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[Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new) | | [eview my Newsfeed selections](http://my.lawlex.com.au/default.asp?goto=news_sub) [iew past editions of Newsfeeds](http://my.lawlex.com.au/default.asp?goto=news) [iew a list of related Standards](http://infostore.saiglobal.com/store/results2.aspx?searchType=subject&publisher=All&doctype=All&status=Current&sfld1=ICS%20Code&sval1=03.160) [earch all Australian legislation from one website](http://my.lawlex.com.au/default.asp?goto=search_leg) [ree trial our Lawlex Legislative Alerts](http://www.saiglobal.com/Compliance/regulatory-news/asiapac/lawlex-legislative-alert.htm) [ree trial our other regulatory products and services](http://www.saiglobal.com/compliance/regulatory-news/default.htm) [overnance, risk and compliance solutions](http://www.saiglobal.com/compliance/about/) | | |  | | --- | | COPYRIGHT WARNING Use of this product must be in accordance with our licence agreement and the relevant licence fee paid by your organisation. We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | |  | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%231) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | | [1. 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Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm#3)  [3.1 Reports](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm#031) [3.2 ASX submission to Treasury on reforms to the supervision of Australia's financial markets](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm#032)  [3.3 Rule amendment - ACH minimum core capital requirements](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm#033) [3.4 ASTC securities lending disclosure initiative](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm#034) [3.5 Rule amendment - Covered short selling](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm#035) [3.6 Rule amendment - 2007 Omnibus Listing Rule amendments come into effect](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm#036)  [4. Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm#4)  [4.1 Tully Sugar Limited - Panel declines to make declaration](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm#041)  **Editor's note**   This is an additional issue of the Corporate Law Bulletin. The recent judgments section of the Bulletin will return in the February issue. |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **1. Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1 Seminar - The care factor: The care, skill and diligence standard for directors after *ASIC v Rich* - Melbourne and Sydney**   The recent decision in *ASIC v Rich*, along with other court judgments, highlights the importance of the duty of care, skill and diligence owed by company directors and officers. In this important seminar at which leading speakers will participate, the following topics will be discussed:   **What is the standard?**   * Differences (and relationship) between the general law and statutory duties * Significance of a corporation's circumstances, and each director's particular responsibilities * Minimum standards of skill and diligence * Availability or relevance of shareholder ratification   **The business judgment rule - What is it and does it really matter?**  In *ASIC v Rich*, Justice Austin provides one of the first comprehensive judicial analyses of the business judgment rule in s 180(2) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The judgment addresses the big mostly unanswered questions for directors and officers like: What is a business judgment? Who bears the onus of proof? Is there a common law business judgment rule? What does the business judgment rule require? What is the effect of the requirement for a "rational belief"?   **Staying out of trouble - lessons from the GFC and the Rich decision on practical steps to comply with directors' duties:**   * meetings and minutes * bullet-proofing in the deal context * significance of special roles and skills * role of professional advisers   **Speakers:** Andrew Lumsden (Sydney seminar) Partner, Corrs Chambers Westgarth; Rebecca Maslen-Stannage (Sydney seminar) Partner, Freehills; Simon Morris (Melbourne seminar) Partner, Corrs Chambers Westgarth; Cameron Price (Melbourne seminar) Partner, Allens Arthur Robinson; Victoria Poole (Sydney seminar) Partner, Allens Arthur Robinson; Michael Ziegelaar (Melbourne seminar) Partner, Freehills.   Dates: 3 March 2010 - Melbourne; 18 March 2010 - Sydney  The flyer and registration details are available on the [CCLSR](http://cclsr.law.unimelb.edu.au/go/news/index.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.2 Greater powers for ASIC to investigate market misconduct and increased penalties**   On 28 January 2010, the Australian Minister for Financial Services, Superannuation and Corporate Law announced proposed changes to the law to strengthen the Australian Securities and Investment Commission's investigative powers and increase penalties for market related offences.    The proposals will increase the maximum criminal penalties that can be imposed when individuals and corporations breach market misconduct provisions.   The changes will increase the penalties for individuals to $500,000 or three times the profit made or loss avoided, whichever is greater. For corporations, the penalty will be the greater of $5,000,000, three times the profit made or loss avoided, or 10 per cent of the corporation's annual turnover during the period the breach occurred.   To ensure compliance and increase deterrence, the maximum term of imprisonment for these offences will be increased from five years to 10 years.  As part of the proposals, ASIC will be able to access telecommunications interception material collected by the Australian Federal Police under a court-issued warrant. ASIC's search warrant powers will also be improved to dispense with the need to issue a notice to produce before a warrant is enforced.  The Government will release an exposure draft of the proposed changes later this year.   **(a) Increased penalties for market misconduct offences**  According to the government, the current penalties in the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) for the offences of insider trading, market manipulation, false trading, market rigging and making false and misleading statements provide insufficient deterrence, as the gain from engaging in market misconduct often far outweighs the penalties imposed for a breach.  It is proposed that the pecuniary penalty for individuals would be increased from the current maximum of $22,000 (or $220,000 for insider trading) to $500,000 or three times the profit made or loss avoided by the conduct that constitutes the offence.  The maximum penalty for a corporation would be increased from the current maximum of $1 million to $5 million, three times the profit made or loss avoided, or 10 per cent of the annual turnover of the corporation in the relevant period.  The Government proposes to increase the penalties for an individual from a maximum term of five years imprisonment to a maximum term of ten years imprisonment.  **(b) Expanded ASIC investigative powers**  The [Telecommunications (Interception and Access) Act 1979](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8268" \t "Default) (the TIA Act) currently limits the offences for which interception can be used as an investigative tool.  Interception may only be conducted under a warrant obtained by an interception agency in relation to the investigation of a serious offence.  It is proposed that the law will be amended so that a serious offence for these purposes includes market and insider trading offences investigated by ASIC.  A telecommunications interception agency, such as the AFP, would execute the warrant, then ASIC and the agency would work together on the investigation. This will enable ASIC to obtain direct evidence of inside information, such as the content of conversations, rather than simply relying on circumstantial evidence, such as the mere existence of suspect telephone calls.  Telephone interception would only be available where a Court is satisfied that appropriate evidentiary and procedural requirements have been satisfied and would be subject to record keeping and reporting obligations.  The TIA Act also regulates what can be done with any intercepted information that is collected and prohibits its use in evidence except in prescribed circumstances.  Further, all interception agencies are subject to record keeping and reporting obligations, which are independently inspected by, in the case of Commonwealth interception agencies, the Commonwealth Ombudsman.  Additionally, ASIC's search warrant powers will also be improved to dispense with the need to issue a notice to produce before a warrant is enforced.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.3 Members' schemes of arrangement**  On 28 January 2010, the Corporations and Markets Advisory Committee (CAMAC) published a report on Members' schemes of arrangement.   Members' schemes of arrangement under Part 5.1 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) are a commonly used mechanism for achieving structural change within a company or a corporate group. They can be tailored to novel or complex corporate structures or be used for major group reconstructions. Members' schemes can be used in some circumstances instead of takeover bids under Chapter 6 of the Corporations Act to achieve a change of corporate control.   The Advisory Committee was asked by the former Government to consider whether the 'headcount' test for shareholder approval of members' schemes (namely a majority in number of shareholders voting on the scheme in addition to 75% of the shares voted) should be removed. The Committee took the view that this issue would usefully be considered in the context of a wider review of whether the provisions for members' schemes operate in an effective and appropriate manner, and with appropriate safeguards, to facilitate corporate restructuring.   The Committee considers that members' schemes of arrangement are a flexible and practical procedure that can be adapted to the needs of particular companies to achieve various forms of corporate reorganization, including in some circumstances a change of corporate control.   The Committee recommends the removal of the headcount test for the approval of schemes, leaving only the voted shares test (namely, 75% of the shares voted on the resolution). Decisions on other fundamental corporate matters, such as a change to a company's constitution or matters requiring approval by special resolution, are already determined on the basis of shares voted.   As a matter of general approach, the Committee is neutral on the question whether changes of corporate control should proceed by a scheme or by a bid in circumstances where either procedure would be open. Each mechanism has its own protections. Given developments in judicial interpretation of section 411(17)(a) and the demonstrated demand in the market for effecting change of control transactions through schemes as well as bids, the provision fulfils no real purpose and should be repealed.   The Committee makes a number of other recommendations to improve the operation of the scheme provisions including the following:   **Information for shareholders**   * introduction of a 'clear, concise and effective' requirement for scheme documents * a right for a director to require the scheme company to convey his or her views on a proposed scheme to shareholders   **Voting on schemes**   * a curative power for the court to approve a scheme, having regard to all the circumstances, even if the classes of shareholders were incorrectly constituted   **Regulatory and judicial supervision**   * that the court, in considering an application by a company for approval of a scheme, may call on ASIC for assistance   **Coverage of schemes**   * extension of the scheme provisions to listed and unlisted managed investment schemes * a short-form merger procedure for companies within wholly-owned corporate groups   **Other matters**   * a power for the court to order that a company's constitution be altered to implement a scheme, without shareholders having to approve the alteration through a separate procedure * a power for the court to dispense with reduction of capital approval requirements where appropriate.   The report is available on the [CAMAC](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2009/$file/Members_Schemes_Report_Dec09.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.4 SEC issues interpretive guidance on disclosure related to business or legal developments regarding climate change**   On 27 January 2010, the US Securities and Exchange Commission (SEC) voted to provide public companies with interpretive guidance on existing SEC disclosure requirements as they apply to business or legal developments relating to the issue of climate change.  US Federal securities laws and SEC regulations require certain disclosures by public companies for the benefit of investors. Occasionally, to assist those who provide such disclosures, the Commission provides guidance on how to interpret the disclosure rules on topics of interest to the business and investment communities.    The Commission's interpretive releases do not create new legal requirements nor modify existing ones, but are intended to provide clarity and enhance consistency for public companies and their investors.  The interpretive release approved provides guidance on certain existing disclosure rules that may require a company to disclose the impact that business or legal developments related to climate change may have on its business. The relevant rules cover a company's risk factors, business description, legal proceedings, and management discussion and analysis.   Specifically, the SEC's interpretative guidance highlights the following areas as examples of where climate change may trigger disclosure requirements:   **Impact of legislation and regulation:** When assessing potential disclosure obligations, a company should consider whether the impact of certain existing laws and regulations regarding climate change is material. In certain circumstances, a company should also evaluate the potential impact of pending legislation and regulation related to this topic.   **Impact of international accords:** A company should consider, and disclose when material, the risks or effects on its business of international accords and treaties relating to climate change.   **Indirect consequences of regulation or business trends:** Legal, technological, political and scientific developments regarding climate change may create new opportunities or risks for companies. For instance, a company may face decreased demand for goods that produce significant greenhouse gas emissions or increased demand for goods that result in lower emissions than competing products. As such, a company should consider, for disclosure purposes, the actual or potential indirect consequences it may face due to climate change related regulatory or business trends.   **Physical impacts of climate change:** Companies should also evaluate for disclosure purposes the actual and potential material impacts of environmental matters on their business.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.5 Basel Committee publishes assessment methodology for compensation practices**   On 22 January 2010, the Basel Committee on Banking Supervision (BIS) issued 'Compensation Principles and Standards Assessment Methodology'. The Methodology seeks to foster supervisory approaches that are effective in promoting sound compensation practices at banks and help support a level playing field.  The Methodology will help supervisors assess a firm's compliance with the Financial Stability Board's "Principles for Sound Compensation Practices" and related implementation standards. This will contribute to ongoing implementation of the Principles and Standards, including the FSB's current thematic review of national and firm implementation. Consistent with the FSB "Principles for Sound Compensation Practices", the Methodology is structured based on the following themes:  1. Effective governance of compensation; 2. Effective alignment of compensation with prudent risk taking; and  3. Effective supervisory oversight and engagement by stakeholders.    Further information is available on the [BIS](http://www.bis.org/publ/bcbs166.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.6 IOSCO completes global framework for cross-border market abuse**    On 22 January 2010, the International Organization of Securities Commissions (IOSCO) announced that it has achieved its goal, set in 2005, of having its eligible membership sign onto or committed to sign the Multilateral Memorandum of Understanding concerning Consultation, Cooperation and the Exchange of Information (MMoU).    From IOSCO's eligible membership of 115 securities regulators, 96% now meet the requirements needed to become signatories to the MMoU, or have made the necessary commitment to seeking national legislative changes to allow them to do so in the near future.   The 64 full MMoU signatories can now request and share confidential information in the pursuit of cross-border securities offences. IOSCO's expert assessments found that these jurisdictions are fully compliant with the cooperation and enforcement requirements of the MMoU.   The majority of the remaining eligible IOSCO members, a further 46, have indicated their commitment to seeking the changes necessary to become signatories. A small number of members have yet to formally enter the process and are likely to receive technical assistance to help them meet the minimum requirements.    The MMoU has been instrumental in a number of recent enforcement cases in various jurisdictions and 2008 saw 867 information requests made by IOSCO members to fellow regulators. This is an increase of 18% from 736 requests made in 2007 and almost double the 384 requests made in 2005 when IOSCO decided to require all members to sign the MMoU.    The MMOU provides a mechanism through which securities regulators share with each other essential investigative material, such as beneficial ownership information, and securities and derivatives transaction records, including bank and brokerage records. It sets out specific requirements for the exchange of information, ensuring that no domestic banking secrecy, blocking laws or regulations prevent the provision of securities enforcement information amongst securities regulators.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.7 President Obama proposes new restrictions on size and scope of financial institutions**    On 21 January 2009, US President Obama called for new restrictions on the size and scope of US banks and other financial institutions to rein in excessive risk taking and to protect taxpayers.  The proposals would:  1. Limit the scope - The President and his economic team will work with Congress to ensure that no US bank or financial institution that contains a bank will own, invest in or sponsor a hedge fund or a private equity fund, or proprietary trading operations unrelated to serving customers for its own profit.   2. Limit the size - The President also announced a new proposal to limit the consolidation of the US financial sector. The President's proposal will place broader limits on the excessive growth of the market share of liabilities at the largest financial firms, to supplement existing caps on the market share of deposits.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.8 Corporate insolvency law reform package announced**  On 19 January 2010, the Australian Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, announced a package of reforms to Australia's corporate insolvency laws.   The reform package contains a range of reforms directed at reducing the costs and complexity of insolvency administrations; improving communications with creditors; and reducing the potential for abuse of corporate insolvency law. The reforms will include the adoption of substantially all of the recommendations made by the Corporations and Markets Advisory Committee (CAMAC) in its issues in external administration report.    The Government will also amend the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) to reverse the effect of the High Court's decision in *Sons of Gwalia v Margaretic* which determined that, in a corporate winding up, certain compensation claims by shareholders against the company were not subordinated below the claims of other creditors.    'Any direct benefits to aggrieved shareholders arising from non-subordination are outweighed by the negative impacts on shareholders generally as a result of restrictions on access to, and increases in, the cost of debt financing for companies,' Minister Bowen said.    'The Government also remains concerned that the Sons of Gwalia decision has the potential to further increase uncertainty and costs of associated with external administration. The decision has also been taken in light of the decision's potential negative impact on business rescue procedures.'    Minister Bowen also released a discussion paper on the operation of Australia's insolvent trading laws in the context of attempts at business rescue outside of external administration. The paper outlines possible options for reform.    **(a) Consultation process**    The insolvent trading discussion paper contains an overview of the current insolvent trading laws; the options available to companies facing insolvency; and outlines the advantages and disadvantages of informal corporate work-outs.  The paper sets out three possible options: to maintain the status quo; to adopt a modified business judgment rule in respect of the director's duty to avoid insolvent trading; and to adopt a mechanism for invoking a moratorium from the insolvent trading prohibition while work-outs are attempted.   **(b) The safe-harbour discussion paper**   The discussion paper canvases a number of possible responses to concerns regarding the effects of insolvent trading laws on informal work-outs. Currently a company must maintain solvency in order to attempt an informal work-out outside of external administration.   **Retention of the status quo**   Under this option the law would continue to apply as it does now (subject to possible minor fine tuning). Adoption of this option may reflect that, while there may be costs arising from how insolvent trading laws affect informal work-outs, these may be justified by the benefits provided by the insolvent trading laws and the potential consequences that may result from any weakening of the prohibition against insolvent trading.   **Adoption of a modified business judgment rule**   Under this option, a modified 'business judgment rule' would operate so that directors would be considered not to have breached their duty not to trade whilst insolvent if:   * the financial accounts and records of the company presented a true and fair picture of the its financial circumstances; * the director was appropriately informed by restructuring advice based on those accounts and records; * it was the director's business judgment that the interests of both the company's creditors and members were best served by pursuing restructuring; and * the restructuring was diligently pursued by the director.   **Expressly invoked moratorium**   Under this option, a company would inform the market, including existing creditors and potential new creditors that the company was insolvent and intended to pursue a work‑out outside of external administration. A moratorium would then apply, during which honest insolvent trading would be permitted. Creditors would be empowered to bring the moratorium to an end, by either passing a resolution or by obtaining a court order. There would be restrictions on how long a moratorium could continue to apply.   **(c) The insolvency reform package**   In addition to reversing the effect of the Sons of Gwalia decision, the Government will implement reforms to:   * facilitate the electronic provision to creditors of creditor lists and align the relevant provisions for most kinds of corporate insolvency administration; * provide certain information to owners of property in the possession of a company in external administration; streamline creditor meeting procedures; introduce voting on certain proposals without the need to hold creditors' meetings; * mandate the requirement to notifying creditors of material breaches of Deeds of Company Arrangement; * streamline the approval of provisional liquidator remuneration and the appointment of replacement external administrators in the event of a vacancy; * empower the Australian Securities and Investments Commission to take and transfer possession of records in the event of a vacancy in external administrator; * facilitate the future development of alternative methods of publication of certain insolvency related events; * align the rules regarding disclosure of former names of a company between the different kinds of external administration; and * reduce the regulatory burden upon insolvency administrations in relation to the provision of notices to creditors.   The reforms will also remove anomalies in respect of 'relation-back' and 'commencement' dates for liquidation in order to eliminate the potential for manipulation of how far back corporate insolvency clawback provisions apply.  Additionally, the reforms will address a number of other minor technical and mechanical issues identified by the Insolvency Practitioners Association.  Further information is available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1713" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.9 Financial Sector Legislation Amendment (Prudential Refinements and Other Measures) Bill 2010**   On 19 January 2010, the Australian Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, released the Financial Sector Legislation Amendment (Prudential Refinements and Other Measures) Bill 2010 for public consultation.    The Bill would further enhance APRA's ability to regulate bodies in the financial sector in accordance with prudential laws. This is consistent with developments overseas where countries such as the UK and the US, have sought to strengthen their financial regulatory frameworks.    Specifically, the measures contained in the Bill would further enhance APRA's powers to:   * investigate and detect risks to prudentially regulated institutions and the financial system, and to promote financial system stability; * compel compliance with, and rectify breaches of, prudential requirements; * act when regulated financial institutions are at risk of experiencing financial distress and to ensure that distress is resolved without undermining financial stability; * administer the financial claims scheme, which protects deposits in Australian banks, credit unions and building societies (currently up to a limit of $1 million per depositor) and eligible policyholders of general insurers; and * collect data that APRA or the Government requires to identify and respond to developments in the financial sector.   This Bill would also make amendments to the financial sector levies frameworks that have been recommended by the 2009 Report of the Review of Financial Sector Levies.    Copies of the Bill, accompanying explanatory material and the report of the levies review can be obtained from the [Treasury](http://www.treasury.gov.au" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.10 FRC consults on stewardship code for institutional investors**     On 19 January 2010, the UK Financial Reporting Council (FRC) began consultation on the content, operation and oversight of a stewardship code that will set out good practice for institutional investors when engaging with the UK listed companies in which they invest.   The FRC agreed to take on responsibility of oversight of the proposed code at the request of the Government, following publication of Sir David Walker's report on the corporate governance of banks and other financial institutions in November 2009.   The FRC is seeking views on:   * Whether the code published by the Institutional Shareholders' Committee in November 2009 provides a suitable basis for the Stewardship Code, in either its existing or an amended form; * What the responsibilities for engagement of institutional shareholders and their agents are to the beneficial owners whose money they manage; * How adoption of the standards in the code by UK and foreign investors can be encouraged; * What information investors should disclose on their engagement policy and practice; and * What arrangements should be put in place to monitor how the code is applied.   The consultation paper is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/Stewardship%20Code%20Consultation%20January%202010.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.11 Report on Australia as a financial centre**  On 15 January 2010, the Australian Government released the report of the Australian Financial Centre Forum titled "Australian as a Financial Centre".    According to the report, Australia's financial sector ranks highly in international surveys on many of the key requirements for a successful financial centre. These include a highly skilled workforce and a first class regulatory framework. Yet exports and imports of financial services are low by international standards. Australia's funds management sector, one of the largest and most sophisticated in the world, manages only a small volume of funds sourced from offshore.  There are many reasons for this 'inward focus' of the financial sector. Central amongst them are some policy settings which inhibit a greater volume of cross-border financial transactions occurring through Australia - a distinguishing feature of successful financial centres.  This Report sets out a small number of policy recommendations which, if implemented, can substantially boost trade in financial services and further improve the competitiveness and efficiency of the financial sector.    The key recommendations are as follows:   * the Investment Manager Regime, funds management vehicles and Asian passport recommendations, which will help Australian fund managers to attract overseas investors into funds run out of Australia. The Investment Manager Regime will also make it easier for both local and international companies to use Australia as a regional base from which to manage offshore assets; * the recommendations on withholding tax on offshore borrowings and on Islamic finance, which will improve Australia's access to offshore pools of savings at competitive rates, so as to provide more diversified and cheaper funding for Australia's investment needs; * the Offshore Banking Unit recommendations, which will increase the volume of offshore financial transactions that are channelled through Australia; * the recommendations for an 'online gateway', on State taxation and regulation of the insurance sector, on increased competition on exchange traded markets, on corporate debt issuance and on the Asian passport, which will reduce the cost and increase the range of financial products available to consumers and business in Australia; and * the regulatory review recommendations, which will help maintain and enhance Australia's first class regulatory framework, increase the confidence of offshore investors to invest in or transact through Australia's financial centre, and protect the interests of domestic consumers of financial products.   The report is available on the [Treasury](http://www.treasury.gov.au/afcf/content/reference_papers/downloads/AFCF_Building_on_Our_Strengths_%20Report.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.12 SEC announces initiative to encourage individuals and companies to co-operate and assist in investigations**    On 13 January 2010, the US Securities and Exchange Commission (SEC) announced a series of measures to further strengthen its enforcement program by encouraging greater cooperation from individuals and companies in the agency's investigations and enforcement actions.   The new initiative establishes incentives for individuals and companies to fully and truthfully cooperate and assist with SEC investigations and enforcement actions, and provides new tools to help investigators develop first-hand evidence to build the strongest possible cases. The cooperation initiative is expected to result in invaluable and early assistance in identifying the scope, participants, victims and ill-gotten gains associated with fraudulent schemes.   To improve the quality, quantity, and timeliness of information and assistance it receives, the SEC approved the following measures:  First, the Division of Enforcement is authorizing its staff to use various tools to encourage individuals and companies to report violations and provide assistance to the agency. The new tools are laid out in a revised version of the Division's enforcement manual in a new section entitled "Fostering Cooperation." For many years, similar cooperation tools have been regularly and successfully used by the US Justice Department in its criminal investigations and prosecutions. The new cooperation tools, not previously available in SEC enforcement matters, include:   * Cooperation Agreements - Formal written agreements in which the Enforcement Division agrees to recommend to the Commission that a cooperator receive credit for cooperating in investigations or related enforcement actions if the cooperator provides substantial assistance such as full and truthful information and testimony. * Deferred Prosecution Agreements - Formal written agreements in which the Commission agrees to forego an enforcement action against a cooperator if the individual or company agrees, among other things, to cooperate fully and truthfully and to comply with express prohibitions and undertakings during a period of deferred prosecution. * Non-prosecution Agreements - Formal written agreements, entered into under limited and appropriate circumstances, in which the Commission agrees not to pursue an enforcement action against a cooperator if the individual or company agrees, among other things, to cooperate fully and truthfully and comply with express undertakings.   Second, the SEC has streamlined the process for submitting witness immunity requests to the Justice Department for witnesses who have the capacity to assist in its investigations and related enforcement actions.   Third, the Commission has set out, for the first time, the way in which it will evaluate whether, how much, and in what manner to credit cooperation by individuals to ensure that potential cooperation arrangements maximize the Commission's law enforcement interests. This pronouncement is expected to provide guidance and serve as an incentive for individuals to report violations and to cooperate fully and promptly in enforcement cases. It is similar to the so-called "Seaboard Report" that was issued in 2001 and detailed the factors the SEC considers when evaluating cooperation by companies.   In the newly issued policy statement, the SEC identifies four general considerations:   * The assistance provided by the cooperating individual. * The importance of the underlying matter in which the individual cooperated. * The societal interest in ensuring the individual is held accountable for his or her misconduct. * The appropriateness of cooperation credit based upon the risk profile of the cooperating individual.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.13 Final report of the Productivity Commission on executive remuneration**   On 4 January 2010, the Australian Government released the final report of the Productivity Commission on executive remuneration. The following are the key points of the report:   * Strong growth in executive remuneration from the 1990s to 2007, and instances of large payments despite poor company performance, have fuelled community concerns that executive remuneration is out of control. * Pay for CEOs of the top 100 Australian companies appears to have grown most strongly, at 13 per cent real a year, from the mid-90s to 2000, and then increased by around 6 per cent annually in real terms to 2007. Since 2007 average remuneration has fallen by around 16 per cent a year, returning it to 2004-2005 levels. The rise and decline in executive pay over the 2000s largely reflects increased use of pay structures linked to company performance. * Executive pay varies greatly across Australia's 2000 public companies. For the top 20 CEOs, in 2008-09 it averaged $7.2 million (110 x AWE) compared to around $260 000 for CEOs of the smallest listed companies (4 x AWE). Generally speaking, Australian executives appear to be paid in line with smaller European countries, but below the UK and USA (the global outlier). * Liberalisation of the Australian economy and global competition, increased company size, and the shift to incentive pay structures, have been major drivers of executive remuneration - companies compete to hire the best person for the job, and try to structure pay to maximise the executive's contribution to company performance. * Nonetheless, some past trend and specific pay outcomes appear inconsistent with an efficient executive labour market, and possibly weakened company performance.  - Incentive pay 'imported' from the United States and introduced without appropriate hurdles spurred pay rises in the 1990s partly for 'good luck'. More recently, complex incentive pay may have delivered unanticipated 'upside'.  - Some termination payments look excessive and could indicate compliant boards. * Instances of 'excessive' payments and perceived inappropriate behaviour could also reduce investor and community trust in the corporate sector more broadly, with adverse ramifications for equity markets. * But the way forward is not to by-pass the central role of boards. Capping pay or introducing a binding shareholder vote on it would be impractical and costly. * Instead, the corporate governance framework should be strengthened by:  - removing conflicts of interest, through independent remuneration committees and improved processes for use of remuneration consultants; and - promoting board accountability and shareholder engagement, through enhanced pay disclosure and strengthening the consequences for those boards that are unresponsive to shareholders' 'say on pay'.   **Recommendation 1**  For the election of directors at a general meeting, where the board seeks to declare no vacancies and the number of directors is less than the constitutional maximum, approval should be sought from shareholders by way of an ordinary resolution at that general meeting. Boards would retain their powers to appoint directors and fill or leave vacant casual vacancies throughout the year. This recommendation should be effected through amendments to the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and relevant regulations.   **Recommendation 2**  The ASX Corporate Governance Council should introduce an 'if not, why not' recommendation specifying that remuneration committees:   * have at least three members * comprise non-executive directors, a majority of whom are independent * be chaired by an independent director * have a charter setting out procedures for non-committee members attending meetings.   **Recommendation 3**   In conjunction with recommendation 2, a new ASX listing rule should specify that all ASX300 companies have a remuneration committee and that it should comprise solely non-executive directors.   **Recommendation 4**   The Corporations Act should specify that company executives identified as key management personnel and all directors be prohibited from voting their shares on remuneration reports and any resolutions related to those reports.   **Recommendation 5**  The Corporations Act should specify that companies prohibit their executives from hedging unvested equity remuneration or vested equity subject to holding locks.  **Recommendation 6**   The Corporations Act and relevant ASX listing rules should be amended to prohibit company executives identified as key management personnel and all directors from voting undirected proxies on remuneration reports and any resolutions related to those reports.  **Recommendation 7**  The Corporations Act should be amended to require proxy holders, except in exceptional circumstances, to cast all of their directed proxies on remuneration reports and any resolutions related to those reports.   **Recommendation 8**   The usefulness of remuneration reports to investors has been diminished by their complexity and by crucial omissions. Remuneration reports should include:   * a plain English summary statement of companies' remuneration policies * actual levels of remuneration received by the individuals named in the report * total company shareholdings of the individuals named in the report.   The Australian Government should establish an expert panel under the auspices of the Australian Securities and Investments Commission to advise it on how best to revise the architecture of section 300A of the Corporations Act and the relevant regulations to support these changes.   **Recommendation 9**   Section 300A of the Corporations Act should be amended to reflect that individual remuneration disclosures be confined to key management personnel. The additional requirement for the disclosure of the top five executives should be removed.   **Recommendation 10**   The ASX Corporate Governance Council should make a recommendation that companies disclose the expert advisers they have used in relation to the remuneration of directors and key management personnel, who appointed them, who they reported to and the nature of other work undertaken for the company by those advisers.   **Recommendation 11**  The ASX listing rules should require that, where an ASX300 company's remuneration committee (or board) makes use of expert advisers on matters pertaining to the remuneration of directors and key management personnel, those advisers be commissioned by, and their advice provided directly to, the remuneration committee or board, independent of management. Confirmation of this arrangement should be disclosed in the company's remuneration report.    **Recommendation 12**  Institutional investors - particularly superannuation funds - should disclose, at least on an annual basis, how they have voted on remuneration reports and other remuneration-related issues. Initially this should be progressed on a voluntary basis by institutions in collaboration with their industry organisations. The Australian Securities and Investments Commission should monitor progress in relation to superannuation funds regulated under the [Superannuation Industry (Supervision) Act 1993](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "Default).   **Recommendation 13**  The Australian Government should make legislative changes to remove the cessation of employment trigger for taxation of equity or rights that qualify for tax deferral and are subject to risk of forfeiture. These equity-based payments should be taxed at the earliest of: the point at which ownership of, and free title to, the shares or rights is transferred to the employee, or seven years after the employee acquires the shares.   **Recommendation 14**  The Australian Securities and Investments Commission should issue a public confirmation to companies that electronic voting is legally permissible without the need for constitutional amendments - as recommended in 2008 by the Parliamentary Joint Committee on Corporations and Financial Services.   **Recommendation 15**  The Corporations Act should be amended such that:   * where a company's remuneration report receives a 'no' vote of 25 per cent or more of eligible votes cast at an annual general meeting (AGM), the board be required to explain in its subsequent report how shareholder concerns were addressed and, if they have not been, the reasons why; and * where the subsequent remuneration report receives a 'no' vote of 25 per cent or more of eligible votes cast at the next AGM, a resolution be put that the elected directors who signed the directors' report for that meeting stand for reelection at an extraordinary general meeting (the re-election resolution). Notice of the re-election resolution would be contained in the meeting papers for that AGM. If it were carried by more than 50 per cent of eligible votes cast, the board would be required to give notice that such an extraordinary general meeting will be held within 90 days.   **Recommendation 16**  If the Australian Securities Exchange does not give effect to recommendations 3 or 11 and/or the Australian Securities Exchange Corporate Governance Council does not give effect to recommendations 2 or 10, the Australian Government should give consideration to putting into effect the intent of those recommendations through legislative means.   **Recommendation 17**  There should be a review of the corporate governance arrangements that emanate from the Australian Government's response to this report. The review should be conducted no later than five years from the introduction of the new arrangements. In particular, the review should consider:   * the effectiveness and efficiency of the reforms in meeting their objectives both individually and as a package, including recent legislative reforms to termination payments and employee share schemes; and * any changes to the regulatory architecture that affect the operations of, or the balance of responsibilities between, the Corporations Act, the Australian Securities Exchange listing rules and the Australian Securities Exchange Corporate Governance Council's principles and recommendations.   The Productivity Commission also made two findings in its report.   **Finding 1**   The continuing marked under-representation of women on boards indicates that boards are not drawing sufficiently widely from available talent. Given the lack of progress in addressing this, the Commission strongly endorses the initiatives by the ASX Corporate Governance Council:   * to require companies to adopt and disclose, on an 'if not, why not' basis, their progress against gender objectives set by their boards; and * to encourage nomination committees to review the proportion of women at all levels in the company and disclose annually the skills and diversity criteria used for board appointments.   Outcomes should be reviewed three years after the measures have been introduced, including determining whether the principles and recommendations should be upgraded to a listing rule by the Australian Securities Exchange.   **Finding 2**  Remuneration structures are company and context-specific and a matter for boards to resolve rather than being amenable to prescriptive direction. That said, some key dimensions often warrant being explained clearly to shareholders and, where appropriate, could usefully be addressed in companies' treatment of their remuneration policies in the remuneration report:   * how the remuneration policy aligns with the company's strategic directions,  its desired risk profile and with shareholder interests * how the mix of base pay and incentives relates to the remuneration policy * how comparator groups for benchmarking executive remuneration and setting performance hurdles and metrics were selected, and how such benchmarks have been applied * how incentive pay arrangements were subjected to sensitivity analysis to determine the impact of unexpected changes (for example, in the share price), and how any deferral principles and forfeiture conditions would operate * whether any 'incentive-compatible' constraints or caps apply to guard against extreme outcomes from formula-based contractual obligations * whether alternatives to incentives linked to complex hurdles have been considered (for example, short-term incentives delivered as equity subject to holding locks) * whether employment contracts have been designed to the degree allowable by law, to inoculate against the possibility of having to 'buy out' poorly performing executives in order to avoid litigation * whether post-remuneration evaluations have been conducted to assess outcomes, their relationship to the remuneration policy and the integrity of any initial sensitivity analysis.   The full report is available on the [Productivity Commission](http://www.pc.gov.au/projects/inquiry/executive-remuneration/report" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.14 SEC issues concept release seeking comment on structure of equity markets**   On 13 January 2010, the US Securities and Exchange Commission (SEC) moved forward with a broad review of the equity market structure, voting unanimously to issue a concept release seeking public comment on such issues as high frequency trading, co-locating trading terminals, and markets that do not publicly display price quotations.  The Commission is assessing how all types of individual investors and all sizes of institutional investors - small, medium, and large - are faring in the current market structure. It also is assessing whether the current market structure promotes capital formation in companies with varying levels of market capitalisation.  The concept release requests comment on all matters related to market structure. In addition, it asks many specific questions about the current market structure, including:  **Market quality metrics:** What are the best metrics for assessing market quality for long-term investors and have these metrics improved or worsened in recent years?  **Fairness of market structure:** Is the current highly automated, high-speed market structure fundamentally fair for investors?  **High frequency trading:** What types of strategies are used by the proprietary trading firms loosely referred to as high frequency traders, and are these strategies beneficial or harmful for other investors? Is the overall use of any harmful strategies by proprietary firms sufficiently widespread that the Commission should consider a regulatory initiative in this area?  **Co-location:** Do co-location services (which enable exchange customers to potentially route trades faster by placing their computer servers in close proximity to an exchange's computer system) give proprietary trading firms an unfair advantage? If so, should the proprietary firms that use these services be subject to any specific trading obligations?   **Dark liquidity:** Has the trading volume of undisplayed trading centres (such as dark pools) reached a sufficiently significant level that it has detracted from the quality of public price discovery? If more individual investor orders were routed to public markets, would it promote quote competition in the public markets, lead to narrower spreads, and ultimately improve order execution quality for individual investors beyond current levels? Are a significant number of individual investor orders executed in dark pools and, if so, what is the execution quality for these orders?  The Commission's ongoing review already has led to several rulemaking proposals that are narrowly targeted to address discrete issues and intended primarily to preserve the integrity of longstanding market structure principles.  One proposal would ban flash orders, which enable a person who has not publicly displayed a quote to see orders less than a second before the public is given an opportunity to trade with those orders.  Another proposal would strengthen transparency requirements for non-public trading interest, including dark pools of liquidity which are a type of alternative trading system that does not display quotations to the public.  In addition, the Commission proposed for public comment a new market structure initiative to strengthen the risk management controls of broker-dealers that provide market access.  The concept release is available on the [SEC](http://www.sec.gov/rules/concept/2010/34-61358.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.15 Position paper on executive remuneration**   The Association of British Insurers (ABI) has issued a position paper on executive remuneration. The ABI's Executive Remuneration Guidelines set out criteria by which shareholders will judge remuneration policy as it applies to main board directors of companies in which they invest. This paper is addressed to Remuneration Committees to help them understand how shareholders expect the ABI's Guidelines to be implemented in current conditions, and to encourage constructive dialogue between Remuneration Committees and shareholders on the delivery of core principles.   The main principles in the Guidelines are:   * Remuneration Committees should be accountable to shareholders for their decisions, especially when these involve the use of discretion. Shareholders seek an open and constructive approach to communication rather than a purely compliance-based approach to remuneration guidelines based on the advice of consultants. * Remuneration structures that seek to increase tax efficiency should not result in additional costs to the company or an increase in its own tax bill. Remuneration Committees should be aware of the potential damage to the company's and shareholders' reputation from implementing such schemes. * Windfall gains may arise if the level of share or option grants expressed as a multiple of salary is maintained after a substantial fall in the share price. Where this risk exists, grants should be scaled back. * Shareholders discourage the payment of annual bonuses to main board directors when the business has suffered an exceptional negative event. In such circumstances shareholders should therefore be consulted on bonus policy and any proposed payments should be carefully justified. * In the case of underpinning measures supporting relative TSR or other similar criteria, any determination of vesting should be justified in relation to the overall underlying financial performance of the company and not solely by performance relative to peer companies. This determination should be disclosed in the Remuneration Report. * Experience has shown that retention awards to main board directors rarely work. Retention concerns on their own are not sufficient grounds for remuneration to increase.   The paper is available on the [ABI](http://www.ivis.co.uk/PDF/ABI_Executive_Remuneration_Position_Paper.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.16 Review of the differentiated nature and scope of financial regulation released by the Joint Forum**   On 8 January 2010, the Joint Forum released its report titled 'Review of the Differentiated Nature and Scope of Financial Regulation - Key Issues and Recommendations'. This review was requested by the G20 through the Financial Stability Board. The report analyses key issues arising from the differentiated nature of financial regulation in the international banking, securities, and insurance sectors. It also addresses gaps arising from the scope of regulation as it relates to different financial activities, with a particular focus on certain unregulated or lightly regulated entities or activities. The objectives of the review were to identify potential areas where systemic risks may not be fully captured in the current regulatory framework and to make recommendations on needed improvements to strengthen regulation of the financial system.    The report's recommendations address five specific areas:   * Issues arising from regulatory differences across the three sectors, including with respect to similar financial products; * Supervision and regulation of financial groups, focusing on unregulated entities within those groups; * Residential mortgage origination, focusing on minimum underwriting standards consistently implemented by different types of mortgage providers; * Hedge funds, especially those that present systemic risk; and * Credit risk transfer, focusing on credit default swaps and financial guarantee insurance.   The report is available on the [BIS](http://www.bis.org/publ/joint24.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.17 APRA consults on implementation of financial claims scheme**   On 6 January 2010, the Australian Prudential Regulation Authority (APRA) released for consultation a discussion paper detailing proposals on the implementation of the Financial Claims Scheme (FCS) for authorised deposit-taking institutions (ADIs).   The FCS was established in October 2008 and is designed to provide depositors with timely access to their deposits, up to a defined amount, in the event that their ADI becomes insolvent.   APRA's discussion paper sets out proposals to ensure that, in the event of failure, ADIs are able to provide reliable data in the required format to enable depositors to be paid in a timely manner. These proposals include details on:   * how end-of-day account balances are to be calculated for FCS purposes; * aggregation of accounts to ensure that each account-holder is able to be identified for the purpose of making payment; * proposed information collection for FCS purposes; and * potential payout options.   Subject to industry feedback, APRA will release a draft reporting standard later in 2010 that sets out further detail on proposed information collection requirements. Once the requirements are finalised, there will be a transition period to allow industry time to make changes to their information technology systems for FCS purposes.  The consultation package is available on the [APRA](http://www.apra.gov.au/Policy/Financial-Claims-Scheme-for-ADIs.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.18 Consultative proposals to strengthen the resilience of the banking sector announced by the Basel Committee**   On 17 December 2009, the Basel Committee on Banking Supervision approved for consultation a package of proposals to strengthen global capital and liquidity regulations with the goal of promoting a more resilient banking sector.   The Committee's consultative documents cover the following key areas:   * Raising the quality, consistency and transparency of the capital base. This will ensure that the banking system is in a better position to absorb losses on both a going concern and a gone concern basis. In addition to raising the quality of the Tier 1 capital base, the Committee is also harmonising the other elements of the capital structure. * Strengthening the risk coverage of the capital framework. In addition to the trading book and securitisation reforms announced in July 2009, the Committee is proposing to strengthen the capital requirements for counterparty credit risk exposures arising from derivatives, repos and securities financing activities. The strengthened counterparty capital requirements will also increase incentives to move OTC derivative exposures to central counterparties and exchanges. The Committee will also promote further convergence in the measurement, management and supervision of operational risk. * Introducing a leverage ratio as a supplementary measure to the Basel II risk-based framework with a view to migrating to a Pillar 1 treatment based on appropriate review and calibration. The leverage ratio will help contain the build-up of excessive leverage in the banking system, and introduce additional safeguards against model risk and measurement error. To ensure comparability, the details of the leverage ratio will be harmonised internationally, fully adjusting for any remaining differences in accounting. * Introducing a series of measures to promote the build-up of capital buffers in good times that can be drawn upon in periods of stress. A countercyclical capital framework will contribute to a more stable banking system, which will help dampen, instead of amplify, economic and financial shocks. In addition, the Committee is promoting more forward-looking provisioning based on expected losses, which captures actual losses more transparently and is also less procyclical than the current "incurred loss" provisioning model. * Introducing a global minimum liquidity standard for internationally active banks that includes a 30-day liquidity coverage ratio requirement underpinned by a longer-term structural liquidity ratio. The framework also includes a common set of monitoring metrics to assist supervisors in identifying and analysing liquidity risk trends at both the bank and system wide level. These standards and monitoring metrics complement the Committee's Principles for sound liquidity risk management and supervision issued in September 2008.   The Committee is also reviewing the need for additional capital, liquidity or other supervisory measures to reduce the externalities created by systemically important institutions.   The final set of standards will be developed by the end of 2010 to be phased in as financial conditions improve and the economic recovery is assured, with the aim of implementation by end-2012, the July 2009 requirements for the trading book, resecuritisations and exposures to off-balance sheet conduits are to be implemented by the end of 2010.    Further information is available on the [BIS](http://www.bis.org/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.19 Report on market surveillance in emerging markets**   In December 2009, the Emerging Markets Committee of the International Organization of Securities Commissions (IOSCO) published a report titled "Approaches to Market Surveillance in Emerging Markets".    The report examines the current approaches adopted by securities exchanges and/or regulators in conducting surveillance of markets. These include the role of the regulator versus the exchange in conducting the surveillance function, surveillance systems and mechanisms used the importance of human capital, and surveillance skills and supplementary efforts to complement the surveillance function. The report also examines the current methods used to intervene once market abuse is detected and international cooperation with foreign exchanges and/or regulators on matters involving market surveillance.   The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD313.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.20 Report on supervision of market intermediaries**   In December 2009, the Emerging Markets Committee (EMC) of the International Organization of Securities Commission (IOSCO) published a report titled "Guidelines to Emerging Market Regulators Regarding Requirements for Minimum Entry and Continuous Risk-Based Supervision of Market Intermediaries".   According to IOSCO, the supervision of market intermediaries has three broad objectives: to protect client assets from insolvency of the intermediary or appropriation by the intermediary or its employees; to guard against defaults and sudden disruptions to the market, either through sudden insolvency or settlement failure; and to ensure that intermediaries are fair and diligent in dealing with their clients. Regulation, therefore, sets licensing standards (limiting the market place to those with sufficient resources and qualification), prudential standards (protecting against sudden financial failure), internal controls and risk management standards (reducing the possibility of default or to appropriate client assets), and business conduct rules (ensuring proper handling of client accounts).   However, while risk-based supervision holds out the hope of a more flexible and targeted regime which can adapt to fast changing market developments, it also places pressure on supervisors who are expected to address these new challenges through:   * the use of supervisory discretion; * corporate governance; and * assessment of supervised entities risk management.   To accomplish the assigned mandate, the EMC undertook a survey of the EMC member jurisdictions to analyze their practices and approaches on minimum entry requirements and continuous risk-based supervision for market intermediaries. The outcome of the survey revealed that supervision of intermediaries is an area that needs to be strengthened by the regulators. Although minimum entry requirements have been established in almost all the surveyed jurisdictions through licensing standards and some form of supervisory framework is in place, many regulators still need to improve their effective oversight of intermediary's activity and require setting up detailed standards for internal controls and risk management along with adequate prudential requirements.   This report covers the entry standards and risk-based supervision framework for market intermediaries in EMC members. Based on the study of risk-based supervision approaches amongst securities regulators in emerging markets members, the report distills the approaches/guidelines on risk-based supervision. Individual regulators will be required to tailor their risk-based supervision approaches to suit the circumstances that are specific to their own markets.   The guideline on risk-based supervision cover:   * systematic planning for risk-based supervision approach; * identification and assessment of relevant risks; and * appropriate allocation of supervisory resources.   The report is available on the [IOSCO](http://www.iosco.org/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1)  **1.21 OECD papers on financial regulation**  The Organisation for Economic Co-operation and Development (OECD) Journal on Financial Market Trends has published two papers:   * '[Regulatory Issues Related To Financial Innovation](http://www.oecd.org/dataoecd/28/62/44362117.pdf" \t "_new)'; and * '[Policy Framework for Effective and Efficient Financial Regulation - General Guidance and High-Level Checklist](http://www.oecd.org/dataoecd/28/49/44362818.pdf" \t "_new)'.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1 ASIC's review of 30 June 2009 accounts and areas of focus for 31 December 2009 accounts**  On 11 January 2010, the Australian Securities and Investments Commission (ASIC) announced focus areas for entities preparing their 31 December 2009 financial reports.  ASIC reviewed 30 June 2009 financial reports for 350 listed and unlisted entities. Following the review and a consideration of the current economic and business climate, ASIC has identified a number of key areas for continued focus, including the appropriateness of going concern assumptions, asset impairments and fair value determinations.   For the first time, the review included a sample of 100 financial reports of unlisted entities that have a larger number of potential non-shareholder financial report users.   ASIC's review of the 31 December 2009 financial reports will include a focus on compliance with revised accounting standards.   Further information is available on the [ASIC](http://www.asic.gov.au/ASIC/asic.nsf/byHeadline/10-04MR%20ASIC%27s%20review%20of%2030%20June%202009%20accounts%20and%20areas%20of%20focus%20for%2031%20December%202009%20accounts?opendocument" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h2)  **2.2 ASIC grants conditional relief to improve access to capital for investors in frozen mortgage funds**  On 23 December 2009, the Australian Securities and Investments Commission (ASIC) announced its intention to grant conditional relief for investors in frozen mortgage funds.  Under the move, investors will be granted relief from some of the requirements of the withdrawal provisions in the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act). The purpose of the relief is to improve investor access to their money in frozen mortgage funds.  ASIC intends to grant conditional relief for a 'rolling' withdrawal offer that has the following features:   * the offer exists for one calendar year and applies to all withdrawal opportunities made by the responsible entity over that calendar year; * all members can opt to provide a withdrawal request to the responsible entity, which applies to all withdrawal opportunities made by the responsible entity over the calendar year until it is withdrawn or amended by the member; and * all members can lodge a withdrawal request with the responsible entity at any time during the calendar year.   The relief, which will apply for a period of three years or until the frozen mortgage fund becomes liquid, will be subject to the following conditions:  The responsible entity:   * provides all members of the frozen mortgage fund with information about the amount of each withdrawal opportunity and how the withdrawal opportunity is being funded prior to the withdrawal opportunity becoming open; * includes reminders about members' ability to participate in the rolling withdrawal in any correspondence, statement or disclosure provided to members; * notifies all members in writing of the outcome of each withdrawal opportunity within a reasonable period after the outcome is known by the responsible entity; * maintains a website that contains all relevant and up to date information in relation to the rolling withdrawal offer:  - for so long as the withdrawal requests from members exceed available cash, the responsible entity must distribute all available cash to the members; and - the responsible entity provides ASIC with information about each withdrawal opportunity, including the amount made available to satisfy withdrawal requests from members, as soon as practicable after the withdrawal amounts are paid.   ASIC will grant conditional relief from various technical requirements of the withdrawal provisions in Part 5C.6 of the Act to facilitate simpler and streamlined withdrawal procedures for investors seeking to redeem their investments in frozen mortgage funds.  Relief will generally be granted on individual application by responsible entities of frozen mortgage funds. To apply for the relief, an applicant will need to lodge an application for relief with ASIC.   Applications should be prepared in accordance with ASIC Regulatory Guide 51: Applications for relief and be lodged through [applications@asic.gov.au](mailto:applications@asic.gov.au)  Mortgage funds froze redemptions in October 2008. Operators must freeze funds if the fund's underlying assets are illiquid, in the interests of all members to prevent withdrawals from destabilising the funds. A freeze means that for a period, the operators have decided to delay redemptions until liquidity improves.    A freeze does not necessarily mean that there has been a loss of asset value, and it does not necessarily mean that investors will not get their money back. ASIC expects mortgage fund operators to take all steps, consistent with their obligations as responsible entities, to allow investors who wish to withdraw their money to do so as soon as possible.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1 Reports**   On 6 January 2010, ASX released the following reports:   * the ASX Group Monthly Activity Report; * the SFE Monthly Volume and Open Interest Report; and * the ASXMS Quarterly Activity Report.   These reports are available on the [ASX](http://www.asx.com.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h3)  **3.2 ASX submission to Treasury on reforms to the supervision of Australia's financial markets**    On 22 December 2009, the ASX released its submission in response to Treasury's Exposure Draft and Consultation Paper "Reforms to the supervision of Australia's financial markets".    In this submission, the ASX has outlined additional steps that the Government will need to consider as ASIC assumes a supervisory role over real-time trading on all of Australia's domestic licensed markets. In particular, there is a need for greater clarity of ASIC's new powers.    ASX also recommends adjustments to:   * Close loopholes in the draft legislation that would allow foreign-owned markets operating in Australia to escape the new ASIC rules; * Enable investors to have the same ability to access compensation funds in the event of loss caused to them by a broker, irrespective of the exchange to which a broker submitted a client's order; * Ensure that ASIC's wide new powers to create rules in place of exchange rules and to promptly enforce those rules apply to all relevant trading venues even-handedly, including dark pools; * Recognise that, in the event of multiple providers of trade facilities, no single operator can be responsible for the integrity of the entire market and, therefore, the licence obligations of all trade facility operators, including ASX, need to be clarified to acknowledge their changed role in influencing integrity outcomes; and * Create accountability mechanisms to ensure that the regulator, ASIC, is effectively maintaining market integrity and that the basis upon which market users are levied fees by the Government and ASIC, via market operators as collection agents, does not create market distortions.   The submission is available on the [ASX](http://www.asx.com.au/about/pdf/20091222_asx_submission_on_reforms_to_supervision.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h3)  **3.3 Rule amendment - ACH minimum core capital requirements**   On 18 December 2009, ASX announced changes to ACH Procedures and ASX Market Rules that bring into effect new minimum core capital requirements for ACH participants from 1 July 2010. These amendments increase the minimum capital requirements for ACH General Participants to $10,000,000, with a further increase in minimum capital requirements scheduled for 1 January 2012.    To facilitate this transition, the ASX has previously announced measures to help ACH Participants meet the new requirements. These include:   * Widening the definition of "Core Capital" to accommodate acceptable mark-to-market reserves; and * Permitting ACH Participants with a shortfall in their Core Capital (who are granted prior approval by ACH) to satisfy up to 50 per cent of the minimum requirement by lodging cash/bank guarantees or injecting approved subordinated debt.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h3)  **3.4 ASTC securities lending disclosure initiative**   ASTC has amended its Settlement Rules and Procedures in order to meet the new requirements of the RBA's Financial Stability Standards for Securities Settlement Facilities in relation to improving the transparency of equities securities lending activity. The amendments were introduced in two phases on 2 November 2009 and 14 November 2009.    The disclosure regime consists of daily securities lending transaction reports depicting both 'gross transactional flow' and 'outstanding loan positions' in each ASX-listed security.    Complementing this disclosure is information about the volume of securities lending transactions as a proportion of total transactions, the composition of the daily settlement batch, and a report measuring daily settlement performance.   The new reports are available on the [ASX](http://www.asx.com.au/professionals/securities_lending/index.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h3)  **3.5 Rule amendment - Covered short selling**   From 11 December 2009, ASX has amended the ASX Market Rules and ASX Market Rules Procedures to reflect changes to the transactional reporting requirements for short selling. These changes were introduced by the [Corporations Amendment Regulations 2009 (No 8)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=110735" \t "Default) and [Corporations Amendment (Short Selling) Act 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=105282" \t "Default), which contain new reporting and disclosure obligations for covered short sale transactions.   The transactional reporting requirements under the new legislation and regulations are intended to effectively replicate the existing transactional reporting requirements under ASIC Class Order [CO 08/751]. However, under the new transactional reporting requirements for short selling, Participants will not be required to include in their short sale reports details of naked short sales undertaken by that Participant arising from ETO exercises. In addition, the distinction for reporting requirements between Cash Market Products, ETFs and Public Securities has been removed.   The communiqué is available on the [ASX](http://www.asx.com.au/supervision/rules_guidance/recent_rule_amendments.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h3)  **3.6 Rule amendment - 2007 Omnibus Listing Rule amendments come into effect**   A number of listing rule amendments came into effect on 11 January 2010. These listing rule amendments were released for public comment in the Omnibus Listing Rule Amendments document on 22 June 2007.   The consultation paper is available on the [ASX](http://www.asx.com.au/supervision/pdf/listing_rules_amendments_exposure_draft_20_june_07.pdf" \t "_new) website.    Key corporate governance listing rules that have been amended include:   * Listing rule 12.7 has been amended so that the group of listed entities that is required to have an audit committee constituted in compliance with the recommendations of the ASX Corporate Governance Council is changed from the top 300 entities in the S&P/ASX All Ords, to the entities that make up the S&P/ASX 300. This simplifies the process for determining which entities are actually required to have an audit committee.   Listing rule Chapter 12 is available on the [ASX](http://www.asx.com.au/ListingRules/chapters/Chapter12.pdf" \t "_new) website.   * Consequently, listing rule 1.1 condition 13 has been amended to reflect the amendment of listing rule 12.7, so that an entity that has applied for listing and which will be included in the S&P/ASX 300 upon its admission will be required to have a complying audit committee. Listing rule 1.1 condition 13 has also been amended so that an entity applying for admission to the official list must provide a statement disclosing the extent to which it follows the recommendations of the ASX Corporate Governance Council. This amendment is designed to eliminate any lag between listing and the adoption of any best practice recommendations.   Listing rule Chapter 1 is available on the [ASX](http://www.asx.com.au/ListingRules/chapters/Chapter01.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1 Tully Sugar Limited - Panel declines to make declaration**   On 23 December 2009, the Takeovers Panel declined to make a declaration of unacceptable circumstances in response to an application dated 25 November 2009 from The Maryborough Sugar Factory Limited in relation to the affairs of Tully Sugar Limited following the provision of a supplementary target's statement. Tully (an unlisted, non-disclosing public company) is the subject of an off-market scrip takeover bid by Maryborough, which is currently scheduled to close on 26 February 2010.   Maryborough submitted that there were material deficiencies in Tully's target's statement, including issues relating to the value of Tully shares. It submitted that an independent expert's report was required. Maryborough further submitted that because the Tully directors did not determine whether the offer price represented a premium or a discount to the value of Tully shares, the Tully directors did not have a proper basis for the making of their recommendation, and accordingly, their recommendation should be withdrawn.   The Panel was concerned that Tully shareholders had insufficient information to assess whether they wished to remain as shareholders in Tully as a stand-alone entity or become shareholders in the post-acquisition Maryborough. The Panel did not agree that an independent expert's report was required. The Panel requested that further disclosure be made, including:   * an update on Tully's financial performance since its last set of financial reports. Tully provided a forecast of its financial performance to 30 April 2010; * information comparing Tully's business with Maryborough should the bid succeed, including a comparison of historical and forecast earnings per share; * information on the historical trading volumes and prices of Tully shares; * an update on the review of Tully (referred to in Tully's 2009 annual report) which included its board structure and its negotiations with Bundaberg Sugar Limited; and * a retraction of comments made by the Tully Chairman on ABC Radio on 13 November 2009 in relation to the value of Tully shares.   Given the further disclosure, the Panel did not agree that the recommendation should be withdrawn.   On the basis of the above, the Panel decided not to make a declaration of unacceptable circumstances.    A review application by Maryborough was unsuccessful.  Further information is available on the [Takeovers](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=reasons_for_decisions/2009/026.htm&pageID=&Year=" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Contributions** |  |  | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/149%20January%202010.htm%23h1) | | | http://my.lawlex.com.au/alert/pic/spacer.gif |

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