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| **Bulletin No. 122**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by Lawlex on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson Waldron](http://www.bdw.com.au/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1. [Recent Corporate Law and Corporate Governance Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20122%20October%202007.htm#h1)
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| **1. Recent Corporate Law and Corporate Governance Developments**  |  | ext Section |

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| **1.1 Report on promoting audit quality** On 12 October 2007, the UK Financial Reporting Council published its report on 'Promoting Audit Quality', following the discussion paper that it published in November 2006. This report contains a summary of the responses and feedback it received. The report also outlines the approach the FRC proposes to take in response to the issues raised in this feedback. Notwithstanding that many respondents to the discussion paper thought that financial reporting in the UK currently operates effectively and that audit is fundamentally sound, most respondents welcomed the FRC's initiative in issuing 'Promoting Audit Quality' at this time. They also noted that the FRC has an important role in supporting confidence in audit quality in the UK and that the FRC's actions would influence the ongoing viability of the profession. The discussion paper was generally considered to cover the main drivers of audit quality and the main threats to them. The drivers of audit quality have been developed into a framework that is being published as part of the report on Promoting Audit Quality. This framework is intended to be a dynamic concept that will be updated as and when appropriate. The FRC is not proposing any additional regulation as a result of the issues raised, believing that a well informed market is the best regulator. However, there are various projects currently in progress examining a number of the issues raised and a new task force will be convened to examine the issues surrounding the way audit fieldwork is undertaken. The feedback paper is available at [here](http://www.frc.org.uk/about/promotingauditquality.cfm%22%20%5Ct%20%22_new). The 37 non-confidential responses are available [here](http://www.frc.org.uk/about/promotingauditqualityresponses.cfm%22%20%5Ct%20%22_new). etailed Contents**1.2 Intenal auditors facing greater expectations** Financial reporting compliance demands have dominated the work of internal auditors in recent years. But increasingly, internal auditors are also being asked to cover a much broader range of risks - including those related to fraud, major programs, contracts and transactions - as well as improve their companies' overall business performance. These are among the main findings of Ernst & Young's Global Internal Audit survey, released on 11 October 2007.  Finding people with the right specialist skills to help meet evolving and emerging risks is the biggest challenge facing internal audit leaders. IT, fraud, and business and operational risk are the specialized skills most difficult to recruit and retain. These are also among the areas that respondents indicated pose the greatest risks to their companies. More than one-third of respondents said that they did not have staff trained in fraud prevention and detection. Other skills gaps cited include transactions and tax.Other key findings include:* International coverage is a major challenge for companies in the global marketplace as they face issues relating to language and culture, local laws and regulations, and increased costs.
* In implementing enterprise wide risk assessments, as well as coverage of key risk areas, there is an opportunity for internal audit to improve coordination with other risk management groups within the company.
* Audit committees and executive management increasingly expect that internal auditors discuss not only the risks covered in the audit plan, but also risks not covered by the audit plan.

To compile its Global Internal Audit survey, Ernst & Young spoke to internal audit executives from 138 companies across 24 countries. Most participants' companies were multinationals with more than US$4 billion yearly revenue.  etailed Contents**1.3 Review of the UK Combined Code on Corporate Governance**  On 11 October 2007, the UK Financial Reporting Council published its latest review of the Combined Code on Corporate Governance. The review has concluded that the Code is working reasonably well and there is no need for major changes at present. However, the FRC is proposing two amendments to the Code, and emphasizes that there is room for improvement in the way it is applied by companies, investors and intermediaries. The two proposed amendments are: * to remove the restriction on an individual chairing more than one FTSE100 company, and
* to allow the chairman of a smaller listed company to be a member of the audit committee where he or she was considered independent on appointment.

Consultation on the proposed amendments will begin in November. If agreed, a revised Code will come into effect in June 2008 at the same time as new FSA Part 6 Rules (which include the Listing Rules) implementing new EU requirements on corporate governance. etailed Contents**1.4 CEBS consults on an assessment of the risks arising from commodities business and from firms carrying out commodities business**On 10 October 2007, the Committee of European Banking Supervisors (CEBS) published an assessment of the prudential risks arising from the conduct of commodities business and the activities of firms carrying out commodities business.The report responds to the second part of a Call for Advice issued by the European Commission in August 2006 and concludes CEBS technical advice on the Review of commodities business under Article 48 of Directive 2006/49/EC.The report is based on information provided by CEBS members and observers on the structure and regulatory coverage of their commodities markets as well as on information directly provided by market participants on their business, their risk structure and mitigates, their perception of the current regulatory framework and their concerns regarding any amendments to this framework. The report concludes that at the market level the risks arising from commodities business and the risks in other financial markets (e.g. equity, FX, interest-rate) are generally the same and that these risks exist basically across all types of products (underlyings). In nearly all markets the majority of transactions are for varying reasons (e.g. greater flexibility, lesser burden on liquidity due to the absence of frequent margining requirements) carried out over the counter (OTC). Therefore, despite the use of risk mitigation techniques, significant risk remains and needs to be appropriately managed. Other relevant risks identified are market risk, operational risk, legal risk and liquidity risk.Systemic risk crystallizes through contagion which is transmitted via market participants' direct and indirect interdependencies. While the perceived interconnections may give rise to systemic risk concerns, their extent may depend on the size of the respective markets for commodities or exotic derivatives relative to the wider financial market or the related industry. Systemic risk concerns may vary widely across the different markets/underlyings and no generalization can be made.The report also touches on the specifics of the commodities markets/business and their possible relevance to the prudential treatment of the variety of firms that are active in the commodities sector.The report is available on the [CEBS](http://www.c-ebs.org/Advice/advice.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.5 UK hedge funds plan voluntary code** On 9 October 2007, the UK hedge fund industry published a consultation document aimed at increasing transparency and improving risk controls with plans for the first voluntary industry code of conduct. Under the plan by the London group, which manages some $US180bn of assets or about 10 per cent of the global industry total, hedge funds would have to "comply or explain", agreeing to meet the standards or tell people why they were not meeting them. Apart from increased transparency for the public through better disclosure of information about managers on their websites, the plan sets out three main standards to protect investors. These are disclosure of holdings of complex, hard-to-value securities, and the methods used to value them; clear risk management plans, including plans to address liquidity risk and the danger of running out of cash; and clear policies on dealing with conflicts between investors and managers. The Hedge Fund Working Group also called for rules to help companies identify hedge funds and others holding significant stakes via derivatives and voting blocs where funds have no economic interest.  The consultation document is available on the [Hedge Fund Working Group](http://www.hfwg.co.uk/%22%20%5Ct%20%22_new) website. etailed Contents**1.6 Report on EU banking structures** On 5 October 2007, the European Central Bank (ECB) published its annual report on EU banking structures, prepared by the Banking Supervision Committee of the European System of Central Banks (ESCB). The Committee comprises representatives of the national central banks and banking supervisory authorities of the European Union and the ECB. The report, which has been published every year since 2002, reviews the main structural developments in the EU banking sector in 2006 and until mid-2007. It also contains two topical studies on the liquidity risk management of cross-border banking groups in the EU and the distribution channels in retail banking. The most important structural developments that took place in the EU banking sector are as follows:  The consolidation process (as indicated by the decreasing number of credit institutions) continued at aggregate level, although at a declining rate (approximately 2% in both the euro area and the EU in 2006). At the same time, intermediation (in terms of total assets of the banking sector) grew at an even higher rate than that of GDP (i.e. 12% in the EU and 10% for the euro area), reaching 321% and 297% of their GDP respectively. The decline in the number of credit institutions and the increase in the total assets of the EU banking sector signal the emergence of larger institutions. The overall number of M&A transactions has been declining since 2000, with the exception of cross-border deals between EU banks in third countries, which have been increasing especially in the last two years. In contrast, the pick-up in the value of M&As observed since 2003 indicates the prominence of a relatively small number of large-scale deals.  Concentration in the EU banking sector remained unchanged at the previous year's level, while showing a wide divergence across Member States. Overall, EU banking markets are still characterised by significant structural differences; nevertheless, the dispersion of many of the structural indicators has been declining over time, indicating that the gap between Member States has been narrowing. The study on distribution channels in retail banking identified the following developments in the distribution strategies of banks: first, branches are being redesigned in terms of location and services in order to become more cost-efficient and better integrated into the new distribution channels used by banks.  Second, electronic channels are growing rapidly, not only providing information and transaction services, but also being used for the promotion and sale of banking products. Third, in an effort to address the fierce competition in the area of consumer credit, banks are increasing their cooperation with third parties, such as retailers, financial companies and financial agents/services groups. These developments, and especially the increasing use of electronic channels, could involve different types of risk (i.e. operational, reputational, liquidity, legal and strategic risk). However, as the importance of electronic channels is still limited for the majority of banks, no significant financial stability concerns have been identified to date. Still, the distribution strategies of banks need to be monitored in view of their potential impact on competition and integration in the banking sector. The report is available on the [ECB](http://www.ecb.europa.eu/pub/pubbydate/2007/html/index.en.html%22%20%5Ct%20%22_new) website. etailed Contents**1.7 APRA and ASIC release discussion paper on breach reporting by dual-regulated institutions**On 4 October 2007, the Australian Prudential Regulation Authority (APRA) and ASIC issued a discussion paper on a proposed online breach reporting system for dual-regulated institutions.The proposed system aims to simplify the process for regulated institutions to report breaches and reduce breach reporting duplication faced by those institutions regulated by both APRA and ASIC. The superannuation industry is already using an online system to report breaches to APRA.  The proposed system will:* enable all APRA-regulated institutions - authorised deposit-taking institutions, general insurers, life insurance companies, friendly societies and superannuation licensees - to report breaches to APRA online; and
* enable those institutions regulated by both APRA and ASIC to report online breach notifications required to be lodged with both regulators through a single breach report to APRA, thereby eliminating the requirement for jointly regulated institutions to provide separate breach reports for the same incident to both regulators.

The proposal follows the recent passage through Parliament of the [Financial Sector Legislation Amendment (Simplifying Regulation and Review) Act 2007 No. 154 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=98576" \t "_Default). The Act introduces a consistent definition of reportable breaches across all institutions in APRA-regulated industries and all ASIC-regulated Australian Financial Services licensees. The discussion paper is available on the [APRA](http://www.apra.gov.au/%22%20%5Ct%20%22_new) website and the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/APRA-ASIC_discussion_paper_Streamlining_breach_reporting.pdf/%24file/APRA-ASIC_discussion_paper_Streamlining_breach_reporting.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.8 Study shows one in 20 Canadians a victim of investment fraud**  A new national study on investment fraud and its social impact estimates that over one million adult Canadians have been the victim of investment fraud and that half these victims were introduced to the fraud through an existing relationship of trust, such as a friend, family member or work colleague.  On 2 October 2007, the Canadian Securities Administrators (CSA) published its investor study: 'Understanding the Social Impact of Investment Fraud' which finds that investment fraud often results in a loss of trust between victims and those close to them, as well as a loss of confidence in the system as a whole. In fact, 68% of fraud victims report they are less likely to trust people in general and 63% report they are less willing to make future investments. The study's executive summary is available on the [CSA](http://www.csa-acvm.ca/html_CSA/invinfo_research.html%22%20%5Ct%20%22_new) website. etailed Contents**1.9 2007 US proxy season report**On 2 October 2007, the RiskMetrics Group released its annual postseason report putting in context the most salient corporate governance issues and voting outcomes from the 2007 US proxy season. Key themes from this year's proxy season include strong shareholder support for proposals seeking greater board accountability. Additionally, there was clear evidence that the effectiveness of shareholder-company engagement is increasing, as more than half of shareholder proposals on majority voting, stock option reforms and sustainability reporting were withdrawn by proponents after target companies took steps toward improved practices.  As of mid-September, 656 investor proposals had appeared on 2007 corporate ballots, up from 581 at the same time last year. So far this year, 107 shareholder proposals have earned a majority of votes cast. Last year, 116 proposals did so, and two years ago, just 85 proposals received majority backing.  As of mid-September, ISS Governance Services had issued negative recommendations against 15 percent of the directors appearing on US company ballots, which is about the same as 2006.  Pay-related proposals received the most attention. Forty proposals that requested an annual advisory vote on compensation were voted on and averaged about 42 percent support. A year ago, this topic averaged 40 percent at seven firms. This level of second year support is comparable to that received by majority voting resolutions in 2005. Since then, more than half of S&P 500 companies have adopted election reforms. In another key development this year, for the first time, US companies filed proxy statements with the additional information required by the Securities and Exchange Commission's (SEC) new compensation disclosure rules. Results from the 2007 ISS Governance Services Policy Survey showed that a significant majority of respondents described the new SEC compensation disclosures as useful, and 71 percent indicated that current disclosures on pay practices are sufficient for investors to make an advisory vote on compensation, if that option were available.  There also was debate about another method to improve board accountability: proxy access. The issue appeared on three corporate ballots in 2007 after the SEC expressed "no view" on Hewlett-Packard's request to exclude an access bylaw proposal submitted by four pension funds. The SEC has dueling access proposals pending; meanwhile, investors strongly support the concept of access: the 2007 ISS Governance Services Policy Survey found that two-thirds of respondents support proxy access at all US companies, with only 5 percent opposing. Support for US shareholder proposals on environmental and social issues increased significantly this year. But for many social and environmental activists, achieving a solid withdrawal agreement constitutes a greater success than a high vote, and 2007 produced many withdrawals. Thirty-eight percent of all political contributions proposals were withdrawn this year, for example, compared with just 19 percent in 2006 and 17 percent in 2005. In sum, proponents settled 109 of 344 proposals filed, or 32 percent. A copy of the 2007 Postseason Report is available [here](http://www.riskmetrics.com/pdf/2007PostseasonReportPR.pdf%22%20%5Ct%20%22_new).etailed Contents**1.10 Revised Malaysian corporate governance framework code** On 1 October 2007, the Malaysian Securities Commission (SC) released a revised Code on Corporate Governance to further strengthen corporate governance framework. The Malaysian Code on Corporate Governance, which came into effect on 1 October 2007 and supersedes the earlier Code issued in March 2000, contains key amendments aimed to strengthen the roles and responsibilities of boards of directors and audit committees, and ensure that they discharge their duties effectively.  The revised Code spells out the eligibility criteria for appointment of directors, the composition of the board of directors and the role of the nominating committee. Independent non-executive directors continue to make up at least one-third of the membership of the board but must provide a more meaningful and independent oversight function. To ensure that the audit committee serves as an effective check on the management of a company, the revised Code details the composition of audit committees, the frequency of meetings and the need for audit committee members to attend continuous training to keep abreast of developments in relevant financial and other related developments. In addition, executive directors will no longer be allowed to become members of the audit committee in order to preserve the independence of the committee. The revised Code requires all PLCs to carry out their own internal audit functions. The reporting line for internal auditors has also been clarified, with the board of directors to be held accountable for ensuring adherence to the scope of internal audit functions.The revised Code is available on the [SC](http://www.sc.com.my/eng/html/cg/intro.html%22%20%5Ct%20%22_new) website.etailed Contents**1.11 Investors call for more meaningful and consistent financial disclosure**  An investor opinion survey of UK investors published on 1 October 2007 by KPMG reveals need for clarity and simplification in financial reporting. Many investors believe that accounts are increasingly becoming regulatory filings rather than documents offering real insight into the ongoing performance of a business.  The report finds that: * Over three quarters of investors (78 percent) would like more information on what assumptions financial statements are based on.
* 74 percent of investors would like more clarification on exceptionals.
* Nearly six in ten respondents (58 percent) would welcome a clearer divisional breakdown highlighting exactly where companies make their money.
* 48 percent would like more information on business risks and opportunities.

The survey includes responses from leading UK institutions managing total global equity funds of US$2.7 trillion. It examines areas of reporting such as financial statements, emerging markets, accounting procedures, ethical investment and views on London's position as a financial capital. It was conducted primarily to examine how UK published financial statements can be further improved to better serve the needs of leading investors.  While they have concerns about clarity and consistency, investors believe that overall the amount of information given in financial statements is about right, and the UK 'principles-based' approach to accounting receives a clear endorsement, with 70 percent of respondents favouring it over the more rules-based US approach. But the research also highlights that investors require more comprehensive information on companies from emerging markets. An overwhelming 90 percent of investors highlighted a need for more information on company strategy and details of the market in which the business operates. In addition, 62 percent of respondents expressed a requirement for more opinion on companies reporting from emerging markets. etailed Contents**1.12 Survey of UK directors' compensation**  KPMG's 'Survey of UK Directors' Compensation 2007', published on 1 October 2007, reveals that chief executives who had remained in post since the previous year saw their median total remuneration (pay, bonus and long term incentives) increase by 16 percent, an acceleration over last year's nine percent. And looking at the rest of the board, executive directors' base salaries are increasing at a similar rate to the past couple of years, although finance directors are seeing bigger increases in pay. Median base salary increases were seven percent for both FTSE100 and FTSE 250 executive directors.  For executive directors there is a clear and positive trend that the bulk of increases in remuneration continue to be channelled through variable pay. The median total remuneration for FTSE100 chief executives (including new hires and promotions) increased twelve percent from £2,329,000 to £2,617,000. Some shareholders continue to protest against one-off plans and such plans have not gone away. An interesting phenomenon in the data this year is that among FTSE 100 companies operating share option plans, the grant levels are greater than the 'normal' grant limits indicating that companies may be using the 'exceptional circumstances' clauses typical in many plans, and perhaps also the influence of some uncapped plans. This has led to the median actual grant being higher than the median maximum grant opportunity for both FTSE 100 chief executives and FTSE 100 finance directors. The survey is available on the [KPMG](http://www.kpmg.co.uk/news/docs/308840%20Director%27s%20Comp%20104pp%20%28Accessible%29.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.13 Business roundtable corporate governance survey** On 28 September 2007, the US Business Roundtable, an association of chief executive officers of 160 leading US companies, released its fifth annual survey of corporate governance practices among its members.  The latest survey found an increase in the number of independent directors serving on corporate boards and a significant rise in the number of companies that have adopted majority voting for directors. This year's survey included some new questions that focus on key issues of governance reform, including:* Board Committees:  97% of Audit Committees, 92% of Compensation Committees and 68% of Nominating/Governance Committees meet in executive session each year.  Audit Committees meet in executive session the most, with 85% meeting in executive session at every meeting.
* CEOs Serving on Other Boards:  75% of CEOs serve on no more than one other public company board. Nearly half (48%) of CEOs serve on only one other public company board while 27% of CEOs do not serve on any other public company boards.
* Shareholder Communications:  Consistent with evolving practices and greater dialogue between boards and shareholders, 38% of companies responded that board members have met with shareholders in the last year.
* Sarbanes-Oxley:  Spending on compliance with Sarbanes-Oxley appears to continue to decline.  About 50% of companies expect costs to decrease moderately in light of the SEC's interpretive guidance and the PCAOB's Auditing Standard No.5; 31% expect costs to remain about the same, and only 2% expect an increase.

The survey results highlight shifts from previous years on these views from CEOs:* Board Independence:  90% of companies report that their boards were at least 80% independent in 2007.  In 2006, 87% of companies reported board independence of 80% or more.
* Majority Voting:  The percentage of companies that have adopted majority voting procedures for directors has leapt from low levels to 82% in just two years.
* Executive Session:  In 2007, 71% of respondents expect their non-management (or independent) directors to meet in executive session at every board meeting, up slightly from last year and representing a 26 point jump from four years ago.
* Pay-for-performance:  40% of companies reported adjusting the pay-for-performance element of senior executive compensation in the past year, in addition to the 57% that reported doing so in 2006.  These figures demonstrate that boards support, in principle and practice, pay for performance and are making adjustments accordingly.

Further information is available on the [Business Roundtable](http://www.businessroundtable.org/%22%20%5Ct%20%22_new) website.etailed Contents**1.14 APRA figures show record superannuation contributions for June 2007 quarter**  On 27 September 2007, figures released by the Australian Prudential Regulation Authority (APRA) showed contributions to superannuation funds (with at least $50 million in assets) exceeded $42.2 billion during the June 2007 quarter.APRA's Quarterly Superannuation Performance publication shows the industry experienced record member contributions of $22.4 billion during the quarter, three times higher than the previous record for member contributions of $7.4 billion in the June 2006 quarter. Under the Government's 'Better Super' reforms, the transitional tax arrangements for up to $1 million of post-tax contributions expired on 30 June 2007.APRA's figures show the June 2007 quarter was also the first quarter in which total member contributions exceeded employer contributions. Members contributed $22.4 billion (53.1 per cent) for the June quarter, employers contributed $18.9 billion (44.8 per cent), and other contributions, including spouse contributions and government co-contributions, totalled $890 million (2.1 per cent). Total superannuation assets in Australia rose during the quarter by $81.0 billion, or 7.6 per cent, to $1.15 trillion. This represents a 25.1 per cent increase over the year to June 2007.Retail funds received 54.7 per cent ($23.1 billion) of total contributions during the June quarter, industry funds 21.3 per cent ($9.0 billion), public sector funds 20.9 per cent ($8.8 billion) and corporate funds 3.1 per cent ($1.3 billion). Industry funds showed the strongest growth during the quarter, with assets increasing by 8.4 per cent ($15.4 billion) to $198.1 billion. Retail fund assets grew by 8.1 per cent ($27.8 billion) to $372.0 billion, public sector fund assets by 7.1 per cent ($11.8 billion) to $177.5 billion and corporate fund assets by 3.5 per cent ($2.5 billion) to $71.9 billion during the quarter. At the end of June 2007, funds with at least $50 million in assets had 29.9 per cent of superannuation assets ($242.5 billion) invested in wholesale trusts and 21.4 per cent ($173.5 billion) in life insurance companies. Individually managed mandates, where asset portfolios are tailored for or chosen by the trustee, comprised 20.8 per cent ($168.6 billion) of superannuation assets. The remaining assets were invested in other categories, including pooled superannuation trusts, unlisted public offer unit trusts and directly invested assets. The combined return on assets was 3.2 per cent for the June quarter. The return for industry funds was 3.9 per cent, public sector funds 3.1 per cent, corporate funds 3.0 per cent and retail funds 2.8 per cent. The Quarterly Superannuation Performance publication is available on [APRA's](http://www.apra.gov.au/Statistics/Superannuation-Institutions-Statistics.cfm%22%20%5Ct%20%22_new) website.etailed Contents**1.15 SEC announces new initiative to warn investors about questionable securities solicitations**On 26 September 2007, the US Securities and Exchange Commission (SEC) announced a new Internet-based initiative to alert investors worldwide about problems with certain unregistered entities engaged in solicitations of securities transactions. By more immediately sharing information received in complaints about particular unregistered soliciting entities, the SEC is aiming to give retail investors, before they invest, a new tool to help them avoid questionable investment solicitations, including solicitations from online boiler room and [advance fee scheme](http://www.sec.gov/answers/nigeria.htm%22%20%5Ct%20%22_new) operations. Through its "Public Alert: Unregistered Soliciting Entities" (PAUSE) program, the Commission will publish on its Web site certain factual information about unregistered soliciting entities that have been the subject of complaints forwarded by investors and others around the globe, including foreign securities regulators. The Commission is seeking public comments on the PAUSE program before it begins. To implement the PAUSE initiative, the Commission will post on its public Web site specific information about unregistered soliciting entities that have been the subject of complaints. For each of these entities, the Commission's staff will have determined either (1) that there is no US registered securities firm with that name, or (2) that there is a US registered securities firm with the same or similar name, but that solicitations appear to have been made by people not affiliated with the US registered securities firm. A second PAUSE list will name fictitious government agencies and international organizations referred to by entities that are subjects of complaints.Generally, entities that solicit purchases or sales of securities for the accounts of other people in the United States are required to register with the SEC. It is important for prospective investors to consider whether a soliciting entity is, in fact, registered with the SEC. A large number of investor complaints received by the Commission concern solicitations of investors by unregistered entities that appear to be involved in boiler room and secondary advance fee schemes, which, in most instances, claim a nexus to the United States, but, in truth, are located outside of the United States and target non-US investors.Perpetrators of boiler room and advance fee schemes increasingly use new devices to persuade investors that their solicitations are legitimate, including:* Impersonating US registered securities firms by, for example, using the same or a similar name or providing an address that closely resembles that of a US registered securities firm.
* Making false references or false claims of endorsement by government agencies and international organizations (sometimes even impersonating them).
* Claiming endorsements or making other references to government agencies and international organizations that sound official, but do not exist.

The comment period extends for 30 days after the release is published in the Federal Register. Further information is available on the [SEC](http://www.sec.gov/rules/other/2007/34-56534.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.16 World Bank report on doing business** Thanks to reforms of business regulation, more businesses are starting up, finds 'Doing Business 2008', the fifth in an annual report series published by the World Bank and IFC on 26 September 2007. Countries in Eastern Europe and the former Soviet Union reformed the most in 2006-2007 along with a large group of emerging markets, including China and India. This year Egypt tops the list of reformers that are making it easier to do business. Egypt greatly improved its position in the global rankings on the ease of doing business, with reforms in five of the 10 areas studied by the report. And for the second year running, Singapore tops the aggregate rankings on the ease of doing business.  Besides Egypt, the other top 10 reformers are, in order, Croatia, Ghana, FYR Macedonia, Georgia, Colombia, Saudi Arabia, Kenya, China, and Bulgaria. Another 11 countries: Armenia, Bhutan, Burkina Faso, the Czech Republic, Guatemala, Honduras, Mauritius, Mozambique, Portugal, Tunisia, and Uzbekistan-had three or more reforms. Reformers made it simpler to start a business, strengthened property rights, enhanced investor protections, increased access to credit, eased tax burdens, and expedited trade while reducing costs. In all, 200 reforms in 98 economies were introduced between April 2006 and June 2007. Eastern Europe and Central Asia, as a region, surpassed East Asia this year in the ease of doing business. Several of the region's countries have even passed many economies of Western Europe on this score. Croatia, FYR Macedonia, Georgia, Bulgaria, and Hungary are among the region's top reformers. Estonia, the most business-friendly country of the former socialist bloc, ranks 17th on the ease of doing business. Georgia and Latvia are also in the top 25. In Africa, the pacesetters are Ghana and Kenya. Reform elsewhere in the region was uneven, with nearly half the countries not reforming at all. With a global ranking of 27th, Mauritius tops the rankings in Africa on the ease of doing business and also had the most reforms in the region, with improvements in six of the 10 areas studied by Doing Business. Also leading reform in southern Africa were Madagascar and Mozambique. In West Africa, little reform took place other than in Ghana and Burkina Faso.   Reform in the Middle East and North Africa is picking up speed, led by Egypt, Saudi Arabia, and Tunisia. Latin America and East Asia are at the bottom of the list of reformers. China was the standout in East Asia, implementing far-reaching new private property rights and a new bankruptcy law. Doing Business 2008 ranks 178 economies on the ease of doing business. The top 25, in order, are Singapore, New Zealand, the United States, Hong Kong (China), Denmark, the United Kingdom, Canada, Ireland, Australia, Iceland, Norway, Japan, Finland, Sweden, Thailand, Switzerland, Estonia, Georgia, Belgium, Germany, the Netherlands, Latvia, Saudi Arabia, Malaysia, and Austria.  The rankings are based on 10 indicators of business regulation that track the time and cost to meet government requirements in business start-up, operation, trade, taxation, and closure. The rankings do not reflect such areas as macroeconomic policy, quality of infrastructure, currency volatility, investor perceptions, or crime rates. Since 2003, Doing Business has inspired or informed more than 113 reforms around the world.   Further information is available on the [Doing Business](http://www.doingbusiness.org/%22%20%5Ct%20%22_new) website.etailed Contents**1.17 Responding to failures in retail investment markets**  On 25 September 2007, the Australia-New Zealand Shadow Financial Regulatory Committee (ANZSFRC) released a statement that: * Emphasises that the prudential safety net should be limited in extent. This means that regulatory proposals such as those being considered to protect investors in financial products need to take care not to blur the boundary line of the safety net.
* Repeats its December 2006 call to the Australian and New Zealand authorities to speedily finalise and implement their proposals regarding failure management arrangements, which would help to clearly delineate the safety net boundary.
* Recommends that proposals for new disclosure requirements should be "road tested" with consumers as part of the required regulatory impact assessment.
* Suggests that regulators review whether increasing (or retaining) the role of  mandatory trustees for debenture or deposit-like securities is appropriate, given the availability of alternative, possibly superior, approaches to fulfilling their current investor protection role.
* Argues that the authorities should promote the development of secondary markets for such securities as a complement to other measures which have been proposed for improving information (and exit mechanisms) for retail investors.
* Questions whether the application of an "If Not Why Not" approach to disclosing whether benchmark financial indicators have been met, as proposed by the Australian Securities and Investments Commission (ASIC), is effectively equivalent to compulsion, and calls for more detailed consideration of the benchmarks proposed.

According to the ANZSFRC, both Australia and New Zealand have recently experienced a number of high-profile failures of non-prudentially-regulated finance companies and property development financiers. While retail investors in debenture or deposit-like products issued by these borrowers have incurred significant losses, the stability of the financial system at large has not been under threat. Nevertheless, the losses have grabbed headlines and prompted both Australian and New Zealand authorities to develop proposals for strengthening investor protection. In New Zealand, these proposals include licensing all "deposit-takers" (which, unlike Australia, includes finance companies), imposing requirements for minimum capital, capital adequacy and restrictions on lending to related parties, as well as stricter requirements for disclosure and formal credit ratings. In Australia, ASIC has proposed a set of minimum "benchmark" conditions on capital, liquidity, lending arrangements and other matters (including credit ratings), that borrowers would be required to disclose whether or not they are met, and if not, to explain why not. ASIC has also suggested increasing the threshold value (currently $50,000) above which promissory notes are not regulated under the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).  The ANZSFRC urges authorities in both Australia and New Zealand to proceed carefully in regulating suppliers of riskier investment products. Failure of financial institutions and the attendant losses must be expected as part of the normal operation of efficient and innovative financial systems. Risk taking, risk transformation and risk management are core parts of the business of financial intermediation. By its very nature, risk involves the prospect of loss as well as gain, and losses must occasionally occur. When investors knowingly accept exposure to high-risk financial assets in the expectation of improving their returns, they should bear the consequences of failure. Furthermore, if governments protect investors from the adverse consequences of their informed decisions, moral hazard can arise to distort the efficient working of the financial system. Ensuring that retail investors are appropriately informed about investment risk is, of course, an important policy challenge.  Further information is available on the [ANZSFRC](http://www.melbournecentre.com.au/anzsfrc.html%22%20%5Ct%20%22_new) website.etailed Contents**1.18 APRA discussion paper on discretionary mutual funds**  On 25 September 2007, the Australian Prudential Regulation Authority (APRA) released a discussion paper on proposals for the collection of data from discretionary mutual funds (DMFs). This follows the Government's announcement on 3 May 2007 'Enhancing the Integrity of Insurance in Australia'. DMFs are entities that offer 'discretionary cover', that is, an insurance-like product that may involve an obligation on the DMF to consider meeting a claim made on it, but gives the DMF a discretion as to whether it will pay the claim. A DMF may be a trust, mutual, company limited by guarantee or other structure. Because of their discretionary nature, DMFs are not insurance companies and therefore are not required to be authorised by APRA. The Government's announcement foreshadowed that DMFs would not be subject to prudential regulation but that they would be required to provide data to APRA under the [Financial Sector (Collection of Data) Act 2001 No. 104 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=57996" \t "_default). APRA's discussion paper includes draft forms and instructions. It sets out proposed data collection arrangements and invites submissions on these as well as the forms and instructions. APRA considers that the proposed level of reporting will provide the data necessary to assist the Government to assess the need to prudentially regulate DMFs. Further information is available on the [APRA](http://www.apra.gov.au/RFC/DMFs.cfm%22%20%5Ct%20%22_new) website.etailed Contents**1.19 CLSA launches Asian corporate governance watch 2007** On 25 September 2007, CLSA Asia-Pacific Markets ('CLSA'), launched its Corporate Governance Watch 2007, the fourth survey of corporate governance in Asia in conjunction with the Asian Corporate Governance Association ("ACGA"). Titled "On a Wing and a Prayer: The Greening of Governance", the report assesses the quality of corporate governance in 11 Asian markets and provides aggregate data from 582 listed companies. ThThe survey provides a score of Asian companies on seven key criteria, viz discipline, transparency, independence responsibility, accountability, fairness and environmental responsibility. On common questions, the average corporate governance score for companies in the Asia ex-Japan sample rose only 1.2 points, a much smaller improvement than in previous years, a factor attributable to the region's thriving economies and markets. Only 58% of the 582 companies surveyed responded to the 20 'Clean and Green' questions. 64% scored zero on the C&G criteria. The clear leaders in their commitment to environmental practices are large-cap companies from Japan, Taiwan and Korea, who dominated the top-30 list of companies that scored 80% or more on 'Clean and Green.'In the country rankings, compiled by the ACGA, Hong Kong takes the lead over Singapore, followed by India in third place, Taiwan fourth and Japan fifth. The Philippines and Indonesia ranked the lowest of the 11 countries which were assessed on 87 issues under five criteria in the country rankings: rules and practices, enforcement, accounting, governance culture and political environment.   AnAn additional element of the report was the measure of 'quality at a reasonable price' (Qarp), a concept CLSA introduced in the 2005 survey that includes PB and ROE in stock selection of companies with higher-than-average corporate governance scores. Qarp stocks outperformed the MSCI Index in particular for China, Indonesia and Hong Kong.  The full report is available only to CLSA clients and ACGA members.Further information is available on the [CLSA](http://www.clsa.com/%22%20%5Ct%20%22_new) website.etailed Contents**1.20 Decline in number of UK executive directors**The number of UK executive directors in FTSE 350 companies has declined for the fifth year running, resulting in 20% less positions than there were five years ago, according to a new report by Deloitte published on 24 September 2007. This disappearance of almost 360 roles suggests that the opportunity to become an executive director of a large UK listed company is declining.The decline of the executive director is primarily a result of corporate governance guidelines which require half the board to be independent. According to Deloitte, this changing shape of the board can be a positive thing, leading to more focussed and high quality debate. However, there is also a danger that as the executive element of the board shrinks, the development of strategy is pushed out of the boardroom and into executive committee meetings leaving non-executive directors with a lack of involvement in key decisions.The report also contains information on the remuneration paid to executive directors.**(a) Salary**Salary increases for executive directors are slightly higher this year than last year. The median increase is now 7.0% compared with 6.8% last year and 6.5% the year before. However, the median increase for the chief executive is lower at 6.4% which may reflect the fact that more of the remuneration for the chief executive is likely to be linked to performance rather than fixed salary. The comparable increase in the seasonally adjusted average earnings index was 3.7% so increases for executive directors are still significantly ahead of those received by the general workforce.**(b) Bonuses and incentives**The median annual bonus opportunity has not changed for the last three years in FTSE 250 companies but continues to increase in FTSE 100 companies from 115% of salary last year to 130% of salary this year. Actual payouts have also increased significantly in FTSE 100 companies with a median payout of 94% of salary this year compared with 75% of salary last year. In FTSE 250 companies the median payout this year was 75% of salary compared with 60% last year.Only just over a fifth of FTSE 350 companies now regularly grant options to executive directors compared with around three quarters of companies five years ago. Most executive directors now participate in a performance share plan and will typically receive an award of shares with a value of 150% of salary at the time of award. The vesting of these shares is dependent on corporate performance targets and it would be usual for around a quarter of the shares to vest if minimum targets are met.Further information is available on the [Deloitte](http://www.deloitte.com/dtt/article/0%2C1002%2Csid%3D2848%26cid%3D131037%2C00.html%22%20%5Ct%20%22_new) website.etailed Contents**1.21 Audit committee research report** On 20 September 2007, the Huron Consulting Group released its second annual Audit Committee research report based on a sample of more than 670 audit committee members at 164 public companies from the NASDAQ 100 and Fortune 100 listings. HuHuron's Audit Committee research report analyzed patterns of audit committee composition over a five-year period from 2002 to 2006 using information contained in the companies' annual proxy statements and 10-K disclosures filed with the US Securities and Exchange Commission.   **(a) Accountants on audit committees*** The number of audit committee members who were accountants doubled from 6% in 2002 to 12% in 2006.
* The number of audit committees with at least one accountant increased from 21% in 2002 to 40% in 2006.
* Only 22% of the designated financial experts had biographies indicating they had accounting backgrounds in 2006, a minimal decline from last year.
* Audit committee members who are finance professionals exceeded accountants by less than 3 to 1 in 2006 (down from 5 to 1 in 2002).
* Although the number of audit committee members considered accountants or finance professionals increased from 34% in 2002 to 47% in 2006, audit committee members in the "other" category still represented more than half of all audit committee members.
* Audit committee chairpersons, whose biographies indicated they had accounting backgrounds increased from less than 10% in 2002 to 23% in 2006, while the number of audit committee chairpersons considered "finance professionals" remained flat from 2002 to 2006 at approximately 40%.

**(b) General observations on audit committees*** Meetings - From 2002 to 2006, the average annual number of audit committee meetings doubled from about five to ten meetings during the period. The average number of audit committee meetings was 10 in 2005, indicating that frequent meetings seem to be the norm as companies continue to deal with Sarbanes-Oxley regulations, greater oversight from the audit committee, and increasingly complex accounting pronouncements. While 60% of companies held nine or more meetings in 2006, only 3% of the companies sampled held four or fewer meetings in 2006.
* Retirees - The percentage of audit committee members who were employed full-time remained relatively constant, at about 64% from 2002 to 2006.
* Size - The average number of audit committee members has remained constant, at about four per company from 2002 to 2006.
* Age - The average age of audit committee members increased slightly from 60 in 2002 to 61 in 2006.

In the report, the term "accountant" was categorized by title and experience, which included certified public accountants (CPA), controllers/comptrollers, accounting professors, and those who served on accounting standards or other similar oversight boards. The "other" category was used to describe an audit committee member who was not an accountant by training or experience and was not a finance professional such as a chief financial officer, treasurer, or financial professor. The report is available [here](http://www.financialexecutives.org/eweb/upload/FEI/Huron_Audit%20Comm%20Report_2007%2092007.pdf%22%20%5Ct%20%22_new). etailed Contents**1.22 CEOs not directors driving the governance agenda** Chief Executive Officers not chairpersons or directors are the strongest initiators or champions of governance change in their organisations, according to a survey published on 20 September 2007 by the Australian Institute of Management (AIM).The [AIM Australian Governance Survey](http://www.aim.com.au/research/aimags.html%22%20%5Ct%20%22_new) found that 83 per cent of directors and managers surveyed reported CEOs to be highly or very highly involved in initiating or championing governance change, trailed by Chairs in second place at 69 per cent.  The role of non-executive directors in advancing the governance agenda also came in below expectations with only 39 per cent of respondents stating they were highly or very highly involved, despite accepted wisdom that the independence of non-executive directors is an important safeguard against management excess.The AIM Australian Governance Survey also highlighted that directors and managers do not see eye-to-eye on the characteristics of an effective, high-performing board. While directors and managers surveyed both agreed that the 'strategy' role was an important indicator of board effectiveness, there was little agreement on other factors. Managers appeared to value the contribution of the board to management's own performance through establishing boundaries within which management is to operate, and engaging with and advising the CEO and senior managers. By contrast, directors saw protecting broader organisational interests through stakeholder and risk management as more important indicators of effectiveness.  In a further finding that again underscored the importance of closer working ties between the board and management, the Survey also indicated that the board's approach to strategy development had a strong impact on others' perceptions of board effectiveness.  The survey found that 'collaborative strategising' - which emphasises face-to-face interaction between the board and management on strategy, a focus on overall organisational health and an informal, ongoing approach to strategy development, strongly influenced positive perceptions of board effectiveness and performance. On the other hand, 'procedural strategising', based on formalistic processes and less 'hands-on' engagement from the board, did not. The report is available on the [AIM](http://www.aim.com.au/research/aimags.html%22%20%5Ct%20%22_new) website.etailed Contents**1.23 The changing roles of company boards and directors** In September 2007, the UTS Centre for Corporate Governance published a report titled 'The Changing Roles of Company Boards and Directors'.  This research shows that in a large sample of Australian companies corporate governance appears fit and well, professionally administered and not overly costly despite the frequently expressed concerns to the contrary.  Highlights of the research include:* Transformation - For most companies, implementation of corporate governance regulation has been a slow process of formalisation and improvement rather than an outright transformation. Engagement with the ASX Principles has proved a positive process, and to an extent companies have tailored their corporate governance structures to fit the needs of the organisation. This report uses board sub-committees and risk management as examples of areas where companies have improved communication and information flow in a way that adds real value.
* Professionalism - Across all sectors of Australian business the research found found evidence of intelligent engagement in corporate governance, and professionalism in its implementation.
* Regulatory Balance - The standard of corporate governance in Australia appears very high. The 'if not, why not' regime permits flexibility and individuality but forces companies to consider and justify their choices. There was much comparison by those interviewed with the US regime which is generally thought to have failed in finding that balance by being too prescriptive and costly for smaller companies.

In contrast to the controversy often raised in the business press about the huge costs involved in governance regulation, very few participants said that corporate governance reform had caused them to incur significant costs.* Corporate Social Responsibility and Sustainability - The one field in which Australian business appears to be falling behind the performance of other countries is in the reporting of corporate social responsibility and sustainability.

The research discovered many examples of extensive commitment to corporate social responsibility and sustainability in both large corporations and in small enterprises. Though the balance of opinion remains in favour of voluntary rather than mandatory reporting, the lack of a framework for reporting and greater impetus to use this, suggests businesses here will not be reporting as comprehensively as in the UK, Europe and Japan. The full report is available [here](http://www.ccg.uts.edu.au/PDF/final_report.pdf%22%20%5Ct%20%22_new). etailed Contents**1.24 The high cost of being a public company in the US**According to the fifth annual study conducted by Foley & Lardner LLP on the costs associated with corporate governance reform, US companies of all sizes experienced double-digit percentage increases in compliance costs during fiscal year 2006 in comparison to fiscal year 2001, the year prior to the enactment of the Sarbanes-Oxley Act.  Specifically, the study reports that the average cost of compliance for companies with under US$1 billion in annual revenue has increased more than US$1.7 million to approximately US$2.8 million since the enactment of the Sarbanes-Oxley Act. This represents a 171 percent overall increase between fiscal years 2001 and 2006. Out-of-pocket costs associated with Sarbanes-Oxley compliance were up 13 percent in fiscal year 2006 from fiscal year 2005 for public companies with annual revenue of under US$1 billion, and were up 12 percent over the same period for public companies with annual revenues over US$1 billion. The increased cost of audit fees, board compensation and legal fees were the primary drivers of these out-of-pocket percentage increases.  **(a) Audit fees continue to increase**External audit fees have continued to increase and represent a significant expense for public companies. The increases seen in connection with the initial implementation of section 404 of the Sarbanes-Oxley Act in fiscal year 2004 have been sustained in fiscal years 2005 and 2006.  On average, external audit fees have increased 271 percent between fiscal years 2001 and 2006 for companies with under US$1 billion in revenue. Between fiscal years 2005 and 2006, external audit fees for these companies increased by 4 percent.  In fiscal year 2006, audit fees alone represent more than 47 percent of out-of-pocket costs associated with compliance for public companies with under US$1 billion in annual revenue and 60 percent for companies with US$1 billion and over in annual revenue.  AuAudit fees have, however, levelled off in 2006 for companies of all sizes with relatively modest year-over-year increases. The percentage increase in average audit fees was relatively consistent for all companies analyzed with a five percent increase for S&P small-cap companies, a four percent increase for S&P mid-cap companies and a six percent increase for S&P 500 companies.  **(b) Going private**Consistent with results from previous years, nearly one in four survey respondents, or 23 percent, are considering going-private transactions as a result of corporate governance and public disclosures reforms. Additionally, respondents to Foley's 2007 survey continue to consider other options, including selling the company (16 percent), and merging with another company (14 percent).  The study is available on the [Foley](http://www.foley.com/publications/pub_detail.aspx?pubid=3736" \t "_new) website.etailed Contents**1.25 Comparison of global stock exchanges** "IPO Insights: Comparing Global Stock Exchanges" has been published by Ernst & Young. Covering the Australian Stock Exchange, Deutsche Börse, Euronext, Hong Kong Stock Exchange, London Stock Exchange, NASDAQ, New York Stock Exchange, Singapore Stock Exchange, and Tokyo Stock Exchange, it looks at: * Stock exchange strategic focus
* The types of companies listed and IPO activity
* Listing standards and fees
* The process and timeline of going public
* Regulatory environment

Further information is available on the [Ernst & Young](http://www.ey.com/global/content.nsf/International/SGM_IPO_Insights_Request_Form%22%20%5Ct%20%22_new) website. |

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

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| **2.1 ASIC updates guidance on licensee obligations**On 11 October 2007, the Australian Securities and Investments Commission (ASIC) released two regulatory guides about the general obligations of Australian financial services (AFS) licensees under section 912A of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act). Regulatory Guide 104 Licensing: Meeting the general obligations [[RG 104](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg104.pdf/%24file/rg104.pdf%22%20%5Ct%20%22_new)] and Regulatory Guide 105 Licensing: Organisational competence [[RG 105](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg105.pdf/%24file/rg105.pdf%22%20%5Ct%20%22_new)] are part of ASIC's Better Regulation initiatives, which are designed to achieve better and more transparent regulation. The regulatory guides aim to:* communicate ASIC's policy on the general obligations of licensees and organisational competence using simpler language;
* clarify some aspects of the policy in light of ASIC's regulatory experience; and
* consolidate and harmonise ASIC's policy on these obligations. ASIC's policy was previously covered in both Regulatory Guide 164 Licensing: Organisational capacities [RG 164] and Regulatory Guide 130 Managed investments: Licensing [RG 130]. RG 164 and RG 130 are now superseded.

[RG 104] and [RG 105] also include the following minor adjustments to ASIC's policy:* [RG 104] refers to various Australian standards and international principles that will help licensees think through their obligations and design measures for ensuring compliance.
* [RG 105] uses the term 'responsible manager' to identify the category of people ASIC looks at when assessing organisational competence. [RG 164] previously referred to this category of people as 'nominated responsible officers'.
* [RG 105] clarifies how ASIC's policy on organisational competence applies to licensees who are regulated by both APRA and ASIC.

While the changes come into effect immediately, ASIC accepts that it may take some time for existing AFS licensees to amend their internal policies and procedures by updating any references to these new regulatory guides. ASIC expects, however, that licensees will update these references the next time they amend their internal policies and procedures.For applicants or AFS licensees who have already started or lodged an AFS licence application or a variation application, ASIC will not refuse the application simply because it refers to [RG 164] and/or [RG 130]. However, ASIC expects applicants who are only beginning to prepare their application to take into account the guidance in [RG 104] and [RG 105] when preparing their application and supporting 'proof' documents. For more information on how to apply for an AFS licence or licence variation, refer to the AFS Licensing Kit ([RG 1](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Licensing_kit_pt1_v7.pdf/%24file/Licensing_kit_pt1_v7.pdf%22%20%5Ct%20%22_new), [RG 2](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Licensing_kit_pt2_v7.pdf/%24file/Licensing_kit_pt2_v7.pdf%22%20%5Ct%20%22_new) and [RG 3](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Licensing_kit_pt3_v7.pdf/%24file/Licensing_kit_pt3_v7.pdf%22%20%5Ct%20%22_new)). Further information is available on the [ASIC](http://www.asic.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents**2.2 New ASIC Commissioner** On 5 October 2007, the Commonwealth Treasurer, the Honourable Mr Peter Costello MP, announced the appointment of Ms Belinda Gibson as a Commissioner of the Australian Securities and Investments Commission (ASIC).  Ms Gibson has been appointed for a three‑year term commencing on 5 November 2007. Ms Gibson is currently a Partner at Mallesons Stephen Jaques where she specialises in transactional advice and in corporate and securities law.  Ms Gibson has managerial experience through her role as Partner in Charge of the Sydney office of Mallesons Stephen Jaques from 2000 to 2003.   Ms Gibson will replace Mr Jeffrey Lucy AM, following Mr Lucy's resignation from ASIC on 10 December 2007.  Mr Lucy has been appointed to the role of part‑time Chairman of the Financial Reporting Council. The FRC is the oversight body for the accounting and auditing standard setting arrangements in Australia and is also responsible for monitoring the effectiveness of the auditor independence requirements. Mr Lucy previously held positions as Chairman and Deputy Chairman of ASIC.  Mr Lucy also served as Chairman of the FRC from 2001 to 2003. etailed Contents**2.3 ASIC proposes widening prospectus exemption for rights issues**On 28 September 2007, the Australian Securities and Investments Commission (ASIC) released a consultation paper seeking comments on its proposal to widen the disclosure exemption for rights issues to cover non-traditional features developed by issuers and their advisers to raise capital more effectively. ASIC's proposal would extend the disclosure exemption to rights issues that allow accelerated institutional participation and other deviations from the 'vanilla' rights issue format, provided there is, in substance, an equality of opportunity to participate for all holders.The disclosure exemption for rights issues was introduced by the [Corporations Legislation Amendment (Simpler Regulatory System) Act 2007 No. 101 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=97385" \t "_default), allowing listed entities to conduct a rights issue without a prospectus or product disclosure statement (PDS) disclosure. The exemption is intended to benefit retail holders by encouraging listed entities to use rights issues, rather than other forms of fundraising that exclude retail participation (e.g. placements). Issuers generally prefer a method of raising capital that does not involve preparing a prospectus or PDS if available and so the exemption creates an incentive for listed entities to use rights issues. For technical reasons, some rights issues would not qualify for the disclosure exemption without ASIC relief and ASIC has therefore proposed the widening of the exemption. ASIC invites comments on the consultation paper by Wednesday 7 November 2007. The consultation paper is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP_91_Non-traditional_rights.pdf/%24file/CP_91_Non-traditional_rights.pdf%22%20%5Ct%20%22_new). The Corporations Legislation Amendment (Simpler Regulatory System) Act 2007 is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Corporations_Legislation_Amendment_SRS_Act.pdf/%24file/Corporations_Legislation_Amendment_SRS_Act.pdf%22%20%5Ct%20%22_new).etailed Contents |

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| **3. Recent Corporate Law Decisions** |  | ext Section |

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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20122%20October%202007_files/spacer%281%29.gif |
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| **3.1 Indemnity against directors of an insolvent company where payments have been set aside pursuant to a court order** (By Pablo Fernandez, DLA Phillips Fox) Sims v Deputy Commissioner of Taxation [2007] NSWSC 998, New South Wales Supreme Court, Hammerschlag J, 25 September 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/september/2007nswsc998.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/september/2007nswsc998.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** In this case, payments were made by Newsnet.com Pty Ltd ("the Company") to the Australian Taxation Office prior to the Company going into voluntary administration (and subsequently, liquidation) The liquidator of the Company brought proceedings against the Deputy Commissioner of Taxation ("the Commissioner") under section 588FF of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("the Act"), in order to claw-back those payments so that satisfaction of the Company's debts could be made in the proper order of legal priority. The liquidator argued that the payments were voidable transactions within the meaning of section 588FE of the Act, as they were made at a time when the Company was, or was deemed to be insolvent.  The Commissioner conceded that the Company was insolvent at the time the various payments were made and in turn, cross claimed against the directors of the company under section 588FGA of the Act, seeking indemnity for any orders made against it. It was found that the Commissioner was entitled to be indemnified by both directors, in full by one director and in part by the other director.  **(b) Facts**  **(i) Background** The Company was formed in April 1999. The main business of the Company involved large volume facsimile, email and SMS broadcasting messaging through dedicated telecommunications links and an internet access system delivering global self-service capacity to customers. In July 2000, the Company's shares were transferred to Newsnet Global Ltd ("Newsnet Global") which became its holding company.  In 2000, the Company entered into various agreements for services which formed the Company's main source of expenditure for the ongoing costs of these services. **(ii) Sequence of events leading up to insolvency** As at 31 December 2000, the Company had negative shareholders' equity of $247,000. It had made an operating loss for the month of December 2000 of $181,000 and had lost $1.37M for the previous six months. In February 2001, Newsnet Global entered into a subscription agreement with an unrelated Singaporean corporate investor called Comcraft Asia Pacific Pte Limited ("Comcraft"). Comcraft subscribed for fully paid ordinary shares in Newsnet Global and agreed to pay $US1M in two separate $US0.5M instalments, with the first payment being due in February 2001, and the second in May 2001. The subscription agreement envisaged that funds would be used for the development of the Company. By May 2001, Comcraft had failed to deliver the second payment as it was experiencing its own financial difficulties. In the same month, the Company was behind with respect to its group tax obligations to the Commissioner.  From September 2001 to November 2001, the Company made various payments to the Commissioner (the subject of the current proceedings), however the debt continued to grow as payments were not sufficient to reduce the debt. Management accounts prepared for the Company as at 30 June 2001, showed a consolidated loss of $2.67M and the balance sheet reflected negative shareholder's equity of $1.205M. On 31 October 2001, Mr Maine sent an email to the shareholders and directors stating that the Company had incurred significant liabilities which could not be satisfied. On 17 December 2001, the Company placed itself into voluntary administration. The Company's creditors resolved to wind up the Company on 21 January 2002. **(iii) Liquidation** Mr Sims was appointed as the Company's liquidator. Mr Sims noted that payments had been made by the Company to the Commissioner between September 2001 to November 2001, which was during the period of insolvency. Mr Sims brought proceedings against the Commissioner pursuant to section 588FF of the Act; seeking orders that the Commissioner be directed to pay back those amounts it received from the Company, as alleged voidable transactions within the meaning of section 588FE of the Act. **(c) The decision**  (**i) As to insolvency** Mr Sims admitted two expert reports into evidence, which expressed the opinion that the Company was insolvent as at 31 December 2000, and remained insolvent until his appointment as administrator on 17 December 2001. Hammerschlag J noted on a cash flow test that by May 2001, the Company was insolvent as it could not pay its debts when they became due and payable. The Company's debts to the Commissioner were well overdue and increasing, its funding from Comcraft had not been received and it seemed unlikely that it would receive any further support from other sources. Hammerschlag J further found that on a balance sheet test, the Company was insolvent by 30 June 2001 (having a negative shareholders' equity of $4,022,577) and had likely been so from a much earlier point in time. His Honour found that by the operation of section 588E(3), the Company was insolvent at least throughout the period of 30 June 2001 to 17 December 2001.  Therefore, the payments made to the Commissioner were made during the period of insolvency and were voidable transactions within the meaning of section 588FE of the Act. As a consequence, the payments had to be given back to the Company so that the Liquidator could use the funds to satisfy the Company's debts in order of legal priority.  The Commissioner then sought a statutory indemnity under section 588FGA from the two remaining directors of the Company, Mr and Mrs Maine. Section 588FGA allows the Commissioner to obtain orders against the directors of a company in their personal capacity to provide an indemnity to the Commissioner for the amount of any loss or damage resulting from any order against the Commissioner under section 588FF.  The directors each relied on separate defences under section 588FGB of the Act.  **(ii) As to Mr Maine's liability for indemnity** Relying on the defence under section 588FGB(3), Mr Maine pleaded that he had reasonable grounds to expect, and did expect, that the Company was solvent at the time of each payment to the Commissioner and would remain solvent even if the payments were made, on the grounds that:* he believed during late 2001, that Comcraft would make the second payment in accordance with the subscription agreement; and
* the Company's creditors were the Maines, the Sherbons (former directors) and Newsnet Global, all of whom were not pressing for payment.

Hammerschlag J found that there could have been no reasonable expectation that the second payment from Comcraft was forthcoming, as Comcraft had indicated as such. Moreover, Comcraft's investment on its own would not have been enough to place the Company in a solvent position. His Honour noted that despite the fact that some of the Company's creditors were not pressing for payment, there was nothing stopping them from doing so at short notice.  His Honour also found that it was obvious that the Company was undercapitalised from the end of 2000. The Company's existence was reliant on securing external funding and there was no reasonable prospect of such beyond May 2001. Mr Maine's defence therefore failed.  **(iii) As to Mrs Maine's liability for indemnity** Mrs Maine brought her defence under section 588FGB(4). She claimed that she had reasonable grounds to believe, and did believe, that Mr Maine and Mr Conway (the Company's CFO) were persons responsible for providing her with adequate information about the Company's solvency, and that she expected, based on this information, that the Company was solvent at the time of each payment and would remain solvent even if the Company made the payment (at all times until the date of administration). Hammerschlag J found that Mr Conway, a member of the Institute of Chartered Accountants and CFO of the Company, was responsible for providing information to the board as to the Company's solvency. His Honour held that it was reasonable for Mrs Maine, a non-executive director, to rely upon the highly qualified CFO to provide her with adequate financial information up until the end of October 2001 when Mr Conway resigned.  Mr Maine however, was not responsible for providing the other directors (including Mrs Maine) with adequate financial information and therefore, the first limb of the defence was not made out with respect to him.  Mr Maine's email of 31 October 2001 foreshadowed financial difficulty and contemplated administration. Hammerschlag J held that having regard to the content of the email, Mrs Maine could not have established that beyond that date, she had reasonable grounds to continue to believe that Mr Conway was fulfilling his responsibility to provide her with adequate information about whether the Company was solvent. Mrs Maine's defence was therefore successful up until 31 October 2001, yet failed beyond that date.  **(d) Conclusion** The Commissioner was entitled to be indemnified by Mr Maine to the full extent of the Commissioner's loss. The Commissioner was also entitled to be indemnified by Mrs Maine, but only with respect to the last four payments made by the Company to the Commissioner, which were made after she had received Mr Maine's email informing her of the Company's financial difficulties and could therefore not have held an expectation of solvency. etailed Contents**3.2 Reasonable grounds for expecting insolvency**(By Trent Duffield, DLA Phillips Fox) Williams v Scholz [2007] QSC 266, Supreme Court of Queensland, Chesterman J 21 September 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2007/october/2007qsc266.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2007/october/2007qsc266.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** The defendants were directors of a company placed into administration and were found to have contravened section 588G of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) by breaching their duty as directors to prevent the insolvent trading of the company.  **(b) Facts**    The Plaintiff was appointed as the administrator of Scholz Motor Group Pty Ltd ("the Company"). The First Defendant (Maria Scholz) and the Second Defendant (Neville Scholz), were directors of the Company along with their son, Leslie Schloz and Brett Seymour.  The Plaintiff alleged that from 1 July 2005, the Company was insolvent and from this time up until 28 January 2006, it was incurring debts which totalled in excess on $3.9 million. The Plaintiff alleged that at the time the debts were incurred, there were reasonable grounds for suspecting that the Company was insolvent and that the defendants had failed to prevent the Company from incurring debts. It was further alleged by the Plaintiff that a reasonable person would have been aware of those grounds.  In their defence, the defendants claimed under section 588H of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("the Act") that they were not involved in any aspect of the trading activities of the Company during the relevant period and did not have any knowledge of its financial affairs; therefore, they should not be liable under section 588G. The defendants submitted that they reasonably relied on the information provided to them by the Company's managers (Leslie Schloz and Brett Seymour) and had an expectation that the Company was solvent.  **(c) Decision**  **(i) Was the Company insolvent?** Although Chesterman J did not agree with the financial analysis of the Company undertaken by the Plaintiff in determining whether or not the Company was insolvent, Chesterman J established that the Company had neither cash, nor assets to convert to cash, and was nevertheless insolvent during the period alleged by the Plaintiff.  In criticising the financial analysis undertaken by the Plaintiff, Chesterman J considered that using the Company's own financial statements as the basis for the analysis was inappropriate given their incomplete and inaccurate state. For example, some liabilities had been incorrectly characterized as assets. Chesterman J did not consider it necessary to depart from the basic definition of insolvency; that a debtor must be able to pay all of its debts as and when they fall due from its cash resources, or by sale or other use of its assets within a relatively short time. In considering whether the Company was insolvent, it was observed that the Company had used increasing bank debt in lieu of working capital. The Company's only valuable assets had been its stock in trade which had been financed by debt and, in any event, the sale of which incurred losses. It was further observed that from July 2005, cheques had been dishonoured, almost on a daily basis, for both small and substantial amounts.   **(ii) Was there an available defence under 588H?** Although not pleaded explicitly by the Plaintiff, Chesterman J acknowledged that the Second Defendant sought to rely on section 588H(4) of the Act. The section provides a defence for directors where the person was a director of a company at the time the debt was incurred, but because of illness or some other good reason, they did not take part in the management of the company.  The Second Defendant had claimed that he was diagnosed with prostate cancer and was consequently ill throughout the relevant period and did not take part in the management of the Company. However, the Second Defendant had failed to lead evidence identifying when the diagnosis had been made. Further, it was found that despite the diagnosis, he had attended the Company's premises each day during the relevant period and been actively involved in the management and day to day operations of the Company.  The Second Defendant's involvement included travelling to Sydney to negotiate selling franchises for French manufactured motor vehicles and acting as signatory to the Company's cheque account. Chesterman J determined that if the Second Defendant had been too ill to take part in the management of the Company, it would be expected that he would remain at home and resign his directorship.   **(iii) Were there reasonable grounds for expecting insolvency?** It was held that there were reasonable grounds for the defendants to suspect that the Company was insolvent. During the period alleged by the Plaintiff, the Company had continually exceeded its bank overdraft and, as a consequence, had negotiated the approved limit upwards. The defendants had been the primary representatives of the Company at the negotiations and had been told by the bank that, once increased, no further increases would be approved.  The steadily increasing level of debt, the Company's need for increased debt financing and its inability to operate within approved limits of borrowing indicated chronic unprofitability. In addition to this, whenever a cheque was dishonoured, the bank had telephoned the defendants and advised them. While Chesterman J acknowledged that the defendants may not have had complete access to accurate financial accounts showing accumulating losses, the fact that the business was running at a loss was the only sensible conclusion. Chesterman J supported his finding by noting that the Company's employees produced daily operating charts which set out, in considerable detail, the financial dealings of the Company. These reports were sent to each director and were the subject of discussions at daily meetings.  The daily meetings took place in the boardroom of the Company's premises and were attended by both of the defendants.   The defendants' submissions that they had relied on assurances by Brett Seymour were rejected.  Their access to financial information from the bank and other people within the Company and their own submissions as to their distrust of Brett Seymour, were used to support the rejection. Chesterman J held that the only sensible conclusion that the defendants could have reached with the information they were provided, irrespective of anything said by Brett Seymour, was one of a company in severe financial trouble.  The failure of the defendants to act for almost three months after first discussing the appointment of an administrator with an accountant, satisfied Chesterman J that the defendants did not do all that was reasonable to protect creditors and prevent the Company from incurring debts whilst insolvent, and therefore breached section 588G of the Act. **(iv) Reduction of the debt owed by the defendants** Pursuant to section 1318 of the Act, the defendants sought to have their liability for the Company's debt's reduced by at least 50% on the basis that they had acted honestly and, having regard to all the circumstances, they ought to be fairly excused.  It was confirmed that the function of section 1318 of the Act is not to subvert the operation of section 588G of the Act, which expressly provides that directors have a duty to prevent a company from trading whilst it is insolvent.  Even on the defendants' own evidence, the Company was left to the management of Brett Seymour whom they did not trust and whom they understood was concealing facts from them.  Chesterman J considered that a neglect to act in circumstances where they knew the finances of the Company were deteriorating, was not a circumstance in which it was fair to excuse the directors from their duties. Chesterman J accepted that the defendants had acted honestly, but this honesty did not override the fact that the directors had allowed the Company to incur debts, knowing or suspecting that the Company could not pay them when they fell due.  **(v) Orders** Chesterman J issued judgement in favour of the Plaintiff and found the defendant's personally liable for the sum of $3,101,145. etailed Contents**3.3 Only cross-respondents legally liable to an applicant can be concurrent wrongdoers within the meaning of Part VIA of the Trade Practices Act** (By Craig Roelofsz, Freehills) Shrimp v Landmark Operations Limited [2007] FCA 1468, Federal Court of Australia, Besanko J, 19 September 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/september/2007fca1468.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/september/2007fca1468.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** On 24 November 2006, the Shrimps ("the Applicants") filed a notice of motion in the Federal Court of Australia ("FCA") in which they sought an order that their claim against Landmark Operations Ltd ("Landmark") be tried separately from and prior to the cross-claim filed by Landmark under the originating process against certain third parties and the cross-claims filed subsequently by such third parties as well.  The issues that the FCA had to consider were whether various cross-respondents could be considered to be concurrent wrongdoers within the meaning of Part VIA of the [Trade Practices Act 1974 No. 51 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default) ("TPA") and the [Proportionate Liability Act 1990 No. 18 (NT)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=84925" \t "_default) ("PLA") irrespective of their legal liability to the Applicants and whether common issues of fact between the claims weighed sufficiently against ordering separation of trials. The FCA held that only cross-respondents legally liable to the Applicants can be concurrent wrongdoers within the meaning of Part VIA of the TPA and PLA and as the common issues of fact weighed sufficiently against ordering separation of trials the application was dismissed. Some of the third parties that filed subsequent cross-claims also sought leave to defend the Applicants claim against Landmark. The issues that the FCA had to consider were whether the proposed defences raised genuine issues not pleaded by Landmark and whether it was appropriate to grant leave to more than one cross-respondent. The FCA held that the proposed defences did raise genuine issues not apparently pleaded by Landmark and that it was not appropriate to grant leave to more than one cross-claimant because the proposed defences raised substantially same grounds. **(b) Facts** On 3 April 2006 the Applicants issued proceedings in the FCA against Landmark. They claimed damages, either at common law, or under section 82 of the TPA or section 91 of the Consumer Affairs & Fair Trading Act 1990 (NT) ("FTA"), interest and costs.  Pursuant to various conversations an order was placed by the Applicants in late November 2004 - early December 2004 whereby the Applicants agreed to purchase seed and other chemical products, including 400 kilograms of jarra grass seed, from Landmark. The seed was delivered to the Applicants by Landmark and was subsequently sown across an area of approximately 470 hectares at the Applicants' property known as "Edith Springs Station". The Applicants alleged that as Landmark had supplied them with summer grass seed rather than jarra seed, they suffered substantial loss.   On 19 June 2006, Landmark filed a defence and on the same date Landmark issued a cross-claim against Michael Gargan ("MG").  On 15 September 2006, MG issued cross-claims against the following parties:* Simon Gargan and Kate Gargan;
* Selected Seeds Pty Ltd;
* Australian Premium Seeds Pty Ltd;
* Seed Testing Laboratory of Australia Pty Ltd;
* State of Queensland; and
* Top End Rural Supplies Pty Ltd.

Landmark and the various cross-respondents referred to above opposed the Applicants notice of motion for separate trials filed on 24 November 2006.  Selected Seeds submitted that it was only in exceptional circumstances that the power to order separate trials of a plaintiff's claim against a defendant and a defendant's claim against a third party should be exercised and that unless Landmark was wholly successful, it was likely that conducting separate trials would involve the determination of the same questions of fact in separate proceedings, potentially leading to inconsistent findings and additional costs and delay to Landmark and the parties other than the Applicants. Selected Seeds also submitted that "the conduct of separate trials would conflict with the legislative intent, and undermine the operation of the "proportionate liability" provisions to be found in the TPA in respect of Shrimp's claim for damages under section 82 of the TPA for conduct in breach of section 52 of that Act". The TPA was amended in the middle of 2004 to introduce a scheme of proportionate liability in respect of economic loss and damage to property by conduct in breach of section 52 of the TPA. Section 82(1)(B) (which deals with contributory negligence) and Part VIA of the TPA were inserted by the Corporate Law Economic Reform Program (Audit reform and corporate disclosure) Act 2004 (Cth). Selected Seeds referred to the provisions of Part VIA and submitted that whether a person was a concurrent wrongdoer for the purposes of Part VIA "depends on the concept of causation of, rather than liability for, damage or loss".  It was therefore submitted by Selected Seeds that it would be inappropriate to order separate trials.  The Applicants on the other hand contended that "a concurrent wrongdoer" for the purposes of Part VIA includes other persons whose acts or omissions caused, either independently or jointly, the damage or loss that is the subject of the claim and who are liable to the claimant for that loss or damage. Selected Seeds, MG and Top End Rural Supplies each sought leave to defend the Applicants' claim against Landmark. The proposed defence by Selected Seeds raised a number of factual issues not raised by Landmark. MG's proposed defence raised nothing more than what was contained in Selected Seeds' proposed defence and Top End Rural Supplies withdrew its application for leave to defend.  **(c) Decision** In respect of the application for separation of trials, the FCA agreed with the Applicants that only cross-respondents legally liable to the Applicants can be concurrent wrongdoers within the meaning of Part VIA of the TPA and PLA. However, the FCA dismissed the application on the grounds that the common issues weighed sufficiently against ordering separation of trials. In respect of the applications for the leave to defend, the FCA found that the proposed defences did raise genuine issues not apparently pleaded by Landmark but it was not appropriate to grant leave to more than one cross-claimant because the proposed defences raised substantially same grounds. Accordingly, the FCA only granted Selected Seeds leave to defend on the basis that its application was first in time.etailed Contents**3.4 Dividends and set-off rights: too much to expect?** (By Tom McGregor, Mallesons Stephen Jaques) Ansett Australia Limited (subject to a deed of company arrangement) v Travel Software Solutions Pty Ltd [2007] VCS 326, Supreme Court of Victoria, Hargrave J, 19 September 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/september/2007vsc326.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/september/2007vsc326.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** The case involved the incurrence of a dividend debt by a company. The company sought to defend not paying the dividend debt on the basis of statutory set-off and in equity.  In finding the company liable to pay the dividend debt, the court determined that:* For a right of statutory set-off to arise, there must exist "mutual" dealings at a relevant date. There can be no set-off in relation to a mere expectant dividend.
* In equity, a future chose in action may be assigned for consideration, although any obligation to do so must be framed in sufficiently obligatory language.
* In equity, the rule in Cherry v Boultbee will only arise where there exists an appropriately constituted "fund". The undistributed profits of a solvent company which operates as a going concern is incapable of constituting a fund.

**(b) Facts**  Travel Software Solutions ("TSS") is a company whose shareholdings included Ansett Australia Ltd (subject to a deed of company arrangement) ("Ansett") as to 25 percent, Qantas Airways Ltd as to 50 percent, and Air New Zealand as to 25 percent. In March 2001 TSS sold its principal businesses and realised substantial profits, for which it sought taxation advice regarding the most tax effective method of distribution. In the interim, TSS lent amounts approximating the total profits to each shareholder in proportion to their shareholdings. Each loan agreement contained the following clause which provided for set-off:"The Lender may without notice to the Borrower or any other person, set-off and apply any credit balance on any account of the Borrower with the Lender and any other moneys owing by the Lender to the Borrower against the liabilities (including any dividend) of the Borrower under this Agreement" (sic) ("the Clause").Based on the taxation advice received, the directors of TSS resolved to distribute part of the profits to shareholders prior to 30 June 2001. These amounts were set-off against the loan debts due to them by TSS pursuant to the Clause. In the months following 30 June 2001, the TSS directors held off declaring a subsequent dividend while they considered alternate uses of the profits, including two investment opportunities identified by management.  Ansett was placed into administration and entered into a deed of company arrangement with its creditors in September 2001 ("Relevant Date"). TSS resolved to pay an interim dividend in December 2005 and sought to set-off the dividend amount against outstanding shareholder loans. Ansett demanded payment of the dividend, disputing TSS' right to set-off the dividend against its liability to repay the shareholder loan. **(c) Decision**  The court found that no dividend debt arose merely by virtue of TSS' resolution to pay an interim dividend.  His Honour noted that pursuant to section 254V(1) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("the Act"):"a company does not incur a debt merely by fixing the amount or time for payment of a dividend. The debt only arises when the time fixed for payment arrives." Accordingly, it was determined that by merely resolving to pay an interim dividend to shareholders, TSS did not become indebted for the amount of the dividend. Nevertheless, a dividend debt did arise in favour of Ansett, although not until December 2005. TSS also advanced several defences to Ansett's claim for the dividend debt, including that:* the Clause amounted to an equitable assignment of the dividend debt which was enforceable against the Ansett administrators;
* the dividend debt had been validly set-off against Ansett's liability to TSS under the loan agreement; and
* TSS was entitled to rely on the rule in Cherry v Boultbee (1839) 41 ER 171.

The court dismissed all of TSS' defences. The following sections summarise the court's decision in relation to each defence. **(i) No right of statutory set-off for expectant liabilities** Pursuant to section 553C of the Act, in the event of insolvency a statutory right of set off is available when there exists, inter alia, mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt admitted against the company.  In the present case, TSS contended that on the Relevant Date the debt owed to it by Ansett under the loan agreement, on the one hand, and the expectation that Ansett would receive a dividend from TSS in respect of the undistributed profits, on the other hand, constituted "mutual dealings" for the purposes of section 553C.  The court found that in order for there to be "mutual dealings" between the parties, it is not necessary for there to exist an accrued debt on the relevant date in respect of each dealing.  In adopting the dicta from Hiley v The Peoples Prudential Assurance Co Ltd (1938) 60 CLR 468, Hargrave J noted that the relevant "mutual dealings" are those: ".which involve rights and obligations whether absolute or contingent of such a nature that afterwards in the events that happen they mature or develop into pecuniary demands capable of set off." In this regard, TSS alleged that it was under an existing obligation to pay Ansett a dividend in respect of the undistributed dividend pool.  TSS submitted that this obligation was capable of inference from the circumstances taken as a whole.  These circumstances involved the fact that TSS lent funds to Ansett on a short term basis upon the express contemplation that the loans would be repaid partly from the first dividend payment and partly from the dividends payable from the undistributed dividend pool after 30 June 2001.  The court rejected this submission, finding that the evidence did not support any agreement obliging TSS to act in accordance with this contemplation.  The court noted that:"The evidence establishe[d] that, for taxation reasons, the parties agreed that TSS would defer payment of a dividend in respect of the profits and, in the meantime, would lend an amount approximating the profits to the shareholders in proportion to their respective shareholdings as "short term" loans "whilst the dividend issue [was] worked through." This decision to defer a dividend was made in circumstances where the TSS board had already resolved to consider further investment opportunities."Consequently, on the Relevant Date the payment of the dividend in respect of the undistributed balance of profits was a mere possibility and it was open to TSS to decide to utilise this dividend pool to fund alternate investment opportunities.  Accordingly, the potential distribution amounted to a mere expectancy and no contingent or absolute obligation existed on the Relevant Date to justify a claim for statutory set-off. **(ii) Equitable assignment of the dividend**  In the present case the court adopted the position from Norman v Federal Commissioner of Taxation (1963) 109 CLR 9 and noted that although no dividend debt arose until December 2005, it was within Ansett's power prior to that time to agree to assign any future chose in action, provided that the assignment was for valuable consideration.   In this regard, TSS submitted that the Clause constituted an agreement by Ansett to assign to TSS any right which Ansett subsequently acquired, until payment in full of Ansett's loan debt to TSS.  It was submitted that the Clause should be construed in this manner because the circumstances, when taken as a whole, established that all shareholders intended that their loans would be repaid from dividends automatically, as and when they became due by TSS. The court rejected this approach, finding that the evidence of surrounding circumstances did not establish an objective intention to assign to TSS any future dividend entitlement payable by TSS to shareholders.  Indeed, there was no evidence that the parties sought any tax advice concerning an intention that the shareholders would agree to assign future dividend debts to TSS.  Additionally, it was decided that the words used in the Clause, construed in the context of the surrounding circumstances and the loan agreement as a whole, did not contain a sufficiently clear expression of an intention to assign future dividend debts.  Hargrave J noted that the Clause's permissive language, which indicated that TSS "may" at its option exercise a right of set-off, was inconsistent with an equitable assignment of the dividend debt being perfected "automatically" on it becoming payable.  **(iii) Inapplicability of the rule in Cherry v Boultbee** The court also analysed the applicability of the rule in Cherry v Boultbee (1839) 41 ER 171 ("the Rule"). The Rule, as restated in Otis Elevator Co Pty Ltd v Guide Rails Pty Ltd (in liq) [2004] NSWSC 383, provides that "a person who is both a claimant on, and a debtor to, a fund cannot obtain payment of his claim out of the fund until he has first paid his debt into the fund."  TSS submitted that the Rule applies to its particular circumstances because of the existence of a fund to which it was both a claimant and a debtor, namely the undistributed balance of profits.  However, the court found that in this case there existed no "fund" as required by the Rule.  His Honour relied upon the definition of "fund" from Derham's "The Law of Set-Off", which pertinently states that "[the concept of fund] does not include a company's assets while the company is still a going concern".  Hargrave J rejected TSS' submission that its dormant existence could be equated with a solvent company in voluntary liquidation which was possessed of a fund constituted by the undistributed balance of profits.  The undistributed balance of the profits was not set aside as a separate fund for the purpose of distributing it to shareholders.  In this regard, TSS was not obliged to distribute any money as a dividend, and was entitled to commit the funds to other investment opportunities. For all intents and purposes, TSS was a going-concern in respect of which no "fund" could be established.  Thus the Rule had no application. The court endorsed Ansett's claim for the dividend debt. For the reasons noted, TSS' defences were dismissed. etailed Contents**3.5 Purchasing debentures off-market; disclosure requirements of an offer document** (By Sholam Blustein, Blake Dawson Waldron) Australian Securities and Investments Commission v Ross Investments (Aust) Pty Ltd [2007] FCA 1433, Federal Court of Australia, Finkelstein J, 18 September 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/september/2007fca1433.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/september/2007fca1433.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 motion filed by the applicant considers facts arising out of the actions of the first defendant, Ross Investments (Aust) Pty Ltd (Ross Investments), in making numerous unsolicited offers to purchase from retail debenture holders debentures in Cambridge Credit Corporation Ltd (Cambridge Credit).  The second defendant, Robert Douglas Ross, is the sole director of Ross Investments, and as such was identified by the Australian Securities and Investments Commission (ASIC) as they "key person" for the purposes of Ross Investments operations. Ross Investments has been issued with a financial services licence which entitles it to deal in securities and retirement savings accounts to retail clients.  Cambridge Credit was a significant property developer and financier.  In 1974 it was placed in receivership.  At that time, Cambridge Credit owed substantial sums to debenture holders under off-market instruments.  During the course of Cambridge Credit's receivership property prices increased and the sale of Cambridge Credit's property enabled debenture holders to be repaid their principal in full.  Nonetheless, the debenture holders remain entitled to receive the accrued interest. On numerous occasions Ross Investments made unsolicited offers to purchase from retail debenture holders both ordinary debentures (debentures which attract various coupon rates which are calculated and paid quarterly) and cumulative debentures (debentures which attract various coupon rates which are calculated quarterly and accumulate until maturity) in Cambridge Credit.   It was in respect of the unsolicited offers to which the plaintiff, ASIC, objected.  The cause of action by ASIC concerned the fact that the offers made by Ross Investments did not comply with Division 5A of Part 7.9 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Act), in particular section 1019I(2) of the Act.  Section 1019I(2) notes that a fair estimate of the value of the product as at the date of the offer and an explanation of the basis on which that estimate was made must be provided in the offer document. Specifically, the court, in determining whether section 1019I(2) was complied with, was required to consider the following 3 questions:* Did the offer document contain an estimate of the value of the product as at the date of the offer?
* Was that a fair estimate of the value of the product?
* Did the offer document explain the basis upon which the estimate was made?

**(b) Facts** In November 2005, and again on several occasions in January 2007, Ross Investments made unsolicited offers to purchaser from retail debenture holders ordinary and cumulative debentures in Cambridge Credit.   It was never in contention that Ross Investments made unsolicited offers to purchase ordinary and cumulative debentures in Cambridge Credit from retail debenture holders by way of offer documents sent to the relevant debenture holders. ASIC contended that the offer documents provided by Ross Investments did not include, as a separate figure to the offer price, a fair estimate of the value of the ordinary debentures.  Nonetheless, each offer document did contain the following statement: "this fair estimate of value of the ordinary debentures is made by Robert D Ross on behalf of Ross Investments and is not the product of independent research." Further, the offer document in respect of cumulative debentures dated 8 November 2005 made reference to a document headed 'Background to this offer'.  Among other things, this background note, which was initially issued by the trustee for the debenture holders, provided that cumulative debenture holders may receive a further 18 to 20 cents in the dollar in their entitlement of outstanding accrued interest.  The note went on to state that any reference to figures should not be taken as a valuation of debenture stock. In addition to the valuation obtained by the defendants, ASIC obtained a valuation of the debentures from a chartered accountant, Anthony McGrath, which noted that in respect of the ordinary debentures the fair value was between 7.2 and 8.8 cents, whereas the fair estimate of value for the cumulative debentures ranged from 99.2 cents to 120.8 cents (in respect of the offers made on 8 November 2005 and 23 November 2005) and between 100.9 cents and 123.0 cents (in respect of the offers made on 22 January 2007). The defendants submitted, in their defence against ASIC's claim that the offer documents did not include an estimate of the value of the relevant debentures, that the amount being offered by Ross Investments should be taken to be the products estimated value.  The defendants further noted that the estimate provided for in the offer was a fair estimate as the estimate had been given in the absence of bias, dishonesty or injustice (adopting the definition of fair as provided for in the Macquarie Dictionary).  Contrastingly, Mr McGrath, in support of ASIC's claim, noted that the estimate provided in his report was fair and objective as it adopted a method of valuation that was most appropriate in determining a fair estimate as it allowed assumptions to be drawn in respect of the future cashflows arising from distributions from the receivership, the timing of those cashflows, and the risks associated with these 2 elements. The defendants, in response to Mr McGrath's report, noted that his report ignored the fact that Ross Investments' offer had been accepted by some debenture holders which they tendered as evidence that their offer was fair.  The defendants also contended that Mr McGrath had overlooked the fact that the provision of immediate cash consideration for the debentures is likely to add value to the debenture holders.  Finally, the defendants argued, that Mr McGrath had relied on unverified statements from the annual reports of Cambridge Credit in making his finding. **(c) Decision** The court held that Ross Investments had contravened section 1019I(2)(c) of the Act.  The court also noted that the second defendant, Mr Ross, was well aware, or should have been aware, of the obligations imposed on Ross Investments by the Act and that Mr Ross was the "conscious moving force" behind the infringing act, "the knowing aider or abettor." **(i) Did the offer document contain an estimate of the value of the product as at the date of the offer?** The court held that the offer documents for cumulative debentures included an estimate of value, albeit by reference to the trustee's statements contained in the background note.  In respect of the ordinary debentures, the court also held that an estimate was provided as a reasonable debenture holder would take the statement "this fair estimate of value" to refer to the estimate of value for each debenture as there was no other figure to which the comment could relate. **(ii) Was that a fair estimate of the value of the product?** The court held that the defendant's estimates, viewed in light of Mr McGrath's estimates, were inadequate and not fair.  The court noted that the word fair in section 1019I(2)(c) refers to the method by which the estimate was arrived at and not, as the defendant's propounded, whether the estimate was completed without any dishonesty.  For this reason, an estimate of the value of a product will be fair if it is obtained by a method of valuation - such as that adopted by Mr McGrath - which attempts to determine, or closely reflect, the underlying value (or exchange value if there is no market for the product) of the product.  Contrastingly, the defendants failed to adequately explain to debenture holders the method by which the estimates of value were determined. **(iii) Did the offer document explain the basis upon which the estimate was made?** The court noted that even if it was to be held that the first and second element were fulfilled by the defendant's offer to debenture holders, it is apparent from the facts that each of the offer documents prepared by the defendants failed to provide a suitable explanation of the basis upon which the estimate was based. The court noted that for Ross Investments to have satisfied section 1019I(2) of the Act it must have offered some form of explanation disclosing the key factors and assumptions upon which the estimate in the offer was founded in a similar way to Mr McGrath's analysis.etailed Contents**3.6 Leave granted nunc pro tunc for a statutory derivative action** (By Kylie Shedden, Clayton Utz) South Johnstone Mill Ltd v Dennis and Scales [2007] FCA 1448, Federal Court of Australia, Middleton J, 14 September 2007 The full text of this judgement is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/september/2007fca1448.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/september/2007fca1448.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary** The applicants (other than South Johnstone Mill Limited ('the Company')) applied to the Federal Court seeking leave under section 237 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ('the Act') to continue a statutory derivative action commenced on behalf of the Company against the receivers of the company ('Receivers'), seeking injunctive relief and damages for contraventions of the duties imposed by the Act on receivers and for breach of an equitable duty to act in good faith. The second respondent ('the Bank') was alleged to be liable for the defaults of the Receivers because the Receivers were said to be agents of the Bank. The primary issue before Middleton J was whether leave could be granted nunc pro tunc for a statutory derivative action commenced under the Act. In his analysis of the relevant criteria for granting leave pursuant to section 237 of the Act, Middleton J considered the duties imposed upon receivers when selling charged property. Middleton J granted leave nunc pro tunc to 31 of the 141 applicants to bring proceedings against the Receivers. Leave was not granted in relation to the remaining applicants due to lack of standing.  His Honour further ordered that the application brought against the Bank be dismissed. **(b) Facts** The Company was an unlisted public company that owned and operated a sugar mill in North Queensland. The assets of the Company included milling assets, plant and equipment, stock and supplies and shares in sugar industry-related companies. The Company also owned other land known as the Warrami Land. Due to a serious deterioration of the Company's trading position, the Bank appointed the Receivers to the company on 18 January 2001. Prior to this, the Company held a meeting to discuss its future at which it was alleged that the Bank had stated it would not accept any offer other than an offer from Bundaberg Sugar Limited ('Bundaberg'). By late January 2001, another potential investor, Tully Sugar Limited ("Tully"), had put together a consortium of interested parties and began discussions with the Receivers. On 21 February 2001, further arrangements were made for Tully's representative to present its proposal to the Receivers. On the same day, a contract for sale of all of the Company's assets (save the Warrami Land) was entered into with Bundaberg for $15.1 million.  The applicants asserted that the Receivers' conduct when selling the Company's assets contravened sections 180 and 420A of the Act and that the Receivers owed an equitable duty to the company. Proceedings in relation to these claims were commenced without first applying to the Court for leave, contrary to section 236(1)(b) of the Act. Accordingly, the primary matter for consideration in this proceeding was whether sections 236 and 237 of the Act permitted leave to be granted nunc pro tunc.**(c) Decision**(**i) Can leave be granted nunc pro tunc with respect to section 236 of the Act?**In deciding whether leave could be granted retrospectively for a statutory derivative action, Middleton J noted that the answer turns on whether sections 236 and 237 mandate that leave be granted before the proceeding is instituted. Section 236 of the Act enables a current or former member or officer of the company to bring or intervene in proceedings on a company's behalf if they are acting with leave granted under section 237. Section 237 of the Act requires that the court must grant leave if the five criteria in section 237(2) are satisfied.Middleton J ascertained the effect of these requirements by construing the provisions in their context and by having regard to the purpose they were intended to serve. His Honour referred to and relied upon the Explanatory Memorandum to the [Corporate Law Economic Reform Program Act 1999 No. 156(Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=18039" \t "_default). His Honour was satisfied that the purpose of the section was to introduce a new regime for the bringing of derivative proceedings and to overcome the difficulties facing those bringing a derivative action at common law. The criteria for granting leave were explained in the Explanatory Memorandum as seeking 'to strike a balance between the need for a real avenue for applicants to seek redress on behalf of the Company, where it fails to do so, and the need to prevent actions proceeding which have little likelihood of success' [at 34].The applicants relied upon Re Testro Bros Consolidated Ltd [1965] VR 18 in support of their submission that the Court had jurisdiction to entertain this application notwithstanding that proceedings had been commenced without leave. They argued that the absence of leave is not a matter going to jurisdiction, it is rather an irregularity capable of being corrected by the court" [at 37]. In considering the effect of non-compliance with statutory requirements, his Honour referred to the High Court decision in Emanuele v Australian Securities Commission (1997) 188 CLR 114 which approved Re Testro Bros. In Emanuele, the failure of the Australian Securities Commission to obtain leave before applying for a winding up order was held to be a 'mere defect in the exercise of that jurisdiction'.Middleton J also referred to the High Court decision in Berowra Holdings Pty Ltd v Gordon (2006) 225 CLR 364 which concerned the validity of proceedings commenced outside a specified time period. In that case, the High Court held that the provision under consideration did not exclude the jurisdiction of the court and that in circumstances where parliament drafts a provision in a way that is silent as to the consequences of a breach, there must be a strong indication elsewhere in the Act that the consequence of a breach should be that the action taken is a nullity or is void. Middleton J regarded the provisions under consideration in Emanuele and Berowra as not materially different from the provisions under consideration. His Honour held that sections 236 and 237 are silent as to the consequences of commencing a proceeding without leave and therefore, there is no basis to conclude that parliament intended that such proceedings be beyond the court's jurisdiction. His Honour relied upon the reasoning of the High Court in Emanuele and Berowra and also parliament's intention as expressed in the Explanatory Memorandum. In doing so, Middleton J held that sections 236 and 237, in requiring leave prior to the institution of proceedings, do not condition the Court's jurisdiction and the granting of leave nunc pro tunc was appropriate in certain circumstances. **(ii) Discretion to grant leave nunc pro tunc - an examination of the evidence as to the duties of receivers when selling charged property**Having decided that leave could be granted nunc pro tunc for a statutory derivative action, his Honour was required to determine whether leave should be granted in the circumstances of this case. Middleton J addressed each criterion for the granting of leave as set out in section 237(2) of the Act and accepted the prevailing view that all criteria must be satisfied for the court to be obliged to grant leave: Jeans v Deangrove Pty Ltd [2001] NSWSC 84. On the facts, his Honour held that the first three criteria had been satisfied (namely, that it was probable that the Company would not bring proceedings itself, that the applicants were acting in good faith and that it was in the best interests of the Company for leave to be granted). The fifth criterion requires notice of the application to be given to the Company. His Honour did not require this criteria to be satisfied as the Company did not have any directors and was therefore not in a position to accept or respond to notice given. The fourth criterion requires that there be a serious question to be tried. In assessing this criterion, his Honour stated that the plaintiff is only required to show a sufficient likelihood of success: Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57. Middleton J accepted that a receiver, when exercising a power of sale, is under a duty analogous to that of a mortgagee - that is, "a duty to act in good faith without wilfully or recklessly sacrificing the interests of the mortgagor. The principle underlying the duty is that of 'unconscionability'": Deangrove Pty Ltd v Buckby (2006) 56 ACSR 630. His Honour further accepted that the whole of the conduct with respect to the sale is to be considered; although the duty may allow a mortgagee to act solely in its own interest, it must also act conscionably towards the mortgagor and those claiming under the mortgagor: Ultimate Property Group Pty Ltd v Lord (2004) 60 NSWLR 646. A breach of the duty will only be established if it can be shown that the mortgagee so failed 'to take reasonable steps to obtain a proper price for the properties that it was guilty of unconscionable conduct' [at 85]. After stating the relevant law, his Honour turned to the evidence before him and assessed the conduct of the Receivers. In order to establish a breach of duty, the applicants relied upon the fact that the Receivers did not obtain any valuation of the land prior to entering the contract and that some assets were sold at a substantial undervalue. The applicants also argued that the Receivers were obliged to continue the sale process and bring in additional potential bidders in order to achieve the best possible result. Middleton J was satisfied that there was a sale of some assets at undervalue. His Honour noted that sale at undervalue does not necessarily evidence a breach of sections 180 or 420A of the Act or an equitable duty, but a substantial undervalue may be evidence of such breach. His Honour further noted that while there was not an absolute obligation for receivers to engage in discussions with other potential purchasers, a failure to do so is evidence relevant to a failure to take reasonable steps to obtain a reasonable price. Whilst his Honour did not agree entirely with the basis upon which the applicants' arguments were put, Middleton J held that there was sufficient evidence to support a 'serious question to be tried as to the Receivers failing to take reasonable steps in obtaining a proper price and looking after the interests of the Company, and in this way, acting unconscionably' [106]. His Honour relied upon the fact that the Receivers proceeded to sale in a very short period of time, without seeking any valuation or competitive tender, without advertising, with no obvious reason for the haste to enter the contract and with no satisfactory explanation for the course followed. In light of the absence of admissible evidence to contradict the records held by the Australian Securities and Investments Commission which indicated that only 31 of the 141 applicants were current or former members of the Company, Middleton J ordered that leave be granted nunc pro tunc to those 31 applicants to bring proceedings against the Receivers.In their claim against the Bank, the applicants relied upon a number of matters to support their contention that the Bank was heavily involved in the performance of the Receivers' duties. His Honour accepted that despite the lack of power of a mortgagee to direct a receiver in the performance of the receiver's tasks, communication between the two is entirely proper. His Honour held that the evidence revealed nothing more than a mere consultation or the communication of preferences by the Bank to the Receivers. Accordingly, Middleton J was not satisfied that there was a serious question to be tried against the Bank on the issue of agency and ordered that the application brought against the Bank be dismissed. etailed Contents**3.7 Court's discretion to hear substantive applications under section 511 of the Corporations Act** (By Thomas Stack, Blake Dawson Waldron) Meadow Springs Resort Ltd (in liq) v Balanced Securities Ltd [2007] FCA 1443, Federal Court of Australia, French J, 13 September 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/september/2007fca1443.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/september/2007fca1443.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** These proceedings were brought by the liquidator of the plaintiff company (the Liquidator) pursuant to section 511 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act). The Liquidator sought directions in relation to the distribution of funds held by the Liquidator following settlement of a claim against Colliers International Consultancy & Valuation Pty Ltd (Colliers). **(b) Facts** The plaintiff company was incorporated to acquire land and construct serviced apartments and related facilities, and to sell the apartments with net proceeds ultimately to be distributed to the plaintiff's shareholders. The development was part subsidised by the plaintiff company's shareholders and part by loan from the first, second and third defendants. Each of the advances by the defendants was secured by a mortgage over the plaintiff company's land and a fixed and floating charges over its assets. The priorities as between each of the above defendants was regulated by a deed of priority. It was accepted by French J that the funding was obtained following and by reason of valuations of the proposed development by Colliers. In February 2001, following six months of poor trading, the plaintiff company was placed into voluntary administration, and eventually, into liquidation in January 2002. In April 2002, the development was sold, leaving the cause of action against Colliers, arising from their overvaluation of the development, as the only substantial remaining asset of the plaintiff company. The fourth defendant (the Litigation Funder) funded the cause of action against Colliers, and the present dispute is as to the respective entitlements of the first, second, third and fourth defendants to the settlement sum held by the Liquidator on the plaintiff company's behalf in relation to the Colliers claim. The Liquidator sought direction on the following issues:* the sum of the Litigation Funder's (the litigation funder for the Colliers claim) entitlement and whether that amount (if any) should be paid in priority to all other interested parties - i.e. in priority over any charge - by reason of alleged agreement between the Litigation Funder and the first, second and third defendants;
* the sum of the first defendant's entitlements, whether certain amounts were secured or unsecured and whether or not amounts owing to the first defendant were subordinated to the fourth defendant;
* the sum of the second defendants' entitlements, whether certain amounts were secured or unsecured and whether or not amounts owing to the second defendants were subordinated to the fourth defendant; and
* the sum of the third defendants' entitlements and whether or not amounts owing to the third defendants were subordinated to the fourth defendant.

Procedurally, the Liquidator sought direction as to whether, in order to ensure a complete and expeditious disposition of the disputes underlying the questions raised (above), affected parties should be permitted, pursuant to section 471B of the Act to file cross-claims against the plaintiff in the Liquidator's application. **(c) Decision**   The court ordered that:* there was sufficient flexibility for the court, within section 511 of the Act, to enable proceedings begun as an application for directions to be converted into proceedings for the determination of substantive rights
* the plaintiff company's statement of claim be filed and served as a statement of the facts (as set out in summary form above) giving rise to the questions which the plaintiff seeks to have determined pursuant to section 511 of the Act;
* each of the defendants had leave to file and serve a cross-claim seeking declaratory and other relief against the plaintiff company and any other party to the proceeding provided that the matter in which such relief was sought was within the scope of the questions raised by the Liquidator in the statement of claim; and
* there was no need for any party to file a defence to the Liquidator's statement of claim which merely existed to define the questions sought to be determined.

etailed Contents**3.8 Auditor's duty of care does not extend to fraud of third party**  (By Cherie Canning, Mallesons Stephen Jaques) MAN Nutzfahrzeuge AG and v Freightliner Ltd [2007] England and Wales Court of Appeal (Civil Division 910), Lord Justice Chadwick, Lord Justice Dyson and Lord Justice Thomas, 12 September 2007 The full text of this judgment is available at: [http://www.bailii.org/ew/cases/EWCA/Civ/2007/910.html](http://www.bailii.org/ew/cases/EWCA/Civ/2007/910.html%22%20%5Ct%20%22_new)  **(a) Summary** This was a claim arising out of the fraudulently-managed accounts of a company that had been acquired by the claimant. The accounts had been signed off by the auditors who had failed to discover the fraudulent mishandling of the accounts by a company employee. In the specific circumstances of this case, the auditors were found not liable because the claimants were seeking to recover a loss that arose out of an employee's fraudulent use of the audited accounts and not a loss that arose from the accounts themselves.  The case confirms the importance of the assumption of responsibility test as a determinant for a duty of care in these circumstances. Here, the auditors had not assumed responsibility for extra-contractual representations made by the dishonest employee, so no duty arose to protect the company from losses arising from these representations. **(b) Facts**   By a share purchase agreement dated 30 January 2000, MAN Nutzfahrzeuge AG ("MN") agreed to purchase from Western Star Trucks Holdings Limited ("Western Star"), the whole of the issued share capital of ERF Holdings Plc ("ERF").  Western Star was acquired by Freightliner LLC ("Freightliner") after the sale of ERF to MN had been completed. It was common ground in the proceedings that Freightliner was responsible for any liabilities in connection with the sale of ERF to MN. The negotiations for the sale had commenced around July 1999 when MN expressed interest in acquiring ERF from Western Star and they were provided with copies of ERF's audited accounts for the years ending 30 June 1998 and 1999.  These accounts had been audited by Ernst & Young (EY) who had signed off on the accounts without discovering the mishandling of the accounts by Mr Ellis, the chief financial controller of ERF. During the negotiations, Mr Ellis played a key role and made a series of representations to the effect that the accounts of ERF which formed the basis for the parties' discussions had been prepared in good faith and that as far as he was aware they gave a true and fair picture of ERF's financial position.  Following the sale, it became apparent that Mr Ellis had been fraudulently manipulating the accounts.  The MN claimants sought to recover from Freightliner all the losses incurred arising out of the purchase of ERF. MN's contractual claims for breach of warranty and misrepresentation failed because of express limits of liability clauses contained in the share sale agreement. MN succeeded in a claim for deceit on the basis that the sale of the company had been induced by ERF's fraudulent misstatements in the accounts.  Freightliner then brought a claim against EY claiming an indemnity against its liability to MN on the basis of a common law duty of care owed to ERF Holdings Plc when auditing the company accounts. The judged held at first instance that E&Y were not liable for the loss sustained by Freightliner. Freightliner appealed. **(c) Decision**  The key issue on appeal was whether the knowledge of EY was sufficient to found a duty of care to Western Star (and, so far as relevant to MN) in relation to the loss which was actually suffered. It was held that, had it been necessary to decide the point, it was within the scope of EY's general audit duty to protect ERF from the consequences of decisions taken by ERF, on the basis that the accounts were free from material misstatement, including misstatement caused by fraud.  However, in these circumstances the loss which Freightliner suffered arose because "MN was induced by fraudulent statements made by Mr Ellis about ERF's circumstances." The question then became, did EY undertake a special audit duty to Western Star (or, so far as relevant, to MN) in respect of representations which might be made by Mr Ellis as to the accuracy of the ERF accounts to which their audit statements related? In answering this question, the Appeal Court applied a decision that had been handed down since the initial proceedings, Customs and Excise Commissioners v Barclays Bank Plc [2006] UKHL 28, [2007] 1 AC 181 (Barclays). Barclays confirmed that the existence (or otherwise) of a special duty could be determined by application of the assumption of responsibility test, quoting Lord Hoffmann at 13D-15B:       ". in a case in which A provides information to C which he knows will be relied upon by D, it is useful to ask whether A assumed responsibility to D. Likewise, in a case in which A provides information on behalf of B to C for the purpose of being relied upon by C, it is useful to ask whether A assumed responsibility to C for the information or was only discharging his duty to B."It was held that Lord Hoffmann's guidance in the Barclays Bank  case as to the approach to the assumption of responsibility test must be read together with the observations of Lord Bridge of Harwich in Caparo Industries Plc v Dickman and others [1990] 2 AC 605, 627D-E:". It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless. The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it." On appeal, it was held that there was no factual basis for a challenge to the judge's finding that it was not foreseeable by EY that Western Star - and, in particular, Mr Ellis, on behalf of Western Star - would make any representations as to the accuracy of ERF's accounts which went beyond, or were outside, those contained in the share purchase agreement. There was no reason for EY to think that Western Star would allow a position to arise in which it was exposed to liability for extra-contractual representations made by Mr Ellis. Moreover, even if EY could have foreseen that Western Star might allow a position to arise in which it was exposed to liability for extra-contractual representations of Mr Ellis, the application of the assumption of responsibility test precluded EY being found liable. It was impossible to conclude that EY assumed responsibility for the use which a dishonest employee of the audited company might make of the information that EY had provided to Western Star. The appeal was dismissed.etailed Contents**3.9 Seeking leave to manage a corporation after an automatic disqualification**(By Brooke Egan and Mark Cessario, Corrs Chambers Westgarth) Schwartz, in the matter of Babybelle Pty Ltd (ACN 116 053 683) FCA 1469, Federal Court of Australia, Gordon J, 4 September 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/september/2007fca1469.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/september/2007fca1469.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** Mr Schwartz, who was disqualified from managing a corporation pursuant to section 206B(1)(b)(ii) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("the Act"), sought leave under section 206G(1)(c) of the Act to manage Babybelle Pty Limited ("Babybelle"). Evidence filed by Mr Schwartz in support of his application indicated that Mr Schwartz was currently responsible for the day to day running of Babybelle, raising questions as to whether Mr Schwartz had and continued to contravene the Act. On the basis of the evidence in support of the application and applying the legal principles established by Lindgren J in Adams v Australian Securities and Investments Commission (2003) 46 ACSR 68, Gordon J dismissed the application. **(b) Facts**   On 14 April 2005, Mr Schwartz pleaded guilty to serious dishonesty offences, namely receiving Youth Allowance payments from Centrelink in the period 31 July 2001 to 31 December 2001, to which he had no entitlement.  During this period, Mr Schwartz had ceased study and commenced casual employment.  He had failed to inform Centrelink of his change in circumstances and under-declared his earnings.  Following his conviction, Mr Schwartz was prohibited from managing corporations under section 206B(1)(b)(ii) of the Act, which provides for automatic disqualification where a person is convicted of an offence that involves dishonesty and is punishable by imprisonment for at least three months. Mr Schwartz was disqualified from managing corporations until 14 April 2010, being five years from the date of his conviction, pursuant to section 206B(2)(a) of the Act.  By way of ex parte application dated 7 August 2007, Mr Schwartz sought leave under section 206G(1)(c) of the Act to manage Babybelle.  In support of the application, evidence was led to the effect that:* The offences committed by Mr Schwartz occurred some six to eight years ago.
* Mr Schwartz had repaid his debts and attended counselling.
* Since 1 March 2007, the registered office of Babybelle had been Mr Schwartz's home address.
* Mr Schwartz was responsible for the day to day running of Babybelle including financials, executing government department forms and selling items over eBay.
* If leave was not granted, Babybelle may be forced to cease trading as Mr Goodman could no longer actively manage the business.

Babybelle was incorporated on 1 September 2005 (five months after Mr Schwartz was convicted of the offence) and its sole director and shareholder was Mr Goodman. Mr Goodman also provided evidence in support of the application. **(c) Decision**  In considering the application, Gordon J applied the legal principles in Adams v Australian Securities and Investments Commission (2003) 46 ACSR 68 being that:* The applicant bears the onus of establishing that the court should make an exception to the prohibition.
* The objectives of the Act are to protect the public, not punish the offender, and to deter others from engaging in similar conduct and abusing the corporate structure to the disadvantage of stakeholders.
* Leave will not be granted on the sole basis that the offender is suffering hardship.
* The court will have regard to the nature of the offence committed by the applicant, the applicant's involvement in committing the offence, the applicant's character (including their conduct in the period in which they were removed from management), the structure of the company that the applicant seeks leave to manage, the nature of the business of that company and the interests of stakeholders. The court will also consider any risks to stakeholders and the public should leave be granted.

Gordon J expressed a concern that the evidence given in support of the application indicated that Mr Schwartz was, in fact, already managing Babybelle. Gordon J considered the evidence filed by Mr Schwartz in support of his application to be unsatisfactory and noted that there was no evidence in relation to:* Mr Scwartz's relationship with Mr Goodman;
* Mr Goodman's role in managing the business;
* Babybelle's current operations, including who it does business with; or
* whether Mr Goodman was to retain his shareholding.

In the circumstances, Gordon J rejected the application but noted that Mr Schwartz could make a fresh application if evidence becomes available addressing outstanding issues.etailed Contents**3.10 Is there a 'change in control'? - general contractual principles of construction and interpretation of contracts** (By Marius de Waal, Freehills) AMCI (IO) Pty Ltd V Aquila Steel Pty Ltd and AMCI (BC) Pty Ltd V BELCOAL Pty Ltd [2007] QSC 238, Supreme Court of Queensland, Muir J, 4 September 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2007/september/2007qsc238.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2007/september/2007qsc238.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** In both AMCI (IO) Pty Ltd v Aquila Steel Pty Ltd and AMCI (BC) Pty Ltd v Belcoal Pty Ltd, proceedings which involved very similar joint venture agreements, the Queensland Supreme Court had to decide whether a 'Change in Control' event had occurred following changes in group shareholding and the subsequent transfer of shares to record the transfer. **(b) Facts**  **(i) Introduction** The first proceeding concerned the 'Premium Iron Ore Joint Venture' (a joint venture between Aquila Steel Pty Ltd and Westiron Pty Ltd), established for mineral exploration purposes, doing feasibility studies and, depending on viability, conducting mining operations. The second proceeding concerned the 'Belvedere Joint Venture' (a joint venture between BD Coal Pty Ltd and Belcoal Pty Ltd)), established for mineral exploration purposes and, depending on viability, carrying out mine developments and coal mining operations. Westiron Pty Ltd and Belcoal Pty Ltd were companies in a group, with AMCI International AG (a Swiss company) the ultimate holding company. **(ii) Joint venture agreement terms** The joint venture agreements each stipulated:* The joint venture participants had the right to transfer all or any part of their joint venture interest to a Related Body Corporate.
* In the event of a 'Change in Control' (which was a defined term), the remaining joint venture participants had the right to purchase the venture interest of the participant that is the subject of the change in control.

**(iii) Group shareholding changes** Changes in group shareholding and other dealings in shares within the AMCI group occurred. As a result, proceedings resulted which revolved around:* the definition of 'Change in Control';
* the right of a remaining joint venture participant to purchase the venture interest of the transferring participant in the event of a 'Change in Control'; and
* the right of a joint venture participant under the joint venture agreements to transfer all or any part of the joint venture interest to a Related Body Corporate.

Below is a summary of the respective views. **(iv) The Aquila case** Aquila argued that the 'Change in Control' provisions and the right of joint venture participants to transfer all or any part of their joint venture interest to a Related Body Corporate operated concurrently.  Aquila argued there had been a 'Change in Control' following changes in group shareholding and the subsequent transfer of shares to record the transfer because the person whom now had control of Westiron Pty Ltd and Belcoal Pty Ltd, did not control the joint ventures at their respective commencement dates.  Due to the 'Change in Control', Aquila argued it had the right to purchase the venture interest of the transferring joint venture participant at a purchase price to be determined in accordance with the particular joint venture agreement. **(v) The Westiron and Belcoal case** In opposition to the Aquila case, Westiron and Belcoal argued:* the 'Change in Control' provisions and the right of joint venture participants to transfer all or any part of their joint venture interest to a Related Body Corporate, operated independently because the clause provided its own remedy for the protection of the non-transferring participant;
* the use of the words "as a matter of right" were significant;
* the purpose of the Related Body Corporate provision is to protect the joint venturers against the possibility of being forced into a joint venture with an unwanted stranger, unrelated to the original participants; and
* there had in fact been no "Change in Control".

**(c) Decision**  In finding there had been no 'Change of Control', the Queensland Supreme Court applied general contractual principles of construction and interpretation of contracts. The court noted:* The object of contractual construction is to "ascertain and give effect to the intentions of the contracting parties".
* The intentions of the parties had to be determined objectively, in accordance with "what a reasonable person would have understood [the words of the contract] to mean."
* To ascertain what a reasonable person would have understood the words of the contract to mean, "normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction."
* That a reasonable person would be one who has all the background knowledge which would reasonably have been available to the parties in the situation which they were in at the time of the contract.
* A commercial contract, like the joint venture agreements, "should be given a businesslike interpretation".
* A businesslike interpretation requires attention to the commercial circumstances which the document addresses, and the objects which it is intended to secure, without being too astute or subtle in finding defects.

etailed Contents**3.11 Director's discretion to decline a registration of transfer of shares** (By Claire Jelbart, Clayton Utz) Beck v Tuckey [2007] NSWSC 1065, New South Wales Supreme Court, Brereton J, 3 August 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc1065.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc1065.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** In this case, Alexi Beck successfully sought an order, under section 175 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), that she be registered as the holder of one share in Tuckey Pty Limited ("Tuckey") pursuant to a transfer from her mother Tamar Beck.  One of Tuckey's directors, Mr Weinstock, had opposed the order. He was ordered to pay Alexi Beck's costs on an indemnity basis as the formal defects in the transfer instrument were notified in submissions at the hearing and Brereton J held that the defects were capable of being cured either before proceedings or earlier in the proceedings. **(b) Facts**    Tamar Beck was a director and the registered holder of 78 of the 100 issued shares in Tuckey. Mr Weinstock was the other director and the registered holder of the remaining 22 issued shares. Tamar Beck executed a form of transfer for one of her shares in Tuckey to her daughter.  Tuckey's Articles of Association included the following relevant provisions:* Article 30 - the instrument of transfer must be left for registration at the registered office of Tuckey accompanied by the certificate of the shares to which it relates and such other information the directors properly require to show the right of transferor to make the transfer; and
* Article 31 - the directors may decline to register any transfer of shares, without giving any reason.

Tamar Beck convened a meeting to vote on the resolution to approve the registration of the transfer. At the meeting, Mr Weinstock opposed and voted against the resolution. He did not provide any reason except that he had considered the matter and considered it contrary to the interests of Tuckey. As no chairman was elected, there was no casting vote. At the close of the meeting, Tamar Beck and Mr Weinstock neither resolved to approve the registration nor resolved to decline registration, the Board being equally divided when a resolution that the transfer be registered was proposed. Thus, the transfer of the shares to Alexi Beck was not registered. **(c) Decision**  (**i) Discretion to decline registration** Brereton J cited case law in relation to the well established principle that where the company constitution provides that a transfer is to be registered, but at the same time confers on the directors a discretion to decline to register, the transferee is entitled to be registered unless and until the directors formally and affirmatively exercise their discretion to decline; and where the directors are evenly divided and there is no casting vote, there is no such exercise of discretion. Brereton J held that, as there was no resolution, the directors of Tuckey did not affirmatively exercise their discretion to decline and thus, Alexi Beck's transfer was entitled to be registered. Counsel for Mr Weinstock submitted that for closely held companies this principle did not apply. Brereton J disagreed and noted that the construction of the constitution relating to the affirmative exercise of discretion is well established and that there was no basis to distinguish the constitution of a closely held company from that of a large public company. Furthermore, Brereton J could find no policy reason to justify Mr Weinstock's proposition, and noted that the transfer did not change the voting power nor affect the balance of equity holdings. The only effect would be to increase the number of members available to create a quorum at a general meeting. **(ii) Transfer formally defective** Counsel for Mr Weinstock contended that Article 30 had not been complied with at the date these proceedings were instituted, as the transfer instrument had not been left for registration at the registered office of Tuckey and was not accompanied by a share certificate.  Brereton J stated that in his view the purpose of Article 30 was to bring transfers to the attention of Tuckey and to ensure that the right of the transferor to make the transfer was established. He found that, as the transfer instrument was tabled and discussed at the meeting and there was no request for more information or a resolution requesting more information, the directors of Tuckey had waived further compliance with Article 30. Brereton J also emphasised that, even if the production of the share transfer instrument could not be waived, non-production did not affect the beneficial entitlement of the transferee under the transfer who was at least entitled to have it registered, subject to compliance with formal requirements such as the production of a share certificate. Mr Weinstock's Counsel advanced further technical argument that, pursuant to section 1071B of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), the directors were prohibited from registering the transfer in the absence of a proper transfer instrument and that the transferee had no entitlement to be registered when proceedings were instituted. The transfer instrument in question, which was in existence when proceedings commenced, did not identify the jurisdiction of Tuckey's incorporation and thus under section 1071B and section 7.11.22 of the [Corporations Regulations 2001 No. 196 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "_default) it did not include the details that were required in an instrument of transfer. Brereton J was not convinced and stated that although the transfer instrument did not identify the jurisdiction of Tuckey's incorporation the "circumstance that registration is prohibited does not deprive the transferee of the character of a valid assignment vesting an equitable interest in the share in the transferee". He emphasised the defect could be rectified at any time before registration: Vaughan v Duncan [2005] NSWSC 670, 119-120.  Therefore, despite the fact that the directors could not have registered the transfer until the details of the jurisdiction of incorporation were inserted into the transfer instrument, Alexi Beck had a beneficial entitlement to the share in question when the proceedings were instituted. Brereton J emphasised although there were defects in the transfer instrument, some of which prohibited its registration, these did not affect the vesting of a beneficial interest in the transferee. Brereton J held that the prima facie entitlement to registration arises from the vesting in the transferee of the equitable interest conveyed by the transfer, although the entitlement was not immediate but conditional upon remedying the formal defects in the transfer.  Finally, Mr Weinstock submitted that, as the formal defects were now remedied, the matter should be returned to the Board for its further consideration. Brereton J rejected this submission as the attitudes of the parties to the proceedings were quite clear and there was no prospect of the directors resolving the issue affirmatively. More importantly, Brereton J noted that the beneficial entitlement already existed and therefore there was no justification for requiring the transferee to await a determination of the Board which had already had ample opportunity to decline the registration but had not done so. Brereton J disagreed with the assertion that the Board's discretion was only triggered by compliance with Article 30, that is, on the presentation of a "proper form of transfer". He asserted that the existence, not the presentation of a transfer was sufficient to trigger the discretion.  **(iii) Costs - formal defects capable of cure notified only in submissions at hearing** Brereton J declared that the costs would have been wholly avoided had the issue of formal defects been raised prior to the proceedings being instituted. He stated that it would send the wrong message to directors if an indemnity costs order were not made, as it would signify that it was reasonable to oppose the registration of a transfer on technical grounds and wait until the very last minute of proceedings being instituted to notify those grounds.  Brereton J declared that "a defendant may be entitled. to keep its powder dry but if it choses to do so, it cannot complain if there are consequences so far as the costs of proceedings which could have been avoided by earlier notification of the issues in dispute".  Brereton J also emphasised that he was not suggesting that directors must give reasons for declining to register a transfer, only that where the reason is an easily curable defect, they unreasonably put the transferor and transferee to costs if they do not afford them an opportunity to remedy the defect, and inform them of it for that purpose.etailed Contents**3.12 Whether section 588FF(3) of the Corporations Act precludes an application to amend an originating process under sections 64 and 65 of the Civil Procedure Act 2005 (NSW)**(By Kathryn Finlayson, Minter Ellison) Austin Australia Pty Ltd (in liquidation) v A & G Scaffolding and Rigging Service Pty Ltd [2007] NSWSC 1077, Supreme Court of New South Wales, White J, 28 September 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/september/2007nswsc1077.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/september/2007nswsc1077.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary*** The plaintiffs' application to amend their originating process was not precluded by section 588FF(3) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) as the application did not involve a new application under section 588FF(1).
* The plaintiffs could rely on sections 64 and 65 of the [Civil Procedure Act 2005 No. 28 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=85461" \t "_default) to amend their application.

**(b) Facts**  On 28 December 2006, the plaintiffs filed an application under section 588FF(1)(a) of the Corporations Act for an order that each defendant pay the first plaintiff an amount of money equal to the amount paid to that defendant under alleged voidable transactions.  The proceeding was an application for the recovery of payments which the plaintiffs alleged to be unfair preferences. The relation back day was 31 December 2003. The party named as the twenty-seventh defendant was 'Dean Mann trading as P K Ceilings'.  The proper party was 'Peter K Ceilings Pty Ltd'. On 19 March 2007, the plaintiffs filed an application under section 64(1)(b) of the Civil Procedure Act to amend the originating process.  The defendant opposed the plaintiffs' application to amend on the ground that no application was filed within the three year period prescribed by section 588FF(3)(a) and that no application was made for an extension of that time limit pursuant to section 588FF(3)(b).  The defendant submitted that sections 64 and 65 of the Civil Procedure Act had no application because section 588FF(3) of the Corporations Act "covers the field". The main issue before the Supreme Court was whether section 588FF(3) precluded the plaintiffs from relying on sections 64 and 65 of the Civil Procedure Act to amend their application. **(c) Decision**  His Honour Justice White held that the application to amend was not precluded by section 588FF(3) as the application did not involve a new application under section 588FF(1) for an order against Peter K Ceilings Pty Ltd in respect of the alleged voidable transactions.  Accordingly, the plaintiffs could rely on sections 64 and 65 of the Civil Procedure Act to amend their application. His Honour considered that the plaintiffs' mistake in the name of the twenty-seventh defendant was a 'mere misnomer' and was not such as to cause a reasonable doubt as to the identity of the person intended to be made a party.etailed Contents |

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| **4. Contributions** |  |   |

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Sent to : i.ramsay@unimelb.edu.au