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| **Bulletin No. 151**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1. [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/151%20March%202010.htm#h1)
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| **1. Recent Corporate Law and Corporate Governance Developments**  |  | ext Section |

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| **1.1 US Senate Banking Committee publishes draft legislation on restoring financial stability**On 16 March 2010, the US Senate Committee on Banking, Housing, and Urban Affairs published draft legislation titled "Restoring American Financial Stability Act of 2010".The draft legislation is wide ranging and includes:* **Consumer protection** - the creation of the Consumer Financial Protections Bureau which will have the task of protecting consumers from unfair, deceptive and abusive financial products and practices.
* **Financial stability** - the creation of the Financial Stability Oversight Council which will focus on identifying, monitoring and addressing systemic risks posed by large, complex financial firms as well as products and activities that spread risk across firms. It will make recommendations to regulators for increasingly stringent rules on companies that grow large and complex enough to pose a threat to the financial stability of the United States.
* **Restrictions on banks** - requires regulators to implement regulations for banks, their affiliates and bank holding companies, to prohibit proprietary trading, investment in and sponsorship of hedge funds and private equity funds, and to limit relationships with hedge funds and private equity funds. Nonbank financial institutions supervised by the Federal Reserve will also have restrictions on their proprietary trading and hedge fund and private equity investments. Regulations will be developed after a study by the Financial Stability Oversight Council and based on their recommendations.
* **Derivatives regulation** - over-the-counter derivatives will be regulated by the SEC and the CFTC, more will be cleared through centralized clearing houses and traded on exchanges, un-cleared swaps will be subject to margin requirements and swap dealers and major swap participants will be subject to capital requirements, and all trades will be reported so that regulators can monitor risks in this large, complex market.
* **Hedge funds** - hedge funds that manage over US$100 million will be required to register with the SEC as investment advisers and to disclose financial data needed to monitor systemic risk and protect investors.
* **Credit rating agencies** - establishes a new Office of Credit Rating Agencies at the Securities and Exchange Commission to strengthen regulation of credit rating agencies. New rules for internal controls, independence, transparency and penalties for poor performance will be introduced.
* **Executive compensation and corporate governance** - gives shareholders a say on pay and proxy access, ensures the independence of compensation committees, and requires public companies to set policies to take back executive compensation based on inaccurate financial statements.
* **Whistleblowers** - creates a program within the SEC to encourage people to report securities violations, creating rewards of up to 30% of funds recovered for information provided.

The draft legislation and a summary of the draft legislation are available on the [Committee's](http://banking.senate.gov/public/index.cfm?FuseAction=Home.Home" \t "_new) website. etailed Contents**1.2 Market supervision reforms pass through the Parliament**Legislation reforming the way financial markets in Australia are supervised passed the Senate on 11 March 2010, paving the way for the transfer of market supervision responsibility to the Australian Securities and Investments Commission (ASIC). The Bill contains three key measures:* It removes the obligation on Australian market licensees to supervise their markets.
* It provides ASIC with the function of supervising domestic Australian market licensees.
* It provides ASIC with additional powers, including the power to make rules with respect to trading on such markets and additional powers to enforce such rules.

The transfer of supervision will come into effect in the third quarter of 2010. Draft Regulations to support the Bill are currently being developed and will be made available for stakeholder consultation. etailed Contents**1.3 Report of examiner into the causes of the failure of Lehman Brothers** On 11 March 2010, the report of the Examiner into the failure of Lehman Brothers Holdings Inc was published. The Examiner was appointed by the United States Bankruptcy Court for the Southern District of New York. When Lehman sought Chapter 11 protection on 15 September 2008, it was the largest bankruptcy ever filed in the US.The Examiner states in the report:"There are many reasons Lehman failed, and the responsibility is shared. Lehman was more the consequence than the cause of a deteriorating economic climate. Lehman's financial plight, and the consequences to Lehman's creditors and shareholders, was exacerbated by Lehman executives, whose conduct ranged from serious but non-culpable errors of business judgment to actionable balance sheet manipulation; by the investment bank business model, which rewarded excessive risk taking and leverage; and by Government agencies, who by their own admission might better have anticipated or mitigated the outcome.""Lehman did not disclose … that it had been using an accounting device (known within Lehman as ‘Repo 105') to manage its balance sheet - by temporarily removing approximately $50 billion of assets from the balance sheet at the end of the first and second quarters of 2008 … Lehman used Repo 105 for no articulated business purpose except ‘to reduce balance sheet at the quarter-end.' … Lehman did not disclose its use - or the significant magnitude of its use - of Repo 105 to the Government, to the rating agencies, to its investors, or to its own Board of directors. Lehman's auditors, Ernst & Young, were aware of but did not question Lehman's use and nondisclosure of the Repo 105 accounting transactions."The report of the Examiner, including an executive summary, is available [here](http://lehmanreport.jenner.com/%22%20%5Ct%20%22_new).etailed Contents**1.4 Financial services consumer protection framework extended to superannuation borrowing arrangements**On 10 March 2010, the Australian Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, announced that the Government proposes to amend the Corporations Regulations 2001 to provide that certain borrowing arrangements by superannuation fund trustees permitted by the Superannuation Industry (Supervision) Act 1993 (the SIS Act) are financial products under the Corporations Act 2001. The amendments will extend the Government's consumer protection framework to cover certain superannuation borrowing arrangements such as instalment warrants and thereby help protect the savings of fund members. The measure will ensure that only licensed financial services providers offer these arrangements to superannuation funds.To allow product providers time to adjust to the new arrangements, the Regulations will come into effect three months after being made.As required by the Corporations Agreement, the Commonwealth will consult the States and Territories about the proposed amendments. The amendments will require the approval of the Governor General in Executive Council, and this will be sought as soon as possible.etailed Contents**1.5 Commodity Futures Trading Commission Chairman calls for major reform of derivative markets** On 9 March 2010, the Chairman of the US Commodity Futures Trading Commission (CFTC), Mr Gary Gensler, gave a speech in which he called for major reform of the derivatives markets.Following are extracts from the speech which contain the key points. The speech focussed largely on credit default swaps (CDS).The CDS marketplace grew from a notional value of around US$630 billion in the second half of 2001 to US$36 trillion by the end of 2009. That is equivalent to roughly two and a half times the amount of goods and services sold in the American economy annually.The 2008 financial crisis had many chapters, but credit default swaps played a lead role throughout the story. They were at the core of the US $180 billion bailout of AIG. **(a) Over-the-counter derivatives reform**The 2008 financial crisis demonstrated how over-the-counter derivatives - initially developed to help manage and lower risk - can actually concentrate and heighten risk in the economy. First, derivatives dealers must be explicitly regulated. They should be required to have sufficient capital and to post collateral on transactions to protect the public from bearing the costs if dealers fail. Dealers should be required to meet robust standards to protect market integrity and lower risk and should be subject to stringent record-keeping requirements. Second, to promote public transparency, standard over-the-counter derivatives should be traded on exchanges or other trading platforms.Third, to lower risk further, standard OTC derivatives should be brought to clearinghouses.**(b) Market manipulation** The CFTC and the SEC should have clear authority to police the over-the-counter derivatives markets for fraud, manipulation and other abuses.**(c) Bankruptcy** Credit default swaps also can play a significant role once a company has defaulted or gone into bankruptcy. Bondholders and creditors who have CDS protection that exceeds their actual credit exposure may thus benefit more from the underlying company's bankruptcy than if the underlying company succeeds.Though reform efforts to date have yet to address the bankruptcy laws, consideration should be given to modifications to address this new development in capital markets. One possible reform would be to require CDS-protected creditors of bankrupt companies to disclose their positions. Another is to specifically authorize bankruptcy judges to restrict or limit the participation of "empty creditors" in bankruptcy proceedings.**(d) Adequate capital and risk management**Under the Basel II capital accords, large banks and investment banks could significantly decrease their regulatory capital by relying on "credit risk mitigants," including CDS positions on existing exposures. Bank capital regulation should be modified to make the use of CDS for capital reduction more restrictive.**(e) Asset securitization**Though CDS at first was promoted as an important market innovation, their development ultimately contributed to lower underwriting standards. Investment banks and other packagers of mortgages wrapping securities with credit protection for sale to investors could reduce their efforts in analyzing the risk that due diligence would otherwise require. It is important that reform enable the CFTC and SEC to write rules to establish recordkeeping and reporting rules as well as business conduct standards to help address these risks. The full speech is available on the [CFTC](http://www.cftc.gov/ucm/groups/public/%40newsroom/documents/speechandtestimony/opagensler-32.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.6 Audit quality in Australia: A strategic review** On 5 March 2010, the Chairman of the Australian Financial Reporting Council, Mr Jeffrey Lucy AM, released a Treasury consultation paper 'Audit Quality in Australia: A Strategic Review.'The Treasury paper identifies the key drivers of audit quality in Australia and assesses whether any measures should be taken to address any real or perceived threats to these drivers of audit quality.Treasury has drawn on the experience, research and studies on audit quality undertaken in Australia, in foreign jurisdictions, including the UK and US, and by international bodies.The Treasury paper is designed to facilitate informed debate within Australia with a view to achieving appropriate policy responses to the issues raised in the paper which may provide a blueprint for possible future reforms.The consultation paper is available on the [Treasury](http://www.treasury.gov.au/documents/1745/PDF/Audit_Quality_in_Australia.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.7 APRA releases enhancements to prudential framework for life companies** On 4 March 2010, the Australian Prudential Regulation Authority (APRA) released final prudential standards on enhancements to the prudential framework for life insurance companies.Legislation was passed in 2009 that gave APRA power to regulate non-operating holding companies (NOHCs) of life insurance companies, including the power to determine prudential standards for life NOHCs. APRA will apply to these NOHCs the same governance and fit and proper standards that currently apply to NOHCs of authorised deposit-taking institutions (ADIs) and general insurers. APRA is also making some limited amendments to the audit and actuarial requirements for life companies. These amendments clarify APRA's requirements and align them more closely with those for ADIs and general insurers.The package released includes a response paper to submissions received on APRA's draft proposals of May 2009 as well as the following revised prudential standards:* Prudential Standard LPS 510 Governance (LPS 510);
* Prudential Standard LPS 520 Fit and Proper (LPS 520);
* Prudential Standard LPS 310 Audit and Related Matters (LPS 310); and
* Prudential Standard LPS 320 Actuarial and Related Matters (LPS 320).

The response paper discusses the main issues raised in the submissions and APRA's response to these issues. A number of clarifications were sought in the submissions, and in some instances APRA has amended its proposals to address matters raised.The four revised prudential standards will take effect from 1 July 2010.The response paper and the prudential standards are available on the [APRA](http://www.apra.gov.au/Life/Enhanced-supervision-of-life-companies-Response-to-Submissions-March-2010.cfm%22%20%5Ct%20%22_new) website.etailed Contents**1.8 CESR recommends European institutions introduce a pan-European short selling disclosure regime** On 2 March 2010, the Committee of European Securities Regulators (CESR) submitted a report as technical advice to the European Institutions (Ref. CESR/10-088), in which CESR recommends the introduction of a pan-European disclosure regime for net short positions in shares. In the meantime, those CESR Members that already have powers to introduce a permanent disclosure regime, as elaborated in the report, will begin the process of implementing this regime. Those CESR Members who do not have the necessary legal powers will aim to implement this regime on a best efforts basis, until an EU regime is adopted. CESR recognises that legitimate short selling plays an important role in financial markets. It contributes to efficient price discovery, increases market liquidity, facilitates hedging and other risk management activities and can possibly help mitigate market bubbles. However, it can also be used in an abusive fashion to drive down the price of financial instruments to a distorted level and, in extreme market conditions, can have an adverse impact on financial stability. Following the recent financial turmoil, it was widely recognised that for a short selling disclosure regime to be efficient and to ensure transparency for market participants, a convergent pan-European regulatory approach is necessary. The short selling disclosure regime proposed by CESR is a two tier-model for the disclosure of significant individual net short positions in all shares that are admitted to trading on an European Economic Area (EEA) regulated market and/or an EEA Multilateral Trading Facility (MTF), when the primary market of those shares is located in the EEA. Under the proposed regime, at the lower threshold of 0.2%, positions should be disclosed to the relevant competent authority. In addition, steps of 0.1% would trigger further disclosure obligations. After the position reaches the higher threshold of 0.5% and any additional steps of 0.1% thereafter, the position should be disclosed to the competent authority as well as to the market as a whole. In calculating whether a disclosure is required, market participants should aggregate any position which provides an economic exposure to a particular share. Positions held in exchange-traded and OTC derivatives would therefore be covered, as well as short positions in cash markets. Disclosure calculations and reports would be done on a net basis with any positions involving long economic exposures to a share subtracted from the short positions. Disclosure reports of short positions - whether to the regulator, or to the market, would be made on the trading day following that on which the relevant threshold or additional step has been crossed. Market making activities will be exempted from the disclosure requirements.By proposing a pan-European harmonised disclosure regime for short selling to the European Institutions, CESR seeks to enhance supervisory convergence, improve market transparency and promote market efficiency and integrity. CESR will continue to work in the coming months on this issue, to ensure greater clarity on the technical details necessary to implement such a regime effectively.Further information is available on the [CESR](http://www.cesr.eu/popup2.php?id=6488" \t "_new) website.etailed Contents**1.9 Overview of recent developments in the financial markets**On 1 March 2010, the Bank for International Settlements (BIS) Quarterly Review for March 2010 was released and gives an overview of recent developments in financial markets. It attributes the fall in asset prices between mid-January and mid-February to, among other factors, the unevenness of the global economic recovery and concerns about sovereign credit risk in the light of large fiscal deficits.It also provides highlights from the latest BIS data on international banking and financial activity.The March issue features articles on: * The architecture of global banking.
* What happens to exchange rates during financial crises. Comparing three recent financial crises, the article shows that exchange rate movements were unusual during the 2007-09 global financial crisis.
* How far the banking sector is still dependent on central bank and government support.

The review is available on the [BIS](http://www.bis.org/publ/qtrpdf/r_qt1003.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.10 European Commission asks stakeholders for views on further possible changes to Capital Requirements Directive** On 26 February 2010, the European Commission launched a public consultation on further possible changes to the Capital Requirements Directive (CRD) aimed at strengthening the resilience of the banking sector and the financial system as a whole. The proposed changes, known as 'CRD IV', following two earlier Commission proposals amending the CRD, relate to seven specific policy areas, most of which reflect commitments made by G20 leaders at summits in London and Pittsburgh during 2009. These commitments included building high-quality capital, strengthening risk coverage, mitigating pro-cyclicality and discouraging leverage, as well as strengthening liquidity risk requirements and forward-looking provisioning for credit losses. The purpose of the CRD (2006/48/EC and 2006/49/EC) is to ensure the financial soundness of banks and investment firms. Together they stipulate how much of their own financial resources banks and investment firms must have in order to cover their risks and protect depositors.The Commission is asking all interested stakeholders for their views on further possible changes to the CRD. These possible changes ('CRD IV') will supplement the two existing sets of revisions adopted in October 2008 ('CRD II', IP/08/1433) and July 2009 ('CRD III', IP/09/1120).The seven areas of potential action are as follows:* Liquidity standards: Introducing liquidity standards that include a liquidity coverage ratio requirement underpinned by a longer-term structural liquidity ratio.
* Definition of capital: Raising the quality, consistency and transparency of the capital base.
* Leverage ratio: Introducing a leverage ratio as a supplementary measure to the Basel II risk-based framework based on appropriate review and calibration.
* Counterparty credit risk: Strengthening the capital requirements for counterparty credit risk exposures arising from derivatives, repos and securities financing activities.
* Countercyclical measures: A countercyclical capital framework will contribute to a more stable banking system, which will help dampen, instead of amplify, economic and financial shocks.
* Systemically important financial institutions: The Commission is consulting on appropriate measures to deal with the risk posed by such institutions.
* Single rule book in banking: The Commission is consulting on areas where more stringent requirements might be necessary. In addition, the Commission is consulting on the appropriate prudential treatment of real estate lending. This is part of the Commission's commitment to create a single rule book in Europe.

In order to achieve the dual objective of improving the resilience of the global financial system and ensuring a level playing field, it will be essential that a more robust and consistent set of prudential capital requirements is applied across the world. Consequently, the possible changes set out in the consultation document are closely aligned with the forthcoming amendments to the Basel II framework and the introduction of a global liquidity standard that are currently being drawn up by the Basel Committee on Banking Supervision (BCBS, http://www.bis.org ). In this context, as part of the countercyclical measures, the Commission puts greater emphasis on dynamic 'through-the-cycle' provisioning.etailed Contents**1.11 International regulators publish systemic risk data requirements for hedge funds** On 25 February 2010, the International Organization of Securities Commissions Technical Committee (IOSCO) published details of an agreed template for the global collection of hedge fund information which it believes will assist in assessing possible systemic risks arising from the sector. The template was developed by the Task Force on Unregulated Entities (Task Force) following requests from the Financial Stability Board (FSB) as well as from IOSCO members. The purpose of the template is to enable the collection and exchange of consistent and comparable data amongst regulators and other competent authorities for the purpose of facilitating international supervisory cooperation in identifying possible systemic risks in this sector. IOSCO believes that participants are best monitored through their trading activities, the markets they operate in, funding and counterparty information, amongst others. The template is not a comprehensive list of all types of information and data that regulators might want and so regulators are not restricted from requiring additional information at a domestic level. IOSCO is publishing the template now to help inform any planned legislative changes being considered in various jurisdictions, as well as providing securities regulators the type of information authorities could gather. The Task Force has recommended that the first data gathering exercise should be carried out on a best efforts basis (given pending legislation in many jurisdictions) in September 2010. The categories of information are: * General manager and adviser information
* Performance and investor information related to covered funds
* Assets under management
* Gross and net product exposure and asset class concentration
* Gross and net geographic exposure
* Trading and turnover issues
* Asset/liability issues
* Borrowing
* Risk issues
* Credit counterparty exposure
* Other issues

The report is available on the [IOSCO](http://www.iosco.org/news/pdf/IOSCONEWS179.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.12 SEC approves statement on global accounting standards**On 24 February 2010, the US Securities and Exchange Commission (SEC) voted to issue a statement that lays out its position regarding global accounting standards and makes clear that the Commission continues to believe that a single set of high-quality globally accepted accounting standards would benefit US investors. As a step toward achieving the goal of a single set of high-quality global accounting standards, the statement notes that the Commission continues to encourage the convergence of US Generally Accepted Accounting Principles (US GAAP) and International Financial Reporting Standards (IFRS) in order to narrow the differences between the two sets of standards.The Commission also directed its staff to execute a Work Plan, the results of which will aid the Commission in its evaluation of the impact that the use of IFRS by US companies would have on the US securities market. Included in this Work Plan will be consideration of IFRS, as it exists and after the completion of various "convergence projects" currently underway between US and international accounting standards-setters. By 2011, assuming completion of these convergence projects and the staff's Work Plan, the Commission will decide whether to incorporate IFRS into the US financial reporting system, and if so, when and how.Among other things, the staff's Work Plan will address many of the issues highlighted by commentators, including:* Determining whether IFRS is sufficiently developed and consistent in application for use as the single set of accounting standards in the US reporting system.
* Ensuring that accounting standards are set by an independent standard-setter and for the benefit of investors.
* Investor understanding and education regarding IFRS, and how it differs from US GAAP.
* Understanding whether US laws or regulations, outside of the securities laws, for example tax laws and regulatory reporting, would be affected by a change in accounting standards.
* Understanding the impact on companies, both large and small, including changes to accounting systems, changes to contractual arrangements, corporate governance considerations and litigation contingencies.
* Determining whether the people who prepare and audit financial statements are sufficiently prepared, through education and experience, to make the conversion to IFRS.

Commentators on the Proposed Roadmap also expressed a view that US companies would need approximately a four- to five-year timeframe to successfully implement a change in their financial reporting systems to incorporate IFRS. Therefore, if the Commission determines in 2011 to incorporate IFRS into the US financial reporting system, the first time that US companies would report under such a system would be no earlier than 2015. The Work Plan would further evaluate this timeline.Further information is available on the [SEC](http://www.sec.gov/rules/other/2010/33-9109.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.13 SEC approves short selling restrictions** On 24 February 2010, the US Securities and Exchange Commission (SEC) adopted a new rule to place certain restrictions on short selling when a stock is experiencing significant downward price pressure. The measure is intended to promote market stability and preserve investor confidence.This alternative uptick rule is designed to restrict short selling from further driving down the price of a stock that has dropped more than 10 percent in one day. It will enable long sellers to stand in the front of the line and sell their shares before any short sellers once the circuit breaker is triggered.Short selling involves the selling of a security that an investor does not own or has borrowed. When shorting a stock, the investor expects that he or she can buy back the stock at a later date for a lower price than it was sold for. Rather than buying low and selling high, the investor is hoping to sell high and then buy low. Short selling can serve useful market purposes, including providing market liquidity and pricing efficiency. However, it also may be used improperly to drive down the price of a security or to accelerate a declining market in a security.The alternative uptick rule (Rule 201) approved imposes restrictions on short selling only when a stock has triggered a circuit breaker by experiencing a price decline of at least 10 percent in one day. At that point, short selling would be permitted if the price of the security is above the current national best bid.Rule 201 includes the following features:**Short sale-related circuit breaker:** The circuit breaker would be triggered for a security any day in which the price declines by 10 percent or more from the prior day's closing price.**Duration of price test restriction:** Once the circuit breaker has been triggered, the alternative uptick rule would apply to short sale orders in that security for the remainder of the day as well as the following day.**Securities covered by price test restriction:** The rule generally applies to all equity securities that are listed on a national securities exchange, whether traded on an exchange or in the over-the-counter market.**Implementation:** The rule requires trading centres to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent the execution or display of a prohibited short sale.Further information is available on the [SEC](http://www.sec.gov/rules/final/2010/34-61595.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.14 FSA publishes paper on systemic risks of hedge funds** On 23 February 2010, the UK Financial Services Authority (FSA) published a paper titled "Assessing possible sources of systemic risk from hedge funds: a report on the findings of the hedge fund as counterparty survey and hedge fund survey". The paper examines the results of the FSA's recent survey on whether hedge funds could pose a source of systemic risk to the financial system. The FSA states that, in the case of hedge funds, systemic risk could arise through two main channels:**The credit channel:** If hedge funds suffer losses on their investments, then once investors' capital has been eroded, losses would be borne by creditors. Where the failing fund is large, or there are a number of funds involved, then this could destabilise creditors, who might be systemically important in their own right.**The market channel:** In a number of asset classes, hedge funds may be significant investors and/or providers of liquidity. As a result, it is possible for their collective impact to be one of the drivers of unsustainable asset price upswings in certain markets. And, in particular, in moments of financial crisis, forced selling by hedge funds may cause downward price adjustments to overshoot.The FSA surveys gathered a very large amount of data and the paper provides analysis and conclusions on subjects, such as leverage (assessing funds' overall footprint and cash borrowings), asset/liability mismatch, credit counterparty risk, fund performance and other supervisory issues.The paper is available on the [FSA](http://www.fsa.gov.uk/pubs/other/hedge_funds.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.15 Restoring investor confidence in European capital markets**On 23 February 2010, the European Investors' Working Group, an independent non-political investor group composed of members from the retail and institutional investment industry community published a report titled ‘Restoring Investor Confidence in European Capital Markets'. The report provides a framework of recommendations for the EU regulatory and supervisory agenda from the investor's perspective, guided by the six objectives of: investor protection; better transparency; market integrity; market efficiency, quality of supervision and competitiveness of EU markets.The report is available on the [Centre for European Policy Studies](http://www.ceps.be/ceps/download/2991%22%20%5Ct%20%22_new) website. etailed Contents**1.16 Report on oversight of ASIC** On 22 February 2010, the Parliamentary Joint Committee on Corporations and Securities published its report titled "Statutory Oversight of the Australian Securities and Investments Commission". The matters dealt with in the report include complaints handling, credit regulation, PI insurance, frozen mortgage funds, Professional Standards Board, criticism of ASIC-initiated court actions, and insolvency.The report is available on the [Committee's](http://www.aph.gov.au/senate/committee/corporations_ctte/asic/index.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.17 SEC announces efforts to educate investors about participating in corporate elections** On 22 February 2010, the US Securities and Exchange Commission (SEC) announced a series of steps to educate investors about proxy voting and support greater investor participation in corporate elections. The series of measures include amending the SEC's e-proxy rules, issuing an Investor Alert, and creating new Internet resources that explain the proxy voting process in plain language.Last year, the Commission approved a change to the New York Stock Exchange rule that previously allowed brokers the discretion to vote shares held in customer accounts in an uncontested election of directors without receiving voting instructions from those customers. Now, brokers can only vote those shares in elections at companies if they are instructed by their customers. The change does not apply to mutual funds or certain closed end funds.To support shareholder participation in corporate elections and help educate investors about how the voting process works, the Commission has:* Amended the SEC's proxy rules to clarify and provide additional flexibility when companies and other persons are relying on the "e-proxy rules." Those rules allow a notice to be sent to shareholders indicating that the proxy materials are online and available upon request, rather than requiring a full package of materials containing a proxy card, annual report and proxy statement be sent. The new rule amendments will, among other things, allow shareholders to be provided with additional materials explaining the e-proxy rules. The Commission issued an adopting release related to the amended rules.
* Published a new Investor Alert entitled New Shareholder Rules for the 2010 Proxy Season. The Alert provides investors with information related to the recent changes to broker voting rules and the impact of those new rules on proxy voting.
* Launched a new Spotlight page that provides investors with information on the mechanics of proxy voting, the e-proxy rules, corporate elections and proxy matters generally.

Further information is available on the [SEC](http://www.sec.gov/%22%20%5Ct%20%22_new) website.etailed Contents**1.18 IOSCO publishes 'Principles for Periodic Disclosure by Listed Entities'** On 22 February 2010, the Technical Committee of the International Organization of Securities Commission (IOSCO) published a final report ‘Principles for Periodic Disclosure by Listed Entities' (Periodic Disclosure Principles) that includes a set of recommendations for disclosures that could be provided in the periodic reports, particularly annual reports, of listed entities whose securities are listed or admitted to trading on a regulated market in which retail investors participate. The ‘Periodic Disclosure Principles' also cover other issues related to periodic disclosure, such as the timeliness of disclosures, disclosure criteria and storage of information.The ‘Periodic Disclosure Principles' provide guidance to securities regulators for use in developing or reviewing their disclosure regimes for the periodic reports of listed entities with securities listed or admitted to trading on a regulated market in which retail investors participate. These periodic reports enhance investor protection by providing relevant information which facilitates investor decision-making, allow investors to compare the performance of the same company over regular intervals and enable investors to make comparisons between different companies. These principles form part of IOSCO's ongoing work to develop principles for disclosure by issuers of listed securities to investors in the public capital markets. The following principles have been identified as essential for any periodic disclosure regime: 1. Periodic reports should contain relevant information;
2. For those periodic reports in which financial statements are included, the persons responsible for the financial statements provided should be clearly identified, and should state that the financial information provided in the report is fairly presented;
3. The issuer's internal control over financial reporting should be assessed or reviewed;
4. Information should be available to the public on a timely basis;
5. Periodic reports should be filed with the relevant regulator;
6. The information should be stored to facilitate public access to the information;
7. Disclosure criteria;
8. Equal access to disclosure; and
9. Equivalence of disclosure.

The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD317.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.19 IFAC global survey says international standards crucial to investors and financial stability** Global accountancy leaders want the International Federation of Accountants (IFAC) to increase pressure for adoption, implementation, and enforcement of international financial standards, according to a media release published by IFAC on 22 February 2010. Investors and all consumers of financial information deserve clear, reliable, and consistent information, IFAC organizations from around the world asserted in a survey by IFAC.The survey is available on the [IFAC](http://web.ifac.org/publications/ifac-policy-position-papers-reports-and-comment-letters/reports-1%22%20%5Ct%20%22_new) website.etailed Contents**1.20 Lessons and policy implications from the global financial crisis** On 1 February 2010, the International Monetary Fund (IMF) published a working paper titled ‘Lessons and Policy Implications from the Global Financial Crisis'. According to the paper the ongoing global financial crisis is rooted in a combination of factors common to previous financial crises and some new factors. The crisis has brought to light a number of deficiencies in financial regulation and architecture, particularly in the treatment of systemically important financial institutions, the assessments of systemic risks and vulnerabilities, and the resolution of financial institutions. The global nature of the financial crisis has made clear that financially integrated markets, while offering many benefits, can also pose significant risks, with large real economic consequences. Deep reforms are therefore needed to the international financial architecture to safeguard the stability of an increasingly financially integrated world. The paper is available on the [IMF](http://www.imf.org/external/pubs/ft/wp/2010/wp1044.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.21 European Committee on Economic and Monetary Affairs publishes report on efficient, safe and sound derivatives markets** In February 2010, the European Parliament's Committee on Economic and Monetary Affairs published a draft report on efficient, safe and sound derivatives markets. It is stated in the draft report that the proposed policy actions are based on the February 2009 De Larosière report, the European Council conclusions of June 2009 and the G-20 decisions made in the second half of 2009. The Commission is proposing four policy action areas, namely:* further standardisation of derivative contracts;
* the use of trade repositories;
* greater use of central counterparty clearing houses; and
* greater use of organised trading venues.

The draft report is available on the [European Parliament](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML%2BCOMPARL%2BPE-438.493%2B01%2BDOC%2BPDF%2BV0//EN&language=EN" \t "_new) website. etailed Contents**1.22 OECD publishes conclusions and good practices on corporate governance** The Organisation for Economic Co-operation and Development (OECD) has published a report which sets out good practices to assist companies and policy makers overcome corporate governance weaknesses and implement the OECD principles on corporate governance.This report represents the third phase of the OECD Steering Group on Corporate Governance action plan on corporate governance and the financial crisis. It builds on the report ‘Corporate Governance Lessons from the Financial Crisis' and its subsequent, preliminary findings that were presented in "Corporate Governance and the Financial Crisis: Key Findings and Main Messages."The matters dealt with in the report are:* governance of remuneration and incentives
* improving the governance of risk management
* improving board practices
* the exercise of shareholder rights.

The report is available on the [OECD](http://www.oecd.org/dataoecd/53/62/44679170.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.23 Report on regulatory failures and the financial crisis in Europe** In February 2010, the Special Committee on the Financial and Economic Crisis (CRIS), set up by the European Parliament in October 2009, published a report titled "To what extent did financial regulation and supervision fail in preventing the crisis?" It is stated in the report that "the financial and economic crisis was not simply a question of major "market failures" but also a dramatic consequence of deep institutional (governmental) failures". This paper provides an overview of these failures which, according to the author, prevented averting and then properly managing, the recent financial crisis.The report is available on the [European Parliament](http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=29752" \t "_new) website.etailed Contents**1.24 Inquiry into liquidators and administrators** The Senate Standing Committee on Economics is currently conducting an inquiry into liquidators and administrators. The terms of reference are: "This inquiry will investigate the role of liquidators and administrators, their fees and their practices, and the involvement and activities of the Australian Securities and Investments Commission, prior to and following the collapse of a business."Submissions closed on 19 February 2010 and the reporting date is 31 August 2010.The Committee received 72 submissions. Those who have made submissions include ASIC, the Institute of Chartered Accountants in Australia, Insolvency and Trustee Service Australia, the Insolvency Practitioners Association of Australia, the Treasury, academics and a number of insolvency practitioners. The ASIC submission deals with:* the insolvency environment and regulatory framework;
* ASIC's activities;
* ASIC's forward program; and
* ASIC's response to issues raised in other submissions.

The submissions (other than the confidential submissions) are available on the [Committee's](http://www.aph.gov.au/senate/committee/economics_ctte/liquidators_09/submissions.htm%22%20%5Ct%20%22_new) website.etailed Contents |

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

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| **2.1 ASIC seeks feedback on requirements for trustee companies providing traditional services** On 15 March 2010, the Australian Securities and Investments Commission (ASIC) released consultation paper 132 titled ‘Trustee Companies: Financial Requirement and Conduct Obligations' (CP 132) seeking public comment on the financial requirements and other conduct obligations for trustee companies that provide traditional trustee company services (traditional services), such as acting in deceased estates and under powers of attorney. Under legislation enacted late last year, the provision of traditional services by trustee companies will be regulated as a financial service under the Corporations Act and will be brought under the supervision of ASIC. Revised draft regulations under the Corporations Act for trustee companies were recently released for further public comment. Trustee companies are currently regulated under legislation in each State and Territory.Those trustee companies providing traditional services which currently hold an Australian Financial Services (AFS) licence must vary their licence to include the provision of traditional services within six months of the regulations commencing. Treasury is currently consulting on transitional arrangements for those trustee companies currently providing traditional services that do not hold an AFS licence.ASIC's existing policies and regulatory documents on financial services, other than financial resources requirements (which are the subject of CP 132) and Regulatory Guide 165 (which is the subject of a consultation paper that will be issued in due course), will generally apply to trustee companies that provide traditional services.The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp132.pdf/%24file/cp132.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.2 ASIC updates share purchase plan relief** On 15 March 2010, the Australian Securities and Investments Commission (ASIC) released changes to Class Order [CO 09/425], which provides prospectus and product disclosure statement relief for share and interest purchase plans. Under the changes, investors holding shares through structures such as investor-directed portfolio services and superannuation master trusts, or who hold shares through structures involving two or more levels of custodians, will now be able to participate in share purchase plans. Changes have also been made to ASIC's relief so that investors who pay for their shares via an electronic payment facility will no longer be required to return a physical application form. Finally, changes have been made to Class Order [CO 05/26] to facilitate the operation of interest purchase plans undertaken by listed managed investment schemes. Regulatory Guide 125 ‘Share Purchase Plans' has been updated to reflect the changes to Class Order [CO 09/425]. Class Order [CO 10/105] ‘Variation of Class Orders' [CO 05/26] and [CO 09/425] is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co10-105.pdf/%24file/co10-105.pdf%22%20%5Ct%20%22_new).Class Order [CO 09/425] ‘Share and interest purchase plans' is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co09-425a.pdf/%24file/co09-425a.pdf%22%20%5Ct%20%22_new).Class Order [CO 05/26] ‘Constitutional provisions about the consideration to acquire interests' is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co05-26a.pdf/%24file/co05-26a.pdf%22%20%5Ct%20%22_new).Regulatory Guide 125 ‘Share purchase plans' is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg125a.pdf/%24file/rg125a.pdf%22%20%5Ct%20%22_new).etailed Contents**2.3 ASIC releases audit firm inspection report**On 11 March 2010, the Australian Securities and Investments Commission (ASIC) released its fourth audit inspection program public report summarising the results of audit firm inspections completed between 1 January 2008 and 30 June 2009.ASIC reviewed audit engagement files across 19 firms, focusing on the substance of the auditor's work and whether sufficient and appropriate audit evidence was documented to support the conclusions reached in relation to key audit judgments. ASIC's inspection identified a number of cases requiring improvements in audit quality in audit areas related to the global financial crisis, such as the appropriate use of experts in testing asset valuations. Additionally, the adequacy of audit evidence and documentation for significant audit judgment areas continues to be an area of focus for ASIC.The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep192.pdf/%24file/rep192.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.4 Short position reporting** On 5 March 2010, the Australian Securities and Investments Commission (ASIC) announced decisions made in relation to the following provisions introduced in the Corporations Amendment Regulations 2009 (No 8) (SR No 327 of 2009) (Short Selling Regulations):* to delay the commencement of short seller obligations to lodge short position reports from 1 April 2010 to 1 June 2010; and
* to reschedule the commencement of ASIC obligations to publish aggregated short position reports from 1 April 2010 to 21 June 2010.

The change in the commencement of the short seller's obligation to report its short positions will allow short sellers more time to ensure they have the appropriate systems in place to meet their reporting obligations. ASIC will facilitate an industry-wide pilot test to allow short sellers access to the new reporting infrastructure from 10 May 2010.To assist short sellers and systems developers adequately prepare for the new reporting requirements, ASIC has also revised Information Sheet 98, now titled ‘Short Selling: Short Position Reporting (INFO 98)'.INFO 98 includes key tasks and practical information which stakeholders must be aware of prior to the revised start date for the reporting requirements. INFO 98 also contains details relating to the threshold for short position reporting and other technical amendments, as well as information about the FIX Rules of Engagement. In the period leading up to implementation, ASIC will regularly update INFO 98.ASIC will shortly publish a revised Regulatory Guide 196 ‘Short selling' (RG 196). This document will contain more details about the decisions described above. Other updates in this document will reflect recent changes in the law, some exemptions provided to allow for certain naked short selling and guidance in relation to the disclosure and reporting requirements that apply.Further information is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/Short%2Bselling%2Breporting%2B-%2BFIX%2Brules%2Bof%2Bengagement?openDocument" \t "_new) website.etailed Contents**2.5 ASIC releases results of term deposit health check** On 1 March 2010, the Australian Securities and Investments Commission (ASIC) released the results of its ‘health check' of the Australian term deposit market. ASIC conducted this review against the background of significant growth in term deposits, with total term deposits in Australian Deposit Institutions (ADIs) growing by over 20 per cent from June 2008 to June 2009.Currently, ASIC estimates that total term deposits in ADIs now exceed $530 billion. ASIC's review looked at the period 1 January 2008 to 27 February 2009 and covered eight authorised deposit-taking institutions (ADIs) holding over 80 per cent of Australia's total term deposits.ASIC's review found that seven out of the eight ADIs reviewed promoted their term deposits by advertising only the highest term deposit rates, while maintaining lower rates for all other deposit periods. The periods on which the advertised higher rates were offered varied over time.This ‘dual pricing' coupled with the potential for term deposits to rollover by default if the investor does not take action, create a risk that a retail investor could inadvertently end up in a much lower interest term deposit. ASIC's recommendations are designed to address this risk by maximising the disclosure to investors about what happens when their term deposit matures.ASIC will conduct a follow up review 12 months after the implementation of its recommendations by ADIs.The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep185.pdf/%24file/rep185.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.6 ASIC consults on market integrity rules**The Australian Securities and Investments Commission (ASIC) is taking over responsibility for supervision of real-time trading on Australia's domestic licensed markets. This will supplement its existing responsibility for enforcement of the laws against misconduct on Australia's financial markets. On 26 February 2010, ASIC released a consultation paper proposing its new market integrity rules. Consultation paper 131 ‘Proposed ASIC Market Integrity Rules - ASX and SFE Markets' (CP 131) proposes market integrity rules to apply to trading on ASX and SFE markets, based on the existing rules of these markets, while clarifying the supervisory responsibilities of ASIC and market operators. The paper contains as background an outline of a proposed approach to dealing with breaches of the rules, including details of a Markets Disciplinary regime as similar as possible to the current ASX disciplinary tribunal, with penalties consistent with the current approach. The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2BPaper%2B131%2BProposed%2BASIC%2BMarket%2BIntegrity%2BRules%2B%EF%BF%BD%2BASX%2Band%2BSFE%2BMarkets?openDocument" \t "_new) website.etailed Contents**2.7 ASIC releases guidance for credit licensees about responsible lending obligations** On 26 February 2010, the Australian Securities and Investments Commission (ASIC) released regulatory guidance for credit licensees about the responsible lending obligations in the National Consumer Credit Protection Act (National Credit Act). ASIC's Regulatory Guide 209 ‘Credit licensing: Responsible lending conduct obligations' (RG 209) has been developed to help industry understand ASIC's expectations in relation to their responsible lending obligations as credit licensees. The release of this regulatory guide is part of ASIC's effort to provide early guidance to assist credit licensees to comply with their responsible lending obligations on the commencement of the National Consumer Credit regime in July 2010. The responsible lending conduct obligations will apply to brokers and some lenders from 1 July 2010. The responsible lending obligations are key new requirements under the National Credit Act. RG 209 takes into account feedback from individual industry participants, industry organisations and consumer representatives following the release of a consultation paper on responsible lending last year (Consultation Paper 115 Responsible lending).RG 209 is designed to help credit licensees and credit licence applicants to: * develop arrangements and systems to meet their responsible lending obligations; and
* understand what ASIC expects when assessing whether licensees are complying with their responsible lending obligations.

RG 209 recognises that the responsible lending conduct obligations in the Credit Act are designed to work in a flexible way and that it is the credit licensee's responsibility to put in place arrangements to comply with the responsible lending conduct obligations. RG 209 is principles based guidance that is designed to apply to a wide range of scenarios. ASIC will continue to assess the need for further guidance following the commencement of the regime.ASIC has also released a feedback report on the consultation process: Report 191 Response to submissions on CP 115 Responsible lending (REP 191).**Background**The National Credit Act requires credit licensees to meet responsible lending conduct obligations. These obligations will apply to both credit providers (e.g. lenders, such as banks, credit unions and finance companies) and credit assistance providers (e.g. mortgage or finance brokers). The key responsible lending obligation is that credit licensees must not suggest, assist with or provide a credit product that is unsuitable for a consumer. Before a credit licensee suggests, assists with, or provides a new credit contract or lease to a consumer, the credit licensee must: * make reasonable inquiries of the consumer about their requirements and objectives in relation to the credit contract;
* take reasonable steps to verify the consumer's financial situation;
* based upon these inquiries, assess whether the credit product is unsuitable for the consumer and only proceed if the credit product is not unsuitable; and
* give the consumer a copy of the assessment if requested.

A contract will be unsuitable if the consumer would be unable to repay it without substantial hardship or it will not meet the consumer's requirements or objectives. The requirements also apply where the credit limit on an existing contract is being increased.Regulatory Guide 209 ‘Credit licensing: Responsible lending conduct obligations' (RG 209) is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg209a.pdf/%24file/rg209a.pdf%22%20%5Ct%20%22_new).The Report 191 ‘Response to submissions on CP 115 Responsible lending' is available [here](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep191.pdf/%24file/rep191.pdf%22%20%5Ct%20%22_new).etailed Contents**2.8 ASIC clarifies relief for group insurance arrangements** On 24 February 2010, the Australian Securities and Investments Commission (ASIC) issued Class Order [CO 10/116] 'Group Purchasing Bodies - Variation of Class Order [CO 08/1].'Class Order [CO 08/1] provides conditional exemptions from the Australian financial services (AFS) licensing and managed investment scheme registration requirements for certain group purchasing bodies that arrange cover for third parties under insurance (excluding certain foreign insurance). ASIC has varied [CO 08/1] in response to requests for clarification from the insurance industry and some group purchasing bodies to provide certainty about who will be eligible for relief and to introduce greater flexibility for compliance with the conditions of relief. Regulatory Guide 195 ‘Group Purchasing Bodies for Insurance and Risk Products' (RG 195), which sets out ASIC's policy on the relief in [CO 08/1] has been revised to include more specific guidance and more ‘real life' examples.Group purchasing bodies may be eligible for the relief if they are independent or are acting incidentally to their not-for-profit activities. Conditions apply to the relief to ensure that the risks to people who receive financial services from group purchasing bodies are minimised. The class order includes a breach reporting obligation which will come into effect from the first time that the group purchasing body acquires, renews or renegotiates the terms of the insurance cover on or after 30 June 2010 but in any event not later than 30 June 2011. ASIC is conscious that some group purchasing bodies may wish to review their arrangements in light of the clarified relief and will take this into account during this transitional period.**Background**Group purchasing bodies arrange or hold cover under risk management products for others but do not issue risk management products or provide any financial product advice other than as a result of providing certain general information.As group purchasing bodies generally do not just obtain cover for members on a one-off basis, they may be carrying on a financial services business and therefore require an AFS licence. Some group purchasing bodies may enter into arrangements that constitute a managed investment scheme that requires registration under the [Corporations Act](http://my.lawlex.com.au/default.asp?cid=56482&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default).ASIC considers that requiring all group purchasing bodies to hold an AFS licence and comply with the management investment scheme registration requirements would impose a disproportionate cost burden on group purchasing bodies. The relief will ensure that eligible group purchasing bodies can continue to enter group purchasing arrangements for the benefit of their members or clients.The class order will commence after it has been gazetted and recorded on the Federal Register of Legislative Instruments (FRLI) in electronic form. The FRLI is available [here](http://www.frli.gov.au/%22%20%5Ct%20%22_new).The Class Order [CO 10/116] ‘Group Purchasing Bodies – Variation of Class Order [CO 08/1] is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co10-116.pdf/%24file/co10-116.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

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

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| **3.1 Reports**On 3 March 2010, the Australian Securities Exchange (ASX) released:* the ASX group monthly activity report; and
* the SFE monthly volume and open interest report

for February 2010.The ASX group monthly activity report is available [here](http://www.asx.com.au/about/pdf/ma_030310_monthly_activity_report_feb10.pdf%22%20%5Ct%20%22_new).The SFE monthly volume and open interest report is available [here](http://www.sfe.com.au/content/notices/2010/notice2010_033.pdf%22%20%5Ct%20%22_new).etailed Contents**3.2 Australian Securities Exchange to adopt next generation trading platform from NASDAQ OMX**On 18 February 2010, ASX issued a Press Release regarding the commitment to deliver ASX's next generation trading system - ASX Trade - powered by NASDAQ OMX's Genium INET trading platform. ASX Trade will replace the current integrated equities and derivatives trading platform and will enable significant latency and transaction capacity advantages.The press release is available on the [ASX](http://www.asx.com.au/about/pdf/mr_180210_asx_nox_genium.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.3 ASX limited half-year report - 31 December 2009**On 18 February 2010, ASX released its results for the half-year ending 31 December 2009. Robert Elstone, Managing Director and CEO, said: "The ASX group performed well during the first half of financial year 2010, following a rebound in financial market confidence, lower volatility and a modest return of risk appetite within the financial intermediary and investment community."The ASX media release is available [here](http://www.asx.com.au/about/pdf/mr_180210_hy2010results.pdf%22%20%5Ct%20%22_new) and the financial statements are available [here](http://www.asx.com.au/about/pdf/asx_180210_hy_results_financial_statements.pdf%22%20%5Ct%20%22_new). etailed Contents**3.4 New ASX Operating Rules to be introduced as a consequence of new ASIC Market Integrity Rules**On 10 February 2010 the Government introduced legislation into Parliament to amend the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) to provide for the Australian Securities and Investments Commission (ASIC) to supervise trading on financial markets with a domestic Australian market licence. ASIC has since released a set of proposed market integrity rules for consultation. ASIC's market integrity rules are based on the rulebooks which the Australian Securities Exchange has developed for the ASX and SFE markets.On 26 February ASX issued a series of notices regarding the new Operating Rules for ASX and SFE markets which are being prepared to take account of the new law. The current ASX Market Rules and SFE Operating Rules will be split into market integrity rules, to be supervised by ASIC, and operating rules to be administered by ASX. Consequently, market integrity rules will not be included in the ASX and SFE operating rules after the ASIC market integrity rules come into effect. At the same time ASX is taking the opportunity to make the rules simpler and more concise, remove duplication, move some material to the procedures and achieve consistency between the ASX and SFE Operating Rules, where useful and possible.Also issued on 26 February were the proposed frameworks for the ASX and SFE operating rules that show the existing rules which will be covered under each new section. ASX is planning to release a copy of the draft operating rules for the purpose of consultation once the rules are finalised.Further information is available on the [ASX](http://www.asx.com.au/%22%20%5Ct%20%22_new) website.etailed Contents**3.5 Market Quality Indicators: December quarter 2009 - ASX Equity and Index Futures**Market Quality Indicators is a publication that is updated quarterly and which provides up-to-date statistics that enable global institutions to evaluate trading opportunities in the five most actively traded contracts and the costs associated with executing trades on SYCOM.The latest edition of Market Quality Indicators is available on the [ASX](http://www.asx.com.au/%22%20%5Ct%20%22_new) website.etailed Contents**3.6 Upgraded online shares courses**ASX has released an upgraded version of its free online shares courses. These courses cover all the basics on investing in the sharemarket. The courses combine text, graphics, interactive exercises and quizzes for learners to test their knowledge. The courses are available on the [ASX](http://www.asx.com.au/resources/education/classes/online.htm%22%20%5Ct%20%22_new) website.etailed Contents**3.7 Summary of submissions received on Consultation Paper: ACH central counterparty risk management controls**On 30 October 2009, ASX released a consultation paper entitled ‘ACH Central Counterparty Risk Management Controls', seeking feedback on a number of alternative enhancements to ACH's risk control framework. In addition, where requested, ASX staff met bilaterally with a number of stakeholders to further outline the initiatives and provide further clarification. Twenty one submissions were received on behalf of 25 participants, one system vendor and two industry associations.On 25 February ASX released a paper providing a brief recap of the key initiatives outlined in the Consultation Paper and a high level summary of the responses received during the consultation process. Following this Consultation Paper feedback, ASX is currently analysing the preferred way forward and will revert to the industry in the near future.The summary paper is available on the [ASX](http://www.asx.com.au/about/pdf/20100225_ccp_risk_enhancements_response_summary.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

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

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| **4.1 Ten year anniversary of the Takeovers Panel**On 12 March 2010, the Australian Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, congratulated the Takeovers Panel on its ten year anniversary. "Over the past decade, the Panel has established itself as a key part of the regulation of capital markets in Australia by providing a fair, speedy and cost-effective mechanism to resolve disputes during takeover transactions," Mr Bowen said. "The existence of the Panel ensures takeover transactions are not unnecessarily delayed by protracted and costly litigation, which would adversely impact upon shareholders and market efficiency. Mr Simon McKeon, the President throughout this ten year period, said: "Since 13 March 2000 we have resolved more than 300 disputes, improved compliance in mergers and acquisitions, and dealt with many novel takeovers issues quickly and effectively. In doing so, we have freed up considerable court time and substantially reduced the cost to both market participants and the public purse. Takeovers regulation in Australia is at the forefront of international best practice and the Panel has been well received by the business community as an efficient way to resolve issues concerning takeovers."etailed Contents |

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

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| **5.1 Superannuation fund director entitled to be indemnified for legal costs in action brought by the superannuation fund trustee company**(By Beth McConnell, Freehills)Rickus v Motor Trades Association of Australia Superannuation Fund Pty Limited [2010] FCAFC 16, Full Federal Court, Jacobson, Siopis and Foster JJ, 26 February 2010The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2010fcafc16.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2010fcafc16.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 Rickus was the chairman of the board of directors of a trustee company. The trustee company brought an action against Mr Rickus for many claims. The Trustee's action was discontinued before a finding of liability was made against Mr Rickus. Mr Rickus had cross-claimed seeking indemnification by the Trustee for legal costs incurred by Mr Rickus in defending the Trustee's action. The Full Federal Court granted indemnification under the applicable Deed of Indemnity and the Trustee's Constitution.**(b) Facts** The appellant, Mr John Rickus, was the chairman of the board of directors of the first respondent, Motor Trades Association of Australia Superannuation Fund Pty Limited (Trustee), the trustee of the MTAA Industry Superannuation Fund (Fund). The Australian Prudential Regulation Authority (APRA) commenced a prudential review of the Fund in September 2006 following concerns that the Trustee's organisational structure gave rise to potential conflicts of interest. On 19 September 2006 and further to its review, APRA served on Mr Rickus a notice (Notice) requiring production of certain books and records. On 27 September 2006, Mr Rickus produced the required documents to APRA in accordance with the Notice. Prior to doing so, Mr Rickus informed the board of directors of the Trustee that he had been served with the Notice and, with the concurrence of the board, had obtained independent legal advice regarding his obligation to comply with the Notice. Mr Rickus was later removed from the board of the Trustee. In November 2006, Mr Rickus provided to the Trustee a list (but not a copy) of the documents which he had provided to APRA. The Trustee made several demands for a complete copy of the documents and, when these requests were refused, the Trustee commenced proceedings against Mr Rickus on 3 September 2007. The Trustee's action made many claims including that Mr Rickus was required to produce to the Trustee the documents which he had provided to APRA pursuant to the Notice. When the Trustee reduced the number of the claims, a hearing fixed for November 2007 was abandoned. On 26 November 2007, Justice Flick ordered the Trustee to pay to Mr Rickus the taxed costs incurred by Mr Rickus in defending the Trustee's proceedings on an indemnity basis up to 26 November 2007 (see *Motor Trades Association of Australia Superannuation Fund Pty Limited v Rickus* [2007] FCA 1878).On 1 February 2008, Mr Rickus filed a cross-claim in the Trustee's proceedings seeking indemnification by the Trustee for legal costs incurred by Mr Rickus in defending the Trustee's action. On 28 July 2008, the Court granted leave to the Trustee to discontinue its proceedings however Mr Rickus's cross-claim remained unresolved. On 24 December 2008 in *Motor Trades Association of Australia Superannuation Fund Pty Limited v Rickus* (No 3) [2008] FCA 1986, Justice Flick ordered that the cross-claim be dismissed with costs and that both parties bear their own costs from 27 November 2007. Mr Rickus appealed this decision and sought an order that the Trustee pay Mr Rickus's costs in relation to the Trustee's proceedings on an indemnity basis.**(c) Decision** The key issues identified by the court were as follows:**Does clause 2.2 of the Deed of Indemnity between Mr Rickus and the Trustee dated 15 February 2006 (Deed of Indemnity) oblige the Trustee to indemnify Mr Rickus for legal costs incurred by Mr Rickus in defending the Trustee's proceedings and in resisting the claims made by the Trustee before those proceedings were commenced?**Clause 2.2 of the Deed of Indemnity provided indemnity for legal costs as follows (Note that indemnification for any liability under clause 2.1 was precluded by the operation of section 199A(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default)):‘The Company shall indemnify the Officer to the maximum extent permitted by law against any liability for legal costs incurred in respect of a Liability incurred by the Officer as or by virtue of holding office as and acting in the capacity of an officer of the Company …other than for legal costs incurred:(a) in the circumstances set out in Section 199A(3)(a) of the Corporations Act, namely in defending or resisting proceedings in which the Officer is found to have a liability for which they could not be indemnified under Section 199A(2) of the Corporations Act.' Section 199A(2) of the Corporations Act provides:'A company or a related body corporate must not indemnify a person . against . a liability owed to the company or a related body corporate.This subsection does not apply to a liability for legal costs.'The primary judge held that Mr Rickus was precluded from indemnification of his legal costs by sections 199A(2)(a) and 199(3)(a) of the Corporations Act and by clause 2.2 which was held to be confined to legal costs incurred in respect of claims or proceedings brought by a third party. The primary judge rejected the additional argument by the Trustee that the indemnity only applied while Mr Rickus was acting in the capacity of director of the Trustee. The Full Federal Court agreed with the second finding of the primary judge.However, the Full Federal Court disagreed with the primary judge's interpretation of clause 2.2 of the Deed of Indemnity, finding:'Liability is defined inclusively . the expression . a Liability incurred by the Officer [in Clause 2.2]. is apt to cover a liability incurred by an officer in the relevant capacity which is incurred to the Trustee itself ... For the above reasons, as a matter of construction of Cl 2.2, legal costs incurred by the appellant in successfully defending proceedings brought by the Trustee itself or in achieving some other outcome which avoids a finding of liability in those proceedings in favour of the Trustee would not be outside the indemnity provided by Cl 2.2.'**Does Article 88 of the Trustee's Constitution oblige the Trustee to indemnify Mr Rickus for legal costs incurred by Mr Rickus in defending the Trustee's proceedings and in resisting the claims made by the Trustee before those proceedings were commenced?**The Full Federal Court held that Article 88 provided a stand-alone indemnity and ordered indemnification of Mr Rickus's legal costs on the basis that there was no finding in the Trustee's proceedings that he was liable to the Trustee and therefore indemnification was not precluded by Corporations Act section 199(3)(a). However, consistent with the finding that clause 2.1 of the Deed of Indemnity did not provide indemnity to Mr Rickus, indemnification did not extend to liability for claims made by the Trustee against Mr Rickus. **Does the common law entitle Mr Rickus to be indemnified for legal costs incurred by Mr Rickus in defending the Trustee's proceedings and in resisting the claims made by the Trustee before those proceedings were commenced?**The Full Federal Court held that Mr Rickus could not rely on a common law stand-alone indemnity. **Does Corporations Act section 199A prevent the Trustee from indemnifying Mr Rickus in respect of legal costs incurred by Mr Rickus in defending the Trustee's proceedings and in resisting the claims made by the Trustee before those proceedings were commenced?**The Full Federal Court held that indemnification of Mr Rickus's legal costs was not precluded by Corporations Act section 199A(3)(a). While the primary judge held that Mr Rickus was under a duty to provide a copy of all the requested documents to the Trustee (and this obligation was a liability owed to the Trustee within the meaning of Corporations Act section 199A(2)(a)), these findings were not made in the Trustee's proceedings. Rather these findings were made in consideration of Mr Rickus's cross-claim. The Trustee's proceedings were discontinued before such a finding was made in the Trustee's proceedings. The court held:‘Although it may have been the case that, had the Trustee pressed its proceedings to finality, the appellant would have been found liable to it as alleged, that is not how events unfolded and no finding of liability was ever made in the Trustee's proceedings.'It is worthwhile noting that the court did not consider whether the primary judge was correct in his articulation of the duty owed by Mr Rickus to the Trustee in consideration of Mr Rickus's cross-claim.**What is the appropriate order for costs of the Trustee's proceedings?** Mr Rickus was awarded indemnification from the Trustee for Mr Rickus's costs in relation to the Trustee's proceedings pursuant to the Deed of Indemnity and the Constitution. etailed Contents**5.2 Liquidators of responsible entities - amending constitutions and duties**(By Zoe Leyland, Mallesons Stephen Jaques) In the matter of Timbercorp Securities Limited (in liquidation) [2010] VSC 050, Supreme Court of Victoria, Davies J, 26 February 2010The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2010/feb/2010vsc050.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2010/feb/2010vsc050.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%20%22%20%5Ct%20%22_new) **(a) Summary**This decision of the Supreme Court of Victoria concerned an application by the liquidators of Timbercorp Securities Limited (in liquidation) ("TSL") for directions from the Court pursuant to section 511 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("the Act"). TSL is the responsible entity of the 2005 Timbercorp Citrus Project ("the Scheme"), a registered managed investment scheme for the cultivation, harvesting and processing of citrus.The liquidators sought a direction that they would be justified in procuring TSL to exercise its power under the Scheme's constitution to extinguish members' licences with respect to the use of property on which the citrus operations are conducted. The relevant power under the Scheme's constitution was inserted by the liquidators pursuant to section 601GC(1)(b) of the Act. The making of the direction was opposed by a member of the Scheme and by a members' group (collectively "the Growers"), who were joined as parties.Davies J ultimately concluded that an order should be made with respect to the liquidators procuring TSL to exercise its power under the Scheme's constitution. The decision is of broader relevance to responsible entities planning constitutional amendments to registered schemes under section 601GC(1)(b) of the Act as it further clarifies the terminology used and the circumstances in which that power may be exercised. While Davies J generally affirmed the construction of the section set out in obiter by Barrett J in *ING Funds Management Limited v ANZ Nominees Ltd* [2009] NSW 243, her Honour's decision demonstrates that the analysis and assessment required by section 601GC(1)(b) of the Act may nonetheless be established through a consideration of commercial strategies and approaches. The decision also provides some further guidance on the duties of a liquidator of a company which is the responsible entity of a managed investment scheme.**(b) Facts** The liquidators sought the direction on the basis that TSL, as the responsible entity of the Scheme, was not able to perform its obligations as it was hopelessly insolvent and unable to continue to fund the operations of the Scheme. The liquidators had earlier inserted a power into the Scheme's constitution to enable TSL to terminate the members' licence agreements so that the sale of the property on which the citrus schemes were conducted could be completed unencumbered by those rights. The power inserted into the Scheme's constitution was the power "to assign, terminate, surrender or otherwise deal with any Licence Agreement".Prior to this amendment, the events for termination of the licence agreements were outlined in the licence agreements that TSL entered into with the members upon acceptance of their applications to become a member of the Scheme. One event that could trigger termination was the termination of the Scheme. Under the constitution, termination of the Scheme occurred on completion of the scheme operations or on the winding up of the Scheme. The circumstance that "the purpose of the [Scheme]…cannot be accomplished" is a ground under the constitution for the formal winding up of the Scheme.**(c) Decision** **(i) The Growers' submissions**The Growers submitted that there was no valid and effective power in the constitution to terminate the licences as the liquidators had not formed the requisite state of mind required to amend the constitution under section 601GC(1)(b) of the Act. Section 601GC(1)(b) provides that a constitution of a registered scheme may be modified, or repealed and replaced with a new constitution, by the responsible entity if it reasonably considers that the change will not adversely affect members' rights.The Growers argued that the liquidators had not performed the task that was required by section 601GC(1)(b) of the Act but had instead directed their consideration to the members' commercial interests. It was further argued that if the requisite state of mind was held, it was not one that was reasonable as the amendment degraded the members' tenure under their licences to a licence terminable at will.It was also submitted that the liquidators would be in breach of their fiduciary duties to the members if they procured TSL to exercise its constitutional power to terminate the licences. It was argued that as the liquidators were also the liquidators of Timbercorp Limited ("TL") which had a 35 per cent interest in the ultimate holding company of the purchaser of the land on which the Schemes were conducted, the liquidators were required to obtain the informed consent of the members to the extinguishment of their licence agreements.**(ii) Efficacy of the amendment**Davies J generally agreed with the construction of the amendment power under section 601GC(1)(b) of the Act set out in obiter by Barrett J in *ING Funds Management Limited v ANZ Nominees Limited*. In that case, Barrett J outlined three components that must be established by the responsible entity. The first component involves an assessment of how the responsible entity viewed its members' rights prior to the amendment and how the proposed amendment would impact on those rights. The rights of members in this regard are the contractual and equitable rights conferred on members by the constitution as distinct from members' commercial interests or the enjoyment of their rights. Second, the responsible entity must establish that on the basis of this assessment, there would be no adverse affectation of those rights. In determining this component, the responsible entity must resolve whether the proposed amendment will "remove, curtail or impair [members'] existing rights in a way that is disadvantageous". Third, the responsible entity must establish that its opinion as to the absence of any adverse affectation was reasonable. This inquiry is an objective inquiry.While Mr Korda, one of the liquidators, admitted in cross-examination that the liquidators had not undertaken an analysis of the constitution and its constituent documents to identify members' rights and the impact of the proposed amendment on those rights, Davies J was satisfied that, on the whole, the liquidators had given due consideration to the affect on members' rights of the proposed amendment. While the approach of the liquidators may have been designed to protect the commercial interests of members, Davies J noted that it was a strategy that was to be effected through the informal winding up of the Scheme. The considerations of the liquidators that led to the amendment to enable TSL to terminate the members' licence agreements concerned the necessity to put TSL into the position to be able to terminate those agreements so that the Scheme could be wound up. Davies J was therefore satisfied that the liquidators were aware of the rights of the members that would be impacted. Davies J was further satisfied that the evidence indicated that the liquidators had formed the view that the constitutional amendment would not adversely affect members' rights. The liquidators made the amendment after becoming aware that the land on which the Scheme was conducted was for sale and, if sold, would be subject to the same conditions precedent to the sale of assets of related managed investment schemes, including that members' rights be extinguished. In the process undertaken with the forestry and almond schemes, the liquidators had sought, and obtained without objection, directions in relation to the equivalent constitutional amendment. As with the other schemes, the liquidators did not intend to cause TSL to terminate members' licences without a direction from the court. Davies J agreed that there was a reasonable basis for the view of the liquidators as the decision to make the amendment was made in the context of the insolvency of TSL and its consequent inability to perform its task as responsible entity. In any event, had the liquidators sought to have the Scheme wound up by direction of the court or under section 601NC of the Act, the licence agreements would have terminated by their own operation.**(iii) Breach of fiduciary duty**Davies J rejected the Growers' contention that the liquidators, by virtue of their office, had obligations to the members akin to those of a trustee which required them to obtain the informed consent of members before causing TSL to exercise its constitutional power to terminate the members' licences. Davies J noted that the liquidators' duties are not solely to the members of the Scheme and affirmed case law to the effect that the obligations imposed on responsible entities under the Act do not override a liquidator's duty to those interested in the winding up. Davies J further rejected the Growers' submission that there was a conflict of interest as a result of the shareholding interest of TL. The conflicting duty was said to be the duty that the liquidators owed to members to consider how the benefit from the purchase of the property that will accrue to TL from its shareholding should be allocated. Davies J noted that TL has no relevant relationship with the Scheme's members and that the liquidators had no role in the sale process for the property.**(iv) Conclusion**Davies J concluded that an order should be made with respect to the liquidators procuring TSL to exercise its power to terminate the members' licences. Davies J noted that, as with other Timbercorp schemes, TSL will not exercise the power to surrender the licence agreements until the sale contract is completed and the purchase price paid. The sale proceeds will be held on trust pending the court's determination of their apportionment between stakeholders.etailed Contents**5.3 Access to company documents: Acting in good faith and for proper purpose** (By Steven Grant, Minter Ellison)McLean v DID Piling Pty Ltd [2010] SASC 33, Supreme Court of South Australia, Layton J, 19 February 2010The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2010/feb/2010sasc33.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2010/feb/2010sasc33.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case concerns the circumstances in which a member of a company can seek access to the documents of the company where there may be more than one purpose for doing so.**(b) Facts** The appellant, David McLean, being a member of the respondent company, D.I.D. Piling Pty Ltd (Company) as the holder of 245 shares in the Company, brought an appeal against a decision of a Master of the Supreme Court dismissing an application by the appellant for permission to inspect certain documents of the respondent company pursuant to section 247A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Act). Section 247A(1) provides that on application by a member of a company, the court may make an order: * authorising the applicant to inspect books of the company; or
* authorising another person (whether a member or not) to inspect books of the company on the applicant's behalf.

The court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose. Under the originating process, the appellant sought access for his solicitor and accountant to inspect a number of records of the Company including:* financial statements for 2007-2008;
* tax returns for financial years ending from 2005 to 2008;
* a list of current company assets;
* a list of assets of any plant or equipment which was previously the property of the Company but had been sold since 1 July 2006 and if so for what price and to whom or which company;
* a current market valuation of any plant and equipment if any valuation exists;
* all relevant documents to review all material transactions with any entity which any director or shareholder has a significant or controlling shareholding; and
* documents relating to the commercial dealings and financial information relating to a number of specific construction or piling contracts, hire of plant and equipment or plant purchase contracts involving the Company.

In affidavit material supporting the application, the appellant claimed that the proper purpose for which he was making the application was to have his shares valued for the purpose of selling those shares. However, at the time of initiating the application and at the time of hearing the appeal, the process for the sale of shares in the Company under article 27 of the Company's Articles of Association had not been initiated by the appellant.The Master dismissed the application on the ground that the appellant was not acting in good faith and for a proper purpose in making the application on the basis that the appellant's dominant purpose for bringing the application was to value the shares. Although the purpose of valuing the shares may have been an 'equal purpose', the Master believed that the true primary purpose for pursuing the section 247A application was to gather information for the purpose of initiating an oppression claim under section 233 of the Act. The basis of an oppression claim is that the conduct of a company's affairs, an actual or proposed act or omission by or on behalf of a company, or a resolution, or a proposed resolution, of members or a class of members of a company was oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity. Although the preparation for an oppression claim would not amount to an improper purpose in itself, the fact that the appellant made the application without admitting his true dominant purpose displayed a lack of candour which suggested a want of bona fides. The appellant appealed on the following grounds:* There was no basis for the Master's finding that the appellant had not established that his primary or dominant purpose for seeking inspection was to obtain information for the purpose of valuing his shares as a precursor to their sale. Further, it was argued that the Master erred when he found that the 'real purpose' for the appellant seeking inspection was to obtain information about certain back charges and the normalisation of particular contracts for the purpose of mounting an oppression claim under section 233 of the Act.
* The Master erred in finding that, notwithstanding that an oppression claim can be a proper purpose for a section 247A application, the appellant's failure to disclose this as the true purpose of the application showed a lack of bona fides. It was submitted that an inference of a lack of bona fides cannot be drawn from a failure of the applicant to depose to the true dominant purpose.

Pursuant to the [Supreme Court Act 1935 (SA)](http://my.lawlex.com.au/default.asp?cid=28891&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default), the appeal was by way of rehearing.**(c) Decision** Layton J considered that an important aspect of the appeal was the evidence tendered both in the first instance and on appeal. The key evidence was as follows:* The appellant was an original shareholder and sole director of the Company, holding 24.5% of the shares (initially through his company BDS Contracting Pty Ltd (BDS) and subsequently in his own right). The other shareholders were an entity controlled by Ian Tarbotton (Tarbotton), which held 51% of the shares and an entity controlled by Dominic Vieceli (Vieceli), which held 24.5% of the shares.
* In 2004, the appellant was replaced as director of the Company by Tarbotton, but continued to work for the Company as a construction manager (initially through his company BDS and subsequently in his own right).
* In September 2007, the appellant was injured at work and was unable to continue in his employment as a construction manager.
* Later that month, the appellant stated that he spoke with Vieceli, who, inter alia, suggested that the appellant should consider selling his shares. Vieceli denied making this suggestion.
* On 26 September 2007, he instructed an accountant, Phillip Plummer of HLB Mann Judd (Plummer), to conduct a valuation of the shares and sent an email to Tarbotton and Vieceli advising that he had accepted what he perceived to be Vieceli's advice to sell his shares and was to have the shares valued for that purpose.
* On 10 October 2007, Plummer sent an email to the Company's accountants (Koster), requesting a copy of the Memorandum and Articles of the Company, financial statements for the years ending 30 June 2004 through to 30 June 2007 and detailed profit and loss and trading statements for the relevant periods.
* Following further correspondence requesting financial records, Koster sent a letter to the appellant on 24 December 2007 stating that the records were not ready and adding that he had been instructed by Vieceli that the financial statements for 2007 cannot be completed due to the finalisation of back charges.
* In early 2008, the appellant instructed solicitors, Marrone & Co (Marrone) to act on his behalf in the negotiations with the Company and on 12 February 2008, Marrone sent a letter to the Company requesting access to the documents. The Company responded to that letter on 18 February 2008, assuring the appellant that the 2006-2007 financial year statements were being finalised and that they would be sent to the appellant in due course.
* On 21 February 2008, Marrone sent another letter to the Company requesting the relevant financial statements and making enquiries about the back charges.
* The Company responded on 27 February asserting that the back charges were 'lawful' and occurred with the knowledge of the appellant. Marrone replied on 28 February 2008, denying that the appellant was aware of what the back charges related to and seeking further information.
* In April 2008 the Company informed the appellant that the back charges amounted to about $1.2 million and consisted largely of salaries payable to Tarbotton and Vieceli as well as delayed charges by York and other retrospective charges.
* On 7 August 2008, Marrone sent a letter to Plummer regarding the ongoing attempt to obtain documents from the Company.
* This was followed by a series of correspondence in which the appellant sought to have documents provided by the Company, which generally denied any obligation to do so. Throughout this correspondence, Layton J considered that the parties both appeared to presume that the purpose of seeking the documents was to allow Plummer to conduct a valuation of the shares.
* Further documentation relating to a series of transactions made by the Company was requested by Marrone by letter of 7 April 2009.
* On 27 April 2009, the Company sent a letter to the appellant informing him that his employment with the Company had been terminated and that his last day of employment would be 25 May 2009.
* Subsequently, the Company made an offer to its current shareholders to take up additional shares, which both Tarbotton and Vieceli accepted. However, the appellant did not take up this offer. The effect was that the appellant's proportion of shareholding was reduced to around 1%. It seems that the appellant disputes the validity of this transaction.
* There were two further letters from Marrone to the Company requesting the necessary information and documentation to value the shares.

From a review of the chronology of events, Layton J concluded that from the commencement of correspondence with the Company seeking information, the appellant was seeking that information for the purposes of valuing shares. Initially the requests were confined to financial statements, profit and loss accounts and balance sheets for relevant years which are precisely contemplated by section 247A of the Act. The requests for information were increased, largely as a consequence of:* the responses of the Company;
* the balance sheets and profit and loss accounts which showed a different treatment of certain items which called for further information;
* the Company indicating that 2008 financial statements were not available because it was necessary to consider back charges; and
* the normalisation of the contracts in retrospect for three years.

Layton J considered this led to a reasonable line of enquiry for the purposes of valuing shares because the previous and future treatment of these financial matters would radically affect the value of the shares for the purposes of sale. At the time when the application was made for inspection, there had not been any suggestion either expressly, or even inferentially, about taking an action as a minority shareholder. That issue only arose after the application pursuant to section 247A was made.Although there may be an oppression claim or indeed some other claim against the Company or its director, Layton J noted that this does not diminish the fact that the appellant's dominant purpose for seeking documentation from the Company was, from the very beginning, and remained at the time of application, to conduct a valuation of the shares for the purpose of sale.The Master had found that the appellant's decision to obtain his own valuation necessarily suggested a desire to circumvent the article 27(a) procedure by initiating an oppression action. However, Layton J concluded that such a result did not necessarily follow. Article 27(a) allows the Board and the outgoing member to agree a price for the shares and thereby avoid a binding independent valuation. Alternatively, although the Board had indicated an intention to buy, if a sale under article 27(a) did not proceed, article 27(c) allowed the member to proceed to private sale. In all of those circumstances, it is perfectly reasonable for the member to obtain a valuation themselves, even prior to providing notice under article 27.On this basis, Layton J concluded that the Master erred in his reasoning because there was no reasonable basis for the Judge finding as he did that the true dominant purpose of the application was in respect of taking potential minority shareholder action. Considering the section 247A application afresh, Layton J concluded that the appellant satisfied the elements of section 247A having brought the application in good faith and for the proper purpose of valuing his shares for the purpose of sale. Accordingly, Layton J allowed the appeal and ordered that the appellant or his representative may inspect the books of the Company. However, Layton J did consider that it was necessary to hear the parties as to the precise orders that should be made as the scope of documents for which inspection was sought by the appellant may not be appropriate.etailed Contents**5.4 Breach of directors' duties: leave to amend statement of claim, bringing of statutory derivative action and joinder of additional defendant** (By Jiayue Li, DLA Phillips Fox)Gerard Cassegrain & Co Pty Ltd v Cassegrain; Cassegrain v Gerard Cassegrain & Co [2010] NSWSC 91, New South Wales Supreme Court, Austin J, 19 February 2010The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/febuary/2010nswsc91.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/febuary/2010nswsc91.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**Five Cassegrain siblings were involved in various proceedings alleging that Claude Cassegrain ('Claude') as director of Gerard Cassegrain & Co Pty Ltd ('the Company') had breached his duties as a director in relation to a transfer of a dairy farm and residence originally owned by the Company ('Derivative Proceedings') and the sale of the Company's shareholdings in two companies at a significant undervalue to Claude's wife, Felicity ('Oppression Proceedings'). In these proceedings, the applicant ('Denis') sought:* leave for the Company to amend its statement of claim in relation to the Derivative Proceedings; and
* leave to amend Denis' statement of claim so as to bring derivative claims on behalf of the Company, and leave to join an additional defendant in relation to the Oppression Proceedings.

Austin J granted leave to amend the statements of claim (subject to certain variations) and to bring the derivative claims and join the additional defendant (subject to certain undertakings and indemnities being given).**(b) Facts**Claude was given the principal management of the Company in the middle 1980s and is the majority shareholder of the Company.As a result of an out of court settlement, the Company received compensation of $9.5 million. $4.5 million of the total payment was characterised as compensation for the defamation of Claude, and a loan account was created in showing that $4.25 million had been received by the Company on behalf of Claude and that he had lent the money to the Company. In its statement of claim, the Company alleged that at all material times Claude was aware that the Company had treated $4.25 million as compensation for Claude's defamation for the sole purpose of seeking to minimise the Company's capital gains tax liability.In September 2006 Claude caused the Company to transfer a dairy farm and residence to himself and Felicity in consideration of a reduction in the amount outstanding to Claude according to the loan account and Claude subsequently transferred his interest to Felicity. In September 2008, Denis brought a derivative action against Claude and his wife Felicity for breach of fiduciary and director's duty in relation to this transaction.In January 2005, the Company disposed of its shareholdings in two companies to Claude's wife Felicity. Denis initiated the Oppression Proceedings in November 2008, after having already procured leave under section 237 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ('the Act') and having initiated the derivative proceedings, because he had concerns arising out of the Company's sale of its shareholdings to Felicity.**(c) Decision**Austin J granted:* leave for the Company to amend its statement of claim in relation to the Derivative Proceedings (subject to certain variations); and
* leave for Denis to amend his statement of claim so as to bring derivative claims on behalf of the Company, leave under section 237, and leave to join an additional defendant in relation to the Oppression Proceedings (subject to certain undertakings and indemnities being given).

**(i) Company's application for leave to amend its statement of claim**In response to comments by Sackville AJ in earlier Derivative Proceedings, the Company sought leave to amend its statement of claim to allege that Claude was to be regarded as Felicity's agent for the purpose of determining whether her otherwise indefeasible title to the dairy farm and residence was affected by fraud.Austin J confirmed that an application to amend should be allowed unless it is so obviously futile that it would be struck out if it appeared in an original pleading.His Honour held that leave to amend the statement of claim should be granted for the following reasons:* There was no evidence of any detrimental reliance stemming from the Company's earlier representation that there would be no amendment to the statement of claim.
* The proceedings were still at an early stage and in the absence of evidence of prejudice, it would be just to allow the amendments to be made.
* The proposed amended pleadings would not make a new substantial claim.
* The proposed amended pleadings do not constitute pleadings of fraud against Felicity which would breach the rules relating to issue estoppel.
* The court would be reluctant to conclude that the Company's allegation of agency was hopeless in light of the evidence.

Austin J also refused to revoke the order granting leave under section 237 of the Act empowering Denis to maintain the proceedings in the name of the Company, on the basis that the question was not properly before the court. His Honour also considered that it would be inappropriate to make any order for security for costs in the context of this application.**(ii) Plaintiff's application for leave to amend statement of claim and to join additional defendant**The plaintiff sought to amend the statement of claim and allege that Claude and another director of the Company, Mr Sarks, caused the sale of the Company's shareholdings in two other companies at significant undervalue to Claude's wife Felicity in a manner which contravened sections 181 and 182 of the Act. The contested proposed amendments concerned whether Claude acted as agent for Felicity in relation to the sale of the Company's shareholdings in the two other companies to Felicity.Austin J made some changes to the proposed amendments but ultimately allowed the proposed amendments to the statement of claim on the basis that there was a plausible possibility that the plaintiff would succeed in proving the pleaded agency.**(iii) Plaintiff's application for leave to bring derivative claims**After considering the relevant authorities, the court held that the requirements for allowing a statutory derivative action under section 237(2) of the Act were satisfied.* As the contemplated claims were directed against the interests of the individuals who control the company, it was probable that the company would not itself bring the proceedings.
* The derivative claims would increase the value of the plaintiff's shares and were related to the transactions which the plaintiff was already challenging in the oppression proceedings, these facts tended to militate against any conclusion that the plaintiff was not acting in good faith in bringing the derivative claim.
* The derivative action would be of practical benefit to the Company and the litigation would not affect the Company's business. As a condition of granting the order sought by the plaintiff, Austin J required Denis, his wife and the other Cassegrain siblings to provide undertakings that they would jointly and severally indemnify the Company against all costs, charges and expenses of and incidental to the bringing and continuation of the derivative claims.
* On the documentary evidence before the court, there appeared to be evidence that there was a serious question to be tried in relation to the allegations made against Claude, Mr Sarks and Felicity.
* The requirement of written notice to the Company was satisfied by the letter of McCabe Terrill to Oliveri Lawyers dated 4 August 2009, copied to Peter Condon & Associates which stated that the plaintiff thereby gave notice to the Company of his intention to apply for leave under section 237.

Since there was already an oppression proceeding in the plaintiff's name under way, his Honour observed that this was not a case where the plaintiff sought to bring proceedings on behalf of the company. Therefore, section 236(2) does not apply to require the Company to become a plaintiff. Austin J also stated that there is no absolute bar to combining derivative and oppression claims in the same proceedings, and held that combining the oppression and derivative claims concerning the transfer of the shares will be the most effective way of addressing the real dispute within the Cassegrain family concerning those transactions.etailed Contents**5.5 Authority of a single director to bind a company** (By Mark Cessario, Corrs Chambers Westgarth)Junker v Hepburn [2010] NSWSC 88, Supreme Court of New South Wales, Hammerschlag J, 19 February 2010The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/febuary/2010nsw88.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/febuary/2010nsw88.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 loaned $200,000 to Hepler Pty Ltd ("Hepler"). The defendants, the two directors of Hepler, executed the relevant agreements documenting the loan, and also provided guarantees to the plaintiffs in respect of Hepler's debt.The first defendant gave a direction to the plaintiffs to pay about $198,000 of the loan monies to his personal account. The directors were both sued pursuant to the guarantee. The second defendant asserted that the monies paid to the first defendant's personal account were not advanced to Hepler and as such that amount was not secured by her guarantee. That argument was founded on the proposition that the first defendant did not have authority to give the direction to pay any part of the loan to his personal account.Hammerschlag J found that the first defendant had:* actual implied authority to give the direction because he had the actual authority to negotiate a variation of the loan agreement whereby the term of the loan was extended; and
* ostensible authority to give the direction to pay the $198,000 to his personal account given that there was no challenge to his authority to give the direction with respect to the other $2,000.

**(b) Facts**The plaintiffs entered into a Deed of Loan with Hepler under which they agreed to loan Hepler $200,000. The defendants, the two directors of Hepler, both executed the Deed of Loan. The directors also executed a Deed of Guarantee and Indemnity ("Guarantee") under which they guaranteed to the plaintiffs Hepler's obligations under the Deed of Loan.A written direction as to how the loan monies were to be advanced was sent to the plaintiffs. That direction was signed, on behalf of Hepler, by the first defendant and another unknown person. The direction provided for about $198,000 to be paid to National Australia Bank Limited, with the remainder being paid to other organisations. The first defendant later requested that the amount to be paid to National Australia Bank be "paid to S Hepburn account". The plaintiffs complied with that direction.About two months later, the first defendant reached an agreement with the plaintiffs to vary the repayment date of the loan.When the loan fell due, it was not repaid. Hepler was subsequently placed into liquidation, and the plaintiffs sought payment from the defendants pursuant to the Guarantee.The second defendant's primary defence was a denial that the $198,000 paid by the plaintiffs to the nominated account in the name of the first defendant had been advanced to Hepler. That defence was founded on the proposition that the plaintiffs had not established that the first defendant had authority on behalf of Hepler to give any direction to pay any part of the loan to his personal account.The second defendant's challenge to the authority of the first defendant was limited to his authority to give the direction to pay to his personal account. That is, her challenge to the first defendant's authority did not extend to his authority to direct the payment of the other $2,000 to the other organisations.Neither of the defendants read any affidavits or gave any evidence in the proceedings.**(c) Decision**The primary issue decided by Hammerschlag J was whether the first defendant had implied actual authority, or had ostensible authority, to give the direction to pay.Implied actual authority is the authority which the law regards as having been given to an agent because of the interpretation put by the law on the relationship and dealings of the two parties. Hammerschlag J referred to the decision in *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 as authority that, ordinarily, where a company has more than one director, a single director does not have authority to bind it. A director's normal power is to bind the company only by joining with other directors in a collective resolution of the board of directors.However, implied actual authority can result from acquiescence in the course of behaviour by persons who have actual authority to delegate. To determine whether authority is to be implied and, if so, the scope of the authority implied requires a close analysis of the evidence that is relied upon to support the implication of actual authority.Hammerschlag J considered that the second defendant's stance that the first defendant had no authority to give the direction to pay to his personal account was irreconcilable with her acceptance that he had authority to vary the Deed of Loan by extending the repayment date. His Honour decided that the existence of that agreement to vary the Deed of Loan brought with it the necessary implication that the first defendant had implied actual authority to bring about the advance by giving the direction to pay in its entirety.In discussing the law of ostensible (or apparent) authority Hammerschlag J stated that:* ostensible or apparent authority is conferred where a principal represents that another has authority;
* the principal will be bound as against a third party by the acts of that other person within the authority which that person appears to have, though the principal had not in fact given that person such authority or had limited the authority by instructions not made known to the third party; and
* in the absence of some representation made by the company, a director has no ostensible authority to bind it.

His Honour held that the fact that the second defendant did not challenge the first defendant's authority to give the direction to pay the $2,000 to the other organisations meant that there was a sufficient holding out that the first defendant had authority to give a direction to pay irrespective of the identity of any recipient.Accordingly, Hammerschlag J found that the first defendant had both implied actual authority and apparent authority to give the direction to pay.etailed Contents**5.6 Validating an otherwise invalid appointment of a company administrator** (By Zoe Leyland, Mallesons Stephen Jaques)Calabretta v Redpen Developments Pty Limited (in liquidation) (receivers and managers appointed), in the matter of Redpen Developments Pty Limited (in liquidation) (receivers and managers appointed) [2010] FCA 81, Federal Court of Australia, Yates J, 17 February 2010The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2010fca81.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2010fca81.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**This decision of the Federal Court concerned an application by Mr Domenic Calabretta for an order pursuant to section 447C(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("the Act") declaring whether or not his purported appointment as administrator of the defendant was valid. In the event that his appointment was invalid (which was contended by Mr Calabretta), Mr Calabretta sought an order pursuant to section 447A(1) of the Act to the effect that Part 5.3A of the Act is to operate in relation to the defendant as though he had been validly appointed.Mr Calabretta was appointed pursuant to a resolution of the defendant's apparent sole director, Mr Santo Bartolotti, who was an undischarged bankrupt and thus had ceased to be a director by operation of the Act. At the time of his appointment, Mr Calabretta was not aware of Mr Bartolotti's bankruptcy.The court found that Mr Calabretta's appointment was not valid and agreed to grant the order sought under section 447A(1) of the Act. The court, however, considered that Mr Calabretta should bear the costs of the application.As a result of this decision, persons asked to act as administrators should consider conducting a search of the National Personal Insolvency Index ("NPII") for the relevant director(s) in order to avoid the possibility of not receiving the protection of the administrator's statutory indemnity and lien in the event of defective appointment.**(b) Facts** Mr Calabretta, a registered liquidator and an official liquidator, was approached on 1 October 2009 by Mr Guy Castellino, a former director of the defendant, to act as administrator. Mr Calabretta provided provisional consent to that appointment. On that same day, the defendant purported to appoint Mr Calabretta pursuant to section 436A(1) of the Act by a resolution of its apparent sole director, Mr Santo Bartolotti.On 2 October 2009, Mr Calabretta instructed his staff to complete a conflict search and to obtain a company search in relation to the defendant. The search of the ASCOT database maintained by ASIC indicated that Mr Bartolotti was the sole and current director of the defendant. Mr Calabretta then completed and executed a consent to act as voluntary administrator of the defendant.On 6 October 2009, following the first meeting of creditors, Mr Calabretta had a conversation with Mr Castellino in which Mr Bartolotti's financial position was discussed. Mr Castellino informed Mr Calabretta that Mr Bartolotti had recently filed for bankruptcy. When questioned by Mr Calabretta when this occurred, Mr Castellino informed him that it was after his appointment.On 28 October 2009, one of Mr Calabretta's staff undertook a search of the NPII, which indicated that Mr Bartolotti was an undischarged bankrupt who had been made bankrupt on 7 August 2009 following the presentation of his own petition.The evidence showed that ASIC and the Insolvency Trustee Service Australia had entered into a Memorandum of Understanding under which ASIC was to act as the matching agency for data-matching between the ASCOT and the NPII databases. As part of this arrangement, ASIC produces a report that identifies those persons who are recorded on ASCOT as being current office holders and whose ASCOT data matches the NPII data with respect to undischarged bankrupts. While ASIC may update a company's corporate register to show that a person has ceased to be an officer holder as a consequence of that person's bankruptcy, there is a time delay between the data-matching and any such administrative action.**(c) Decision** **(i) Mr Calabretta's standing**Yates J was satisfied that section 447C(1) of the Act provided Mr Calabretta with standing to seek an order declaring whether or not his appointment was valid. His Honour was also satisfied that Mr Calabretta had standing to seek consequential relief under section 447A(4)(f) of the Act on the grounds that an invalidly appointed administrator who has acted on the basis of that appointment is an "interested person" within the meaning of section 447A(4)(f) of the Act.**(ii) Validity of Mr Calabretta's appointment**Yates J held that Mr Calabretta's appointment as administrator of the defendant was not valid. The effect of the Official Receiver having earlier accepted the debtor's petition presented by Mr Bartolotti was that Mr Bartolotti had become a bankrupt. Under section 206B(3) of the Act, an undischarged bankrupt is disqualified from managing corporations. Under section 206A(2) of the Act, if a person is disqualified from managing corporations under Part 2D.6 of the Act and is not given permission to manage the corporation, that person ceases to be a director of the company. As a result of the operation of section 206B(3) and 206A(2) of the Act, Mr Bartolotti ceased to be a director of the defendant on 7 August 2009. As he was not a director of the defendant on 1 October 2009, he was not capable of passing the resolution pursuant to which the defendant purported to appoint Mr Calabretta.Yates J concluded that Mr Bartolotti's act of passing the resolution could not be rendered effective by section 201M of the Act. Section 201M provides that an act done by a director is effective even if their appointment, or the continuance of their appointment, is invalid because the company or director did not comply with the company's constitution (if any) or any provision of the Act. Yates J considered that as the effect of Mr Bartolotti's bankruptcy was that, by operation of the Act, he ceased to be a director of the defendant on 7 August 2009, the requirement that, at the time of the impugned act, the appointment or continued appointment of the director was invalid because the company or director failed to comply with its constitution or the Act was not met.Yates J also noted that the fact that Mr Calabretta's consent to act was given the day after his purported appointment was an alternative basis on which his appointment could be impugned. As the point was not taken by any interested party, it was not pursued.**(iii) Relief pursuant to section 447A(1)**As noted above, Mr Calabretta sought an order to the effect that Part 5.3A of the Act is to operate in relation to the defendant as if he had been appointed on the basis of a valid resolution. Yates J noted that his discretion whether to exercise this power was a plenary one, to be exercised having regard to the circumstances of the case. His Honour noted that one such consideration was whether substantial injustice would be caused by effectively validating an otherwise invalid appointment. In this regard, his Honour considered the following three matters brought to the court's attention by Mr Calabretta:* the administrator's statutory indemnity and lien;
* the administrator's remuneration; and
* the consequences of a change in the relation-back day.

In relation to the first two matters, Yates J noted that if the order sought by Mr Calabretta was made, he would be entitled under section 443D of the Act to be indemnified out of the defendant's property of certain debts, liabilities, damages or losses, and remuneration. Section 443F of the Act would then provide a lien to secure this right of indemnity. Yates J accepted that the work performed by Mr Calabretta in investigating the affairs of the defendant had been of value. As Mr Calabretta had not made any recoveries, Yates J noted that the practical effect of an order of the kind sought is that although his right of indemnity will have the priority accorded by the Act, its utility would be dependent on whether and to what extent the liquidator makes recoveries.In considering the relation-back day matter, Yates J noted that the effect of an order of the kind sought would be a shift in the period for recovery of voidable transactions pursuant to section 588FE of the Act. While absent an order of the kind sought, the prospect would exist for the liquidator to attack earlier transactions, there was no evidence to suggest that this was any more than a theoretical possibility. Yates J also noted the considerable work carried out by Mr Calabretta and the costs incurred by him on his assumption that his appointment was valid, and noted that had his appointment been valid, the shift in the relation-back day would have occurred by force of the Act.**(iv) Orders and costs**Yates J adjourned the matter for the purpose of making orders in accordance with the reasons. His Honour noted that Mr Calabretta's costs of the application should not be paid out of the assets of the defendant as the risk of acting solely on the basis of an ASCOT database search is one that should be borne by Mr Calabretta.etailed Contents**5.7 When will a transaction create an "artificial price" for securities?** (By Stefania Gardner, Freehills)Australian Securities and Investments Commission v Soust [2010] FCA 68, Federal Court of Australia, Goldberg J, 15 February 2010The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2010fca68.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2010fca68.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)All legislation references in this case note are to the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).**(a) Summary**On 31 December 2007, Martin Soust (Soust), the Managing Director and CEO of Select Vaccines Limited (SVL), a biotechnology company, purchased $2,550 worth of SVL shares "on behalf of his mother" without notifying SVL (Trade).ASIC brought an action against Soust for declarations that carrying out the Trade:* had the effect of creating an artificial price for SVL shares (section 1041A);
* had the effect of creating a false and misleading appearance with respect to the market and the price for trading in SVL shares (section 1041B(1)(b));
* amounted to Soust failing to exercise his power, and discharge his duty as a director of SVL in good faith and in the best interests of SVL or for a proper purpose (section 181(1)); and
* amounted to Soust improperly using his position as a director of SVL to gain an advantage for himself and, the trustee of his family trust, Martin Soust & Co Pty Ltd (MSC), causing detriment to SVL (section 182(1)).

Justice Goldberg made the declarations sought by ASIC on the basis that Soust made the Trade for himself and not for his mother in order to obtain a short-term performance bonus (Bonus) from SVL. His Honour adjourned the consideration of whether orders for pecuniary penalties or disqualification should be made. **(b) Facts** Soust was the Managing Director and CEO of SVL and also a director of MSC.**(i) The Executive Services Agreement (ESA)**On 24 April 2007, SVL, MSC and Soust entered into an ESA which provided that MSC would employ Soust to be Managing Director of SVL. SVL agreed to pay MSC a fee of $245,000/annum. MSC was also entitled to receive a Bonus in certain circumstances, which for 2007 included if the change in SVL's share price outperformed the change in the Intersuisse Biotech Index by 10% at the close of trading on 31 December 2007.**(ii) SVL's Trading Policy**SVL's Trading Policy provided that officers were only entitled to trade during designated "trading periods" except with the approval of the Chairman. The Trading Policy also stated that officers must notify the Company Secretary of any trade in SVL shares within two days so that the Company Secretary could notify the ASX.**(iii) Soust's share trading**Shortly before close of trading on 31 December 2007 (which was outside the "trading periods"), Soust telephoned his stockbroker, Bell Potter Securities, and placed an order "on behalf of his mother" for $2,550 worth of SVL shares on his account (Trade).The effect of the Trade was that the Bonus under the ESA was payable because:* the SVL share price over the 2007 calendar year had increased by 19.05%; and
* there had been a decrease of 1.49% in the IB Index for the 2007 calendar year.

But for the Trade, the share price of SVL's shares over the 2007 calendar year would have decreased by 4.76% and no Bonus would have been payable.In consequence, Soust was paid the Bonus. At no time prior to the payment of the Bonus did Soust disclose the Trade. Further, Soust never notified the Chairman of his intention to trade in SVL shares as required by the Trading Policy.Subsequently, SVL's Company Secretary was contacted by the ASX, which queried why the Trade had not been reported to the ASX. The Company Secretary questioned Soust, who stated that his mother had made the purchase. ASIC then launched an investigation into the Trade and sent Soust's mother a letter requesting that she contact ASIC in regard to the Trade. At a later SVL Board meeting, Soust was questioned by two of the directors about the Trade. Soust refused to discuss the issue and his services under the ESA were then terminated by the SVL Board. In its investigations, ASIC discovered a document entitled "Q&A" created by Soust on his SVL laptop, around the time of ASIC's letter to his mother, which outlined how his mother could respond to ASIC's questioning and justify that it was her decision to purchase the SVL shares.Shortly before the commencement of the proceedings, Soust advised that he would tender no evidence in contradiction of the facts pleaded in ASIC's Statement of Claim and would adduce no evidence in support of his pleaded defence. The facts as outlined above therefore constituted Justice Goldberg's findings of fact.**(c) Decision** Justice Goldberg held, relying on the principle in *Jones v Dunkel* (1959) 1010 CLR 298, that it was peculiarly within the ability of Soust to give evidence, had he wished to do so, as to the person on whose instructions he carried out the Trade and that it could therefore be inferred from the facts stated above that: * the Trade was Soust's own trade and not a trade on behalf of his mother; and
* Soust intended to increase the price of SVL shares by the Trade and, by so doing, obtain the Bonus.

**(i) Contravention of sections 1041A and 1041B(1)**ASIC submitted that Soust's conduct in carrying out the Trade amounted to creating:* an artificial price for SVL shares in contravention of section 1041A; and
* a false and misleading appearance with respect to the market and the price for trading in SVL shares in contravention of section 1041B(1)(b)).

Soust submitted that these findings of fact did not result in a contravention of section 1041A or section 1041B(1) as:* the sections impugned the creation of an artificial share price;
* the transaction was not artificial as there was a seller in a market wishing to sell at 2.5 cents/share and a buyer prepared to buy at that price; and
* his intention to obtain the Bonus was an irrelevant collateral purpose.

Justice Goldberg found that there had been no judicial consideration of sections 1041A and 1041B. After reviewing the origins of these sections and the authorities considering them, his Honour found that:"the expression "artificial price" in section 1041A connotes a price created not for the purpose of implementing . a transaction between genuine parties wishing to buy and sell securities, but rather for a purpose unrelated to achieving the outcome of genuine market forces of supply and demand . It is fundamental to the working of free market forces of securities exchanges . that buyers are concerned to buy securities at the lowest possible price and sellers are concerned to achieve the highest possible price."Justice Goldberg held that Soust was not a genuine buyer as his purpose was to increase the market price in order to obtain the Bonus. On this basis, his Honour found that Soust had contravened section 1041A and, following from this conclusion, had also contravened section 1041B(1)(b).**(ii) Contravention of sections 181(1) and 182(1)**Justice Goldberg also found that Soust, as a director of SVL, consciously and deliberately contravened the Trading Policy, deliberately and consciously lied to the other members of the SVL Board and embarked on a deliberate course of conduct to conceal the Trade. The severity of Soust's conduct was also exacerbated by the preparation of the Q&A document. On this basis, his Honour held that Soust had:* breached section 181(1) by failing to exercise his power, and discharge his duty as a director of SVL in good faith and in the best interests of SVL or for a proper purpose; and
* breached section 182(1) by improperly using his position as a director of SVL to gain an advantage for himself and MSC.

etailed Contents**5.8 Margin loans - assignment, novation and margin calls** (By Audrius Skeivys, Blake Dawson)Ross Ian Goodridge v Macquarie Bank Limited and Leveraged Equities Limited [2010] FCA 67, Federal Court of Australia, Rares J, 12 February 2010The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2010fca67.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2010fca67.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**A margin lender cannot novate its rights and obligations under a margin loan agreement to a third party unless the margin lender gives its express consent to the transfer at the time when the identity of the transferee is known. Terms in the original lending agreement which state that the lender can novate the agreement are "merely agreements to agree".The rights and benefits of a lender under a margin loan agreement may be incapable of assignment where they contain not only rights but also obligations to extend further credit to the margin lender on provision of sufficient security.**(b) Facts**In April 2002, Goodridge entered into a Loan and Security Agreement (the Agreement) with Macquarie Bank Limited (the Bank) under which the Bank made a margin loan facility available to Goodridge. The Agreement gave the Bank the power to make margin calls and set out the conditions when such calls could be made. Clause 5.2 of the Agreement provided that "The Borrower shall comply with any Margin Call by 2pm on three (3) Business Days following the Margin Call, unless otherwise notified by Macquarie Bank Limited in its absolute discretion."The Agreement also incorporated the following terms:21.2 The Bank may assign, transfer, novate … and can otherwise deal in any manner [with] all or any part of the benefit of this Agreement and any of its rights, remedies, powers, duties and obligations under this Agreement to any person, without the consent of the Borrower …21.4 Without limiting the previous provisions of this Clause 21, the Bank and/or its assignee or transferee is entitled to assign its rights and novate its obligations under this Agreement, or any part of this Agreement, to any trustee or manager of any securitisation programme.In February 2009, Goodridge held a portfolio comprised entirely of units in the Macquarie CountryWide Trust (MCT) which were mortgaged as security for the margin loan. At that time, the loan balance was approximately $865,000 and the facility limit was $4.8 million. As the market fell, Goodridge's margin loan went into margin call.In early January 2009, the Bank "sold" its book of approximately 18,500 margin loans (including Goodridge's loan) for nearly $1.5 billion through a series of complex transactions. The ultimate purchaser of the loans was Leveraged Equities Limited (LE), with an intermediate sale to BNY Trust Company of Australia Limited (BNY). Notices were sent out to the Bank's customers informing them of the sale (although Goodridge's evidence that he did not receive such notice was accepted by the court).On 5 February 2009, LE made a margin call requiring Goodridge to pay about $160,000 into his margin loan account. Goodridge said he did not have cash available to pay the margin call within three days as required under the Agreement. Goodridge asked for and was given a 10 day extension to meet the call.The market price of the MCT units fell sharply on 23 February 2009. LE demanded that Goodridge pay another margin call of about $130,000 by 2pm the next day. When the unit price continued to fall, LE demanded that Goodridge meet a margin call of $190,000 by close of business on 24 February 2009.Shortly before the market closed on 24 February 2009, LE began selling down Goodridge's portfolio of MCT units to meet the margin call. LE sold about 18% of the portfolio on that day, which was the bottom of the market for the price of MCT units. LE sold off the remainder of the portfolio over the following week.**(c) Decision****(i) Margin calls and sale of MCT units invalid**The court held that the margin calls made by LE on 23 and 24 February 2009 were invalid as they did not give Goodridge three days to meet the calls as required under the Agreement. By demanding payment when none was due, LE denied Goodridge the right to use his loan to hold the MCT units (the court accepted evidence that Goodridge would have been able to borrow sufficient funds from a friend within the three day timeframe to satisfy the calls). Clause 5.2 of the Agreement gave the Bank the discretion to extend the period for compliance or to waive the margin call.LE argued that terms in the Agreement suggested that LE retained a discretion to sell down the MCT units to meet a margin call as soon as the margin call arose (that is, without waiting three days to enable Goodridge to make the call). However, Rares J considered it would produce an unreasonable and uncommercial result to construe the terms in that way. Accordingly, Rares J construed the provisions as requiring Goodridge to fail to meet a margin call before any forced sell-down could commence. It was a repudiatory breach of the Agreement, a breach of trust and a misuse of the power of sale for LE to begin selling down the MCT units on 24 February 2009.**(ii) Novation and assignment of Agreement ineffective**A key issue for the court was whether the margin loan agreements (including the Agreement) had been effectively novated to LE.The court held that the terms in the Agreement referring to novation were "merely agreements to agree with no contractual effect". Rares J considered that it is impossible for a lender to effect a novation of a contract between its borrower and a third party in circumstances where the borrower has no participation in or knowledge of the formation of the new contract between itself and the third party.Rares J acknowledged that there was authority (*Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395) which suggested that the original contract itself may, on its proper construction, authorise a party to substitute a contracting party in its place without the need for a further tripartite agreement. However, Rares J did not consider that he was bound to apply it in this case.The Agreement was incapable of assignment as a whole, as it contained not only rights but also an obligation on the Bank to extend further credit to Goodridge (upon provision of sufficient security). The Bank's obligation to extend further credit was so intertwined with its rights under the Agreement that it would have created an unworkable relationship to split them. In particular, Rares J considered it was not possible for there to be two persons — the original margin lender (the Bank) and its assignee (LE) — who were capable of exercising the same rights and powers under the Agreement to determine, independently, the available credit for Goodridge, the value of his securities and whether or not he was in default.As no novation of the Agreement occurred in January 2009, the Bank retained all of its obligations to Goodridge.**(iii) Unconscionability**Goodridge claimed that the Bank and LE acted unconscionably within the meaning of the consumer protection provisions (specifically sections 12CA and 12CB) of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/default.asp?cid=56481&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) (ASIC Act). These provisions prohibit a person in trade or commerce from engaging in unconscionable conduct in connection with the supply of financial services.Rares J held that Goodridge's purpose in acquiring the MCT units through his margin loan was to provide a source of income for his retirement. His Honour considered that this was for personal use and that margin loans of this kind are ordinarily acquired for personal use. Accordingly, section 12CB applied to the Agreement.LE acted unconscionably in contravention of section 12CB of the ASIC Act in requiring Goodridge to comply with conditions which were not reasonably necessary to protect LE's legitimate interest, namely:* requiring Goodridge to pay money in accordance with a timetable and a series of demands that were not valid; and
* threatening, and then proceeding, to sell the MCT units without a legitimate interest.

Rares J accepted that the relationship between a mortgagor and a mortgagee is not ordinarily capable of being characterised as fiduciary in nature. However, he distinguished the usual position from the situation in this case on the basis that LE had misused its power of sale.etailed Contents**5.9 Liquidator's power to dispose of trust assets potentially expanded under Corporations Act** Apostolou v VA Corporation Aust Pty Ltd [2010] FCA 64, Federal Court of Australia, Finkelstein J, 11 February 2010The full text of this judgement is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2010fca64.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2010fca64.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, the current and former trustees of a unit trust, sought to impugn the conduct of the mortgage financier and the liquidator of a corporate trustee, the former trustee of the unit trust.The court dismissed the application as it had no legal basis. In obiter, the court clarified the circumstances where a liquidator may use powers to dispose of trust property. **(b) Facts**In July 1997, a corporate trustee (VA), in its capacity as trustee of a unit trust, obtained finance by way of mortgage, to purchase a parcel of real property. The mortgage provided for a loan of $1.2 million which was secured by the real property. The mortgagee (PTC) was the custodian of a corporate mortgage fund. Over several years, VA incurred various debts which went unpaid. In March 2006, the Commissioner of State Revenue filed an application for the winding up of VA due to its failure to comply with a statutory demand for the payment of unpaid land tax. By order of the Supreme Court, VA was wound up and liquidators were appointed. In July of 2006, the single director of VA (Ms Apostolou) unsuccessfully appealed the winding up order despite the likelihood that VA's assets exceeded its liabilities at the time of the application. Upon appointment, the liquidator sought to satisfy creditor debts by realising the parcel of real property, being the only asset of VA. In May 2007, the liquidators issued proceedings seeking an order for judicial sale of the real property, despite being able to sell the property outright. During the ensuing procession of interlocutory proceedings aimed at preventing the judicial sale, PTC took possession of the real property, which subsequently sold at auction for $4.6 million. The proceeds of sale exceeded the total debt owed to creditors and a substantial surplus was returned to VA. The Applicants claimed relief in the Federal Court, alleging that:* PTC was not entitled to sell the real property as mortgagee and in any event breached its duties as mortgagee in selling it at an undervalue; and
* The liquidators acted unreasonably by unnecessarily prolonging the winding up of VA and failing to stay the liquidation despite the solvency of VA, and as a consequence were not entitled to claim fees and expenses.

**(c) Decision**The court held that there was "no legal basis" for the application, which was dismissed with costs.**(i) The conduct of the mortgagee**Firstly, the allegation that PTC did not provide a valid default notice to the Applicants as required by the [Transfer of Land Act 1958 (Vic)](http://my.lawlex.com.au/default.asp?cid=272&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) was rejected by the court. The Applicants conceded that a notice of default was received and that they failed to comply with its terms. Because PTC complied with its statutory obligations, the court concluded that PTC was entitled to take possession and sell the real property. Secondly, the allegation that PTC was required to stay the sale of the real property to permit the Applicants time to secure additional finance was rejected by the court. The Applicants submitted that PTC was obliged to make a further extension of time as it had done so previously on several occasions over the loan period. Without the Applicant specifically raising the issue of an estoppel (which it did not), the court reasoned that the prior conduct of PTC in extending the loans did not create a duty which compelled PTC to give further extensions, particularly upon default of VA. Lastly, the allegation that PTC breached its duty to VA, as mortgagee in possession, by realising the real property at an undervalue was dismissed. The Applicants submitted that the gross disparity between each side's property valuation (in excess of $2.7 million) evidenced a breach of duty by PTC in not obtaining the best price. The court held that the primary consideration is the conduct of the mortgagee, not the eventual price obtained (affirming the decisions of *Stone v Farrow Mortgage Services (in liq)* (1999) 12 BPR 22,175 and *Stockl v Rigura Pty Ltd* [2004] NSWCA 73). Although critical of the PTC valuation, the court found no evidence to impeach the conduct of PTC as mortgagee. **(ii) The conduct of the liquidator**On the facts, the court dismissed the allegation that the liquidators had improperly prolonged the liquidation of VA. Despite having both statutory authority and the power of sale pursuant to the trust deed, the court held the liquidators had good cause to apply for judicial sale. This was due to; inter alia, the purported transfer of the property to the incoming trustee, the complaints made about their conduct, the complexity of the issues at hand and their acting on legal advice. The liquidators made much of their reliance on legal advice for pursuing the judicial sale, specifically that VA's right to be indemnified out of the trust assets was only enforceable by order of the court. Although the liquidators' reliance on legal advice was ultimately accepted as reasonable, instructively the court considered the powers of liquidators of trustees and of trustees generally and provided guidance on the circumstances when liquidators may dispose of trust assets. The court observed that typically, difficulties arise in circumstances where illiquidity in the trust assets exists and a pool of funds is unable to be utilised to discharge trust liabilities. Difficulties arise because the trustee's lien is an equitable proprietary interest and does not, of itself, arm a trustee with a right to dispose of the charged property. Justice Finkelstein reasoned, in obiter at [39], that "where there is no other source of power to sell charged property, a trustee's right of indemnity against non-cash assets must be enforced by the processes of equity".The court analysed the situation where the trustee holds legal title, an equitable lien and an express power of sale under a trust instrument. His Honour distinguished the present case from a line of authorities derived from *Re Pumfrey (deceased)*; *The Worcester City and County Banking Co Ltd v Blick* (1883) 22 Ch D 255 and *The Melbourne Tramways Trust v The Melbourne Tramway and Omnibus Co Ltd* (1887) 13 VLR 487, on the basis that no express power of sale was conferred upon the trustee, unlike the present matter. Justice Finkelstein observed at [46] that, where a trustee is vested with legal title, a right of indemnity supported by an equitable lien and a power of sale, "the trustee may have recourse to the power of sale to get in funds against which his right of indemnity can be exercised".His Honour considered the position of liquidators and concluded, at [47], that section 477(2)(c) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) provides a liquidator with the power to sell or otherwise dispose of, in any manner, all or any part of the property of the company. This is in addition to any subrogated rights of the trustee assumed by the liquidator upon appointment. Applying the case of In re Suco Gold Pty Ltd (in liq) (1983) 7 ACLR 873, Justice Finkelstein stated in obiter at [48] that, where a liquidator has both legal title and an equitable interest, section 477 of the Corporations Act may be used to supplant the absence of a power of sale pursuant to the trust instrument. The liquidators further argued that the replacement of VA by Ms Apostolou as trustee during their appointment compelled their application for judicial sale. Justice Finkelstein rejected this submission as the removal of a trustee does not extinguish that trustee's right of indemnity (*Coates v McInerney* (1992) 6 ACSR 748). Further, pursuant to the [Trustee Act 1958 (Vic)](http://my.lawlex.com.au/default.asp?cid=312&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default), Torrens land does not automatically vest in a new trustee upon their appointment. The court considered the position of retiring trustees and cited *Stott v Milne* (1884) 25 Ch Div 710, as authority for the entitlement for a retiring trustee to withhold trust assets, against other trustees and beneficiaries, as security for its right of reimbursement. The Court distinguished that scenario from one considered in the recent case of *Lemery Holdings Pty Ltd v Reliance Ltd* [2008] NSWSC 1344, where it was held a retiring trustee cannot withhold trust assets from an incoming trustee (presumably absent of any right of indemnity).The court also examined the conduct of the liquidators in relation to the likely solvency of VA and its alleged failure to assist the beneficiaries in restructuring the trust. In obiter, Justice Finkelstein opined that circumstances could foreseeably exist which might require a liquidator to take steps to facilitate a reasonable restructuring proposal. Although the degree of any assistance would be determined on the merits of the case, it should fall short of imposing any personal liability on the liquidator. Further, where the company under liquidation is a solvent trustee, the need to facilitate restructuring of the trust is of greater significance given the trustee's duty to preserve the trust estate. For liquidators, this may not require staying the liquidation per se, but may entail the appointment of a replacement trustee. In the present case, in 2006 the liquidator had received an offer on the real property of $1.75 million. However, by March 2007 total creditor debt was approximately $1.4 million. The court observed the liquidator had "strong reason to believe that the value of the property well exceeded the quantum of the company's liabilities", at [63]. Further, several attempts were made by Mr Vasiliou (Applicant) to negotiate the refinancing of the real property. Justice Finkelstein remarked that the liquidators "did not go out of their way to assist Mr Vasiliou", at [64] and this led his Honour to "have some reservations about the manner in which the liquidators dealt with Mr Vasiliou's refinancing proposals", at [65]. Despite the liquidators' conduct in this regard, the court observed that negotiating a viable refinancing proposal with Mr Vasiliou was unlikely. Whilst it is doubtful that the court was imposing additional duties on liquidators, it is arguable that patently unreasonable conduct by a liquidator may be imputed in a given factual scenario. etailed Contents**5.10 Controllers beware: Pre-appointment hire contracts may result in significant liability** (By Claire Martin, Clayton Utz)Rapid Metal Developments (Aust) Pty Ltd v Rildean Pty Ltd (No 3) [2010] NSWSC 7, New South Wales Supreme Court, R A Hulme J, 10 February 2010The full text of this judgement is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/febuary/2010nswsc7.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2010/febuary/2010nswsc7.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 *Rapid Metal Developments (Aust) Pty Ltd v Rildean Pty Ltd* [2009] NSWSC 571 (Rapid Metal No 1), Hulme J held the controllers personally liable to pay rent accruing under a hire agreement between Rildean Pty Ltd (Rildean) and the plaintiff. The controllers were also held liable for conversion for selling the goods. The decision in *Rapid Metal Developments (Aust) Pty Ltd v Rildean Pty Ltd* (No 3) [2010] NSWSC 7 (Rapid Metal No 3) follows the decision in Rapid Metal No 1 on the question of quantum.In Rapid Metal No 3 Hulme J determined the quantum of damages the controllers would be liable for pursuant to section 419A [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the CA) in respect of rent and other amounts accruing under a hire agreement between Rildean and the plaintiff. The decision provides a legal precedent for quantifying the damages of a controller under section 419A for dealings with third party goods hired pursuant to a pre-appointment contract. Significantly, the controllers were held liable for all amounts payable under the agreement in respect of the use or possession of the plaintiff's scaffolding. These included hire charges, interest and the value of equipment not returned at the plaintiff's list prices. Prior to this decision the court had indicated that a controller would only be liable for rent and other amounts which were ejusdem generis with rent. This decision suggests that where a controller deals with third party property, without regard to the third party owner's rights (and fails to issue a section 419A(3) notice not to be liable for rent), the controller may be exposed to significant liability as the court will hold the controller personally liable for all amounts accruing under a pre-appointment contract in respect of the use or possession of the unreturned property.**(b) Facts**Rildean hired scaffolding from companies and on-hired them to building sites. On 19 September 2001 the plaintiff entered into a hire agreement with Rildean (the Agreement). Navmost Pty Limited (Navmost) held a fixed and floating charge over all of Rildean's assets. On 18 July 2002 Navmost appointed the controllers as agents for the mortgagee in possession of the assets of Rildean. The controllers entered into possession and took control of the property of Rildean for the purpose of enforcing the charge given by Rildean to Navmost.As at the date when the controllers were appointed controllers, Rildean was in possession of 26,731 items of scaffolding belonging to the plaintiff. The plaintiff had immediately pursued the return of the items of scaffolding belonging to the plaintiff in Rildean's possession. The plaintiff was only successful in securing the return of approximately 1,091 items of scaffolding, with 25,640 of the items hired to Rildean unaccounted for.On 8 August 2002 Rildean, the controllers and others entered into a license deed with Action Construction Services Pty Limited (ACS). Pursuant to the terms of the deed ACS would perform Rildean's existing contracts and enter into new contracts on Rildean's behalf for the purpose of generating revenue and recovering debts owed to Rildean and thus maximising the prospect that the Navmost debts would be recovered from Rildean. In accordance with the deed all scaffolding in the possession of Rildean was made available for use by ACS, including the scaffolding originally hired to Rildean by the plaintiff. On 3 December 2004 Rildean sold the scaffolding in its possession to ACS.**(c) Decision** **(i) Liability for the hire charges**His Honour found that the controllers had failed to give notice pursuant to section 419A(3) and held the controllers liable for hire charges including GST, from 25 July 2002 until 3 December 2004, pursuant to section 419A(2) which provides:(2) Subject to subsections (4) and (7), the controller is liable for so much of the rent or other amounts payable by the corporation under the agreement as is attributable to a period:(a) that begins more than 7 days after the control day; and(b) throughout which: (i) the corporation continues to use or occupy, or to be in possession of, the third party property; and(ii) the controller is controller of the third party property. The controllers had argued that they were only liable for hire charges accrued up until 8 August 2002, when they entered into the license agreement with ACS. The controllers submitted that their liability ended at this point as it was ACS and not the controllers who had "use" of the property for the purposes of section 419A(2). Conversely, the plaintiff relied on the terms of the licence agreement to support its argument that there was a continued use of the property by the controllers. The licence agreement provided that ACS was to perform the Rildean contracts and enter into new contracts on behalf of Rildean with the aim of reducing the debt owed to the controllers' principal. The plaintiff submitted that, therefore, the controllers' continued to use the property and derive benefit from the property. His Honour rejected the controllers' argument and found for the plaintiff. According to his Honour, entry into the licence agreement by the controllers did not bring about an end to Rildean's "use" of the plaintiff's property, and thereby end the liability of the controllers under section 419A(2). In his Honour's opinion Rildean was still using the third party property to receive a benefit; that benefit being the continuation of Rildean's business and the income received towards the reduction of Rildean's debts. **(ii) Liability for the value of the scaffolding equipment** His Honour held that the controllers were liable for the value of the scaffolding equipment not returned to the plaintiff. The plaintiff claimed the value of the scaffolding which had not been returned as at 3 December 2004 pursuant to clause 22 of the Agreement. Relevantly clause 22 provided (inter alia) that the scaffolding items were to be returned to the plaintiff cleaned and oiled and in condition at least equal to when they were despatched from the plaintiff's depot. Clause 22(b) further provided that at the end of the hire period Rildean would be responsible for replacing all lost or damaged goods at the plaintiff's ruling list prices, in addition to hire charges already rendered.The controllers raised three submissions to refute their liability with respect to the value of the scaffolding. Firstly, the controllers submitted that clause 22(b) was a personal covenant given by Rildean to the plaintiff and as such the clause had no application to the controllers. Secondly, the controllers argued that the value of the scaffolding did not fall within the scope of section 419A(2) as it was not "rent or other amounts payable by the corporation under the agreement". This relied upon a construction of section 419A(2) adopted by Campbell J (as he then was) in *Nardell Coal Corporation (In Liq) v Hunter Valley Coal Processing* [2003] NSWSC 642 which required "other amounts" to be identified by whether they are ejusdem generis with "rent". The controllers used Campbell J's construction of the section to argue that the value of the scaffolding was not ejusdem generis with "rent". Lastly the controllers argued that the scaffolding had been converted and, therefore, had not been "lost or damaged" pursuant to clause 22(b) of the Agreement. His Honour found that none of these arguments had any merit. In particular, his Honour refused to accept the controllers' second submission that the Court should construe the phrase in section 419A(2) "rent or other amounts payable" so that the "other amounts" are to be identified by whether they are ejusdem generis with "rent". In his Honour's opinion there was no justification for reading down the words "other amounts payable" and they should be understood by their ordinary meaning in the context in which they appear. The context that was to be applied was "an agreement made before the control day pursuant to which the corporation continues to use, occupy or be in possession of the property owned or leased by some other entity." In his Honours' view "rent" in section 419A(2) "may be regarded as surplusage or a pleonasm." Consequently, the provision should be construed to render the controllers liable for all amounts payable to the plaintiff under the Agreement in respect of the use or possession by Rildean of the plaintiff's scaffolding.**(iii) Interest on hire charges** His Honour held that the plaintiff was entitled to interest on the hire charges pursuant to clause 15(d) of the Agreement on the same reasoning that he had held the controllers liable for the hire charges.**(iv) Damages for conversion** His Honour held that the quantum of liability of the controllers would have been the same whether damages were awarded under clause 22(b) of the Agreement or for the act of conversion which held the controllers liable for the value of the goods. The controllers had argued that damages for conversion should not have been awarded according to the plaintiff's list price as at 3 December 2004. However, his Honour considered that damages for conversion should be assessed upon a consideration of the position the plaintiff would have been in had the tort not been committed. The plaintiff would have been in a position to hire the goods or to sell them at the prevailing list price. Therefore, the list price was "an appropriate measure of what the plaintiff lost by the act of conversion, the ability to realise a sale of the goods at that price." etailed Contents**5.11 Transferring assets and liabilities of a deregistered company** (By Dean Bao, DLA Phillips Fox)Stork ICM Australia Pty Ltd v SFS 007.298.633 Pty Ltd (formerly Stork Food Systems Australasia Pty Ltd), in the matter of Stork ICM Australia Pty Ltd (deregistered) [2010] FCA 53, Federal Court of Australia, Lindgren J, 2 February 2010The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2010fca53.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/february/2010fca53.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**This case concerned whether certain assets and liabilities of the former Stork ICM Australia Pty Ltd (Stork ICM) could be transferred to the current Stork ICM Australia Pty Ltd (Stork FSA) (following the deregistration of Stork ICM), and whether this could be done without prejudicing any persons who might have a future claim for injuries suffered from exposure to asbestos fibre. **(b) Facts** Stork ICM and Stork FSA were Australian subsidiaries of a corporation incorporated in the Netherlands. Stork ICM had ceased all operations, and the parent corporation wished to transfer all assets and liabilities of Stork ICM to Stork FSA, and then to subsequently deregister Stork ICM. Previously, Stork FSA made an application to deregister Stork ICM under section 601AA(2)(e) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). This application was successful, save that certain insurance policies and liabilities were not transferred due to the presence of 'no assignment without consent' provisions in the company's insurance policies. When orders were initially made on 14 December 2006, it was established that all known asbestos related claims against Stork ICM had been resolved. However, it was agreed that there was the potential for future claims to arise. These future liabilities could not be transferred to Stork FSA as they did not currently exist. Indemnities under insurance policies, which related to those possible future liabilities, were also unable to be transferred to Stork FSA due to the operation of 'no assignment without consent.' Since insurers had not given consent, the indemnities could not be assigned to Stork FSA. These indemnities were subsequently vested in ASIC, as per section 601AD(2) of the Corporations Act.Since the initial orders were made on 14 December 2006, Zurich Australian Insurance Limited (Zurich) consented to transfer all of Stork ICM's relevant insurance policies to Stork FSA. Further, in August 2009, David Willesden filed a writ against Stork ICM seeking damages for asbestos-related injuries. Mr Willesden substituted Stork FSA as a defendant for Stork ICM. WorkCover Queensland was the relevant insurer, and consented to all rights of indemnity under the insurance policy with Stork ICM to be assigned to Stork FSA.In light of these developments, Stork FSA made an application to reinstate Stork ICM in order to obtain the benefits of the indemnities under the Zurich and WorkCover Queensland insurance policies, along with the relevant liabilities.**(c) Decision** Lindgren J noted that pursuant to section 601AH of the Corporations Act, the court has the power to reinstate Stork ICM if:* an application is made by a person aggrieved by the deregistration (among other persons); and
* the court is satisfied that it is just that the company's registration be reinstated.

**(i) Was Stork FSA 'aggrieved' by the deregistration?**Lindgren J held that the phrase 'aggrieved by the deregistration' should be interpreted widely and concluded that it included a person who was aggrieved by the state, fact or condition of deregistration. Since Stork FSA was being sued by Mr Willisden and (as a result of Stork ICM's deregistration) was not entitled to the relevant indemnities, Lindgren J concluded that Stork FSA was a person 'aggrieved.' **(ii) Was the company's reinstatement 'just'?**Section 601AH(5) of the Corporations Act deems that if a company is reinstated, it is taken to have continued in existence as if it had not been deregistered. Lindgren J held that it is just that this position be achieved in relation to any claims to which the insurance indemnities (if any) respond, on the basis that claims should be able to be made against a legal entity that will have the benefit of the relevant insurance indemnity, as would have been the case prior to the deregistration of Stork ICM on 20 December 2006.Lindgren J discussed two further issues. First, his Honour held that ASIC would be required to be joined as a defendant to the proceeding. This was because at the time of deregistration, the right of indemnity under the insurance policies was vested in ASIC. Therefore, an order divesting property from ASIC should not be made without ASIC being a party. Further, a person should not be ordered to do something unless they are a party to that decision. Hence, ASIC was joined as a defendant in the proceeding.Secondly, his Honour considered Stork FSA's request that the reinstatement take effect as of the date of the order, and not be deemed to have taken effect as of the time of deregistration. Lindgren J held that the court had no power to make such an order, and that even if the court had that power it would not do so in the present circumstances.Accordingly, Lindgren J ordered that ASIC reinstate Stork ICM, and following the reinstatement, all rights of indemnity and all liabilities of Stork ICM be transferred to Stork FSA.etailed Contents**5.12 US Bankruptcy Court flips English decision on flip clauses in Lehman Brother's case** (By Karolina Popic, Partner, Clayton Utz)In re Lehman Brothers Holdings Inc, United States Bankruptcy Court, Southern District of New York, Peck J, 25 January 2010The full text of the judgment is available at:[http://www.nysb.uscourts.gov/opinions/jmp/180787\_86\_opinion.pdf](http://www.nysb.uscourts.gov/opinions/jmp/180787_86_opinion.pdf%22%20%5Ct%20%22_new)**(a) Summary**On 25 January 2010, the United States Bankruptcy Court handed down its much anticipated decision in relation to an action brought in that court by two Lehman Brothers entities (the Lehman entities) against BNY Corporate Trustee Services Limited (BNY) (the US Decision). In contrast to an earlier decision of the English courts, the United States Bankruptcy Court held that so called "flip clauses" (clauses which provide that the payment obligations owed to two different creditors "flip" in priority following an event of default) are unenforceable. Flip clauses are routinely used in structured finance transactions, including Australian securitisation transactions, to prevent a defaulting swap counterparty from benefiting as a result of its own default at the expense of other creditors. In this regard the US decision is highly relevant.**(b) Facts**BNY is the security trustee in relation to a structured finance transaction involving a Lehman related SPV. Under the transaction documents relating to that transaction (which were governed by English law), BNY owed payment obligations to one of the Lehman entities, as a swap counterparty, and to Perpetual Trustee Company Limited (Perpetual), in relation to notes issued by that SPV. The transaction documents contained a flip clause which provided that the payment obligations owed by BNY to one of the Lehman entities would take priority over those owed by BNY to Perpetual other than following an event of default under the relevant swap agreement, in which case the priority of those payment obligations would be reversed. Importantly, events of default under the relevant swap agreement included a bankruptcy filing in respect of either of the Lehman entities. The High Court of England and Wales and the Court of Appeal have previously held that the flip clause in question was enforceable (the English Decisions).**(c) Decision****(i) Orders sought and jurisdiction** Notwithstanding that the relevant transaction documents were governed by English law, the Lehman entities brought an action in the United States Bankruptcy Court seeking, amongst other things, a declaratory judgment that: "[T]he provisions in the Swap Agreements that modify LBSF's payment priority upon an event of default constitute unenforceable ipso facto clauses that violate Bankruptcy Code sections 365(c)(1) and 541(c)(1)(B), thereby enabling LBSF to retain its right to receive a priority payment under the Swap Agreements". The United States Bankruptcy Court declined to be bound by the English Decisions to the extent that those decisions gave no consideration to the Bankruptcy Code and the provisions of the Bankruptcy Code provided greater protections than those available under English law. **(ii) Ipso facto clauses and decision**Simply put, an ipso facto clause is a contractual provision pursuant to which the filing of a bankruptcy petition triggers a modification or change in the position of the contracting parties. Two sections of the Bankruptcy Code effectively render ipso facto clauses unenforceable by stipulating that: * rights under an executory contract may not be modified or terminated solely as a result of the operation of a provision under that contract which is triggered by a bankruptcy filing (section 365(e)); and
* a debtor's interest in property becomes the property of its estate in bankruptcy irrespective of any provision in an agreement, which is triggered by a bankruptcy filing, that purports to modify or terminate that interest (section 541).

The United States Bankruptcy Court found that the flip clause in question fell within the scope of sections 365(e) and 541 of the Bankruptcy Code and, being an ipso facto clause, was therefore unenforceable. **(d) Implications**While the English Decisions upheld the enforceability of flip clauses, the US Decision did not. The glaring inconsistency between the English Decisions and the US Decision leaves BNY (and others involved in structured finance transactions with a US counterparty or that are subject to US law) in a less than ideal situation. Immediate implications of the US Decision appear to be that flip clauses will not be enforceable in circumstances where the relevant transaction has a US nexus (including where the documentation is subject to US law or where the counterparty is a US entity) and may thereby be subject to the jurisdiction of US courts. It has already been suggested by various commentators and rating agencies that as a consequence of the US Decision, ratings assigned to existing and future structured finance transactions which have a US nexus may be limited to the rating of the swap counterparty. In the context of the Australian securitisation market, flip clauses are relatively recent (they have only become prevalent in the last 2 years or so) and, in asset-backed transactions, are generally limited to the subordination of break costs due to a swap counterparty following its default. In this context (i.e. given the likely low quantum of the payment which would otherwise be subordinated), calls to limit note ratings to the rating of the swap counterparty may be somewhat hyperbolic. In the short term, the US Decision is likely to lead to forum shopping (i.e. future transactions may be structured to ensure that they do not involve a US nexus). In the longer term, we may see legislative action to expand the existing Bankruptcy Code safe harbour provisions relating to swap agreements (which protect from the operation of the Bankruptcy Code, provisions relating to the liquidation, acceleration and termination of swap agreements in bankruptcy) to include the operation of swap related flip clauses. It is understood that BNY will be appealing the US Decision and, accordingly, the full fallout of the US Decision is not yet entirely clear. It is fair to say, however, that the uncertainty generated by the decision will not bode well for the slowly recovering cross-border structured finance market which routinely employs flip clauses.etailed Contents**5.13 Relief granted from civil liability arising from past offers of sale which did not comply with sections 707(3) and 727(1) or satisfy section 708A of the Corporations Act** (By Jeremy Thompson and Megan Trethowan, Blake Dawson) Golden Gate Petroleum Ltd (ABN 090 074 785), in the matter of Golden Gate Petroleum Ltd (ABN 090 074 785) [2010] FCA 40, Federal Court of Australia, McKerracher J, 22 January 2010The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/january/2010fca40.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/january/2010fca40.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**This case concerned offers of sale and sale of placement options in circumstances where an obligation to make disclosure under section 707(3) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) was not met. The plaintiff, Golden Gate Petroleum Ltd (Golden Gate), warranted to the ASX that an offer for securities within 12 months after their issue did not require disclosure under section 707(3) of the Corporations Act, and gave a notice representing that the offers for sale fell within the exemption in section 708A of the Corporations Act. However, section 708A(5) was not complied with because the issue of the securities occurred less than three months after the securities were first listed on the ASX. Golden Gate sought, and was granted, declaratory relief on the basis that it had acted honestly and no substantial injustice was caused to third parties. **(b) Facts** On 4 September 2009, Golden Gate issued a prospectus for a rights issue of up to 185,128,519 new shares and 92,564,260 options - exercisable at an exercise price of 8 cents and expiring on 31 August 2012 (GGPO). After acceptances of offers in the rights issue, 42,794,130 GGPO were issued and listed on the Australian Securities Exchange (ASX).On 30 November 2009, Golden Gate held its Annual General Meeting, where shareholders approved the issue of a further 65,392,933 options, which were in the same class as the GGPO (AGM Placement Options). The AGM Placement Options comprised four different issues to various sophisticated investors and convertible note holders. The AGM Placement Options were issued on 8 December 2009 and then listed on the ASX.On 21 December 2009, Golden Gate entered into a further placement agreement with Novus Capital for the issue of up to 16,000,000 options in the same class as the GGPO to sophisticated investors (December Placement Options). The December Placement Options were issued on 24 December 2009 and then listed on the ASX.Some of the AGM Placement Options and the December Placement Options issued were subsequently onsold between 8 December 2009 and 12 January 2010.In the Appendices 3B lodged with the ASX seeking the listing of the AGM Placement Options and December Placement Options (Placement Options), Golden Gate:* warranted that an offer of securities for sale within 12 months after their issue did not require disclosure under section 707(3) or section 1012C of the Corporations Act 2001 (Cth) (Corporations Act); and
* gave a notice representing that offers for sale of the Placement Options fell within the exemption in section 708A(5) of the Corporations Act.

Section 707(3) of the Corporations Act provides that offers of securities in a body for sale within 12 months after their issue requires disclosure if the body issued the securities without disclosure and either the body who issued the securities or the person who acquired the securities did so with the purpose of selling or transferring the securities or granting, issuing, or transferring interest in, or options over them. Section 708A of the Corporations Act contains exceptions to the requirement to give disclosure for the sale of securities that would otherwise contravene section 707(3), including section 708A(5)(a), where the securities offered for sale are in a class that were quoted on the ASX at all times in the three months before the day on which they were issued (amongst other things).In this case, the issue of the Placement Options did not comply with section 708A(5) because the issue (on 8 December and 24 December 2009) occurred less than three months after they were first listed on the ASX (on 6 October 2009). Golden Gate sought declaratory relief and incidental relief pursuant to section 1322(4)(a) (act not invalid by reason of contravention) and section 1322(4)(c) (relief from civil liability for contravention) of the Corporations Act. **(c) Decision** The court held that any offer for sale or sale of the quoted securities, being the Placement Options, to acquire ordinary shares in Golden Gate, was not invalid by reason of Golden Gate's failure to satisfy section 708A, and the seller's consequent failure to comply with section 707(3) and section 721(1). The court further held that the seller be relieved from any civil liability.The court was satisfied that, in considering the case on its merits, Golden Gate had met the section 1322 requirements for relief. Golden Gate was held to be an interested person. The offers for the sale of the Placement Options were held to meet the description of an act purporting to have been done in relation to a corporation. The court accepted that Golden Gate's consultant and company secretary had acted honestly in making inaccurate representations in Appendices 3B and section 708A notices lodged with ASX, even if in ignorance of the legal requirements applicable. Further, as soon as Golden Gate become aware of the erroneous assumption that section 708A(5) was applicable to both the shares listed on 8 December and 24 December 2009 and the Placement Options, it informed ASX and ASIC, and trading of the GGPO was suspended and legal advice sought. The court also considered that the persons who subsequently offered the Placement Options for sale between 8 December 2009 and 12 January 2010 were likely to have done so in good faith and in reliance on Golden Gate's representation to the effect that offers for sale did not require disclosure under section 707(3) due to an exemption under section 708A. Finally, the court did not consider that substantial injustice had been or was likely to be caused to any person. Persons who acquired GGPO via transactions on ASX after 8 December 2009 were considered to have had sufficient information available regarding the issue and listing of the Placement Options. To the extent that any person who acquired Placement Options from the person to whom they were issued or a subsequent seller claims to have suffered substantial injustice, the court noted that it would permit an application to be made within 28 days to vary or dissolve any of the orders made.etailed Contents**5.14 Court review of decisions by chairman of a meeting** (By Cecily Xi, Clayton Utz)C & C Fisher Pty Ltd v Livadaras [2010] FCA 11, Federal Court of Australia, Reeves J, 21 January 2010The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/january/2010fca11.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2010/january/2010fca11.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 applicant was a member of a registered managed investment scheme. A meeting of scheme members resolved to replace the incumbent responsible entity. The applicant's votes were disallowed because it was decided by the Chairman that the applicant and the incumbent responsible entity were associates as they were acting in concert. The applicant sought declarations from the court that the applicant was not an associate of the incumbent responsible entity and that the resolutions to remove and replace the responsible entity were not validly passed. The application was dismissed by Reeves J because there was no evidence that the Chairman had acted in bad faith, or had acted unreasonably such that there was an error of law.**(b) Facts**On 12 December 2008, Mr Spyridon Livadaras chaired a meeting of the members of the Australian Olives Project No 3, a managed investment scheme registered under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). The purpose of the meeting was to consider a motion to remove Australian Olives Limited ("Australian Olives") as the responsible entity of the scheme. In considering the total number of eligible votes, Mr Livadaras raised the issue of the transfer of 70 groves from Australian Olives to C & C Fisher on 20 August 2008. Ownership of each grove gave C & C Fisher the right to cast one vote at the meeting. Mr Livadaras requested confirmation that C & C Fisher had actually paid money into the account of Australian Olives for the management fees associated with the 70 groves. C&C Fisher's proxyholder at the meeting was Australian Olives. Its representative was unable to satisfy Mr Livadaras that payment had been made. Section 253E of the Act prevents a responsible entity and its associates from voting on a resolution at a meeting of Scheme members if they have an interest in the resolution other than as a member. Section 15 of the Act provides that the term "associates" includes a person with whom another person is acting in concert.Mr Livadaras concluded that Australian Olives and C & C were acting in concert and therefore disallowed the C & C Fisher votes. **(c) Decision**C & C Fisher sought declarations that it was not an associate of Australian Olives and that the resolutions were not validly passed. Reeves J stated that the question whether C & C Fisher was an associate of Australian Olives was irrelevant to the true questions in dispute in the case. Reeves J was of the view that the true questions in the case revolved around whether Mr Livadaras acted in bad faith, or alternatively, made an error of law, in making the ruling at the 12 December meeting. Reeves J defined bad faith as a serious allegation involving a lack of an honest or genuine attempt to undertake the task at hand. It included the exercise of a power knowingly for an improper purpose. It involved personal fault on the part of the decision-maker going beyond error of fact or law and therefore had to be clearly identified and proved. C & C Fisher's allegation that Mr Livadaras acted in bad faith was partially based on a contention that Mr Livadaras failed to discharge his role as Chairman in an impartial manner without bias or prejudgment. Reeves J held that to establish the presence of bias or prejudgment it was necessary to establish that Mr Livadaras had acted with a closed mind on the question of the validity of the C & C Fisher votes. It was necessary to show that Mr Livadaras was not willing to receive relevant information or was not willing to listen to arguments on that question. It would be insufficient for C & C Fisher to show that Mr Livadaras held views about the desirability of removing Australian Olives as the responsible entity. Reeves J held that, because Mr Livadaras sought further information in relation to payment by C & C Fisher and offered opportunities for vague information to be clarified, he had impartially discharged his role as Chairman of the meeting.Reeves J held that the allegation of bad faith against Mr Livadaras could not be established because there was no evidence that he acted with any lack of honesty, or knowingly exercised his power as the Chairman of the meeting for an improper purpose.Reeves J then considered the submission that Mr Livadaras's ruling, even if it was made in good faith, involved an error of law through acting unreasonably. C & C Fisher referred to *Byng v London Life Association Ltd* [1990] Ch 170, which draws an analogy between supervisory review of administrative decision-making and a review of a ruling by a chairman at a meeting of members. Relying on the Byng decision, C & C Fisher identified three separate kinds of unreasonableness on Mr Livadaras' part:* that he acted unreasonably, capriciously and irrationally in making the ruling;
* that he acted unreasonably by failing to take into account relevant considerations and taking into account irrelevant considerations; and
* that his ruling was unreasonable in the sense that he had reached a conclusion that no reasonable chairman properly directing himself or herself to the chairman's duties could have reached (Wednesbury unreasonableness).

Reeves J first held that there was no separate obligation on Mr Livadaras as Chairman to act on reasonable grounds in making a ruling. To hold otherwise would suggest that the court could review the merits of a chairman's decision. As such a review was generally not permitted in judicial review of administrative decisions, there was more reason for not permitting it in a court's review of a chairman's ruling at a private meeting such as the one in this case. It was held that there was no specific evidence provided by C & C Fisher supporting an allegation that Mr Livadaras acted unreasonably, capriciously and irrationally in making the ruling.It was further held that the analogy with judicial review of administrative decision-making, by reference to the Byng decision, was inappropriate. However, it was held that, even if Byng did apply to the case, C & C Fisher could not make out a claim that Mr Livadaras should have taken into account certain relevant considerations and had failed to do so, or took into account certain irrelevant factors. Lastly, it was held that, even if Byng did apply to this case, Wednesbury unreasonableness only applies to an administrative decision-maker's discretionary decisions and Mr Livadaras' ruling at the meeting was not a discretionary decision.Reeves J dismissed the application of C & C Fisher because it did not make out its claims that Mr Livadaras' ruling was made in bad faith, or involved an error of law.etailed Contents**5.15 Delaware Chancery Court rejects bylaw amendments and claims of impermissible vote buying**(By Jonathon Redwood, Barrister)Kurtz v Holbrook, C.A. No 5019-VCL (9 February 2010), Delaware Chancery Court, Laster VCThe full text of this judgment is available at:[http://www.courts.delaware.gov/opinions/(uhnrvw55xdiiibmo25ahiw55)/download.aspx?ID=133390](http://www.courts.delaware.gov/opinions/%28uhnrvw55xdiiibmo25ahiw55%29/download.aspx?ID=133390" \t "_new)**(a) Summary**In *Kurz v Holbrook* (9 February 2010) the Delaware Chancery Court issued an important decision addressing a number of significant issues of Delaware corporate law. The case involved a contest for corporate control of EMAK Worldwide, a "deregistered, poorly-performing microcap corporation" with one large preferred shareholder over an otherwise "diffusive" shareholder body. The court decided three significant issues of corporate law. First, it held that consents executed by brokers that held shares in "street name" at The Depository Trust Corporation ("DTC"), the record holder on the corporation's books, were valid despite the failure of DTC to deliver an omnibus proxy. The court ruled that banks and brokers that hold shares in street name through the DTC depositary system are the stockholders of record under Delaware law. Secondly, the court held that the acquisition by one competing shareholder faction of both the economic and voting (but not full ownership) interests in EMAK stock in order to secure the votes necessary to succeed in its consent solicitation was not impermissible vote buying.Thirdly, bylaws that purported to reduce the size of the EMAK board below the number of directors then in office in an effort to remove sitting directors, and to require a special meeting for purposes of electing a new director to replace those displaced by the board shrinkage, were invalid under Delaware law.An appeal from the decision has been filed with the Delaware Supreme Court.**(b) Facts**The Chancery Court opinion concerned two competing consent solicitations by opposing stockholder factions of EMAK. The first consent solicitation, led by a significant EMAK stockholder, sought the removal of two of the five current EMAK directors without cause and the election of three directors to fill an existing vacancy and the two newly vacated board seats.The holder of EMAK's preferred stock led the second consent solicitation. The holders of that preferred stock were entitled to elect two directors to the EMAK board but were not allowed to vote in the election of other directors. The holder's preferred stock afforded it 27.6% of EMAK's voting power in all other matters. The holder essentially sought to amend EMAK's bylaws to reduce the size of EMAK's board to three directors (thereby giving its two directors majority control).Each side claimed success in its consent solicitation. The preferred stockholder claimed that its own 27.6% voting power, together with consents from management owners and one sympathetic stockholder, provided sufficient consents to amend EMAK's bylaws. The competing faction claimed that it had obtained sufficient consents to remove two directors and elect its three nominees to the board in accordance with the first consent solicitation, including through broker consents provided by DTC participants in respect of EMAK stock held by DTC in street name.EMAK's inspector of elections declared the second consent solicitation a success, concluding that consents representing 50.89% of EMAK's voting power were delivered in support of the proposed amendments to EMAK's bylaws. The first consent solicitation, on the other hand, failed to generate sufficient support to remove or elect any EMAK directors. This was principally because the inspector invalidated over one million consents provided by DTC participants because DTC - the stockholder of record in respect of those street name shares - did not provide to EMAK its "omnibus proxy". An "omnibus proxy is a formal proxy routinely issued by DTC in consent solicitations and other stockholder votes whereby DTC delegates express authority to each of its participating banks and broker-dealers to vote the shares held by them in street name at DTC.**(c) Decision**The proponents of the first consent solicitation filed suit, arguing that the bylaw amendments were invalid, and that the inspector of elections improperly invalidated the consents provided in support of the first consent solicitation by brokers in respect of the stock held in street name by DTC. The court concluded that the consents solicited in support of the first consent solicitation were valid and effective. It held that the DTC participants' nominee validly voted the street name shares held by the DTC participant banks and brokers even without any formal omnibus proxy from DTC. Vice-Chancellor Laster concluded that the "formality" of the DTC omnibus proxy was not essential to empower the DTC banks and brokers to validly vote their shares because "DTC inevitably transfers voting authority to its participant member banks and brokers, making it unnecessary to provide specific evidence of proxy authority at the time the broker consent is delivered." He held that Delaware corporate law does not restrict the manner in which a stockholder of record may grant a third party authority to vote its shares. Accordingly, the court found that the banks and brokers had the authority to control voting of the shares and thus validly gave their consents in support of the first consent solicitation even without a formal written proxy from DTC.As part of a lengthy and scholarly discussion of the law, Vice Chancellor Laster held that "street name" holders – banks and brokers who appear on the DTC participant listing (or "Cede breakdown") – are "stockholders of record" for purposes of determining which shareholders have the right to vote or act by written consent. He reaffirmed the traditional distinction between record holders and beneficial holders but held there was no legal requirement for a universal proxy in this case. Thus, whilst only record holders can vote, in ascertaining who those record holders are, companies must now look behind Cede & Co to the participating banks and brokers on the Cede breakdown on the record date. The court observed that the Cede breakdown had long been treated as part of the stock ledger for purposes of determining whether a stockholder is entitled to inspect the company's stock ledger or books and records under Delaware corporate law. It followed that the Cede breakdown logically should be part of the stock ledger. The court also found the DTC omnibus proxy to be a superfluous tradition that has the potential to disenfranchise stockholders.In another matter of first impression, the court invalidated the bylaw amendment that purported to reduce the size of the board to fewer than the number of sitting directors. It noted that a bylaw purporting to impose a requirement that would disqualify a sitting director and thereby terminate his service would be invalid under Delaware law. The approach taken in the second consent solicitation differed markedly from the usual approach in contested elections, whereby the insurgent first removes directors, then shrinks the board, and then fills the vacancies. The proponent did not take this course here because, as a holder of preferred stock, it could vote the 28% voting power incident to its preferred stock in support of the proposed bylaw amendment, but could not vote to remove EMAK directors because under Delaware law only stockholders "entitled to vote at an election of directors" may vote in favour of removal. The proposed bylaw amendment thus sought to achieve indirectly what the preferred shareholder could not accomplish directly - the removal and replacement of a majority of the board.The decision also rejected the incumbents' claim that the insurgents had engaged in improper "vote buying". The Vice Chancellor expressed the view that Delaware law should not hesitate to provide a remedy where the decoupling of economic ownership of shares from their voting rights proves deleterious, particularly where there is fraud or disparity of information. But where, as in this case, the party buying the votes assumes the economic risks of ownership, the court will perceive no "legal wrong" just because the buyer is primarily interested in securing swing votes needed to win an election. The Chancery Court also rejected the claim that the consents submitted in support of the first consent solicitation in respect of stock recently acquired by the leader of that solicitation were invalid. The acquisition of the economic and voting interests in those shares in order to support the solicitation did not amount to improper "vote buying." Although "vote buying" typically refers to the expenditure of corporate funds to acquire voting stock, Vice-Chancellor Laster found that "third party vote buying" nevertheless deserved scrutiny "when it delivers the swing votes" in a contested election. The court observed that third party vote buying is an unsettled area of Delaware law without clear standards. He considered, however, that a court should have regard to whether the transaction was the product of fraud or information disparity, and whether the transaction created a divergence of interests between the voting and economic rights incident to share ownership.In this case, the seller of the stock was well aware of the purpose of the transaction and its significance to the first consent solicitation. Moreover, as the purchaser's economic interests were not inconsistent with his voting interests, the court rejected the improper "vote buying" claim.etailed Contents |

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