate disclosure, it should make the orders sought. While Stone J did not equate the position of future asbestos claimants with every category of current and future creditor of New CSR, she considered that future asbestos claimants and existing shareholders of CSR would be interested in whether New CSR would likely be able to meet those future claims and the court had to be satisfied that there was proper disclosure in the explanatory statement.  Her Honour considered 11 expert reports which were tendered by CSR and the objectors, which included actuarial projections of CSR's asbestos liabilities.  All but one of the reports were the subject of confidentiality orders and therefore there was limited discussion about the 10 confidential reports in the judgment.  In the end, Stone J declined to adjudicate between the correctness of the reports.  Instead, she considered that the critical issue that emerged from the expert evidence was that there was a genuine dispute between the experts and considerable uncertainty as to the conclusions about New CSR's ability to meet future asbestos claims.   Stone J also observed that New CSR would be the repository of all of CSR's present and future liabilities in respect of asbestos-related claims and that it would suffer a significant reduction in the capital available to meet such claims.  For these reasons, Stone J concluded that:* she could not be satisfied that the provisions made were consistent with commercial morality or that the Scheme, if given effect, would not involve an unfair or oppressive result; and
* the material in the explanatory statement could not provide adequate disclosure to CSR shareholders of New CSR's ability to meet its future liabilities.

Stone J declined to make the orders sought.**(iii) Comment** On 10 February 2010, CSR sought expedited leave to appeal from this decision.etailed Contents**5.2 ASX announcements and directors' duties: Misleading statements in relation to financial products**(By Steven Grant, Minter Ellison) Australian Securities and Investments Commission v Citrofresh International Ltd (No 2) [2010] FCA 27, Federal Court of Australia, Goldberg J, 2 February 2010 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2007fca27.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2007fca27.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 concerns whether statements made in letters released to the Australian Securities Exchange (ASX) were misleading and deceptive and whether the person appointed as Managing Director and Chief Executive Officer had breached his duties as a director by allowing the company to make misleading and deceptive statements in relation to financial products. **(b) Facts**  The plaintiff, the Australian Securities and Investments Commission (ASIC), alleged that the contents of two letters sent to the Company Announcements Office of the ASX were misleading and deceptive in a number of respects and contained misrepresentations by the first defendant, Citrofresh International Ltd (CIL) of which the second defendant, Mr Ravi Narain was at relevant times Managing Director and Chief Executive Officer.  ASIC alleged that by sending the letters to the ASX, CIL engaged in conduct in relation to a financial product or a financial service in contravention of the provisions of section 1041H of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Section 1041H provides that a person must not engage in conduct, in relation to a financial product or a financial service that is misleading or deceptive or is likely to mislead or deceive.   ASIC further alleged that Mr Narain engaged in conduct in relation to a financial product or a financial service in contravention of section 1041H by reason of:* his participation in the drafting and preparation of the first letter in the manner alleged;
* his approval of the contents of the letter;
* his direction to CIL's company secretary to send the first letter to the ASX;
* sending the first letter to the ASX; and
* the fact that both letters contained his name as one of two persons to contact for further enquiries.

CIL consented to orders being made against it and the proceeding continued against Mr Narain who denied the allegations made against him.  On 30 November 2007 Goldberg J dismissed the application against Mr Narain finding that he did not contravene section 1041H on the following basis: * the letters sent to the ASX were not statements in relation to a financial product or service; and
* Mr Narain was not personally liable for the sending of the letters to the ASX.

ASIC appealed to the Full Federal Court, which allowed the appeal, finding that the two letters and the statements in them were statements in relation to a financial product, namely shares in CIL, and that Mr Narain was responsible for the publication of those statements.  The Full Court remitted the matter to Goldberg J to determine whether the statements made in the letters were misleading and whether Mr Narain breached his duties as a director of CIL, thereby contravening section 180 by causing CIL to contravene section 1041H.   Section 180 requires directors to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director of a corporation in the corporation's circumstances, and occupied the office held by, and had the same responsibilities within the corporation as, the director. **(c) Decision** **(i) Were the statements misleading?** ASIC claimed that:  * two of the statements contained in the 27 September letter constituted representations of existing fact which were false;
* three of the statements contained in the 27 September letter constituted a representation with respect to a future matter and that Mr Narain had no reasonable grounds for making the representations; and
* the letters did not disclose to the ASX, or to the public, a number of issues which were material to the matters disclosed in the letters and were also material to the prospects of commercial success for CIL, material to its business prospects, relevant to its share price and were matters that should have been disclosed in the letters in order to avoid the letters being misleading or deceptive or likely to mislead or deceive.

The following statements were made in respect of CIL's product Citrofresh:* '. can now offer a global solution to reduce and eventually stop the spread of [human immunodeficiency virus ("HIV")] using Citrofresh';
* 'Citrofresh provides a non‑hazardous, non‑toxic and effective solution that deal [sic] with emergency disease control and prevention for HIV, human influenza A virus, SARS virus and human rhinovirus';
* '[CIL] will market a range of 'Barrier Protection' products to be used in the first instance for Men's Health (post intercourse spray or lotion);
* 'the use of Citrofresh as a postcoital application will act as an 'invisible condom' for the prevention of STD's including HIV'; and
* 'the ability to use Citrofresh as a postcoital application will have a significant impact on reducing the transmission of HIV and STD's'.

ASIC relied on Professor Steven Wesselingh's evidence, which can be summarised as follows:* there was no evidence provided that Citrofresh could act in any way other than as a disinfectant which cannot offer a global solution to reduce and eventually stop the spread of HIV;
* the data presented indicated that Citrofresh could be a moderately effective disinfectant but this provides no novel, innovative solution or support for emergency disease control;
* there was no scientific evidence presented, either in the Retroscreen Virology Ltd Report or in the second letter from Australian Rickettsial Reference Laboratory Foundation Ltd that indicated a basis for the use of Citrofresh as a barrier protection product; and
* there was no evidence that post‑coital application of gels or other products with anti‑HIV activity would have any significant impact in reducing the transmission of HIV or other sexually transmitted diseases.

Goldberg J analysed each of the statements in turn and based on that analysis and Professor Wesselingh's evidence, Goldberg J concluded that Mr Narain was a person who engaged in conduct in relation to a financial product that was misleading and deceptive and that he contravened, and caused CIL to contravene section 1041H of the Act as the five statements were misleading and deceptive.   Goldberg J was also satisfied that the letters were misleading and deceptive by virtue of the fact that there was non‑disclosure of the facts that:* Citrofresh was a disinfectant and not a vaccine;
* the tests that had been carried out on Citrofresh by a laboratory were in vitro and not in vivo;
* further in vivo tests were necessary before Citrofresh could be marketed for use as a pre‑ or post‑ coital application designed to prevent sexually transmitted diseases; and
* further tests and trials would need to be conducted before Citrofresh could be marketed for use as a sanitizer pre or post intercourse.

Although Mr Narain denied that these matters were material and that they should have been disclosed Goldberg J considered that each of these matters was integrally tied up with what was the misleading thrust of the statements, namely that Citrofresh was available to counter the spread of HIV and other sexually transmitted diseases.  Accordingly, Goldberg J declared that Mr Narain contravened section 1041H(1) and that he caused CIL to contravene that section. **(ii) Did Mr Narain breach section 180?** In considering whether Mr Narain's conduct contravened section 180, Goldberg J noted that not every misleading statement made by a director on behalf of a company results in a contravention of section 180(1) and much depends upon the degree and extent of the misleading nature of the statement and its falsity.   Although Mr Narain sought the advice of external advisers, Goldberg J concluded that Mr Narain was not entitled to rely on their expertise in drafting or participating in the drafting of the statement in the manner that Mr Narain had done, as the advisers were neither experts in the area of science or infectious diseases and their treatment.  Furthermore, whilst Mr Narain may have had a background in abalone processing and may not have been a professional director with public company experience, he was not excused from exercising the appropriate degree of skill and care required of a company director, especially as a managing director and chief executive officer.  The circumstances required him to have an active participation in the drafting and to exercise a considerable amount of skill and care as the responsible Managing Director and Chief Executive Officer of CIL.   On this basis, Goldberg J concluded that Mr Narain contravened sections 1041H(1) and 180(1) and that the Commission was entitled to declarations accordingly.   **(iii) Further hearing** As agreed between the parties, a further hearing of the proceeding was adjourned to enable the parties to make submissions as to whether any orders should be made pursuant to section 1317G requiring Mr Narain to pay a pecuniary penalty in respect of his contravention of section 180(1) and whether any orders should be made pursuant to section 206C(1) that Mr Narain be disqualified from managing corporations for a period that the Court considers appropriate.etailed Contents**5.3 Protecting confidential information from potentially competing employees**(By Zoe Leyland, Mallesons Stephen Jaques) Blackmagic Design Pty Ltd v Overliese [2010] FCA 13, Federal Court of Australia, Jessup J, 22 January 2010 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/january/2010fca13.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/january/2010fca13.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** This decision concerned the preparations of two then employees of the applicant, Blackmagic Design Pty Ltd ("Blackmagic"), to establish a new business venture.    Blackmagic alleged that in making these preparations, the former employees made use of its confidential information, infringed its copyright in certain works, engaged in conduct that was in breach of the [Trade Practices Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default), the [Fair Trading Act 1999 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12938" \t "Default) and the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") and, in the case of one employee, breached the terms of his employment contract. While the court granted permanent injunctions to protect Blackmagic's confidential information, the decision:* suggests that employers could better protect their copyright by providing employees with remote access so as to preclude the need for employees to retain such information on personal computers;
* provides guidance to employers on the drafting of restraint clauses so as to capture preparatory activities in the establishment of a new competing business; and
* confirms that in the employer/employee setting, confidential information is better protected through equitable principles rather than an employee's obligations under the Act.

**(b) Facts**  The first and second respondents, Mr Overliese and Mr Young, were former employees of Blackmagic, a company whose operations included the manufacture and sale of hardware and software for broadcast television and video production.   Mr Overliese ultimately assumed the position of Director of Hardware Engineering at Blackmagic. During the second half of 2007, differences of opinion arose between Mr Overliese and Blackmagic regarding the development of a new one-lane PCI express card and the extent to which potential competition ought to be analysed. In late April 2008, Mr Overliese gave notice to Blackmagic, citing personal issues. Mr Young was employed with Blackmagic as Business Development Manager. Following a dispute concerning Mr Young's authority to purchase stock, Mr Young resigned in May 2008. From December 2006, Mr Overliese and Mr Young had occasional discussions about the possibility of establishing a joint business venture to manufacture electronic products in the audio industry.  In May 2007, Mr Overliese created a spreadsheet containing details of speakers, suppliers and organisations in the audio industry. On 12 August 2007, Mr Overliese and Mr Young registered a company called Atomos Audio Pty Ltd ("Atomos"), also a respondent to this proceeding, through which to conduct their business venture.   On 10 January 2008, Mr Overliese created a further spreadsheet on his personal computer. While the worksheets originally contained ideas and calculations in respect of audio products, from 7 February 2008 they included details about video products, including those of Blackmagic. One worksheet listed some of Blackmagic's existing products, the costs and profits which might be derived from those products, and the products that a hypothetical competitor may develop. At one stage, Mr Overliese informed Mr Young that he had included some products that he would like to manufacture, but was not allowed to make at Blackmagic. To this, Mr Young expressed reservations about competing with Blackmagic.  Further documents, including a cashflow spreadsheet, a business plan and marketing plan were then developed, each with reference to video products. Jessup J rejected Mr Overliese's evidence that the notion of competing with Blackmagic was briefly entertained before being quickly abandoned or that it was purely conceptual in character, concluding that the most likely inference was that, for a series of reasons, Mr Overliese changed the focus of his analysis to video products. **(c) Decision**  **(i) Confidential information** Blackmagic alleged that while in its employ, Mr Overliese and Mr Young used its confidential information, obtained by reason of their positions at Blackmagic, for the purposes of establishing a potentially competing business.  It was also alleged that they disclosed this information to Ms Young, also a respondent to this proceedings, and to Atomos. While Jessup J was satisfied that much of Blackmagic's confidential information was stored by Mr Overliese on his personal computer as a consequence of him being required to work at home on occasions, his Honour held that the parts usage figures and pricing used in the spreadsheets were Blackmagic's own commercial information which should have been regarded as confidential by Mr Overliese.  Jessup J was further satisfied that the incorporation of this information into the spreadsheets was for Mr Overliese's own, or for Atomos', purposes.   While Mr Young was a recipient, rather than originator, of the confidential material, Jessup J considered that he should be bound by the same injunction given his role in the Atomos project.  Jessup J also ordered that Atomos be similarly restrained, however, his Honour refused to similarly restrain Ms Young, characterising her involvement as a 'useful volunteer' rather than a participant. **(ii) The Corporations Act** Blackmagic sought injunctions under section 1324 of the Act for alleged contraventions of sections 182(1) and 183(1) of that Act on the basis that Mr Overliese used his position as its employee, and the information gained as an employee, to gain advantage for himself and Atomos, and to cause detriment to Blackmagic. As the parties agreed that the contents of the norms of conduct conveyed by the expression "improperly use" in section 183(1) were equivalent to the impropriety which equity would require to restrain a breach of confidence or fiduciary duty, it followed that Mr Overliese had therefore contravened that section.  Jessup J, however, refrained from further restraining him in respect of the same course of conduct.  Further, Blackmagic was not entitled to compensation under section 1317 as it had not suffered any damage as a result of Mr Overliese's contravention.   Jessup J was satisfied that Mr Young had not contravened section 183(1) as the information was not obtained by Mr Young in the course of his employment with Blackmagic, but was provided to him by Mr Overliese. Jessup J dismissed Blackmagic's case against Mr Overliese under section 182 on the basis that this section is concerned with the direct use of an employee's position to gain an advantage, as opposed to where that position is the means by which the employee obtains information which is then used to gain the requisite advantage.  Jessup J also dismissed the like case against Mr Young.  **(iii) Equitable damages** Blackmagic sought equitable damages against Mr Overliese for the loss of opportunity to exploit one of the hypothetical products that featured on Mr Overliese's spreadsheet.  Blackmagic contended that as a fiduciary, Mr Overliese was obliged to disclose his ideas to Blackmagic.  Jessup J considered that this point was met by established authority to the effect that the obligations imposed upon a fiduciary are proscriptive, not prescriptive. **(iv) Misleading conduct** Blackmagic submitted that Mr Overliese, individually and on behalf of Atomos, engaged in misleading conduct in making representations to Blackmagic regarding the feasibility of particular video technology that Blackmagic was considering.  The representations were said to serve the interests of Atomos and to ensure that Blackmagic did not derive the benefit of that knowledge.  Jessup J was satisfied that the representations were made in the context of then conventional wisdom and that, in any event, they were not made in trade or commerce given their internal nature. **(v) Copyright** Blackmagic claimed that Mr Overliese, in copying material in which it claimed copyright, made unauthorised reproductions of the works and thus infringed its copyright.  As Jessup J was satisfied that Mr Overliese reproduced the works in the course of copying files from his personal computer to separate out and then destroy Blackmagic's files, he accepted Mr Overliese's defence that this copying was implicitly licensed by Blackmagic. **(vi) Breach of contract** As Jessup J had already concluded that the confidential information was not obtained by Mr Young, his Honour was satisfied that Mr Young had not breached the confidentiality obligations contained in his employment contract.  In relation to the cascading non-competition restraints, Jessup J considered that the expression "business, activity or operation" was not apt to include the embryonic structure that Atomos was at when the search order was executed.etailed Contents**5.4 Implementing the restructure of a managed investment scheme - application of the statutory power to amend and the scope of members' powers** (By Jodene Chia, DLA Phillips Fox)Great Southern Managers Australia Limited (ACN 083 825 405) (Receivers and Managers appointed) (in liq) [2009] VSC 627, Supreme Court of Victoria, Davies J, 31 December 2009The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/december/2009vsc627.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/december/2009vsc627.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**Great Southern Managers Australia Limited ('GSMAL') and its receivers and managers sought orders from the Supreme Court of Victoria that they would be justified, and otherwise be considered to be acting reasonably, in:* Implementing, and carrying into effect, resolutions passed concerning the restructure of certain forestry managed investment schemes ('MIS') of which GSMAL was the responsible entity for the purposes of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act'); and
* Making supplementary amendments to the constitution of each scheme concerning the payment of additional fees to the new responsibility entity of the MIS appointed as part of the restructure and other changes to the way the schemes were to be managed.

Davies J considered it appropriate to make the orders sought.   **(b) Facts**In a separate earlier proceeding, Davies J held that GSMAL and its receivers would be justified, and would otherwise be acting reasonably, in calling a meeting of members of the MIS to consider resolutions to give effect to, and to enable the implementation of, a proposal from the first defendant Gunns Limited for the restructure and future operation of the MIS under the management of the second defendant Gunns Plantation Limited, as the responsible entity ('the Gunns Proposal').  The reasons for her Honour's decision were published on 4 December 2009 - see *Great Southern Managers Australia Ltd (Receivers and Managers appointed) (in liq)* [2009] VSC 557. This judgment is discussed in item 5.11 of this Bulletin.Subsequently, members meetings were called for 23 December 2009 and resolutions to approve the restructure were passed.    This application was made by GSMAL and its receivers for directions that they would be justified, and otherwise be considered to be acting reasonably in implementing, and carrying into effect, the resolutions passed and the making of supplementary amendments to the constitution of each scheme.  Her Honour was asked to consider three main issues relating to the constitutional amendments required to give effect to the Gunns Proposal:* Whether the resolutions passed to amend the constitution affected the rights of members of the MIS, as distinct from their rights as growers under their contractual relations with the responsible entity and, if not, whether such amendments were within the scope of their power, as members, to pass under the Act;
* Whether the responsible entity would be in breach of the Growers' Agreements in acting on those amendments; and
* The legal efficacy of the agency and attorney relationship created by exercise of the amendment power under the Act.

**(c) Decision**  On the first issue Davies J was satisfied that the amendments passed were within the scope of a member's power to pass by special resolution for the purposes of the Act. Section 601GC of the Act permits the constitution of a registered scheme to be modified by special resolution of the members of the scheme. Her Honour considered that there was no suggestion of any misuse of power on the part of the members who voted in favour of the resolution to amend the constitution.  In her view all amendments were within the scope of Act and the passing of the resolutions was a proper exercise of power by those members who voted in favour of the resolutions.   As to the second issue, her Honour held that the Growers' Agreements expressly permitted modification and amendment, subject to any such modification or amendment being recorded in writing and duly executed by the parties. Further, that the use of a power of attorney contained in the constitutions of the MIS permitting the responsible entity to amend the Growers' Agreements on behalf of members satisfied that prescription.   On the third issue, her Honour was satisfied that it was within the power of members to effect, by passing a special resolution, an agency and power of attorney that would be binding on all members, whether or not an individual member voted in favour, abstained or voted against the creation of that agency.  That is, once the power of attorney was exercised to amend the constitutions in the manner approved by members by special resolution, the amended constitution would be binding on all members.   In relation to the supplementary constitutional amendments, her Honour held that the amendments did not adversely affect members' rights and could be made by Gunns Plantations Limited under section 601GC of the Act which permits the constitution of a registered scheme to be modified by the responsible entity if the responsible entity considers the change will not adversely affect members rights.  etailed Contents**5.5 Director subject to banning order can prevent publication through AAT review**(By Zoe Leyland, Mallesons Stephen Jaques) Australian Securities and Investments Commission v Administrative Appeals Tribunal [2009] FCAFC 185, Federal Court of Australia, Full Court, Moore, Downes and Jagot JJ, 23 December 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009fcafc185.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009fcafc185.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 of the Full Federal Court concerned an application commenced by the Australian Securities and Investments Commission ("ASIC") challenging the power of the Administrative Appeals Tribunal ("AAT") to obstruct ASIC's publication obligations in respect of a banning order while a review of that order was being conducted by the AAT. The court dismissed ASIC's application, holding that the AAT had the requisite power to prevent ASIC from performing its publication obligations under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the CA").   The decision includes important comments from the court on the aspects of the two statutory schemes that are relevant to the exercise of the AAT's powers, particularly on the balancing of a director's right to anonymity and the protection of the public. While the court refused to entertain ASIC's argument that the decision would result in an "unseemly race" between ASIC to publish and the recipient of the banning order to apply for a stay, from the point of view of the recipient, the decision confirms the importance of invoking the AAT's power to order a stay at the earliest opportunity. **(b) Facts**  ASIC made a banning order prohibiting the second respondent from providing financial services.  Prior to ASIC publishing notice of this order and making the requisite entries into the register, the second respondent applied to the AAT for review of ASIC's decision and applied for interlocutory orders staying the operation and implementation of the order. On 4 September 2009, the AAT imposed a stay on the banning order, including the entry of the order in any ASIC register, publication of the order in the Gazette and disclosure through any ASIC media releases.  The AAT also made orders giving the second respondent a pseudonym and protecting the publication or disclosure of evidence.  The AAT further ordered that the hearing in relation to the banning order take place in private. ASIC subsequently filed an application in the original jurisdiction of the Federal court, seeking, amongst other things, to quash the orders made by the AAT.  The Acting Chief Justice determined that the issue was of sufficient importance to justify the court's original jurisdiction being exercised by a Full Court. **(c) Decision**  **(i) Issues for determination** The central issue was whether the AAT, by reason of section 41(2) of the [Administrative Appeals Tribunal Act (1975) (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7115" \t "Default) ("the AAT Act"), had the requisite power to make the orders challenged in this proceeding by ASIC.   **(ii) The applicable legislative provisions**Under section 920A of the CA, ASIC may make a banning order prohibiting a person from providing financial services.  Under section 920E(2) of the CA, ASIC must publish a notice in the Gazette as soon as practicable after making a banning order.  ASIC is also obliged, under section 922A of the CA and reg 7.6.06 of the [Corporations Regulations](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default), to maintain a register relating to financial services, which includes information on banning orders. Section 1317B(1)(b) of the CA provides that applications may be made to the Tribunal for review of a decision made under that Act by ASIC. The AAT's review function is set out in section 43 of the AAT Act.  Section 43(1) provides that for the purpose of reviewing a decision, the Tribunal may exercise all powers and discretions conferred on the person who made the decision. Under section 41(2) of the AAT Act, the AAT has the power to make an order "staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates.for the purpose of securing the effectiveness of the hearing and determination of the application for review".  Under section 35 of the AAT Act, the AAT may make certain confidentiality orders. **(iii) Arguments made by ASIC** ASIC submitted that the AAT's power extended only to staying the operation and implementation of the banning order itself.  In support of this argument, ASIC claimed that:* ASIC was obliged to comply with its publication obligations as a corollary of making a banning order, whether or not that order is affirmed or set aside by the AAT or is otherwise invalid;
* the orders made by the AAT pursuant to section 41(2) of the AAT Act were not made "for the purpose of securing the effectiveness of the hearing and determination of the application for review"; and
* the orders made by the AAT pursuant to section 41(2) of the AAT Act concerning ASIC's publication obligations and issue of any media release do not stay or otherwise affect the "operation or implementation of the decision to which the relevant proceeding relates".

ASIC also challenged the related confidentiality orders made by the AAT pursuant to section 35(2) of the AAT Act. **(iv) Section 41(2) issues - immediate enlivening of ASIC's duties?** Downes and Jagot JJ rejected ASIC's argument that its publication obligations are irrevocably enlivened by the making of the banning order.  Downes and Jagot JJ concluded that this reasoning was inconsistent with previous reasoning of the High Court, the operation of the AAT Act and principles of statutory construction.   Downes and Jagot JJ noted that in some circumstances a purported banning order will not be a banning order enlivening ASIC's publication obligations as there was High Court authority to the effect that in a decision affected by jurisdictional error, ASIC would be entitled to treat its own decision as not being a decision at all.  Similarly, where the AAT sets aside a banning order following a merits review, under section 43(6) of the AAT Act, that decision will be deemed to be the decision ASIC made.  In these circumstances, if ASIC had not already fulfilled its publication obligations, it would have no duty to do so. On the statutory construction point, their Honours noted that the relevant provisions of the AAT Act and the CA were capable of operating together.  Where a banning order is made, the recipient's right to seek review of that decision, and the AAT's statutory powers with respect to that review, are enlivened.  If ASIC has not already fulfilled its publication obligations, the recipient is entitled to request a stay in respect of the publication of the notice and the required entry into the register. **(v) Section 41(2) issues - required purpose argument** Downes and Jagot JJ rejected ASIC's argument that an exercise of power under section 41(2) of the AAT Act purporting to prevent ASIC from discharging its publication obligations can never be "for the purpose of securing the effectiveness of the hearing and determination of the.review".  Their Honours considered that this argument could not be reconciled with the terms and operation of section 43(6) of the AAT Act.  Where the AAT sets aside a banning order, section 43(6) of the AAT Act operates so that the order is deemed never to have taken effect.  The making of an order under section 41(2) of the AAT Act staying or affecting ASIC's discharge of its statutory duties is therefore capable of being for the relevant purpose required by section 41(2) of the AAT Act. **(vi) Section 41(2) issues - scope of the "operation or implementation" of the decision and AAT's media release order** Downes and Jagot JJ were not persuaded by ASIC's argument that the operation and implementation of a decision to make a banning order is limited to the making of the order itself, and does not extend to ASIC's publication obligations.  Their Honours concluded that the act of publication is "part and parcel" of both the operation and implementation of the banning order.  As the statutory steps involved in the making of a banning order include its publication, the AAT's powers under section 41(2) of the AAT Act were therefore enlivened.  In relation to whether the AAT had the power to order that its stay extend to the disclosure of the decision in any ASIC media release, Downes and Jagot JJ considered that this information publication was nevertheless an aspect of the operation and implementation of the banning order. **(vii) Comments on the manner in which ASIC framed its case and other matters** While the court unanimously rejected ASIC's argument that the AAT had no power to make the orders challenged in this proceeding (save for Moore J's view in relation to the order concerning the media release), Downes and Jagot JJ considered that ASIC's arguments exposed the careful consideration that should be given by the AAT in any exercise of power under section 41(2) of the AAT Act.  Their Honours emphasised that particular consideration should be given to the balance between competing rights and interests embodied in the CA, including the rights and interests of the recipient and the general public. Downes and Jagot JJ, while emphasising the norm that proceedings before the AAT shall be public, also dismissed ASIC's arguments in relation to the confidentiality orders.etailed Contents**5.6 Irregular expert report insufficient hurdle to compulsory acquisition under Part 6A.2 of the Corporations Act** (By Edward Bunting, Blake Dawson) Espasia Pty Ltd (ABN 74 057 517 825), In the matter of Farm By Nature Pty Ltd (ABN 13 107 299 730) [2009] FCA 1559, Federal Court of Australia, Gordon J, 22 December 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009fca1559.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009fca1559.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** This case concerned an application by Espasia Pty Ltd (Espasia) to the Court for approval to compulsorily acquire all shares in, and convertible notes issued by Farm By Nature Pty Ltd (Company) under Part 6A.2 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).  In approving Espasia's application, Gordon J held that deficiencies in the compulsory acquisition notice served on shareholders by Espasia did not allow the court to establish that the terms of the compulsory acquisition were other than for fair value.  **(b) Facts**  The only securities issued by the Company were 3,058,333 shares and 45 convertible notes (notes); of these securities, only the shares carried voting rights. On 4 May 2009, Espasia, a major creditor of the Company and already the holder of 88.82% of the shares, purchased a further 175,747 shares taking its stake in the Company's shares to 94.58%.  The first seven of the sixteen defendants were the remaining shareholders of the Company. Under section 664A of the Act, a person wishing to compulsorily acquire all securities of a Company must have full beneficial ownership in at least 90% by value of all of the securities of the company that are shares or are convertible into shares (90% beneficial owner). Espasia did not hold any of the convertible notes.  Defendants eight to sixteen held five convertible notes each.  Each note had a face value of $10,000 and was convertible to shares during September 2009 (pursuant to the terms of a Convertible Note Agreement).  None of the note holders gave notice of an intention to convert the notes into shares during September 2009. On 13 May 2009, Espasia obtained an opinion of the fair value of the Company's shares and convertible notes (the Report) from WHK Horwath Corporate Finance Limited (WHK). The Report concluded that the Company:* was net asset deficient;
* historically traded at a loss and showed no sign of improving in the future;
* had a nil or nominal value; and
* was solely reliant on the support of Espasia (as a creditor) for its ongoing survival.

On 18 May 2009, Espasia sent to each security holder:* a notice of compulsory acquisition (ASIC form 6024) whereby Espasia offered to pay 2.22 cents for each note and 0.0006 cents for each share;
* an objection to compulsory acquisition form; and
* a copy of the Report.

Section 667A of the Act sets out two key requirements for expert reports provided pursuant to a proposed compulsory acquisition.  In summary, a report must state whether: * the terms proposed in the notice give a fair value for the securities concerned; and
* the acquirer has full beneficial ownership in at least 90% by value of all of the securities of the company that are shares or are convertible into shares (90% beneficial owner),with reasons for each opinion to also be provided.

The Report was deficient in two main aspects.  Firstly, it was inconsistent in how it referred to the value of shares and the notes, concluding that "the fair market value", "fair value" or "value" of an ordinary share was "nil" or "nil or nominal value".  Further, the Report failed to contain WHK's opinion that Espasia was a 90% beneficial owner or supporting reasoning for such an opinion as required by the Act. After the Federal Court proceedings were issued on 20 July 2009, Espasia's solicitors sought clarification on 27 August 2009 from WHK with regard to whether the Report complied with the requirement to provide an opinion as to whether Espasia was a 90% beneficial owner. On 31 August 2009, WHK responded in a Supplementary Report and addressed the deficiencies of the Report, stating that Espasia, as legal owner of the shares and trustee for a superannuation fund, was a 90% beneficial owner.  Further, the Supplementary Report stated that due to the financial performance of the Company, the convertible notes were unable to be converted into shares during September 2009. Given this background, Gordon J considered the following three main objections:* not all of the affidavit material was filed with the application (Objection 1);
* Espasia was a 90% holder in relation to the shares but not in relation to the notes (Objection 2); and
* the Report contravened sections 664A and 667 of the Act (Objection 3).

**(c) Decision**  In deciding in favour of Espasia and approving the acquisition by Espasia of all the securities in the Company, Gordon J referred to *Regional Publishers Pty Ltd v Elkington* (2006) 154 FCR 218, stating that "it is a matter for the court . to determine whether [the terms of the compulsory acquisition] gives shareholders a fair value" pursuant to section 664F. Further, Gordon J reflected on the legislative intention of Part 6A.2 of the Act, namely the facilitation of change in corporate ownership by an overwhelming interest holder of a company in exchange for fair value compensation to existing minority shareholders. **(i) Objection 1** Gordon J rejected the first ground of objection on two bases. First, the defendants did not submit that the service of the Supplementary Report at a time after the original application caused any prejudice to them.  Second, her Honour stated that the court, was able to consider all material in determination of fair value, regardless of when it was filed. **(ii) Objection 2** Gordon J held that requirements of section 664A of the Act were satisfied as a mechanism existed whereby the notes could be converted into shares, stating that the Act did not require that the notes be convertible at the exact time of the notice of compulsory acquisition (at [39]). **(iii) Objection 3** Gordon J held that the omissions in the initial WHK Report were rectified by the Supplementary Report which specifically addressed the requirements of an expert's report under section 667A of the Act. Further, her Honour held that the omissions did not invalidate the proceeding; in fact, they were procedural irregularities capable of being regularised by an order under sections 1322 or 1325D of the Act.etailed Contents**5.7 Quantum meruit liabilities in the context of section 588G of the Corporations Act** (By Sarah d'Oliveyra, Freehills) Edwards v Australian Securities and Investments Commission [2009] NSWCA 424, New South Wales Court of Appeal, Spigelman CJ, Campbell JA and Macfarlan JA, 22 December 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009nswca424.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009nswca424.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 appeal was brought in relation to a declaration of contravention which was sought by the Australian Securities and Investments Commission ("ASIC") and made by the New South Wales ("NSW") Supreme Court against Malcolm Leslie Edwards ("Appellant") pursuant to section 1317E of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act"), together with a disqualification order made pursuant to section 206C(1) of the Act. At first instance, Barrett J of the NSW Supreme Court found that the Appellant had contravened section 588G(2) of the Act by failing to prevent  Murray River Limited ("MRL"), a company of which he was a director, from incurring certain quantum meruit liabilities at a time that MRL was insolvent and where the Appellant had reasonable grounds for suspecting that MRL was insolvent.  The NSW Court of Appeal dismissed the Appellant's appeal against certain findings of the primary judge and confirmed, amongst other things, that quantum meruit liabilities are "debts" for the purpose of section 588G of the Act. **(b) Facts** This case related to events which occurred in 1999 (ie before the commencement of the Act).  However, it was submitted by ASIC and not denied by the Appellant that the transitional provision contained in section 1400 of the Act rendered the Act, as opposed to the corporations law which was in force in 1999, applicable to those events.  The facts of this case were as follows. On or about 10 February 1999 ("Commencement Date"), building contractor Colin Joss & Co Pty Ltd ("CJC") commenced building works which formed part of a resort development project of MRL ("Redevelopment Project").  Prior to the Commencement Date:* CJC was invited, and did, tender to do the building works as part of the Redevelopment Project.
* MRL informed CJC that it was the chosen contractor but no formal contract was entered into between MRL and CJC at that time.
* CJC made it clear that it would not commence works as part of the Redevelopment Project without a "letter of intent" from MRL.
* MRL subsequently provided a letter to CJC stating MRL's intention to enter into a contract with CJC to perform building works as part of the Redevelopment Project ("Letter of Intent").

Upon receipt of the Letter of Intent, CJC commenced building works as part of the Redevelopment Project.  There was subsequent correspondence between MRL and CJC in relation to the arrangements for the provision of building works by CJC.  CJC submitted a series of progress claims for completed work to Knapman Clark & Co Pty Ltd ("KCC"), a quantity surveyor engaged by MRL in relation to the Redevelopment Project.  These progress claims were certified by KCC.  The first two progress claims were paid in full by MRL, the third was only partially paid and the remainder went unpaid.  Building works by CJC in relation to the Redevelopment Project ceased on 10 June 1999. The Appellant was a director of MRL at the time that it incurred debts to CJC.  At first instance, the NSW Supreme Court found that the Appellant had contravened section 588G(2) of the Act by failing to prevent  MRL from incurring certain quantum meruit liabilities towards CJC at a time that MRL was insolvent and where the Appellant had reasonable grounds for suspecting that MRL was insolvent. On appeal, the Appellant challenged a number of finding of the primary judge, in particular, the conclusions that:* MRL incurred quantum meruit liabilities towards CJC;
* the Appellant was aware of the incurring of quantum meruit liabilities towards CJC;
* MRL was insolvent  in the months of February and March 1999 (it being accepted that it was insolvent for the remainder of the period during which the relevant debts were allegedly incurred); and
* the Appellant was aware or there were reasonable grounds for suspecting that MRL was insolvent during the period when the debts were allegedly incurred.

The question was also raised, on appeal, whether quantum liabilities are a "debt" for the purpose of section 588G of the Act. **(c) Decision**  **(i) Quantum meruit liabilities were incurred** At first instance, Barrett J took the view that a formal contract between MRL and CJC was contemplated but never concluded and that CJC performed building works as part of the Redevelopment Project at the request of MRL. Accordingly, he held that MRL incurred quantum meruit liabilities towards CJC upon the certification by KCC of each progress claim submitted to it by CJC. By contrast, Spigelman CJ of the NSW Court of Appeal reached the conclusion that a building contract was entered into between CJC and MRL on or about 15 April 1999 (or, alternatively, on 13 May 1999) ("Contract Date"). Accordingly, MRL only incurred quantum meruit liabilities towards CJC during the period commencing on the Commencement Date and ending on the Contract Date. These quantum meruit liabilities arose day to day as the work was done by CJC.  On and from the Contract Date, MRL was liable to CJC for payment under the terms of the building contract between MRL and CJC.   **(ii) Quantum meruit liabilities are a "debt" for the purpose of section 588G of the Act** On the basis of Australian High Court authority, Spigelman CJ concluded that a quantum meruit liability is a "debt" within the meaning of section 588G of the Act.  Campbell JA provided additional reasons for this conclusion and focused, in particular, on the statutory purpose of section 588G of the Act.  He considered that the statutory purpose was to "discourage and provide a remedy for a particular type of commercial dishonesty or irresponsibility" and that treating "debt" as both a liquidated amount owing pursuant to a contract and an amount that is owing by reason of a quantum meruit is consistent with this purpose. **(iii) The Appellant's awareness and the insolvency of MRL** On the evidence, the NSW Court of Appeal upheld the primary judge's findings that:* the Appellant was aware of the building works which were being performed by CJC during the months of February and March 1999 and of MRL's liability to pay for such works on and from the Commencement Date;
* MRL was insolvent during the months of February and March 1999; and
* the Appellant knew or suspected that MRL was insolvent during that period.

**(iv) The Appellant's disqualification**  The Appellant challenged the primary judge's decision to disqualify the Appellant for ten years. However, on the evidence, Spigelman CJ upheld the primary judge's disqualification order, together with the factors which the primary judge considered to be relevant to the disqualification order.etailed Contents**5.8 Oppression (issues of liability and valuation considered); fiduciary duty owed by director to shareholders** (By Talia Pranskunas, Freehills) Crawley v Short [2009] NSWCA 410, New South Wales Court of Appeal, Allsop P, Macfarlan JA and Young JA, 16 December 2009  The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/december/2009nswca410.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/december/2009nswca410.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*** Numerous acts by a director/ shareholder of a company taken together amounted to corporate oppression.
* Director/shareholder may owe fiduciary duties to other shareholders.
* Defence of laches not relevant to oppression case based on breach of fiduciary duty.
* Valuation of land assets based on "best and highest use" - higher valuations by adjoining landowners not an indication of market value.
* Estimated costs of selling assets and capital gains tax liability not to be taken into account in valuation of shares.
* Case management considerations are relevant in determining whether an appeal should be allowed.
* Appeal and cross appeal succeeded in part.
* Prior judgments relevant to this appeal and cross-appeal are *Short v Crawley (No 30)* [2007] NSWSC 1322 (liability judgment), and *Short v Crawley (No 38)* [2008] NSWSC 917 (valuation judgment).

**(b) Facts** Marsico Holdings Pty Ltd and J & J O'Brien Pty Ltd (the Companies) owned and operated hotels in and around Sydney. Each Company had a shareholder structure where three shares were held by each of (i) the first appellant (Mr Crawley), (ii) the first respondent (Ms Short), and (iii) Mr Davis' interests. Crawley's interests acquired Davis' interests in each of the Companies, using Springsley Holdings Pty Ltd (Springsley), to acquire Davis' shares.  The primary judge (White J) found that Crawley's interests acquired Davis' interests deceitfully and therefore engaged in corporate oppression of the respondents' interests in the two Companies.  White J ordered that Crawley and the other appellants purchase the respondents' shares in the two companies at a price calculated in accordance with the valuation judgment.   The appellants appealed in relation to liability and valuation.  The respondents/cross appellants also appealed from parts of White J's findings.   **(c) Decision**  **Liability judgment****(i) Fiduciary duty owed to shareholders**The respondents alleged that Crawley obtained majority shares in the Companies dishonestly through the Springsley share purchase, in breach of rights of pre-emption and fiduciary duty, and ought to account on the basis that the respondents are deemed to hold 50% of the shares (as they would have if they had purchased half of Davis' shares) and not merely one-third. The Court of Appeal (CA) reiterated the general position in relation to fiduciary duties owed by directors to shareholders as follows:* generally, a director owes fiduciary duties to the company and not to individual shareholders; but
* particular factual circumstances may give rise to a fiduciary relationship between a director and individual shareholder.

The respondents challenged White J's narrow application of *Brunninghausen v Glavanics* (1999) 46 NSWLR 538 (at 549-550). White J considered that although there were cases where a director who was a shareholder could owe a duty to another shareholder, Brunninghausen prevented this where the same acts constituted a breach of fiduciary duty to the company. White J considered that the fiduciary duty owed to the Companies in arranging finance, approving and registering shares was breached, however no separate duty of different content was owed to the shareholders. The CA held that this was too narrow a reading of Brunninghausen.  Young JA noted (at 121-122) a variety of situations where a shareholder or director/ shareholder could owe duties to another shareholder by virtue of holding a "special position". These instances included:* where one shareholder undertakes to act on behalf of another shareholder;
* where one shareholder has special knowledge and knows that another shareholder is relying on them to use that knowledge for the advantage of another shareholder as well as for themself; and
* where the company is in reality a partnership in corporate guise.

The CA considered that there was a special opportunity for Crawley to act to the detriment of other shareholders, and therefore he owed a duty to them as well as to the Companies. The CA considered that the breach of the pre-emption rights contributed to the overall finding of oppressive conduct. **(ii) Breach of fiduciary duty** Although Crawley breached his fiduciary obligations to the respondent shareholders, the finding as to breach of fiduciary duty was not a ground for equitable compensation for the following reasons:* the respondents had not demonstrated that they could have taken up the opportunity to acquire half of Davis' shares had the shares been offered for sale, and that this was not merely due to the oppression and breaches of fiduciary duty which had occurred up to that time. (The respondents never sought to put up any evidence in relation to purchasing Davis' shares, and therefore drew the inference that they would not have made the purchase); and
* the defence of laches succeeded.

The CA did not consider that laches was relevant on these facts. Young JA noted there had never been a case in Australia or England where laches was raised as a defence to an oppression suit; practically, because (i) laches is a defence to an equitable claim; and (ii) acquiescence in conduct implies that it is not oppressive. Young JA reasoned that if a case for oppression was based on breach of fiduciary duty (as on these facts), and breach of a fiduciary duty failed due to laches, it cannot be said that at the date of the hearing (which is when the oppressive conduct is measured) a plaintiff is oppressed. However, as both sets of counsel made submissions on the basis that it was relevant, the CA dealt with the issue. In the first instance, White J found all three elements of laches made out in favour of the appellants, being:(i) knowledge of the wrong; (ii) delay; and (iii) unconscionable prejudice cause to the opponent by the delay. The respondents were aware of facts which gave them the right to challenge the Springsley purchase of Davis' interests, they sought legal advice on the point, yet failed to act.The CA considered the level of knowledge of the wrong is a question of fact and degree to be ascertained in each case. The CA held that there was no ground for interference with White J's consideration of the factual issues, and subsequent finding for the appellants. **(iii) Claim for just allowance**The appellants alleged that White J erred in failing to consider the appellants' claim for a just allowance in respect of the liability to account for profit derived from loans. They submitted that White J should have allowed for and deducted just allowances from the liability in respect of the breach of fiduciary obligations, and consequently from the value of the companies and the amounts ordered to be paid by way of compulsory share purchases.  The CA refused this ground of appeal citing case management considerations. As the issue was not brought up in the first instance when it could have been dealt with by White J, the CA could not say that White J was in error for not dealing with the issue.**Valuation judgment****(i) Valuation of the hotel**White J's liability findings required him to value the assets of the two Companies to effect the court ordered purchase of the respondents' interests in the Companies.  White J rejected both sides' expert valuations, finding a higher valuation of the hotel.  He relied on a letter containing an "offer" by a company located in an adjoining building to purchase the site for $30m, which indicated a "special value" of the land to a particular purchaser. His Honour used this figure as a base value, and adding the value of transferable licences, permits and entitlements, came to a figure of $36.5m. The CA held that White J erred in treating the letter as a formal offer. It was merely an invitation to treat rather than an offer at law, and therefore of no value in fixing the value of the hotel. The CA held that the market value for the land was to be judged on the "best and highest use" of the hotel, and the fact that a neighbouring owner considered the property was worth more was not relevant to the determination of market value.**(ii) Capitalisation rates**White J chose a capitalisation rate of 7.5% which departed from the rate given by two independent valuers. He held that this departure from the suggested rate reflected the potential for additional savings through a more efficient operation of the hotel. The CA held that it was open on the facts for White J to make this finding.**(iii) Deduction for selling costs and capital gains tax liability**White J held it was appropriate to deduct estimated costs of selling the hotel assets from the value of the shares, and that it was appropriate to take capital gains tax liability to the Companies into account should the hotels be sold. Young JA agreed, however a majority of Allsop P and Macfarlan JA held that White J erred in taking these factors into account.  etailed Contents**5.9 Credit and debit cards - when are cards "of the same kind"?**(By Laura Keily and Charlotte Poole, Corrs Chambers Westgarth) Westpac Banking Corporation v Australian Securities and Investments Commission [2009] FCA 1506, Federal Court of Australia, Rares J, 15 December 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009fca1506.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009fca1506.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** Westpac Banking Corporation (Applicant) sought a declaration from the court that its conduct in substituting an existing debit card (Handycard) held by certain Westpac customers with a Westpac Debit MasterCard (Debit MasterCard) was not a contravention of the prohibition against issuing credit or debit cards set out in section 12DL(1) of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default) (ASIC Act).  The Applicant was prompted to seek this declaration as a result of an allegation of breach by ASIC, made on the basis that the Debit MasterCard is not "a card of the same kind" as the Handycard, a pre-condition to issuing a card under section 12DL(2). Based on his construction of section 12DL of the ASIC Act, Justice Rares found that, despite the differences between the Handycard and the Debit MasterCard (including additional functionality of the Debit MasterCard), they were both debit cards within the meaning of section 12DL of the ASIC Act and therefore cards "of the same kind" for the purposes of section 12DL(2).  Accordingly, the Court declared that the Applicant had not breached section 12DL of the Act.   **(b) Facts** The Applicant decided to substitute a new Debit MasterCard for the existing Handycard of approximately 900,000 of its customers.  The new cards provide the same functionality as the old Handycards, but have some differences in relation to operation and functionality, including:* the ability to be used on the MasterCard network, which is subject to different prescribed standards as those of the ATM and EFTPOS networks on which Handycards are used;
* the application of different interchange fees where a customer accesses the MasterCard network rather than the EFTPOS network; and
* the ability to be used in additional ways that a Handycard cannot, such as allowing a cardholder to access their account remotely without having to enter a PIN into an EFTPOS or ATM machine, for example, for transactions via telephone or internet.

ASIC asserted that these differences mean that the Debit MasterCard is not "a card of the same kind" as a Handycard, and therefore the Applicant was in breach of section 12DL of the ASIC Act by issuing the new cards.  In response, the Applicant applied to the Court for declarations that issuing a Debit MasterCard in the circumstances did not constitute a breach of section 12DL on the basis that regardless of the differences described above, the Handycard and the Debit MasterCard were both debit cards and therefore "of the same kind" for the purposes of the ASIC Act. **(c) Decision**  **(i) Construction of relevant legislation** Justice Rares' decision focused on the construction and application of section 12DL of the ASIC Act.  In summary, section 12DL(1) prohibits a person from sending another person a credit or debit card (defined in subsection (5)) except in accordance with subsection (2), which provides that: (2) A person may send the targeted person the card:(a) in pursuance of a request in writing by the person (the liable person) who will be under a liability to the issuer of the card in respect of the use of the card; or(b)  in renewal or replacement of, or in substitution for:(i)  a card of the same kind previously sent to the targeted person in   pursuance of a request in writing by the liable person to the issuer of the previous card; or(ii) a card of the same kind previously sent to the targeted person and used for a purpose for which it was intended to be used. After making some general comments in relation to statutory interpretation, particularly of provisions such as section 12DL which impose strict criminal liability in the event of their contravention, Justice Rares considered in some detail the provisions of section 12DL(2)(b).  His Honour focused in particular on the meaning of the words "in substitution for" a card "of the same kind", commenting that a substitute is not normally an exact replica of the existing item, and will often have different or improved characteristics, even though it will be able to take the place of the original it is substituting.  Similarly, he considered that the expression "of the same kind" in this context does not require that previous and later cards be absolutely identical.  In general, his Honour was of the view that whether a substitute or something more has been provided will be a question of fact based on the context and characteristics of the original and substitute. His Honour then had to consider the qualifications to the three purposes (renewal, replacement and substitution) for which a new card may be sent under section 12DL(2)(b), those qualifications being that the card is one "of the same kind previously sent" and that the conditions in either subsection (2)(b)(i) or (2)(b)(ii) are present.  His Honour focused particular on qualification (ii), interpreting it to mean that if a customer has used the previous card appropriately, for "a purpose for which it was intended to be used", that use will create a sufficient relationship with the issuer to justify sending a later card.  He emphasised that the use made of the previous card "does not have to exhaust or cover the range of functions or features of the card", but that "one use or one method of use for the permitted purpose" is all that the subsection requires.   His Honour also noted that the definitions of each type of card in subsection 12DL(5) include a card "that may be used as [a card] referred to" in other parts of the definition, such as a debit card that may be used in a manner set out in the definition of a credit card.  Importantly, his Honour considered that this indicated that the uses to which a particular card may be put are different from the "kind" of card a particular card will be for the purposes of section 12DL(2)(b). Justice Rares concluded his consideration of section 12DL by rejecting a number of specific arguments put forward by ASIC.  In particular, he rejected ASIC's narrow construction of the words "a card of the same kind" based on earlier versions of section 12DL which had significantly different wording, as those earlier provisions have no counterparts in the present section 12DL, and the language of the present section 12DL was sufficiently clear without turning to such earlier versions for clarification.  He also rejected ASIC's contention that differences in the number of complaints and reports of fraudulent use between the two cards proves that the cards are not "of the same kind".  His Honour appeared to be of the view that the numbers provided in support of this contention were inconsequential and their probative value unclear. **(ii) Application to the Westpac cards** His Honour concluded that the defining characteristic of each "kind" of card for the purposes of section 12DL(2) is "the ability to use it for one particular purpose, whatever other functions or purposes it may have", that characteristic being either (1) to obtain credit from the issuer for which the customer will be liable or (2) to obtain access to the customer's own funds.  In this case, his Honour found that each of the Handycard and the Debit MasterCard are debit cards within the meaning of section 12DL(5), and that a person who receives a new Debit MasterCard will be able to use it at least for all of the purposes that her or she used the earlier Handycard.  He considered that the extra functionality of the Debit MasterCard, whether considered individually or together, does not change the nature of that card as a debit card.  Accordingly, the new Debit MasterCard was held to be a card of the same kind as the Handycard within the meaning of section 12DL(2) of the ASIC Act. As a result of Justice Rares interpretation of section 12DL of the ASIC Act, the Court was prepared to declare that by sending a Debit MasterCard to its existing Handycard holders who had used their Handycard for a purpose for which it was intended to be used, the Applicant sent each such cardholder the Debit MasterCard in renewal or replacement of, or in substitution for, a card of the same kind previously sent to that customer within the meaning of section 12DL of the ASIC Act.  etailed Contents**5.10 Directors' liability for insolvent trading - when is a debt incurred and when is a company insolvent?**(By Tina Davey, Blake Dawson) Playspace Playground Pty Ltd v Osborn [2009] FCA 1486, Federal Court of Australia, Reeves J, 11 December 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009fca1486.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009fca1486.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009fca1486.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009fca1486.htm%22%20%5Ct%20%22_new) **(a) Summary** This case considered whether a director was liable under section 588G of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act) for a company's insolvent trading. Reeves J held that the director was not liable as the company was not insolvent at the time the relevant debt was incurred.  The case contains some interesting commentary on what is meant by incurring a debt in a sale of goods context.   **(b) Facts** The Toy Shed Pty Ltd (Toy Shed) placed an order with Playspace Playground Pty Ltd (Playspace) during June 2004 for the supply of component parts necessary to assemble and install playground equipment in parks in Darwin.  After delivery of the goods, Toy Shed failed to pay Playspace the various invoices it had issued and in September 2005 Playspace obtained a default judgment against Toy Shed for approximately $116,525.  In October 2005, Toy Shed was placed in voluntary administration and soon after that its creditors voted to have the company wound up.   Playspace commenced proceedings against the sole director of Toy Shed, Osborn, claiming that she had breached the statutory duty in section 588G of the Act to prevent insolvent trading.   **(c) Decision** The issues before Reeves J were:1. When did Toy Shed incur the debt to Playspace?2. When did Toy Shed first become insolvent?3. Were there reasonable grounds to suspect that Toy Shed was insolvent at the time the debt was incurred to Playspace, or it would become so by incurring the debt?4. Did Osborn have reasonable grounds to expect, and did she expect, that Toy  Shed was solvent at the time the debt was incurred and would remain so notwithstanding the incurring of the debt? **(i) When did Toy Shed incur the debt to Playspace?** Osborn, relying on the decision in *Leigh-Mardon Pty Ltd v Wawn* (1995)17 ACSR 741, argued that the debt was incurred when the goods were ordered.  That case stands for the proposition that whether a debt arises at the time of the order, or at the time of delivery, depends on the saleability of the goods and the extent of the resultant damage to the company if delivery were to be refused.  Osborn submitted that because the goods had been "specially manufactured" for Toy Shed, they were not readily saleable elsewhere at the same price if delivery were refused, and that the debt was therefore incurred at the time of the order. Reeves J rejected this argument on the basis that Osborn had denied that the goods had been specially manufactured in her re-examination.  However he noted that the goods had been specially collected together and packed into 15 separate packages, where the contents of each package were determined by criteria that were specific and unique to each playground.  This meant that once the packages were dispatched, it is unlikely that they would have been of any real commercial value to anyone else, should Toy Shed fail to take delivery.  Consequently, Toy Shed became obligated to pay for the goods once the dispatch date shown on the order form passed without Toy Shed cancelling the order.  The debt was therefore incurred by Toy Shed on 26 July 2004 when the goods were dispatched. **(ii) Was Toy Shed insolvent at that time?** Reeves J noted that section 95A of the Act implements a "cash flow" test of insolvency: a person is insolvent if it is unable to pay its debts as and when they become due and payable.  His Honour stated that determining Toy Shed's solvency requires an objective consideration of its financial position as a whole, taking into account the commercial realities of the situation.  Relevant considerations include matters such as expected profits and other sources of income and funding that the company may be able to avail itself of.  His Honour also endorsed the checklist of 14 indicators of insolvency adopted by Mandie J in *ASIC v Plymin* (2003) 175 FLR 124.   Reeves J concluded that Toy Shed was not insolvent on 26 July 2004 for the following reasons:* it had made a small profit in the 2004/2005 financial year;
* it maintained an overdraft facility with ANZ with a limit of $10,000 and remained within that limit;
* only two incidents of dishonoured cheques were identified;
* Playspace's writ was the only legal action taken against Toy Shed;
* Toy Shed was able to produce accurate and timely financial information to display the company's financial position; and
* it had access to alternative finance - Osborn had been providing loans to Toy Shed over a period of years, had paid various company expenses on her credit card and owned a property which had been used by her in the past to secure funds to support Toy Shed.  In addition, Toy Shed also had access to funding from an associate of Osborn.

Because Toy Shed was not insolvent at the time the debt was incurred, it was not necessary for Reeves J to consider the remaining two issues.  His Honour ordered that the plaintiff's application be dismissed.etailed Contents**5.11 Directions sought on the proposed restructure of a managed investment scheme**(By Jodene Chia, DLA Phillips Fox)Great Southern Managers Australia Limited (ACN 083 825 405) (Receivers and Managers appointed) (in liq) [2009] VSC 557, Supreme Court of Victoria, Davies J, 4 December 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/december/2009vsc557.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/december/2009vsc557.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 the proposed restructure ('the Gunns Proposal') of certain forestry managed investment schemes ('MIS') of which Great Southern Managers Australia Limited ('GSMAL') was the responsible entity for the purposes of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act'). The Gunns Proposal required the approval of members of the MIS, amendments to the constitutions of the MIS and the appointment of a new responsibility entity.The plaintiffs sought the Supreme Court of Victoria's advice as to the legal efficacy of what was proposed. The court held that the Gunns Proposal and the method proposed to give effect to the proposal would not disenfranchise members of the MIS and was within the legal framework that applied to the exercise of the powers required to give effect to the Gunns Proposal. **(b) Facts** Judicial advice and directions were sought by GSMAL and its receivers and managers on matters concerned with the MIS of which GSMAL was the responsible entity. GSMAL was insolvent and unable to continue to operate the MIS.  The Gunns Proposal involved the restructure of, and future operation of the MIS under a Gunns company and new responsible entity, Gunns Plantations Limited.  The plaintiffs wanted to put the Gunns Proposal to the members of the MIS for their consideration and, if thought fit, pass resolutions to:  * approve the Gunns Proposal;
* amend the Constitution to implement the Gunns Proposal;
* amend the Grower Agreements to implement the Gunns Proposal; and
* appoint a new Responsible Entity in respect of the Gunns Proposal.

The main matters raised by the plaintiffs for the court's consideration were:* the scope for constitutional amendment and the scope for, and manner of effecting, amendments to the Grower Agreements; and
* conduct of the meetings and in particular the voting entitlement of two members that were companies in the same group of companies as GSMAL and the valuation of members' voting entitlements.

**(c) Decision** **(i) Are the proposed amendments within the scope of the power to amend the constitution of a registered scheme under section 601GC of the Corporations Act?** Davies J held that the proposed amendments would be authorised by section 601GC of the Act which permits the constitution of a registered scheme to be modified by special resolution of the members of the scheme. **(ii) Are the proposed amendments to the Grower Agreements within the scope of the power to amend, and is the proposed manner of effecting amendments to the Grower Agreements valid?** Davies J noted that case law indicated that simply amending the constitutions would not effect amendment of the Grower Agreements and that it would be necessary for the actual contracts to be varied by agreement between the parties as with any "ordinary contract". Under the Grower Agreements this meant that any amendment would have to be in writing and duly executed by the parties.  The Gunns Proposal sought to put to members a resolution that members approve the amendment of the Grower Agreements. Further that they approve the right of the responsible entity to make those amendments on behalf of the growers using powers of attorney provided by members on acquiring an interest in the MIS and a second power to be inserted into the constitution as part of the constitutional amendments required to give effect to the Gunns Proposal.  Her Honour concluded that the powers of attorney could be used to amend the Grower Agreements on behalf of the growers. Her Honour held that the replacement responsible entity under the Gunns Proposal could exercise the powers if they were novated to the new responsible entity and that the relevant sections of the Corporations Act supported such novations. Her Honour held that the amendments of the Grower Agreements were within the powers conferred on the responsible entity under the powers of attorney and that the manner they would be given effect to sufficiently protected the interests of members to the MIS.   **(iii) Are the related member entities entitled to vote on the Gunns Proposal?** The Act places restrictions on the entitlement of the responsible entity and its "associates" to vote on a resolution at a meeting of the registered scheme's members. Davies J held that the material before her regarding the relationship of the related entities to GSMAL did not show or suggest that the related entity members would obtain any direct or indirect benefit or advantage from voting on the proposed resolutions, other than in their capacity as members. On this basis, her Honour concluded that the plaintiffs would be justified and would be acting reasonably in accepting and counting any votes by the related entity members on resolutions put forward at the meetings.   **(iv) Is the valuation method proposed by the plaintiffs reasonable to value members' votes?** As the resolutions were to be decided on a poll, the number of votes would be based on the value of the total interests each member had in the MIS.  Davies J concluded that the plaintiffs would be justified and would otherwise be acting reasonably in determining the value of a member's interests in the MIS by allocating nominal values to the interests, distinguishing between "unimpaired interests", "impaired interests" and "partly-impaired interests" and allocating one vote for each dollar of the value of the total interest. etailed Contents**5.12 Does soliciting funds from contingent creditors constitute a managed investment scheme?**(By Katrina Sleiman, Corrs Chambers Westgarth) HP Mercantile Pty Limited; in the matter of Tumut River Orchard Management Ltd (In Liquidation); in the matter of Merilbah Investments Pty Limited (In Liquidation) v Tumut River Orchard Management Ltd (In Liquidation) [2009] FCA 1456, Federal Court of Australia, Lindgren J, 4 December 2010 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009fca1456.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/december/2009fca1456.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 for an interim injunction under section 1324(4) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act) restraining liquidators from attempting to raise further funds and from expending the funds already raised for a "fighting fund" to challenge the validly of certain assignments of debt.  The application was made on the basis that the obtaining of the funding in all of the circumstances constituted a managed investment scheme (MIS) that was required to be registered but which was unlawful for non-registration.  **(b) Facts** The plaintiff, HP Mercantile Pty Limited (HPM), claimed to be the assignee of debts that came into existence when investors (investor-debtors) were financed into certain MISs.  The first defendant, Tumut River Orchard Management Ltd (TROM), lent the money to the investor-debtors. The second defendant, Nicholas Crouch, was the liquidator of TROM (TROM's Liquidator).  TROM assigned the debts to assignee companies which in turn assigned them to the third defendant, Merilbah Investments Pty Limited (Merilbah), of which Mr Crouch and Shabnam Amirbeaggi (Merilbah's Liquidators) were the liquidators.  Merilbah assigned the debts to HPM. HPM has numerous outstanding proceedings and proposes to issue many more against the investor-debtors to recover the debts.HPM alleged that the defendants sought funding from the investor-debtors to enable a challenge to be made to the validity of the assignments and therefore to HPM's title to sue on them.  If the assignments are invalid, title to the debts will remain in TROM or Merilbah, depending on whether all or only the last of the assignments is invalid. HPM also alleged that TROM's Liquidator was planning to conduct public examinations of officers and employees of the companies concerned.HPM complained that by seeking and obtaining the funding from the investor-debtors and taking steps to challenge the validity of the assignments, the defendants established and operated a MIS within the meaning of section 9 of the Act.  Specifically, HPM submitted that each of the funding investor-debtors acquired a right to a benefit within subpara (a)(i) of the MIS definition in section 9 of Act, the monetary contributions have been "pooled" for the purposes of subpara (a)(ii) of the definition, that each investor-debtor will acquire the financial benefits and/or rights or interest in certain property and that the investor-debtors do not have the day to day control of the scheme within subpara (a)(iii) of the definition.HPM submitted that as the MIS has not been registered under section 601EB Act, it is unlawful, with the consequence that steps taken and proposed to be taken by those parties in raising the funds and using the funds raised are unlawful.    HPM sought an interim injunction under section 1324(4) of the Act to restrain Merilbah's Liquidators from expending any part of the funds raised as well as from raising any further funds from "any member of the public". **(c) Decision**  Justice Lindgren considered that is was not necessary to embark on a detailed consideration of the various elements of a MIS as defined in section 9 of the Act. Rather, for the purpose of the application for urgent interim relief, his Honour proceeded on the assumptions that arguably funds had been and are to be raised under an unlawful MIS and that arguably the assignments are invalid and HPM lacks title to them. His Honour noted that the following questions of concern are raised by the application for interim relief, which may be answered at the final hearing:(i) Who are the creditors (including, but not limited to, contingent creditors) of TROM and Merilbah who will benefit from a determination that the assignments are invalid?  (ii) What is the ground of their status as creditors or contingent creditors? (iii) What is the fund that it is hoped will provide the basis of a distribution to creditors?  (iv) Have TROM's Liquidator and Merilbah's Liquidators been encouraging investor-debtors to make claims and thereby to become contingent creditors?  (v) How can TROM's Liquidator and Merilbah's Liquidators support a result that all investor-debtors be released from their debts?  (vi) Has there been an abuse by TROM's Liquidator and Merilbah's Liquidators of their powers in seeking to create challenges to the validity of the assignments in circumstances in which, if it be the case, the only persons who will benefit in terms of payment of money will be themselves?Notwithstanding some doubts in the light of these questions, his Honour considered that weight should be given to the position taken by TROM's Liquidator and Merilbah's Liquidators as officers of the court that they need to conduct the public examinations.His Honour considered that what should occur is that the proceeding should be given an early final hearing.  In the meantime, his Honour ordered that TROM's Liquidator and Merilbah's Liquidators (or whichever of them is appropriate) should have access to the funds already raised but only to enable them to pursue public examinations under sections 596A and 596B of the Act and that pending the final hearing no further solicitation of funds should take place.  etailed Contents |

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