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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/158%20October%202010.htm%231) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1 Financial Stability Board statement on financial regulatory reform**   On 20 October 2010, the Financial Stability Board (FSB) issued a statement on key elements of financial reforms ahead of the G20 Summit in Seoul. The FSB welcomed the Basel Committee's global bank capital and liquidity standards; agreed on a framework for addressing systemically important financial institutions; endorsed recommendations for increasing the intensity and effectiveness of financial supervision; approved recommendations for implementing central clearing and trade reporting of over-the-counter (OTC) derivatives; and endorsed principles for reducing reliance on credit rating agency ratings.   The FSB also reviewed progress on other elements of the financial regulatory reform agenda, including accounting convergence, established FSB regional outreach arrangements, and discussed the future work program.   The statement focuses on the following elements of the program of financial regulatory reform agreed by the G20 economies and coordinated by the FSB in the wake of the financial crisis.   **(a) New bank capital and liquidity standards**    The new standards developed by the Basel Committee on Banking Supervision have been designed to markedly increase the resilience of the global banking system by raising the quality, quantity and international consistency of bank capital and liquidity, constrain the build up of leverage and maturity mismatches, and introduce capital buffers above the minimum requirements that can be drawn upon in bad times. The new standards will reduce the likelihood and severity of future financial crises and create a less procyclical banking system that is better able to support long-term economic growth.   The FSB and the Basel Committee, in close collaboration with the BIS and IMF, have assessed the macroeconomic impact of the transition to the stronger capital and liquidity standards. The implementation horizon and transition arrangements have been designed to ensure that implementation does not harm the recovery. National implementation of the risk-based capital requirements by member countries will begin on 1 January 2013. Member countries will translate the capital rules into national laws and regulations before that date. From that point forward, the capital standards rise each year, reaching their new level on 1 January 2019.   **(b) Addressing systemically important financial institutions**   The FSB agreed a policy framework, work processes and timelines to address the "too big to fail" problem associated with systemically important financial institutions (SIFIs).    The framework calls for jurisdictions to put in place:  Capacity to resolve national and global SIFIs without disruption to the financial system and without taxpayer support;  A requirement that SIFIs and initially in particular global SIFIs (G-SIFIs) have higher loss absorbency capacity to reflect the greater risks that these institutions pose to the global financial system;  Supplementary prudential and other requirements to reduce the probability and impact of SIFI failure;  Increased intensity of SIFI supervision; and  Updated standards for more robust core market infrastructures, including central counterparties in the OTC derivatives market.  The effectiveness and consistency of national policy measures for G-SIFIs will be subject to review by an FSB Peer Review Council.  **(c) Increasing supervisory intensity and effectiveness**   The FSB endorsed recommendations to increase supervisory intensity and effectiveness. Strong supervision is a necessary complement to stronger rules. Supervisors are expected to detect problems proactively, intervene early to reduce the impact of potential stresses on individual firms and therefore on the financial system as a whole. The actions and processes endorsed cover the following elements necessary to deliver greater supervisory intensity and effectiveness:  Ensuring that supervisors have unambiguous mandates, sufficient independence and appropriate resources;  Providing supervisors with the full suite of powers necessary for effective early intervention;  Improving supervisory standards to reflect the complexity of financial institutions and the system as a whole; and  Increasing the frequency of assessments of supervisory regimes.  National authorities and standard setters will follow up on these recommendations as they make improvements to their core principles. FSB thematic peer reviews and IMF/World Bank FSAP assessments will assess national implementation.   **(d) Implementing central clearing and trade reporting of OTC derivatives**   The FSB approved a report containing recommendations to promote consistent implementation of the G20 commitments concerning:  Increasing the proportion of the market that is standardised;  Moving to central clearing of OTC derivatives by implementing mandatory clearing requirements strengthening oversight and regulation of central counterparties (CCPs), and introducing robust risk management requirements for the remaining non-centrally cleared markets;  Trading on exchanges or electronic platforms, where appropriate, by asking IOSCO to complete an analysis by end-January 2011; and  Ensuring that OTC derivatives transactions are reported to trade repositories.  The FSB will assess implementation of these recommendations, and monitor progress to identify if further work on the international level is needed, on a regular basis.  **(e) Reducing reliance on CRA ratings**  The FSB endorsed principles to reduce authorities' and financial institutions' reliance on credit rating agency (CRA) ratings. The principles cover five types of financial market activity: prudential supervision of banks; policies of investment managers and institutional investors; central bank operations; private sector margin requirements; and disclosure requirements for issuers of securities. The goal of the principles is to reduce the cliff effects from CRA ratings that can amplify procyclicality and cause systemic disruption. The principles call on authorities to do this through:  Removing or replacing references to CRA ratings in laws and regulations, wherever possible, with suitable alternative standards of creditworthiness assessment; and  Expecting that banks, market participants and institutional investors make their own credit assessments, and not rely solely or mechanistically on CRA ratings.  The FSB has asked standard setters and regulators to consider next steps that could be taken to translate the principles into policy approaches tailored to specific financial sectors and market participants. As market participants need to build up their own risk management capabilities, clear milestones should be set to achieve a transition to a reduced reliance on CRA ratings over a reasonable timeframe into the medium term.   **(f) Accounting convergence**    The FSB recognised progress toward improved, converged accounting standards in four main areas:  impairment of financial assets;  derecognition;  addressing valuation uncertainty in fair value measurement guidance; and  netting/offsetting of financial instruments.  The FSB reaffirmed its support of standards that do not expand the use of fair value measurement recognition for lending activities, a position echoed by the comments of many investors and other stakeholders, and expressed hope that the FASB and IASB consideration of stakeholders' comments on proposed standards will result in improved and converged approaches. More generally, the FSB encourages the IASB and FASB to continue their efforts to achieve improved converged financial instrument accounting standards by June 2011.   **(g) Future work program**  The FSB discussed its forward work program. In addition to the follow-up work described in the reports submitted to the G20 and monitoring implementation of overall financial regulatory reform, in cooperation with all the relevant bodies, it will focus attention on the shadow banking sector, macroprudential frameworks and emerging markets' financial stability issues, as well as commodity derivatives markets and market integrity.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.2 Plans for a new EU framework for crisis management in the financial sector**   On 20 October 2010, the European Commission published its plans for an EU framework for crisis management in the financial sector. These plans pave the way for legislation which will create a crisis management framework for banks and investment firms.   The new framework aims to equip authorities with tools and powers to tackle bank crises at the earliest possible moment, and minimise costs for taxpayers. The toolbox of measures will include:  preparatory and preventative measures such as a requirement for institutions and authorities to prepare for recovery (i.e. dealing with serious difficulties faced by a bank) and resolution plans to ensure adequate planning for financial stress or failure;  powers to take early action to remedy problems before they become severe such as powers for supervisors to require the replacement of management, or to require an institution to implement a recovery plan or to divest itself of activities or business lines that pose an excessive risk to its financial soundness; and  resolution tools, such as powers to effect the takeover of a failing bank or firm by a sound institution, or to transfer all or part of its business to a temporary bridge bank, which would enable authorities to ensure the continuity of essential services and to manage the failure in an orderly way.  Further information is available on the [European Commission](http://ec.europa.eu/internal_market/bank/crisis_management/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.3 Report to the G20 on response to the financial crisis**    On 19 October 2010, the Basel Committee on Banking Supervision published a report on its regulatory reform program to address the lessons of the crisis. The report was prepared for the G20 Finance Ministers and Central Bank Governors meeting in Gyeongju, South Korea on 22 and 23 October 2010.    The Basel Committee's report describes the measures taken by the Committee and its governing body of Central Bank Governors and Heads of Supervision to strengthen the resilience of banks and the global banking system.   The new global standards to address both firm-specific and broader, systemic risks have been referred to as "Basel III". Basel III is comprised of the following building blocks, which were agreed and issued by the Committee and its governing body between July 2009 and September 2010:  higher quality of capital, with a focus on common equity, and higher levels of capital to ensure banks can better absorb the types of losses like those associated with this past crisis;  better coverage of risk, especially for capital market activities;  an internationally harmonised leverage ratio to constrain excessive risk taking and to serve as a backstop to the risk-based capital measure, with a view to migrating to a Pillar 1 treatment based on appropriate review and calibration;  capital buffers, which should be built up in good times so that they can be drawn down in periods of stress;  minimum global liquidity standards to improve banks' resilience to acute short term stress and to improve longer term funding; and  stronger standards for supervision, public disclosures and risk management.  The Basel Committee is also contributing to the Financial Stability Board initiative to address the risks of globally systemic banking institutions by developing approaches to identify them and ways to raise their loss absorbing capacity, including work on capital surcharges, contingent capital, and bail-in-able debt.    The report is available on the [BIS](http://www.bis.org/publ/bcbs179.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.4 SEC proposes rules on "say on pay" and proxy vote reporting**  On 18 October 2010, the US Securities and Exchange Commission (SEC) proposed rules that would enable shareholders to cast advisory votes on executive compensation and "golden parachute" arrangements. The rules are called for by section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.   Under the proposed rules, public companies subject to the federal proxy rules would be required to:  provide their shareholders with an advisory vote on executive compensation and an advisory vote on the desired frequency of these votes;  provide shareholders with an advisory vote on compensation arrangements and understandings in connection with merger transactions, known as "golden parachute" arrangements; and  provide additional disclosure of "golden parachute" arrangements in merger proxy statements.  The proposed rules would also require that institutional investment managers report their votes on executive compensation and "golden parachute" arrangements at least annually, unless the votes are otherwise required to be reported publicly by SEC rules.   Last year, the Commission adopted rules requiring public companies with outstanding obligations under the Troubled Asset Relief Program to provide a shareholder vote on executive pay in their proxy solicitations. The Commission also adopted rules requiring enhanced disclosure of executive compensation by public companies in their proxy statements.   **(a) Required say-on-pay votes and additional disclosure requirements**  **(i) Shareholder approval of executive compensation**  Under the proposed rules implementing the Dodd-Frank Act, companies subject to the federal proxy rules would be required to provide shareholders with an advisory vote on executive compensation. Section 14A(a) of the Exchange Act, which was added under the Dodd-Frank Act, specifies that these votes, generally known as say-on-pay votes, are required at least once every three years beginning with the first annual shareholders' meeting taking place on or after 21 January 2011.   The SEC's proposal requires companies to provide disclosure about the say-on-pay vote in the annual meeting proxy statement, including whether the vote is non-binding. The proposal also would require the company to disclose in the Compensation Discussion and Analysis, or CD&A, whether, and if so, how companies have considered the results of previous say-on-pay votes.   **(ii) Shareholder approval of the frequency of shareholder votes on executive compensation**   Under the proposal, companies subject to the federal proxy rules also would be required to allow shareholders to vote on how often they would like to cast a say-on-pay vote, namely: every year, every other year, or once every three years.  Shareholders would be allowed to cast this non-binding "frequency" vote at least once every six years beginning with the first annual shareholders' meeting taking place on or after 21 January 2011.  The proposals would require companies to provide disclosure about the frequency vote in the annual meeting proxy statement, including whether the vote is non-binding.  **(iii) Shareholder approval and disclosure of golden parachute arrangements**   Under the proposal, companies also would be required to provide additional information about the compensation arrangements with executive officers in connection with merger transactions. Disclosures of these "golden parachute" arrangements would be required of all agreements and understandings that the acquiring and target companies have with the named executive officers of both companies.   This "golden parachute" disclosure also would be required in connection with going-private transactions and third-party tender offers, so that the information is available for shareholders no matter the structure of the transaction. Further, the proposed rules would require companies to provide a shareholder advisory vote to approve certain "golden parachute" compensation arrangements in merger proxy statements.  **(b) Institutional investment manager reporting of votes**  The SEC also proposed rules that would require institutional investment managers to annually file with the SEC their votes on say-on-pay, frequency of say-on-pay votes, and "golden parachute" arrangements.   The proposal would generally apply to every institutional investment manager that manages certain equity securities having an aggregate fair market value of at least US$100 million.   The manager would be required to identify securities voted, describe the executive compensation matters voted on, disclose the number of shares over which the manager held voting power and the number of shares voted, and indicate how the manager voted.   The proposal would require institutional investment managers to report these votes annually not later than 31 August of each year for the twelve months ended 30 June.   The Proposed Rule Release No. 34-63123 is available on the [SEC](http://www.sec.gov/rules/proposed/2010/34-63123.pdf" \t "_new) website.                      The Proposed Rule Release No. 33-9153 is available on the [SEC](http://www.sec.gov/rules/proposed/2010/33-9153.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.5 IOSCO publishes recommendations for market interventions and securitisation in emerging markets**    On 15 October 2010, the Emerging Markets Committee (EMC) of the International Organization of Securities Commissions (IOSCO) published two reports containing recommendations for regulators in emerging markets jurisdictions aimed at assisting them in relation to market interventions and the securitisation market.    **(a) Effectiveness of market interventions in emerging markets**  The report titled 'Effectiveness of Market Interventions in Emerging Markets' sets out the following broad implementing measures to intervene in markets:  Regular review of the framework governing interventions in light of the changing trading landscape;  Market interventions need to be considered in a holistic manner and not on a piecemeal basis;  Market interventions need to be transparent and explicitly guided by clear criteria and parameters;  Market interventions must be consistently applied across all exchanges and/or markets to prevent regulatory arbitrage; and  A proper framework for coordination and communication between exchanges and/or regulators and exchanges for multi-listed securities is necessary.  **(b) Securitization and securitized debt in emerging markets**    The report titled 'Securitization and Securitized Debt Instruments in Emerging Markets' includes recommendations on both enabling conditions necessary for the development of securitization markets and those required for the further development of these markets.    **Enabling conditions**    A stable macroeconomic environment; robust legal framework; robust accounting framework; neutral tax system; investor education - financial literacy; and robust framework for the securities regulator.    **Further development of securitization markets**  Regulators in Emerging Markets should collect a minimum set of information on securitization markets to monitor their development and identify potential sources of risk for financial stability or consumer protection;  Regulators in Emerging Markets should strengthen disclosure requirements for Securitized Financial Product (SFP) vis-à-vis investors, both in the context of public as well as private offerings;  Regulators in Emerging Markets should encourage trading of SFPs in public venues, and impose transparency in OTC markets;  Regulators in Emerging Markets should encourage the development of pricing agencies, which should be regulated;  Regulators in Emerging Markets should establish a minimum framework for key participants of the securitization process;  Regulators in Emerging Markets should strengthen business conduct obligations; and  Regulators in Emerging Markets should align credit rating agencies regulation with the IOSCO Code of Conduct.  The report titled 'Effectiveness of Market Interventions in Emerging Markets' is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD333.pdf" \t "_new) website.  The report titled 'Securitization and Securitized Debt Instruments in Emerging Markets' is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD334.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.6 SEC proposes rules to require issuer review of assets underlying asset-backed securities**   On 13 October 2010, the US Securities and Exchange Commission (SEC) issued a proposal to enhance disclosure to investors in the asset-backed securities market.    The SEC's proposed rules require issuers of asset-backed securities (ABS) to perform a review of the assets underlying the securities and publicly disclose information relating to the review. The proposal also requires an issuer or underwriter of ABS to make publicly available the findings and conclusions of any third-party due diligence report.    The SEC's proposal seeks to enhance ABS disclosure in three ways:  Issuers of ABS that are registered with the SEC would be required to perform a review of the bundled assets that underlie the ABS.  Proposed amendments to Regulation AB would require an ABS issuer to disclose the nature, findings and conclusions of this review of assets.  The issuer or underwriter for both registered and unregistered ABS offerings would be required to disclose the findings and conclusions of any review performed by a third party that was hired to conduct such a review.  The Proposed Rule Release No. 33-9150 is available on the [SEC](http://www.sec.gov/rules/proposed/2010/33-9150.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.7 SEC proposes rules to mitigate conflicts of interest involving security-based swaps**  On 13 October 2010, the US Securities and Exchange Commission (SEC) proposed rules intended to mitigate conflicts of interest for security-based swap clearing agencies, security-based swap execution facilities, and national securities exchanges that post security-based swaps or make them available for trading.   Prior to passage of the Dodd-Frank Act, the over-the-counter derivatives market was largely unregulated. The new law fills a number of significant regulatory gaps and gives the SEC important new tools to better protect investors.   The SEC's proposed rules known as Proposed Regulation MC require security-based swap clearing agencies, security-based SEFs and security-based swap exchanges to adopt ownership and voting limitations as well as certain governance requirements.   The Proposed Regulation is available on the [SEC](http://www.sec.gov/rules/proposed/2010/34-63107.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.8 European Commission consults on how the European audit market can be improved**   13 October 2010, the European Commission launched a consultation on how the European audit market can be improved.   The Commission is keen to discuss whether audits provide the right information to all financial actors, whether there are issues around the independence of audit firms, whether there are risks linked to a concentrated market, whether supervision at a European level might be useful and how best the specific needs of small and medium sized businesses may be met.    There are a number of areas which the Commission believes need to be explored further, in particular:  the independence of auditors - it is unclear if auditors are truly detached and critical when examining the financial statements of a company when that same company is an existing or potential client for non audit services;  the reliance stakeholders can place on audited financial statements. That is why the Commission seeks to understand what 'expectation gaps', if any, exist amongst stakeholders with regard to the scope and the methodology of audit;  the potential for systemic risk because of the strong concentration in the audit sector (what consequences could there be for the wider financial system if one of the big audit firms closed down?);  the role played by supervisors, and whether national supervision is fully effective;  the potential for a real internal market for audit and the removal of barriers which currently make audit a mainly national market. In that context, the concept of a European passport for auditors should be explored further;  the specific needs of small businesses - ensure proportional application of rules to SMEs; and  the global context: audit is a global market with firms operating as global networks; to this extent it is important to co-ordinate efforts at an international level.  The consultation paper is available on the [European Commission](http://ec.europa.eu/internal_market/auditing/otherdocs/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.9 Board composition and non-executive director pay in the top 100 Australian companies**   On 11 October 2010, the Australian Council of Super Investors (ACSI) published an empirical analysis of board composition and non-executive director pay in the S&P/ASX 100 for the 2009 financial year.    Key findings from the 2009 study are as follows:  Top 100 Australian companies have heeded investor calls for independent non-executive directors to comprise a majority of the board, with the 2009 study finding independent directors held 69 percent of all board seats. This is the highest level recorded in the history of ACSI's longitudinal studies of Top 100 boards over the past eight years and is an increase from the level of approximately 65 percent for the past four years.  The number of Top 100 directors holding no other ASX listed board seats increased compared with 2008, with 55 percent of all individuals holding office as a director of an S&P/ASX 100 entity holding no other ASX listed board seats, up from 31.4 percent in 2008.  Female representation on boards remained stagnant in 2009 as it has since 2006. Women accounted for 11.1 percent of all individuals holding S&P/ASX 100 board seats and 12.1 percent of all board seats (in 2008 women accounted for 10.1 percent of all S&P/ASX 100 directors and 11.1 percent of all board seats).  Women held just 3.5 percent of chairperson roles in the S&P/ASX 100 and 4.1 percent of executive director positions.  Nearly 30 percent of S&P/ASX 100 companies in the sample had no female directors in 2009, compared with 32 percent in 2008. Just under a quarter of sample companies had more than one woman on the board, largely unchanged from 2008.  For the second year in succession individuals new to S&P/ASX 100 boards accounted for a narrow majority of new non-executive appointments. Individuals who prior to 2009 had not served as directors of Top 100 companies represented 52.2 percent of all individuals appointed to Top 100 non-executive roles in the 2009 sample period, up from 50.6 percent for 2008.  In 2009 average and median non-executive director remuneration continued to increase, although by lower rates than in prior years. The average Top 100 non-executive chairperson in 2009 received $442,994, up from $439,449 in 2008 (in 2008, the average increased 12.6 percent) while the median was also effectively unchanged at $400,000 after a 10.9 percent increase to $396,880 in 2008. The average non-executive director's remuneration, excluding chairpersons, was up 3.6 percent to $190,027 in 2009 after a 5.6 percent increase in 2008, while the median rose 5.5 percent to $186,288 after a 8.6 percent increase in 2008.  The study is available on the [ACSI](http://www.acsi.org.au/images/stories/ACSIDocuments/detailed_research_papers/board_comp_and_non-exec_director_pay_in_top_100_companies_2009.oct_10.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.10 Draft guidelines on remuneration policies and practices**    On 8 October 2010, the Committee of European Banking Supervisors (CEBS) published its draft guidelines on remuneration policies and practices.   CEBS had already published a set of High-level Principles for Remuneration Policies on 20 April 2009 aimed at assisting in remedying unsound remuneration policies. These principles also built on the remuneration work carried out by other bodies, namely the Financial Stability Board and the European Commission.    Article 22 of the revised guidelines lays down the fundamental principle whereby institutions are required to ensure that their remuneration polices and practices are consistent with their organisational structure and promote sound and effective risk management. The remuneration requirements included in the draft guidelines are divided into three blocks:  Governance;  Risk alignment; and  Transparency.  The draft guidelines are available on the [CEBS](http://www.c-ebs.org/documents/Publications/Consultation-papers/2010/CP42/CP42.aspx" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.11 Report on deterring and detecting financial reporting fraud**   On 6 October 2010, the Center for Audit Quality (CAQ) published a report, 'Deterring and Detecting Financial Reporting Fraud - A Platform for Action'.   The report is the result of CAQ-sponsored roundtable discussions and in-depth interviews on the issue of financial reporting fraud at public companies. The discussions and interviews featured corporate executives, members of boards of directors and audit committees, internal auditors, and external auditors - the stakeholders that are participants in the "financial reporting supply chain" - as well as investors, regulators and academics, among others.    The report defines financial reporting fraud as "a material misrepresentation resulting from an intentional failure to report financial information in accordance with generally accepted accounting principles." The CAQ's roundtable discussions identified three conditions, referred to as the "fraud triangle," that typically are connected to financial reporting fraud: pressure or incentive, opportunity and rationalisation.   The report is available on the [CAQ](http://www.thecaq.org/Anti-FraudInitiative/CAQAnti-FraudReport.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.12 Women in leadership census**   On 6 October 2010, the Equal Opportunity for Women in the Workplace Agency published the latest edition of its biennial Australian Women in Leadership Census. The census examined the number of male and female board directors and executive key management personnel in ASX200 listed companies.    The findings include the following:  Women chair five boards and hold 8.4% of Board Directorships in the ASX 200 companies (123 seats out of 1467). This compares with 8.3% (125 seats out of 1504) reported in the 2008 Census, 8.7% (129 out of 1487) reported in 2006 and 8.2% (119 out of 1456) reported in 2004.  In 7.0% of ASX 200 companies, 25% or more of the Board Directors are women. This is a return to just below the level of 2004 (7.1%). The increase to 12% in 2006 has not been sustained. In 13.0% of companies there are two or more women Board Directors, up from 11.5% in 2008 but still down from 13.5% in 2006.  Industry groups with the highest percentage of women Board Directors were Insurance, Consumer Services, Banks, Software & Services, and Diversified Financials.  The percentage of companies with no women board directors has increased from 51.0% in 2008 to 54% in 2010.  Women hold six Chief Executive Officer positions in 2010 compared with four in 2008, and 8.0% of Executive Key Management Personnel positions in the ASX 200 companies (104 out of 1300 positions). This compares with 7.0% in 2008 (81 out of 1152).  The percentage of companies with no women Executive Key Management Personnel has declined slightly to 61.9% in 2010 from 65.1% in 2008.  Women hold 4.1% of line roles (the same as in 2008) and 24.1% of support roles, an increase from 17.1% in 2008.  The report is available on the [Equal Opportunity for Women in the Workplace Agency](http://www.eowa.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.13 SEC seeks public comment on asset-backed securities rule proposal**   On 6 October 2010, the US Securities and Exchange Commission (SEC) announced that it is seeking public comment on proposed regulations to require issuers of asset-backed securities (ABS) and credit rating agencies that rate ABS to provide investors with new disclosures about representations, warranties, and enforcement mechanisms.   Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the Commission to prescribe regulations on the use of representations and warranties in the ABS market by 14 January 2011 (180 days after enactment).    ABS are created by buying and bundling loans such as residential mortgage loans, commercial loans or student loans and creating securities backed by those assets that are then sold to investors. In the transaction agreements that govern a securitization, ABS issuers or originators of those loans typically make "representations and warranties" about the characteristics and the quality of those loans. If a loan does not comply with the representation or warranty, an ABS issuer or lender can be required to repurchase the loan from the pool or replace it with a substitute asset.    Since the financial crisis, many investors and other transaction parties have questioned whether the loans in the bundle meet the characteristics specified by the representations and warranties in transaction agreements, and have been seeking to enforce repurchase provisions. The Dodd-Frank Act imposes new disclosure obligations so that investors receive information about the representations and warranties and repurchase history so they may identify originators with clear underwriting deficiencies.   The SEC's proposed rules would:  Require disclosure of repurchase history;  Require disclosure of repurchase history in prospectuses and ongoing reports; and  Require NRSROs to provide disclosure in any report accompanying a credit rating.  The proposal is available on the [SEC](http://www.sec.gov/rules/proposed/2010/33-9148.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.14 Principles for enhancing corporate governance issued by the Basel Committee**   On 4 October 2010, the Basel Committee on Banking Supervision issued a set of principles for enhancing sound corporate governance practices at banking organisations.    The principles for enhancing corporate governance address fundamental deficiencies in bank corporate governance that became apparent during the financial crisis. The principles were first issued for consultation in March 2010. Comments received were highly supportive of the Committee's proposed corporate governance guidance.    The principles cover:  the role of the board, which includes approving and overseeing the implementation of the bank's risk strategy, taking account of the bank's long-term financial interests and safety;  the board's qualifications. For example, the board should have adequate knowledge and experience relevant to each of the material financial activities the bank intends to pursue to enable effective governance and oversight of the bank;  the importance of a risk management function (including a chief risk officer or equivalent for large banks and internationally active banks), a compliance function and an internal audit function, each with sufficient authority, stature, independence, resources and access to the board;  the need to identify, monitor and manage risks on an ongoing firm-wide and individual entity basis. This should be based on risk management systems and internal control infrastructures that are appropriate for the external risk landscape and the bank's risk profile; and  the board's active oversight of the compensation system's design and operation, including careful alignment of employee compensation with prudent risk-taking, consistent with the Financial Stability Board's principles.  The principles also stress the importance of the board and senior management having a clear knowledge and understanding of the bank's operational structure and risks. This includes risks arising from special purpose entities or related structures.    Supervisors also have a critical role in ensuring that banks practice good corporate governance. In line with the Committee's principles, supervisors should establish guidance or rules requiring banks to have robust corporate governance strategies, policies and procedures. Commensurate with a bank's size, complexity, structure and risk profile, supervisors should regularly evaluate the bank's corporate governance policies and practices as well as its implementation of the Committee's principles.    The principles are available on the [BIS](http://www.bis.org/publ/bcbs176.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.15 IMF financial stability report**   On 1 October 2010, the International Monetary Fund (IMF) published its semi annual Financial Stability Report. The report deals with two main issues:   **(a) Systemic liquidity risk: Improving the resilience of institutions and markets**  Review of the Systemic Liquidity Shock through Various Short-Term Funding Markets  Funding Markets as Propagation Channels of Systemic Liquidity Risk  Policies to Strengthen the Resilience of Funding Markets  Policies to Strengthen Prudential Liquidity Regulations for Institutions  Outstanding Policy Issues in Addressing Systemic Liquidity Risk  Conclusions and Policy Considerations  **(b) The uses and abuses of sovereign credit ratings**  Basic Rating Definitions and Principles  The Evolving Roles and Regulation of Credit Ratings and Credit Rating Agencies  Fundamental Sovereign Credit Risk Analysis  The Accuracy and Informational Value of Sovereign Ratings  Conclusions and Policy Implications  In relation to the systemic liquidity risk issues, it is stated in the report that the inability of multiple financial institutions to roll over or obtain new short-term funding was one of the defining hallmarks of the crisis. Banks and non-banks financial institutions, in particular in advanced countries, increased their reliance on short-term markets for funding, exposing them to significant risks when these markets dried up. Secured lending through repurchase operations grew immensely, greasing the funding markets. Perhaps insufficiently recognized was that the wholesale providers of funds had changed - instead of banks playing a central role in intermediating unsecured funds where needed, others, such as money market mutual funds, were growing suppliers of funds while traditional, more stable, depositors were not. Underestimated were also the risks associated with the greater use of low quality securities as collateral for secured funding. Moreover, the crisis demonstrated that regulators, and banks themselves, had underestimated the risks emanating from the reliance on cross-border funding.    A number of policy proposals are included in the report:  Policymakers should strengthen collateral valuation and margin practices in the secured funding markets. Important would be to have more realistic assumptions about how long it might take to sell the collateral, more frequent adjustments to collateral to avoid the problem of abrupt shortfalls in cash. Supervisors should also encourage markets to value collateral through a full credit cycle so to discourage excessive funding when values are high. Moreover, financial supervisors should periodically validate the models banks use to price collateral used to secure funding.  Market regulators should advocate greater use of central counterparties to lower operational and counterparty risk associated with repo transactions. Central counterparties serving repo markets should be subject to minimum regulatory requirements to ensure safety and soundness. Central bank emergency liquidity should be made available to well-run central counterparties in times of systemic liquidity crisis.  Over time, money market mutual funds should have to choose to either become mutual funds whose net asset value fluctuates, or be regulated as banks. Ensuring that investments in such funds are regularly valued at market prices would enhance investors' awareness that they bear investment risks and that their funds are different from a bank deposit in that the principal is not guaranteed and not backed by a public deposit insurance scheme.  The agreement reached to implement the quantitative liquidity requirements as proposed by the Basel Committee on Banking Supervision in September 2010 is a significant step towards lowering liquidity risk. The rules will encourage banks to hold higher liquidity buffers and reduce the mismatch between the cash flows of their assets and payment obligations of their liabilities.  Policymakers should also consider extending the Basel quantitative rules, in some form, to other financial institutions that, as the crisis demonstrated, can contribute to maturity transformation and a build up of systemic risk. This would help mitigate the build up of liquidity risks in the less-regulated "shadow banking" system.  Policymakers should consider ensuring that foreign exchange swap facilities of central banks are readily available in the future in times of stress. This should be complemented by placing greater emphasis on the cross-border, cross-currency dimension in the new liquidity regulations.  Finally, closer international coordination is called for to improve the collection of financial information on relevant funding markets and institutions to allow for an adequate assessment of build up of liquidity risks in the financial system.  The report is available on the [IMF](http://www.imf.org/external/pubs/ft/gfsr/2010/02/pdf/press.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.16 IMF urges more comprehensive reform of the global financial system**   On 3 October 2010, the International Monetary Fund (IMF) published a report indicating that there is much left to be done to build a global financial system that can provide a lasting foundation for stable and sustainable economic growth.    While current reforms are moving in the right direction, the Fund's latest staff position note, "Shaping the new financial system," finds that many difficult decisions lie ahead both at the national and international levels, which are both urgent and challenging.   The following five goals are identified by the IMF as key priorities in the reform agenda:  **Ensure a level playing field in regulation:** Global coordination is needed to promote the benefits of global finance; foster competition; and minimize regulatory arbitrage.  **Improve the effectiveness of supervision:** Stronger supervision is necessary if a new cycle of leveraging and excessive risk taking is to be prevented. Supervision needs to be more intensive and intrusive, as well as more focused on cross-border exposures.   **Develop coherent resolution mechanisms at the national level and for cross-border financial institutions:** Given the global reach of financial institutions, an enhanced cross-border resolution framework that eliminates moral hazard while preserving financial stability is needed. The first step is to focus on making this operational among a small set of countries that are home to most cross-border financial institutions, particularly to address the problem of "too important to fail."   **Establish a comprehensive macro prudential framework:** Micro prudential regulations designed to improve the resilience of individual institutions must be complemented with effective macro prudential regulations that strengthen the resilience of the financial system. This will require indentifying, monitoring, and addressing systemic risks generated by individual firms and collective behaviour.  **Cast a wide net:** Reforms must address emerging exposures and risks in the entire financial system, not just banks. There is a danger that riskier activities and products will migrate to less regulated or un-regulated segments of the system.   The report is available on the [IMF](http://www.imf.org/external/pubs/ft/spn/2010/spn1015.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.17 Reintroduction of corporate law legislation into Parliament**   On 29 September 2010, the Australian Government announced that following the recent election the following Bills, which lapsed with the calling of the election, have been reintroduced into Parliament.   **(a) Market misconduct and unsolicited share offers**  The [Corporations Amendment (No. 1) Bill 2010](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=118027" \t "Default) targets the practice of unsolicited off-market share offers that are below value to vulnerable investors. The legislation also substantially increases the penalties for persons or businesses that breach the market manipulation and insider trading provisions.   The legislation would change the way information contained in company registers is accessed by requiring someone seeking a copy of the register to state what use they will make of the information contained in the register. Importantly, the legislation will enable companies to refuse to provide information if the purpose is improper, as provided for in the [Corporations Regulations](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default). It will be an offence to make a false statement when requesting a copy of the register and the penalty will be up to 12 months imprisonment. The legislation will also make it an offence to use any information obtained for any improper purpose.    These reforms will prohibit a person from using the information in the register to:  make unsolicited share offers (other than a takeover);  solicit members by brokers;  solicit members by charities; and  use the register to gather information about the wealth of individuals.  The legislation will also increase the penalties for market offences, such as insider trading and market manipulation. Currently, the benefits that can be gained from engaging in such conduct can significantly exceed the present maximum penalty. As these offences are recognised as being difficult to investigate and prove, the legislation will also improve how they can be investigated through enhancing the Australian Securities and Investments Commission search warrant power and by enabling telecommunications interception material to be collected by agencies such as the Australian Federal Police.   **(b) Reversal of the High Court decision in Sons of Gwalia**  The [Corporations Amendment (Sons of Gwalia) Bill 2010](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=118026" \t "Default) gives effect to the Government's decision to reverse the High Court's decision in *Sons of Gwalia v Margaretic*. The Sons of Gwalia decision determined that, in a corporate insolvency, certain shareholder claims against a company ranked equally with the claims of other unsecured creditors. The Bill returns the order of claims to that which existed prior to the Sons of Gwalia judgment.    The Bill also makes procedural reforms relating to notices to creditors and shareholder voting, designed to remove a cost burden on companies in external administration, and will clarify the position of shareholders bringing claims for damages against companies.   Specifically, the Bill removes the right of persons bringing claims regarding shareholdings to:  vote as creditors in a voluntary administration or a winding-up, unless they receive permission from the court; or  receive reports to creditors, unless they make a request in writing to the external administrator.  The Bill also eliminates a number of restrictions on the capacity of a shareholder to recover damages against a company based on how they acquired the shares or whether they still hold the shares.   On 30 September 2010, the Senate referred this Bill to the Legal and Constitutional Affairs Committee for inquiry. The Committee is to report by 18 November 2010.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.18 EC/US joint statement on regulation of the OTC derivatives markets**   On 29 September 2010, US Commodity Futures Trading Commission (CFTC) Chairman Gary Gensler and European Commissioner Michel Barnier issued a joint statement about regulatory reform of the over-the-counter (OTC) derivatives markets with respect to the Dodd-Frank Wall Street Reform and Consumer Protection Act and the September 2010 European proposal for a Regulation on OTC derivatives, central counterparties and trade repositories. The issues discussed include:  comprehensively regulating derivatives dealers for capital and margin, recordkeeping and reporting and business conduct standards;  requiring standardised OTC derivatives to be cleared by central counterparties, imposing stringent prudential and organisation rules for central counterparties and imposing risk mitigation standards for non-standardised contracts that are not centrally cleared; and  increasing transparency of OTC derivatives.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.19 PCAOB issues report on inspection observations of auditing during the economic crisis**   On 29 September 2010, the US Public Company Accounting Oversight Board (PCAOB) released a report summarising inspection observations of audits of financial institutions and other companies during the economic crisis.  The key points discussed in the report include:  PCAOB inspectors identified instances where auditors appeared not to have complied with PCAOB auditing standards in connection with audit areas that were significantly affected by the economic crisis, such as fair value measurements, impairment of goodwill, indefinite-lived intangible assets, and other long-lived assets, allowance for loan losses, off-balance-sheet structures, revenue recognition, inventory, and income taxes.  Firms have made efforts to respond to the increased risks stemming from the economic crisis. The deficiencies identified by inspectors in their reviews of issuer audits suggest that firms should continue to focus on making improvements to their quality control systems.  The PCAOB will focus on whether firms' actions to address quality control deficiencies described in Board inspection reports have, in fact, reduced or eliminated subsequent occurrences of the kinds of deficiencies described in the report.  The observations described in the report will serve to inform future PCAOB actions in connection with certain inspection, enforcement, and standard-setting activities. The Board will consider whether additional guidance is needed related to existing standards.  PCAOB inspectors will continue to focus on firms' audits and quality control systems, particularly as they relate to audit risks posed by the ongoing effects of the economic crisis and any future similar events.  The report is available on the [PCAOB](http://pcaobus.org/Inspections/Documents/4010_Report_Economic_Crisis.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.20 US Chamber of Commerce joins Business Roundtable in lawsuit challenging Securities and Exchange Commission**   On 29 September 2010, the US Chamber of Commerce and Business Roundtable filed a legal challenge to the US Securities and Exchange Commission's (SEC) final rules requiring a corporation to include in its proxy materials director nominees put forward by a shareholder (or group of shareholders) who have owned three percent or more of company stock for at least three years. The SEC rules are summarised in Item 1.7 of the [September 2010 Corporate Law Bulletin](http://my.lawlex.com.au/news.asp?id=8259&sp=1" \t "_new).   In a petition for review filed in the US Court of Appeals for the District of Columbia Circuit, the Chamber and Business Roundtable charge that the rule is arbitrary and capricious, violates the Administrative Procedure Act, and that the SEC failed to properly assess the rule's effects on "efficiency, competition and capital formation" as required by law. In adopting the rule, the SEC:  Erred in appraising the costs that proxy access would impose on American corporations, shareholders, and workers at a time the economy can least afford it. For example, the Commission essentially disregarded numerous commenters who explained that the rule will be misused by special interest investors such as labor union pension funds and state pension funds;  Ignored evidence and studies highlighting the adverse consequences of proxy access, including that activist shareholders would use the rule as leverage to further their special interest agendas;  Claimed to be empowering shareholders, but actually restricted shareholders' ability to prevent special interest shareholders from triggering costly election contests; and  Claimed to be effectuating state law rights, but gave short shrift to existing state laws regarding access to the proxy and related principles, including the law in Delaware and the Model Business Corporation Act, and created significant ambiguities regarding the application of federal and state law to the nomination and election process.  Chamber v SEC proxy stay request is available on the [US Chamber of Commerce](http://www.uschamber.com/sites/default/files/press_release/1009motionforstayproxy.pdf" \t "_new) website.   Chamber v SEC proxy petition is available on the [US Chamber of Commerce](http://www.uschamber.com/sites/default/files/press_release/1009stampedpetitionproxy.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.21 Australian financial services benchmark report**   On 27 September 2010, the Australian Trade Commission published 'Australia - A Global Financial Services Centre - Benchmark Report 2010'. The report presents data on how Australia compares to other major economies on the following matters: World's 20 Largest Economies, Real GDP Growth by Country, Resilience of the Economy to Economic Cycles, Unemployment Rates by Country, Australia's Real Gross Value Added by Industry, Australia's Real Gross Value Added - Growth by Industry, Gross Fixed Capital Formation as a Percentage of GDP, Inward Foreign Direct Investment Stocks by Country, Australia's Exports of Goods and Services, Australia's Exports of Education Services, The Prosperity Index - World Ranking by Country, Net Government Debt, Percentage of Nonperforming Bank Loans to Total Bank Loans.    The report is available on the [Australian Trade Commission](http://www.austrade.gov.au/Invest/Opportunities-by-Sector/Financial-Services/Data-and-Charts/default.aspx" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.22 Independent Commission on Banking: publication of issues paper**   On 24 September 2010, the UK Independent Commission on Banking published an Issues Paper. The Commission has been asked to consider structural and related non-structural reforms to the UK banking sector to promote financial stability and competition, and to make recommendations to the Government by the end of September 2011.   The purposes of the Issues Paper are to indicate how the Commission is approaching its task, to set out the issues on which the Commission will be focused, and to serve as a Call for Evidence inviting submissions from all interested parties.   The Issues Paper describes the Commission's initial approach to considering financial stability, competition and the other issues to which it must have regard under its Terms of Reference. The Paper then outlines a number of options for reform in broad terms, but emphasises that the list is not intended to be exhaustive and that the Commission has not moved towards any particular options at this stage.    The options set out in the paper are:  **(a) Reform options related to the structure of banks**  Separation of retail and investment banking  Narrow banking and limited purpose banking  Limits on proprietary trading and investing  Structural separability, including living wills and resolution schemes  Contingent capital  Structure-related surcharges  **(b) Reform options related to the structure of markets**  Measures to reduce market concentration  Market infrastructure reform  The Issues Paper is available on the [Commission](http://bankingcommission.independent.gov.uk/bankingcommission" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.23 Federal Court of Australia Practice Note on schemes of arrangement**  On 24 September 2010, the Chief Justice of the Federal Court of Australia issued a new Practice Note CORP 3 - 'Schemes of Arrangement'.  Practice Note CORP 3 requires that orders for the convening of a meeting of members/creditors under section 411(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) contain a statement to the effect that the fact the court has ordered a meeting be convened and has approved the explanatory statement required to accompany the notices of the meeting is no indication that the court has a view as to the merits of the scheme or as to how members/creditors should vote or has prepared, or is responsible for the content of, the explanatory statement.  The Practice Note has been issued in response to a recommendation by the Council of Chief Justices' Harmonised Corporations Rules Monitoring Committee. It was considered by that Committee to be necessary to address any concern that the court's orders for the convening of a meeting of members/creditors under section 411(1) may give the impression of endorsement by the court of the scheme of arrangement proposed.   The practice note is available on the [Federal Court of Australia](http://www.fedcourt.gov.au/how/practice_notes_corp3.html" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.24 Recommendations for handling inside information**   On 23 September 2010, the UK Financial Services Authority (FSA) published Market Watch 37 which deals with leaks of inside information in relation to financial firms, including recommendations on the handling of inside information. The FSA puts forward 25 recommendations under the headings of media policies, verbal communication, written communication, training staff, regularly communicating with staff, establishing a strong reporting culture and disciplinary action.   The FSA undertook investigations into the handling of inside information and reports as follows:   "Our enquiries revealed that media reports containing leaks were often closely preceded by telephone conversations between insiders occupying senior roles on a corporate transaction, and the journalists who published those media reports. Due to their position as insiders, these senior individuals held detailed knowledge of the transaction. The calls between the insiders and journalists lasted up to 20 minutes in length and in some cases took place with journalists the afternoon or evening before the leak was first published. Such suspicious communication between the insiders occupying senior roles and journalists is a cause for concern, especially in the context of the level of leaks that occur in our markets. While we acknowledge that some of the insiders we identified as speaking to journalists may have been asked to confirm details the journalist already held, insiders who confirm information put to them by a journalist still potentially commit market abuse as they are in effect disclosing inside information through affirmation (even though the information was sourced first elsewhere). As a result, we believe regulated/unregulated firms and issuers can improve controls and we believe it is essential that senior management establish a robust anti-leaking culture in their organisations.   "We were also concerned about the apparent deficiencies in regulated firms' media and compliance policies. Our review of regulated firms' controls revealed several concerns about handling inside information in the context of media enquiries. In particular we found:  inconsistency in the handling of media enquiries amongst insiders at issuers and firms acting as advisers to the transaction, and uncertainty as to who was ultimately responsible;  that when insiders corresponded with a journalist there was no requirement at regulated firms to advise either media relations personnel or compliance/legal personnel;  a lack of harmonisation between regulated firms' media policies and compliance policies about inside information and price sensitive information;  regulated firms usually have unwritten informal exemptions to their general policy, permitting staff members to respond to the media without the media relations team's authorisation. These unwritten exemptions effectively gave a blanket permission to senior staff to speak to the media. These exemptions were generally not documented but the core insiders we interviewed as part of our enquiries relied on these;  when an exemption in regulated firms' media policies applied, it was often unclear as to its extent, to whom it applied, and in what circumstances staff could directly converse with the media;  regulated firm's staff did not receive sufficient training on relevant areas of market abuse (e.g. inside information and misusing information); and  policies were unclear on how to handle a potential leak or how regulated firm's staff should escalate it."  Market Watch 37 is available on the [FSA](http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter37.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.25 NYSE-Sponsored "Commission on Corporate Governance" outlines key governance principles**   On 23 September 2010, the NYSE Euronext (NYX) released the final report of the NYSE-sponsored Commission on Corporate Governance.     The 10 core principles outlined by the NYSE-sponsored Commission on Corporate Governance are as follows:  The Board's fundamental objective should be to build long-term sustainable growth in shareholder value for the corporation;  Successful corporate governance depends upon successful management of the company, as management has the primary responsibility for creating a culture of performance with integrity and ethical behaviour;  Good corporate governance should be integrated with the company's business strategy and not viewed as simply a compliance obligation;  Shareholders have a responsibility and long-term economic interest to vote their shares in a reasoned and responsible manner, and should engage in a dialogue with companies in a thoughtful manner;  While legislation and agency rule-making are important to establish the basic tenets of corporate governance, corporate governance issues are generally best solved through collaboration and market-based reforms;  A critical component of good governance is transparency, as well governed companies should ensure that they have appropriate disclosure policies and practices and investors should also be held to appropriate levels of transparency, including disclosure of derivative or other security ownership on a timely basis;  The Commission supports the NYSE's listing requirements generally providing for a majority of independent directors, but also believes that companies can have additional non-independent directors so that there is an appropriate range and mix of expertise, diversity and knowledge on the board;  The Commission recognises the influence that proxy advisory firms have on the markets, and believes that it is important that such firms be held to appropriate standards of transparency and accountability;  The SEC should work with exchanges to ease the burden of proxy voting while encouraging greater participation by individual investors in the proxy voting process; and  The SEC and/or the NYSE should periodically assess the impact of major governance reforms to determine if these reforms are achieving their goals, and in light of the many reforms adopted over the last decade the SEC should consider the expanded use of "pilot" programs, including the use of "sunset provisions" to help identify any implementation problems before a program is fully rolled out.  The report is available on the [NYSE](http://www.nyse.com/pdfs/CCGReport.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.26 Draft revised OECD guidelines on insurer governance**  On 22 September 2010, the Organisation for Economic Co-Operation and Development (OECD) invited public comment on its draft revised guidelines titled 'OECD Guidelines on Insurer Governance'.    The guidelines are intended to apply to any insurer licensed to underwrite life, non-life, and reinsurance policies and take into account the specificities of the insurance sector. They are designed in light of the overriding objective of an insurance undertaking, which is to provide benefits to the insured in accordance with the contracts concluded with them and satisfy its shareholders.  The guidelines are organised around four main sections: governance structure; internal governance mechanisms; groups and conglomerates; and stakeholder protection. They are structured in such a way as to promote clear presentation and comparability with other possible national or international rules or principles. The guidelines are also accompanied by detailed annotations that elaborate more fully on the guidelines and their rationale.   These guidelines are non-binding. They are meant to provide guidance and serve as a reference point for policymakers, insurers, and other relevant stakeholders in OECD and non-OECD countries. The guidelines are intended to be consistent and compatible with the OECD Principles of Corporate Governance.   The current OECD guidelines are available on the [OECD](http://www.oecd.org/dataoecd/54/28/40990025.pdf" \t "_new) website.    The draft revised guidelines are available on the [OECD](http://www.oecd.org/dataoecd/53/15/46036505.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.27 SEC proposes measures to enhance short-term borrowing disclosure to investors**  On 17 September 2010, the US Securities and Exchange Commission voted unanimously to propose measures that would require public companies to disclose additional information to investors about their short-term borrowing arrangements.   The SEC's proposal would shed a greater light on a company's short-term borrowing practices, including what some refer to as balance sheet "window-dressing." The proposed rules are aimed to enable investors to better understand whether amounts of short-term borrowings reported at the end of reporting periods are consistent with amounts outstanding throughout the reporting periods.   The additional short-term borrowing disclosure information required under the proposed rules would be presented in the Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) section of a company's quarterly and annual reports.  The Commission also voted to issue an interpretive release that will provide guidance about existing requirements for MD&A disclosure about liquidity and funding.  The proposed disclosure requirements are available on the [SEC](http://www.sec.gov/rules/proposed/2010/33-9143.pdf" \t "_new) website.  The interpretive release is available on the [SEC](http://www.sec.gov/rules/interp/2010/33-9144.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.28 EU regulation of short selling**  On 15 September 2010, the European Commission adopted a proposal for a regulation on short selling. Its main objectives are to create a harmonised framework for coordinated action at European level, increase transparency and reduce risks.   **(a) Greater transparency**    At present, there is little reliable information available on short selling: it is difficult for market participants and regulators to know which securities are being traded "short" and their overall significance. The proposal enhances transparency by requiring that all share orders on trading venues be marked as 'short' (so-called "flagging") if they involve a short sale, so that regulators know which transactions are short. In addition, investors will have to disclose significant net short positions in shares to regulators at one threshold (0.2% of issued share capital), and to the market at a higher threshold (0.5%). These measures will mean market participants are better informed whilst allowing regulators to monitor markets and detect developing risk. Concerning sovereign bonds, regulators will be better able to detect possible risks to the stability of sovereign debt markets by receiving data on short positions, including those obtained through sovereign Credit Default Swaps (a derivative sometimes regarded as a form of insurance against the risk of default).   **(b) Clear powers for regulators and a coordinated European framework**    In distressed markets, transparency alone may not be enough. At present, the powers that national regulators have to restrict or ban short selling vary greatly between Member States. The proposal gives national regulators clear powers in exceptional situations to temporarily restrict or ban short selling in any financial instrument, subject to coordination by the new European Securities and Markets Authority (ESMA) (which should be operational from January 2011 subject to agreement by the European Parliament). ESMA is also given the power to issue opinions to competent authorities when they intervene in exceptional situations. In line with the new supervision framework, ESMA will have the possibility, when certain conditions are fulfilled, to adopt temporary measures itself, with direct effect, restricting or prohibiting short selling.    In addition, if the price of a financial instrument falls by a significant amount in a day, national regulators will have the power to restrict short selling in that instrument until the end of the next trading day. These measures will help regulators take the necessary action, in a coordinated way, to slow or halt price declines which can be amplified by short selling in distressed markets. They will also reduce compliance costs for market participants which currently arise from the divergence of national rules.   **(c) The specific risks of naked short selling**   Naked short selling potentially increases the risk of settlement failure. The proposal requires that to enter a short sale, an investor must have borrowed the instruments concerned, entered into an agreement to borrow them, or have an arrangement with a third party to locate and reserve them for lending so that they are delivered by the settlement date (at the latest 4 days after the transaction). Trading venues must ensure that there are adequate arrangements in place for buy-in of shares or sovereign debt, as well as fines and a ban on short selling, where there is a settlement failure.    **(d) Exemptions**   Certain exemptions are included in the proposal - for example for some defined activities which play an important role in providing liquidity or are essential to the proper functioning of primary bond markets.   **(e) Next steps**   The proposal now passes to the European Parliament and the Council for negotiation and adoption. Once adopted the regulation would apply from 1 July 2012.   Further information is available on the [European Commission](http://ec.europa.eu/internal_market/securities/short_selling_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.29 EU regulation of the derivatives markets**   On 15 September 2010, the European Commission tabled a proposal for a regulation aimed at bringing more safety and more transparency to the over-the-counter (OTC) derivatives market.    In its draft regulation, the Commission proposes that information on OTC derivative contracts should be reported to trade repositories and be accessible to supervisory authorities. More information will also be made available to all market participants. The Commission also proposes that standard OTC derivative contracts be cleared through central counterparties (CCPs). This will reduce counterparty credit risk, i.e. the risk that one party to the contract defaults. The Commission's proposal, fully in line with the EU's G20 commitments and the approach adopted by the United States, now passes to the European Parliament and the EU Member States for consideration. Once adopted, the regulation would apply from end 2012.   **(a) Key elements of the proposal:**  **Greater transparency:** Currently, reporting of OTC derivatives is not mandatory. As a result, policy makers, regulators but also market participants do not have a clear overview of what is going on in the market. Under the Commission's proposal, trades in OTC derivatives in the EU will have to be reported to central data centres, known as trade repositories. Regulators in the EU will have access to these repositories, enabling them to have a better overview of who owes what and to whom and to detect any potential problems, such as accumulation of risk, early on. Meanwhile, the new European Securities and Markets Authority (ESMA) will be responsible for the surveillance of trade repositories and for granting / withdrawing their registration. In addition, trade repositories will have to publish aggregate positions by class of derivatives to give all market participants a clearer view of the OTC derivatives market.    **Greater safety - Reducing counterparty risks:** Under the current situation, participants in the OTC derivatives market do not sufficiently mitigate counterparty credit risk, which refers to the risk of loss arising from one party not making the required payments when they are due. Under the Commission's proposal, OTC derivatives that are standardised (i.e. they have met predefined eligibility criteria), such as a high level of liquidity, would have to be cleared through central counterparties (CCPs). CCPs are entities that interpose themselves between the two counterparties to a transaction and thus become the 'buyer to every seller', as well as the 'seller to every buyer'. This will prevent the situation where a collapse of one market participant causes the collapse of other market participants, thereby putting the entire financial system at risk. If a contract is not eligible and therefore not cleared by a CCP, different risk management techniques must be applied (such as requirements to hold more capital). As CCPs are to take on additional risks, they will be subject to stringent business conducts and harmonised organisational and prudential requirements to ensure their safety - such as internal governance rules, audit checks, greater requirements on capital etc.    **Greater safety - Reducing operational risk:** The OTC derivatives market allows for a high degree of flexibility in defining the economic and legal terms of contracts. As a consequence, there are a number of highly bespoke and complex contracts in the market that still require significant manual intervention in many stages of the processing. This increases operational risk, i.e. the risk of loss due to, for example, human error. The Commission's proposal requires market participants to measure, monitor and mitigate this risk, for example by using electronic means for confirming the terms of OTC derivative contracts.   **Scope:** The proposal applies to all types of OTC derivatives. It applies both to financial firms who use OTC derivatives but also to non-financial firms that have large positions in OTC derivatives. It also applies to CCPs and trade repositories. However, non-financial firms (such as manufacturers) who use OTC derivatives to mitigate risk arising from their core business activities ("commercial hedging" used to protect against exchange rate variations for example), are exempt from the CCP clearing requirements.   **(b) Background**  The use of derivatives has grown exponentially over the last decade, with OTC transactions being the main contributor to this growth. At the end of December 2009, the size of the OTC derivatives market by notional value equalled approximately US$615 trillion, a 12% increase with respect to the end of 2008. However, this was still 10% lower than the peak reached in June 2008.   The near-collapse of Bear Stearns in March 2008, the default of Lehman Brothers on 15 September 2008 and the bail-out of AIG the following day started to highlight the shortcomings in the functioning of the OTC derivatives market, where 80% of derivatives are traded. In a Communication on Driving European recovery from March 2009, the European Commission committed to deliver, on the basis of a report on derivatives and other complex structured products, appropriate initiatives to increase transparency and to address financial stability concerns.   Further information is available on the [European Commission](http://ec.europa.eu/internal_market/financial-markets/derivatives/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.30 Report on insolvency practitioners**   On 14 September 2010, the Senate Economics References Committee of the Parliament of Australia published its report titled "The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework".    The Committee states in its report:  "11.65 The committee recognises that the role of the insolvency practitioner is important to the proper functioning of a market economy. Practitioners require a range of financial, investigative, written and interpersonal skills to perform their role well. Their proficiency allows troubled businesses to stay afloat and, where this is not possible, enables vulnerable creditors to maximise their returns. The committee also acknowledges that the process of corporate insolvency is often turbulent and distressing for company directors and employees. Insolvency practitioners deserve to be properly remunerated.   11.66 By the same token, the insolvency profession must also be properly regulated. There are significant responsibilities vested in the insolvency practitioner to act in the interests of creditors and employees and in the public interest. Accordingly, there must be an effective framework to promote high performance and deter misconduct.    11.67 This inquiry has found several regulatory gaps in the framework for regulating insolvency practitioners in Australia. Of greatest concern is that ASIC lacks a proactive approach and its response to complaints is often slow and unsatisfactory.   11.68 The recommendations made in this chapter are bold and substantive. The committee believes they are necessary and, in many cases, long overdue. It foresees several advantages from transferring ASIC's insolvency functions to within ITSA, all of which will improve the monitoring of the corporate insolvency profession.    11.69 In the committee's opinion, the financial costs associated with implementing the recommendations are far outweighed by the deterrent effect they will have on misconduct. Moreover, if properly implemented and enforced, the recommendations will restore stakeholders' and the public's confidence in the performance and reputation of corporate insolvency industry."   The Committee makes 17 recommendations in its report. The first recommendation is that "the corporate insolvency arm of ASIC be transferred to ITSA to form the Australian Insolvency Practitioners Authority (AIPA). The agency should be governed by the [Financial Management and Accountability Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12266" \t "Default) under the Attorney General's portfolio."   Other recommendations deal with matters including harmonisation of the personal insolvency and corporate insolvency regimes; establishment of a 'flying squad' within the new insolvency regulator that would be responsible for conducting investigations of a sample of insolvency practitioners, some selected at random, others with the aid of a risk profiling system and market intelligence; making proceedings of the Companies Auditors and Disciplinary Board open to the public; establishment of a fidelity fund to ensure that creditors are insured for fraud and wrongdoing; and improved insolvency data.   The report is available on the [Parliament of Australia](http://www.aph.gov.au/senate/committee/economics_ctte/liquidators_09/report/index.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.31 Compensation for US corporate directors remained flat in 2009**  Compensation for outside directors at the largest US corporations remained relatively flat last year as most companies continued their cautious approach to spending compensation dollars, according to a new analysis by Towers Watson published on 13 September 2010.     The analysis also found that more companies replaced board and committee meeting fees with fixed retainers for service.   The Towers Watson annual analysis of director compensation at Fortune 500 companies found that 2009 pay packages for directors climbed just 1% over 2008 levels. That is smaller than the median increase of 3% directors received in 2008. Prior to the economic crisis, directors had been steadily receiving annual pay increases of nearly 10%.   According to the analysis, total compensation for the outside directors at the companies studied increased to $200,698 (all figures are in US$) last year, up slightly from a median value of $199,949 in 2008. This marks the first time that median total compensation, which factors in the annualized value of one-time equity grants some directors receive when joining the board, has surpassed the $200,000 threshold. Cash compensation increased by 1% (from $83,875 in 2008 to $85,000 last year), while the value of equity awards also increased by a scant 1%, to $104,939 from $103,963 the previous year.   Indeed, the analysis found that more companies eliminated board and committee meeting fees, and replaced them with fixed retainers for serving on boards and committees. The percentage of companies paying board meeting fees declined from 44% in 2008 to 40% last year, a reversal from 2005, when 60% of companies paid board meeting fees. There was also a decline in companies paying committee meeting fees - from 48% in 2008 to 45% in 2009. The value of compensation previously provided as meeting fees was replaced with corresponding increases to board and committee retainers. Most companies continued to move toward a relatively even mix of cash and equity in their programs.   Among other survey findings:  Nearly four in 10 (38%) companies operate with a separate chair and CEO, up slightly from the previous year. At the median, nonexecutive board chairs received an additional $150,000 in incremental pay above and beyond that provided for regular board service, bringing their median total pay package to approximately $347,000 in 2009.  Audit committee members received larger retainers ($10,000 median value in 2009) versus those who serve on compensation committees ($7,500 median value) or governance/nominating committees ($6,000 median value). The higher fees are to compensate directors for added time requirements and responsibilities associated with the enactment of the Sarbanes-Oxley Act.  The analysis is available on the [Towers Watson](http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2010/201008/Aug_31_Director_Pay.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1)  **1.32 CEO pay in the top 100 Australian companies**  In September 2010, the Australian Council of Superannuation Investors (ACSI) published its annual report on CEO pay in the top 100 Australian companies.   Results in brief:  In 2009, median total remuneration for a top 100 CEO was down only 0.2 percent from 2008 to $4.04 million. Between 2007 and 2009, the median S&P/ASX 100 CEO total pay has declined by only 3.1% from 2007's record high. Median total CEO pay in 2009 was 23.4% above median CEO total pay posted in 2006, over the same three year period, there has been a decline in the S&P/ASX 100 Index of 21.4%.  Although average annual bonuses fell 19.9% in 2009 to $1.546 million, the median bonus actually increased by 3.3% to $1.207 million. Median bonuses, while 10% below the 2007 record, remain 20% above 2006 levels.  The report is available at [ACSI](http://www.acsi.org.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1 ASIC seeks comment on proposed guidance for independent experts' reports and related party transactions**  On 18 October 2010, the Australian Securities and Investments Commission (ASIC) released two consultation papers outlining proposals for guidance on independent experts' reports and governance and disclosure for related party transactions.   Over the past 12 months, ASIC reviewed the approach to related party arrangements of listed companies and registered managed investment schemes. Independent experts' reports in the context of related party dealings, and takeover and similar transactions were also examined. As a result, ASIC identified critical areas in which independent experts' reports and related party approval processes and disclosures can be improved.   The papers contain a number of proposals, reflecting ASIC's market analysis.  **(a) Related party transactions**  The proposals in CP 142 offer updated guidance for companies and registered managed investment schemes on whether an 'arm's length' exception applies when entering into transactions with related parties or whether members should have the opportunity to vote on these transactions. ASIC's reviews indicated some companies have relied on the exception even though there was uncertainty about whether it applied. ASIC encourages a broad review of all the circumstances of the transaction.   ASIC believes that details of all arrangements, whether or not a board has assessed them as 'arm's length', are material to investors and propose that they should be fully described in prospectuses, product disclosure statements and other materials sent to shareholders for approval, such as takeovers, schemes and significant transactions.  **(b) Experts' reports**  ASIC's reviews identified examples of experts relying on information without adequately explaining their valuation methodology. CP 143 proposes additional guidance on the requirement for an expert's report to be based on reasonable grounds. It includes discussion of the circumstances in which a discounted cash flow (DCF) valuation will be appropriate for start-up or potential development assets, where there is no certainty of cash flow in the future.   The consultation paper titled 'Related Party Transactions' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp142.pdf/$file/cp142.pdf" \t "_new) website.  The consultation paper titled 'Expert Reports and Independence of Experts: Updates to RG 111: Content of Expert Reports and RG 112: Independence of Experts' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp143.pdf/$file/cp143.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h2)  **2.2 Preventing insolvent trading: new ASIC report**  On 18 October 2010, the Australian Securities and Investments Commission (ASIC) released a report that sets out the key messages and outcomes of its national insolvent trading program (NITP).   The report titled 'National Insolvent Trading Program Report' (REP 213) will be beneficial to directors of companies, company advisers (including accountants and lawyers) and other interested stakeholders to assist them in understanding and complying with their duty under the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) to prevent insolvent trading.   The NITP was aligned with ASIC's oversight responsibility in monitoring compliance and conduct by company officers in relation to their obligations and behaviour where corporate failure occurs. The program focused on companies which were in financial distress or nearing insolvency. Through on site visits, the program encouraged directors to seek professional advice at an early stage to address solvency issues. During the period 2006 to 2010, ASIC visited over 1,530 companies displaying solvency concerns. As a result, directors have an increased awareness of their duties.   There are four key messages from the NITP that directors should take into account in carrying out their role.  Directors must:  maintain appropriate books and records;  identify insolvency concerns and assess available options;  seek professional advice; and  act in a timely manner.  ASIC has previously released Regulatory Guide 217 'Duty to Prevent Insolvent Trading: Guide for Directors' (RG 217), which sets out key principles which ASIC considers directors should follow to meet their obligation to prevent insolvent trading. The development of RG 217 was assisted via the outcomes and observations of the NITP.  Key indicators of insolvency include, but are not limited to, ongoing trading losses, cash flow difficulties, outstanding trade creditors and the inability to obtain further finance.   ASIC's forward plan for Insolvency Practitioners and Liquidators will focus on the conduct of liquidators and insolvency practices, particularly in relation to independence and remuneration. ASIC will however continue to review companies displaying significant insolvency indicators and encourage directors to seek appropriate advice early.  **Background**  RG 217 also details factors which ASIC will consider when deciding to bring proceedings against a director for allowing a company to trade while insolvent (including criminal proceedings and proceedings to recover comprehension for loss resulting from insolvent trading).  The Corporations Act imposes on directors a positive duty to prevent insolvent trading: see section 588G.   The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep213.pdf/$file/rep213.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h2)  **2.3 ASIC releases proposals to strengthen disclosure by unlisted mortgage schemes**  On 6 October 2010, the Australian Securities and Investments Commission (ASIC) released a consultation paper outlining proposals to further improve disclosure for retail investors considering investing in unlisted mortgage schemes.  Consultation Paper 141 'Mortgage schemes: Strengthening the disclosure benchmarks' (CP 141) aims to build on the benchmark-based disclosure model for unlisted mortgage schemes, as outlined in ASIC's Regulatory Guide 45 'Mortgage schemes - improving disclosure for retail investors' (RG 45). The proposals in CP 141 reinforce ASIC's focus on protecting retail investors through the promotion of better disclosure.   Since the release of RG 45, ASIC has worked with the responsible entities of unlisted mortgage schemes to help them understand the benchmarks and ASIC's disclosure expectations. Throughout the implementation phase, ASIC has reviewed the effectiveness of the benchmarks and found they could be strengthened to respond to recent changes in the sector.   CP 141 includes a summary of ASIC's findings on its review of the disclosure against the existing benchmarks in RG 45 and sets out proposals to improve the benchmarks to produce better and more focused disclosure by:  simplifying the benchmarks to make it easier to determine whether the benchmark is met or not;  separating additional disclosure requirements from the benchmark;  clarifying how the RG 45 benchmarks apply to feeder funds; and  providing additional guidance on compliance with the 'if not, why not' approach.  The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp141.pdf/$file/cp141.pdf" \t "_new) website.   RG 45 is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg45" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h2)  **2.4 ASIC issues consultation paper on financial requirements for managed investment scheme responsible entities**  On 30 September 2010, the Australian Securities and Investments Commission (ASIC) released a consultation paper, setting out issues for consultation regarding the financial requirements for responsible entities (REs) of managed investment schemes (MISs).  ASIC has reviewed the financial requirements of REs. The review aims to ensure that REs have adequate resources to meet operating costs and there is appropriate alignment with the interests of investors.   The consultation paper requests feedback about the following issues:  restricting guarantees and indemnities granted by REs;  requiring REs to create rolling 12-month cash flow projections;  increasing the net tangible asset capital (NTA) requirements for REs; and  specifying the net tangible asset (NTA) liquidity requirements for REs.  The consultation paper is available on the [ASIC](http://www.asic.gov.au/cp" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h2)  **2.5 ASIC begins nationwide surveillance activities under national consumer credit regime**  On 23 September 2010, the Australian Securities and Investments Commission (ASIC) begun its first nationwide surveillance activity to detect unregistered businesses and people under the [National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111363" \t "Default) (National Credit Transitional Act).  Between now and late 2010, ASIC will be in the field, across Australia, to detect businesses or people engaging in credit activities who are not registered with ASIC. As of 1 July this year, it has been an offence to engage in credit activities (e.g. acting as a lender, or as a credit broker) if not registered with ASIC.  More than 14,000 people or businesses registered with ASIC before 30 June 2010, as a precursor to applying for a credit licence. Licensing is now underway and will be complete by 30 June 2011 or before. As of 23 September 2010, 292 licences have been issued.  As set out in the National Credit Transitional Act, ASIC can prosecute non-compliance or seek a civil penalty from the courts. The maximum criminal penalties for operating without registration or a licence are $22,000 for individuals and $110,000 for corporations, or two years imprisonment, or both; or civil penalties of up to $220,000 for individuals and $1.1 million for corporations, partnerships or multiple trustees.  ASIC's primary focus of this surveillance activity is to ensure firms and people engaging in credit activities are registered and apply for a licence to meet the requirements of the National Credit Transitional Act.   Further information on credit registration and licensing is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/Credit+licensing?openDocument" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h2)  **2.6 ASIC consults on compensation requirements for traditional trustee company services**  On 23 September 2010, the Australian Securities and Investments Commission (ASIC) released a consultation paper inviting feedback on its proposal regarding the administration of compensation requirements for trustee companies providing traditional trustee company services (traditional services) to retail clients.   Under legislation enacted in late 2009, the provision of traditional services by trustee companies, such as preparing wills, is now regulated as a financial service under the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act). Trustee companies providing traditional services are now supervised by ASIC and will be required, among other things, to meet the compensation requirements under the Corporations Act.  ASIC proposes to apply its existing policy on administering the compensation requirements contained in Regulatory Guide 126 'Licensing: Compensation and Insurance Arrangements for AFS Licensees' (RG 126) to trustee companies providing traditional services to retail clients.   ASIC invites comment on Consultation Paper 139 Compensation and insurance arrangements for trustee companies providing traditional services (CP 139). In particular, ASIC is interested in feedback on whether the method of calculating the amount of professional indemnity insurance cover contained in RG 126 is appropriate for trustee companies providing traditional services.  ASIC's existing policies and regulatory documents on financial services will generally apply to trustee companies that provide traditional services.    RG 126 is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg126" \t "_new) website.  The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp139.pdf/$file/cp139.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1 Trade cancellation policy consultation paper**   On 6 October 2010, the Australian Securities Exchange (ASX) released a consultation paper outlining proposed changes to ASX and ASX 24 cancellation policies.  In developing its cancellation policies ASX has taken into account recent overseas events, including the 6 May US "flash crash" and consequential changes to US exchange trade cancellation policies.  The approach adopted by ASX is broadly consistent with trends towards a transparent and certain cancellation policy to manage the risks of market mis-pricing borne by an exchange operator.  ASX invites feedback on its proposed changes.   The consultation paper is available on the [ASX](http://www.asx.com.au/about/pdf/20101006_trade_cancellation_policy.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h3)  **3.2 Reports**   On 6 October 2010, the Australian Securities Exchange (ASX) released the ASX 'ASX Group Monthly Activity Report', the 'ASX 24 Monthly Volume and Open Interest Report' and the 'ASX Compliance Monthly Activity Report for September 2010.  The ASX Group Monthly Activity Report is available on the [ASX](http://www.asx.com.au/about/pdf/20101006_asx_group_monthly_activity_report_september.pdf" \t "_new) website.   The ASX 24 Monthly Volume and Open Interest Report is available on the [ASX](http://www.sfe.com.au/content/notices/2010/notice2010_163.pdf" \t "_new) website.   The ASX Compliance Monthly Activity Report is available on the [ASX](http://www.asx.com.au/about/pdf/20101006_asx_compliance_monthly_activity_report_september.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h3)  **3.3 Launch of equity volatility index**  On 21 September 2010, the Australian Securities Exchange (ASX) and Standard & Poor's (S&P) announced the launch of an Australian equity volatility benchmark - the S&P/ASX 200 VIX.   The S&P/ASX 200 VIX is an end-of-day index that reflects investor sentiment about the expected volatility in the Australian benchmark equity index, the S&P/ASX 200.  The calculation uses proprietary methodology of the Chicago Board Options Exchange (CBOE).  The S&P/ASX 200 VIX reflects expected equity market volatility over the next 30 days by using settlement prices for S&P/ASX 200 put and call options to calculate a weighted average of the implied volatility incorporated into the options.   The S&P/ASX 200 VIX is initially available as an end-of-day index from ASX, with back data available on the [ASX](http://www.asx.com.au/volatilityindex" \t "_new) website.   The press release is available on the [ASX](http://www.asx.com.au/about/pdf/20100921_ASX_VIX_press_release.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h3)  **3.4 ASX and SGX proposed merger**   On 25 October 2010, ASX Ltd (ASX) and the Singapore Exchange (SGX) announced a proposed merger to be undertaken by way of a scheme of arrangement. Under the proposal, SGX will acquire all the issued ordinary shares of ASX at a price of A$48 per ASX share. This values ASX at A$8.4 billion. ASX and SGX will remain separate legal and locally operating entities and will maintain their existing brands. If implemented, the merger would create the world's fifth largest listed exchange group.   Further information is available on the [ASX](http://www.asx.com.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1 Declaration of unacceptable circumstances and orders: NGM Resource Ltd**   On 8 October 2010, the Takeovers Panel made a declaration of unacceptable circumstances and final orders in relation to an application dated 29 September 2010 by NGM Resources Limited in relation to its affairs.   NGM is the subject of an off-market scrip takeover bid by Paladin Energy Limited. Paladin's bid is subject to defeating conditions, including condition 10.12(l) ("No force majeure event") and condition 10.12(m) ("No material adverse change to NGM").   On 24 September 2010, Paladin announced that its offer for NGM will lapse at the end of the offer period (8 October 2010), relying on conditions 10.12(l) and 10.12(m). It said:  "On 16 September 2010, forces associated with al-Qaida in the Magreb (North Africa) (AQIM) entered the town of Arlit in Niger's uranium mining region and abducted seven people, employed by the French uranium company Areva and its construction contractor, Vinci Areva subsequently evacuated expatriate personnel from its operations in the north of the country and, in response to a request by the Government of Niger, France has dispatched anti-terrorism forces and reconnaissance aircraft to Niger. According to The Associated Press, in order "to kidnap seven foreigners from inside their homes, al-Qaida-linked gunmen in northern Niger forced their way past the security cordon of one of the world's most heavily guarded mining towns." Such action "shows a new level of brazenness."   In the Panel's view, Paladin is not entitled to rely on condition 10.12(l) because, when properly construed, it requires the relevant event to have a "materially adverse effect" on NGM (which, on the material available, has not been established). Further, the 16 September 2010 event (relied on by Paladin to support its position) does not satisfy the other requirements of the condition.   On the material available, Paladin is not entitled to rely on condition 10.12(m) because a material adverse effect on NGM has not been established.   The Panel has made orders that:  Paladin extend the offer period for its bid in accordance with the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) until 5.00pm (Perth time) on 22 October 2010 (or a later date permitted under the Corporations Act);  Paladin immediately withdraw the notice given to NGM and ASX under section 630 dated 1 October 2010 in relation to the status of the bid conditions;  Paladin lodge a new notice with NGM and ASX in accordance with section 630 in due course;  Paladin make an ASX announcement as soon as practicable explaining the effect and substance of the orders and;  as soon as practicable, Paladin confirm in writing to the Panel that it has complied with the orders.  Further information is available on the [Panel](http://www.takeovers.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h4)  **4.2 Takeovers Panel revises Guidance Note 1 and releases Guidance Note 22**   On 21 September 2010, the Takeovers Panel announced that it has published two Guidance Notes:  a rewritten version of Guidance Note 1 on Unacceptable Circumstances; and  a new Guidance Note 22 on Recommendations and Undervalue Statements.  The Panel issued a consultation draft of the Guidance Notes on 20 April 2010. It received 4 submissions and has taken them into account and made further changes.   **(a) Guidance Note 1 - Unacceptable circumstances**   Guidance Note 1 discusses when the Panel may make a declaration of unacceptable circumstances under section 657A (References are to the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) unless otherwise indicated). It has been rewritten as part of the Panel's planned process of simplification and includes:  a review of the currency and consistency of the guidance note;  an expanded history to show the derivation of section 657A and to make it clear that the power to declare unacceptable circumstances is broad; and  a new example dealing with reverse takeovers (Paragraph 32(b), example 8). The new example says the Panel will look at circumstances where a change of control, or a material effect on control by an issue of shares as consideration for a bid, either disenfranchises shareholders or does not meet the policy of chapter 6 (even if strictly it satisfies item 4 of section 611). This follows the recent decisions of *Gloucester Coal* 01 and 01R ([2009] ATP 6 and [2009] ATP 9).  **(b) Guidance Note 22 - Recommendations and undervalue statements**   Guidance Note 22 discusses when the Panel may make a declaration of unacceptable circumstances because, for example, a director recommends that shareholders reject a bid relying on an undervalue statement, and the reasons for the recommendation (addressing also the undervalue statement) are not clearly disclosed, or it is not clearly stated that the reasons will be disclosed later (and in this case they must be disclosed no later than the time the target's statement is issued).   The Guidance Note follows the recent decisions of *Origin Energy Ltd* ([2008] ATP 23 and *Tully Sugar Ltd* 01 and 01R ([2009] ATP 26 and [2010] ATP 1).    Further information is available on the [Panel](http://www.takeovers.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%236) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **5.1 Determining a special purpose liquidator's entitlement to remuneration claimed**   (By Jiayue Li, DLA Phillips Fox)   Onefone Australia Pty Ltd v One.Tel Ltd [2010] NSWSC 1120, New South Wales Supreme Court, Barrett J, 1 October 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1120.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1120.html" \t "_new)   **(a) Summary**   The proceeding related to an application by the special purpose liquidator of One.Tel Limited under section 511 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Act') seeking directions from the court with respect to their entitlement to remuneration from the company for the winding up.    In an earlier proceeding which was also heard by Barrett J, *Onefone Australia Pty Limited v One.Tel Limited* [2010] NSWSC 401 ('earlier proceeding'), the court ordered the special purpose liquidator to provide further information for the purposes of a hearing to determine the special purpose liquidator's remuneration application.    In the current proceeding, after considering the further materials presented by the special purpose liquidator, Barrett J ordered the special purpose liquidator to reformulate the claim and materials as the materials were insufficient to enable the court to form a view as to whether the remuneration claim was fair and reasonable. The matter of quantifying and assessing the special purpose liquidator's remuneration claim would be referred to the registrar, who would report back to the court such that an order under section 511 of the Act could be made.   **(b) Facts**   The factual background to these proceedings was largely set out in the judgment of the earlier proceeding.  Barrett J stated that the present judgment must be read in conjunction with the reasons provided in respect of the earlier proceeding.   On 8 December 2009, a meeting of the committee of inspection ('COI') was held to consider a resolution relating to the special purpose liquidator's remuneration claim.  At that meeting, no resolution was passed.    Subsequently, the special purpose liquidator proposed to members of the COI alternatives in relation to the remuneration claim.  The special purpose liquidator claimed that on 14 December 2009 a majority of the COI members voted via email in favour of one of the alternatives proposed and effectively resolved that the special purpose liquidator be paid the sum of $215,436.10 for the period during 1 July 2009 to 31 October 2009 ('the 14 December Resolution').   In the earlier proceeding, Barrett J held that the 14 December Resolution was invalid as the purported resolution of the COI members did not comply with the requirements of the Act.  Barrett J ordered the special purpose liquidator to provide further information for the purposes of a hearing of the special purpose liquidator's remuneration application.   **(c) Decision**    Barrett J upheld the decision in the earlier proceeding that the resolution of 14 December 2009 and the payment of $215,436.10 pursuant to it were invalid and could not be validated by resort to section 1322 of the Act.   In relation to the special purpose liquidator's remuneration application, Barrett J held:  The court may in certain circumstances, under section 511 of the Act, deal with the quantification of a liquidator's remuneration in a creditors voluntary winding up.  The court will not make an order that the liquidator's remuneration claim is fair and reasonable where there is insufficient evidentiary material available.  Ultimately, Barrett J concluded that there was insufficient material to determine the special purpose liquidator's remuneration claim. Barrett J ordered the special purpose liquidator to re-formulate the claim and the evidentiary materials and to serve the reformulated materials on both ASIC and the members of the COI who participated in the hearing of the application.    **(i) 14 December Resolution was invalid and could not be validated by resort to section 1322**   Barrett J maintained the position stated in the earlier proceeding that the 14 December Resolution was not a valid resolution of the COI.  His Honour rejected the liquidator's arguments that the court should make an order pursuant to section 1322 validating the 14 December Resolution.    His Honour held that there was no 'procedural irregularity' within the meaning of section 1322 of the Act and that the 14 December Resolution differed in form, substance and effect from a meeting of the COI which should have occurred.   Barrett J further held that there was nothing that 'purported' to be a resolution agreed to by a majority of the COI members present at a meeting on 14 December 2009, as there was no meeting on that day. Therefore, it was not open to the court to make an order under section 1322(4)(a) of the Act that 'any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation'.   His Honour also stated that an order validating the resolution would cause 'substantial injustice' to persons who were entitled to discuss and debate the remuneration issue together.   **(ii) Court's role in determining the special purpose liquidator's entitlement**   Barrett J held that in determining the special purpose liquidator's remuneration claim, the court was bound by the following principles:  The liquidator may have resort to the court pursuant to section 511 of the Act only if it can be shown that the remuneration fixing mechanism provided by section 499(3) of the Act is incapable of operating to determine remuneration.  The starting position is that a liquidator is entitled to fair and reasonable remuneration and, importantly, it is for the liquidator to establish that entitlement. The role of the court is to consider the material provided with an independent mind.  The court should have regard to the principles set out in section 473(10) of the Act that apply to the fixing or review of the remuneration of a court-appointed liquidator.  A court when reviewing remuneration should never consider a review of quantum, but only matters of principle.  No order should be made if a liquidator fails to provide adequate evidentiary material to enable the court to determine whether the amounts claimed are fair and reasonable.  Against the background of these principles, Barrett J considered the issues which arose in the special purpose liquidator's remuneration application.   **(iii) Whether remuneration was within the scope of the special purpose liquidator's functions**   Barrett J held that the majority of the remuneration claim related to work which extended beyond the scope of the special purpose liquidator's functions to investigate possible causes of action available to One.Tel against particular persons by reason of the cancellation of the company's proposed rights issue shortly before its financial collapse in 2001. This included costs in relation to briefing media advisers and members of the press.   However, his Honour held that further information was required before the court could reject or accept the special purpose liquidator's remuneration claim.   **(iv) Form of materials presented by special purpose liquidator to support the remuneration claim was inadequate**   The special purpose liquidator presented information in relation to the remuneration claim by providing a summary of work performed, a listing of time spent and an amount for each item calculated by reference to an hourly rate.    Barrett J stated that this system of presenting supporting information made it difficult for the court to form a clear view of the work the special liquidator performed and the relevance of that work to the special purpose liquidator's administration.  His Honour also emphasised the fact that time based charging can lead to abuses and the need for the court to be certain that the time recording system used is focused on performance of relevant functions.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h5)  **5.2 Rights of former responsible entity not transferred to new responsible entity**   (By Jiayue Li, DLA Phillips Fox)   Saker, in the matter of Great Southern Managers Australia Ltd (Receivers and Managers Appointed) (in liquidation) [2010] FCA 1080, Federal Court of Australia, McKerracher J, 1 October 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2010/1080.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/1080.html" \t "_new)   **(a) Summary**   The plaintiffs are the liquidators of Great Southern Managers Australia Ltd ('GSMA'), which was the responsible entity ('RE') of several managed investment schemes ('Schemes'). GSMA was replaced as RE in the Schemes by Primary Securities Ltd ('PSL').     The plaintiffs sought direction from the court in relation to whether funds formerly under the control of GSMA in relation to the Schemes should be paid to PSL or retained and applied in accordance with Chapter 5 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Act').   PSL, as the new ongoing RE of the Schemes, contended that on the proper construction of the legislation and the Schemes it should have access to certain funds formerly controlled by GSMA. The plaintiffs, however, contended that those funds should be available among others for the creditors of GSMA.  The funds which were the subject of the dispute were funds in a Trust Maintenance Fund ('TMF') which was required to be established and maintained in respect of each Scheme.    McKerracher J held that the totality of the effects of the insolvency of GMSA, the replacement of GSMA as RE by PSL, the evolution of the statutory regime regulating managed investment schemes and the constituent documents of the Schemes gave rise to the conclusion that the plaintiffs were entitled to the funds in the TMF accounts.    **(b) Facts**   The Schemes were originally established by a trust deed as prescribed interest schemes in 1988.  Under the prescribed interest schemes regime, each scheme had a trustee and a manager. Clause 38.1 of the original trust deed provided that a certain amount of the lease and management fees was to be transferred to the trust's TMF to be held by the trustee on trust for the manager and only be dispersed in accordance with the trust deed for the costs or expenses of the manager.   Upon the conversion of the prescribed interest scheme to a managed investment scheme on 26 May 2000, the trust deed became the Scheme Constitution ('Constitution') and the roles of the trustee and manager merged into the role of the RE. In the process, clause 38.1 of the original trust deed was slightly amended. The amended clause 38.1 of the Constitution mainly replicated its predecessor.  However, the significant difference was that the declaration of trust 'for the manager' had been removed.   At the same time, GSMA inserted a new clause 14.3(c) into the Constitution.  Clause 14.3(c) provided that: '[On its retirement or removal, the Responsible Entity] is entitled to receive the balance of the Trust (Maintenance) Funds, and the new responsible entity must prior to the retirement or removal of the Responsible Entity taking effect, pay into a new Trust (Maintenance) Fund the sum of money determined by an independent professional forester to be the appropriate amount to be held in the new Trust (Maintenance) Fund as calculated in accordance with clause 38 of this Constitution.' In doing so, GSMA stated that it was of the opinion that the amendment did not adversely affect the rights of the plaintiffs or growers.   The plaintiffs were appointed liquidators of GSMA on 19 November 2009 by resolution of creditors.  Over a period of time in April 2010, PSL became the RE of the Schemes following the resolution of the Scheme members to remove GSMA as RE of those Schemes.   **(c) Decision**   McKerracher J held that the plaintiffs were entitled to retain and apply the various amounts in the TMF of the Schemes as:  There was no right existing which had an ongoing operation relevantly after the change of RE.  GSMA had the power on 26 May 2000 to make the amendment to the Constitution and there was no evidence that the opinion expressed was not validly or reasonably held.  Section 601FC(2), which provides that the RE holds scheme property on trust for scheme members, does not necessarily apply to all property held by the RE or used in the operation of a scheme.  The funds in the TMF were not held on trust for the benefit of the Scheme members.  **(i) No right capable of passing to the new RE**   Section 601FS(1) of the Act provides that, subject to certain exceptions: '[I]f the responsible entity of a registered scheme changes, the rights, obligations and liabilities of the former responsible entity in relation to the scheme become rights, obligations and liabilities of the new responsible entity.'   After considering the relevant authorities, his Honour stated that he was bound by the decision of the Full Federal Court in *Huntley Management Limited v Australian Olives Limited* [2010] FCAFC 98 ('Huntley Management Limited').  In Huntley Management Limited, the court held that the obligations to which section 601FS of the Act refers and to which the novation provisions apply are impliedly limited to those that are capable of having an ongoing operation after the change of RE.    His Honour held that in the present case, there was no right existing which had an ongoing operation relevantly after the change of RE. The right which arose under clause 14.3(c) was perfected at the time of the change of RE and GSMA became entitled absolutely to retain for its own purposes the balance of the TMF which it held as a RE until that time. Therefore, there was no right existing which had an ongoing operation relevantly after the change of RE which could be transferred to the new RE pursuant to section 601FS(1).   **(ii) GSMA had power to amend Constitution by inserting clause 14.3(c)**   McKerracher J rejected the arguments that clause 14.3(c) was not validly inserted into the constitutions of the Schemes.   First, his Honour held that section 601GA(2) which regulated payments and indemnities paid to the RE out of 'scheme property' did not invalidate clause 14.3(c).  His Honour held that the TMF funds were not 'scheme property' and were the funds of GSMA as manager of the Schemes, subject to its obligations to disburse them in accordance with the provisions of the deed.   McKerracher J held that following the change of the statutory regime, the funds which had been held by the trustee for the benefit of the manager were now held by the RE for its own benefit. There was no trust as the interest of the beneficiary and trustee had merged. Therefore, GSMA was absolutely entitled to the TMF funds subject to it covenanting to disburse the funds in accordance with the Constitution.   Second, his Honour held that GSMA had the power to modify the trust deed unilaterally pursuant to section 601GC(1)(b), as it was reasonably open to GSMA as the RE to hold the opinion that the amendment would not adversely affect members' rights. This was on the basis that an amendment which clarified and gave certainty to an existing state of affairs would reasonably be expected not to adversely affect members' rights.   **(iii) Conclusion**   McKerracher J held that the funds in each TMF should be treated in accordance with the plaintiff liquidator's usual statutory obligations rather than being passed over to PSL as the new RE.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h5)  **5.3 Promissory notes and disclosure document requirements under the Corporations Act**   (By Robert Withycombe-Taperell, Freehills)   ASIC v Great Northern Developments Pty Ltd [2010] NSWSC 1087, New South Wales Supreme Court, White J, 23 September 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1087.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1087.html" \t "_new)     **(a)  Summary**   ASIC brought an action against a property developer, Great Northern Developments Pty Ltd (GND) in respect of unsecured loans that individuals gave to GND in return for promissory notes. The case turned on whether the loan agreements and the provision of promissory notes breached the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act), on three potential bases. First, ASIC argued that the promissory notes constituted debentures, which meant that GND had offered securities without providing a disclosure document. Second, ASIC argued that GND was required to enter into a trust deed and appoint a trustee, and that it had not. Third, ASIC argued that it was operating managed investment scheme and that GND was required to register the scheme. The case turned on whether or not GND could rely on the exceptions to the obligation to provide a disclosure document.    **(b) Facts**   GND acquires and develops parcels of land and finances its business activities in part by unsecured loans from individual lenders, in return for promissory notes. ASIC and GND agreed in court that these promissory notes were debentures within the meaning of that term in section 9 of the Corporations Act. ASIC alleged contraventions of the following sections of the Corporations Act, in connection with the promissory notes:  section 727: making offers of debentures (which ASIC argued constituted securities within the meaning of the Corporations Act) of securities without a disclosure document;  section 283AA: failing to enter into a trust deed and to appoint a trustee; and  section 601ED: failing to register a managed investment scheme that was required to be registered, under the Corporations Act.  **(c) Decision**   **(i) Whether GND made an offer of securities**  An entity breaches section 727 of the Corporations Act if it makes an offer of securities that needs disclosure, and the entity has not lodged a disclosure document with ASIC. The recitals of each loan agreement provided that 'the Borrower has applied to the Lender for a loan of an amount of the Principal Sum'. On this basis, Justice White determined that GND had made offers of securities.   Justice White affirmed that it is not necessary that there be solicitation of an investment for an offer to have been made, following *Australian Securities & Investments Commission v Karl Suleman Enterprises Pty Ltd (In Liq)* [2003] NSWSC 400 at [5].    **(ii) The personal offers exception in section 708 of the Corporations Act**   Section 708 of the Corporations Act sets out the offers of securities that do not require disclosure. GND argued that its offers of securities were exempt from disclosure requirements because of this section. Section 708 of the Corporations Act provides: (1)  Personal offers of a body's securities by a person do not need disclosure to investors under this Part if:  (a)  none of the offers results in a breach of the 20 investors ceiling (see subsections (3) and (4)); and  (b)  none of the offers results in a breach of the $2 million ceiling (see subsections (3) and (4)).    (2)  For the purposes of subsection (1), a personal offer is one that:  (a)  may only be accepted by the person to whom it is made; and  (b)  is made to a person who is likely to be interested in the offer, having regard to:  i. previous contact between the person making the offer and that person; or  ii. some professional or other connection between the person making the offer and that person; or  iii. statements or actions by that person that indicate that they are interested in offers of that kind.    In respect of section 708(1)(a), Justice White was satisfied that the offers were 'personal offers'. This was because they were made to people who had some connection with GND and it was this connection that led them to provide the loans.   GND also had to demonstrate that the offers did not breach the 20 investors and $2 million dollars ceilings (the 20 investors/$2 million in sections 708(1)(a) and 708(1)(b) above). In calculating the total amount of money raised by loans or the number of investors, the court only needs to take into account issues of securities that are not exempt from the disclosure requirements by another section of the Corporations Act.  Section 708(14) exempts 'disclosing entities' from disclosure document requirements in respect of offers they make to one or more existing debenture holders. GND argued that this meant that offers it had made to existing debenture holders should not be included in the ceiling calculations. For the reasons below GND could not rely on this exception.   **(iii) GND could not rely on section 708(14) because it did not comply fully with its obligations as a 'disclosing entity'**   GND was, prima facie, a 'disclosing entity' in that it was an entity that was required to appoint a trustee under section 283AA of the Corporations Act. This would normally mean that offers made by GND to people who already held debentures, would not be counted in connection with possible breaches of the 20 person/$2 million dollar ceiling. However, Justice White was concerned that the section 708(14) exception was intended to apply only to entities that had complied fully with their reporting obligations, so that additional disclosure (under section 708) was not necessary. Justice White therefore determined that section 708(14) should be read to mean that a disclosing entity is exempt from disclosure requirements only where it has complied with section 283AA.   As GND had not appointed a trustee in compliance with section 283AA, it could not rely on the 708(14) exception. Justice White found that GND breached the $2 million dollar ceiling. Justice White made declarations that GND had contravened sections 283AA, 283AC and 727 of the Corporations Act.    **(iv) GND was not operating a managed investment scheme**   Section 9 of the Corporations Act defines 'managed investment scheme': "managed investment scheme" means:   (a)  a scheme that has the following features:  i. people contribute money or money's worth as consideration to acquire rights ( interests ) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not). ii. any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the members ) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);  iii. the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions); or    (b)  a time-sharing scheme;    but does not include the following:  (i)   a scheme operated by an Australian ADI in the ordinary course of its banking business;   (j)   the issue of debentures or convertible notes by a body corporate.   ASIC argued that GND was operating a managed investment scheme and that it had issued interests in the managed investment scheme, in the form of promissory notes.     Justice White found that the requirement in (a)(i) of the definition of 'managed investment scheme' was not satisfied. The lenders did not receive rights to benefits produced by the scheme in return for the money they lent. GND had also never made representations that the lenders would receive benefits produced by GND's business in return for the loan amounts.        The requirement in (a)(ii) of the definition also was not satisfied. Justice White found that there was no evidence that any lender intended that the money that they lent be pooled with contributions from other lenders or investors, to be used in a common enterprise for the financial benefit of all the lenders.    This led Justice White to conclude that GND was not operating a managed investment scheme.    **(v) If GND were operating a managed investment scheme, it would have been required to register it**   Justice White found that, had GND been operating a managed investment scheme, GND would have been required to register it under section 601ED of the Corporations Act. His Honour found that GND would not have been able to rely on the exceptions to the registration obligation in section 601ED(1) or 601ED(2) - which are the same exceptions, based on the 20 person and $2 million dollar ceilings - in section 708(3) of the Corporations Act.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h5)  **5.4 Purported redemption of redeemable preference shares void**   (By Annette Scardino, Freehills)   Beck v Weinstock [2010] NSWSC 1068, New South Wales Supreme Court, Hamilton AJ, 17 September 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1068.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1068.html" \t "_new)     **(a) Summary**   The case concerns the purported redemption of C Class Redeemable Preference Shares ("C Class Shares") in LW Furniture Consolidated (Aust) Pty Limited ("the Company").   The constitution of the Company provides that the C Class Shares have a preference over ordinary shares as to the return of capital, but not as to dividends. No ordinary shares in the Company have ever been issued.   Hamilton JA found in interpreting section 254A(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") (which is the same in substance as the relevant provision that applied at the time of the issue of the C Class Shares) that there was not any indication that there must be a preference as to both payment of capital and dividends for a share to be a preference share. Hamilton JA also found that preference shares cannot be created unless there are on issue at the time shares over which they have a preference.   Hamilton JA held that the C Class Shares do not fail to be preference shares because they have preferential rights in relation to repayment of capital only. However, the C Class Shares were not validly issued as redeemable preference shares, as at the time of issue of the C Class Shares there were no ordinary shares in the Company on issue over which they had preference. The purported redemption of the C Class Shares by the Company was not valid.    **(b) Facts**   The proceedings concern the purported redemption of 8 C Class Shares in the Company. The constitution of the Company provides that the C Class Shares have a preference over ordinary shares as to the return of capital, but not as to dividends. No ordinary shares in the Company have ever been issued.   The relevant statutory provision that applied at the time of issue of the C Class Shares was section 66(1) of the *Companies Act 1961*, which is the same in substance as section 254A(2) of the Act. Section 254A(2) of the Act provides that a company can issue preference shares only if rights attached to the preference shares are set out in the company's constitution or approved by special resolution of the company. The rights which must be specified include, amongst other things, priority of payment of capital and dividends in relation to other shares or classes of preference shares.   The primary issues before the Court were whether the C Class Shares were redeemable preference shares within the meaning of the Act, and whether the purported redemption of the C Class Shares was valid.   **(c) Decision**   One argument was that the C Class Shares were not redeemable preference shares as preference shares must be given a preference both as to repayment of capital and as to dividends. In interpreting section 254A(2) of the Act, Hamilton JA found that section 254A(2) of the Act does not provide any 'real indication' that there must be a preference in respect of both payment of capital and dividends for a share to be a preference share. Hamilton JA held that the C Class Shares do not fail to be preference shares because they have preferential rights in respect of repayment of capital only.   Another argument was that the C Class Shares fail to be preference shares because the preference that they were given were over unissued ordinary shares. The argument was that the preference given must be over issued shares, as a differentiation from unissued shares is not sufficient. Hamilton JA, in referring to the judgment of Barrett J in Re Capel Finance Ltd (2005) 52 ACSR 601, took the view that preference shares cannot be created unless there is on issue, at the time the preference shares were issued, another class of shares over which the shares have a preference in some regard. Hamilton JA held that the C Class Shares were not validly issued as redeemable preference shares and their purported redemption by the Company was not valid.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h5)  **5.5 A deed indeed**  (By Marc Fauvrelle, Mallesons Stephen Jaques)   400 George Street (Qld) Pty Limited v BG International Limited [2010] QCA 245, Queensland Court of Appeal, Muir and Fraser JJA and Mullins J, 10 September 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/qld/QCA/2010/245.html](http://www.austlii.edu.au/au/cases/qld/QCA/2010/245.html" \t "_new)   **(a) Summary**   In this decision the Queensland Court of Appeal considered whether a document that was ambiguously expressed should be treated as a contract or a deed and, if it was a deed, whether it had been properly delivered by and was therefore binding on the executing party.   The court said that the "conventional canons" of contractual interpretation must be applied to determine whether a document is a contract or a deed.  It is a matter of objectively determining whether the parties intended that the document take effect as a deed.  If a document is "executed as a deed" and "signed, sealed and delivered" this is likely to outweigh other factors.  A deed will not be delivered and binding on execution unless that is the intention of the executing party.   **(b) Facts**   These proceedings were an appeal against a decision by McMurdo J in the Queensland Supreme Court.  The respondent, BG International Limited ("BG") was a prospective tenant in a building to be developed by the appellants.  The parties negotiated a document that was titled "agreement for lease" ("AFL") but also indicated that it was to be "executed as a deed".  The solicitors of the appellants sent the unexecuted AFL to BG's solicitors.  BG executed and returned the AFL, but purported to withdraw from the deal before all the appellants had executed the document.   At trial the appellants made two alternative claims. Firstly, the appellants claimed that in executing the AFL BG had accepted the appellants' offer to contract and such acceptance could not be withdrawn.  Alternatively, the appellants argued that the AFL was a deed and, as such, BG was bound by the document on execution.   McMurdo J dismissed the contractual argument on the basis that there was no offer capable of acceptance.  If it were otherwise, execution by the appellants would have been unnecessary.  Furthermore, the contract would have been made by the solicitors, rather than the parties themselves, and there was no evidence that the solicitors had authority to do so.  McMurdo J also dismissed the argument that the AFL was a deed, saying that the execution language was a "mere surplusage" that was outweighed by the title and other language used in the body of the document (particularly the mutual exchange of promises as consideration), which indicated that it was intended to be a contract.   **(c) Decision**   The Court of Appeal dismissed the appellants' application but disagreed with the reasoning of McMurdo J.  The court rejected the characterisation of the AFL execution clause as "mere surplusage". The words "executed as a deed", "signed, sealed and delivered" and "by executing this deed" were a clear indication that the parties intended the AFL to take effect as a deed, outweighing any other indicia.   However, notwithstanding this, the court found that BG was permitted to withdraw from the deal because the deed had not been delivered and was therefore not binding.  The court said that execution of a deed only constitutes delivery where that is the intention of the executing party.  A letter between the parties showed it was BG's intention that the parties become bound contemporaneously.  It was also relevant that at the time BG executed the AFL it was undated, even though a number of BG's obligations referred to the "date of the agreement".  On this basis, the court concluded that BG did not intend to deliver and become bound by the deed unless and until the appellants were also bound.  As not all of the appellants had executed the deed at the time, BG was able to revoke its execution.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h5)  **5.6 Unitholders' meeting proceedings - application for injunction to prevent managed investment funds' unitholders meeting to vote on removal of responsible entity dismissed**   (By Georgina Molloy, Blake Dawson)   Lachlan Reit Limited v Garnaut [2010] VSC 399, Supreme Court of Victoria, Judd J, 6 September 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2010/399.html](http://www.austlii.edu.au/au/cases/vic/VSC/2010/399.html" \t "_new)   **(a) Summary**   In this case, Judd J in the Supreme Court of Victoria found that unitholders were entitled to proceed with a meeting to consider whether to remove the Responsible Entity of the managed investment funds. On the balance of convenience, it was held that the unitholders should meet, as their interests were paramount.     The plaintiff, Lachlan Reit Limited, was the responsible entity of two managed investment funds, Becton Office Fund No 2 and Becton Diversified Direct Property Fund.   The plaintiff sought declarations and permanent injunctions in the Supreme Court of Victoria to restrain the first defendant, financial adviser Mr Garnaut, from convening meetings with the unitholders to remove the plaintiff from its role as responsible entity of the funds, and replace the plaintiff with the second defendant, Century Funds Management Ltd (Century) as the responsible entity.   **(b) Facts**   Mr Garnaut, the first defendant, was a director of Garnaut Client Private Advisors, whose clients held approximately 27% of the units in Becton Office Fund No 2 and 19% of the units in Becton Diversified Direct Property Fund.  Mr Garnaut, as attorney for fund members, requisitioned the meeting, in order to remove the plaintiff as responsible entity, and replace it with Century Funds Management Ltd ("Century").     Mr Garnaut's rationale for the removal of the plaintiff was his concern over the uncertain financial position of the Becton Group.  The plaintiff's ultimate holding company is the Becton Property Group, and the plaintiff and its parent company, Becton Investment Management Ltd, control just under 20% of the units in the two managed investment funds.      The plaintiff challenged the validity of the meeting on various grounds, including:  that the information provided to unitholders was (or was likely to be) misleading or deceptive under section 12DA of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default), section 1041 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and section 52 of the [Trade Practices Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) and/or section 9 of the [Fair Trading Act 1999 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12938" \t "Default);  disparate communications to unitholders had corrupted the meeting process;  Century's stated action proposals if it was appointed responsible entity had changed in the various material distributed to unitholders;  Century had improperly attempted to coerce an investment adviser to influence his clients to vote in favour of the resolution; and  the proxies had been directed to Computershare rather than the responsible entity.  The main alleged misrepresentations relate to information circulated to unitholders regarding Century's ability to borrow funds on better terms than Becton, that Century would reduce fees charged by the responsible entity, and that the Becton Group and the responsible entity were insolvent.   **(c) Decision**   In this case, Judd J recognised that the interests of unitholders was paramount, and dismissed the plaintiff's application.  The court found that any analysis of the information circulated to the unitholders regarding the alleged misrepresentations should include consideration of all the material provided, and that a proper analysis would only be complete once a vote was taken at a meeting.   Judd J found that the situation concerned an attempt by investors to deal with a perceived risk to their investments, given the plaintiff's inseparable relationship with the Becton Group.  In his considerations, his Honour emphasised the particular context of the meeting with the plaintiff's conflict of interest, and contrasted the situation to where the fund manager is a neutral figure between disputing member groups.     Consequently, it was found that the meeting should go ahead, as Judd J decided that the balance of convenience "overwhelmingly favours" a rejection of the plaintiff's application.  Given the plaintiff's conflicted position, it was held that any future opportunity for a neutral process for the delivery of further information to unitholders was "illusory".     His Honour also noted that unitholders had not complained to the court about the adequacy of the information provided to them, nor any unfairness regarding the process.  Rather, Judd J found that by the time the meeting is due to commence, all information may be analysed and the plaintiff will then have a further opportunity to challenge the validity of any resolution removing it as responsible entity.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h5)  **5.7 Indemnification of corporate trustee for losses incurred after it becomes a bare trustee**   (By Steven Grant, Minter Ellison)   Commissioner of Taxation v Bruton Holdings Pty Ltd (in liquidation) [2010] FCA 978, Federal Court of Australia, Graham J, 3 September 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2010/978.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/978.html" \t "_new)   **(a) Summary**   The case concerned whether a corporate trustee was entitled to be indemnified out of the trust property for legal costs incurred after the corporate trustee became a bare trustee through commencement of a voluntary winding up.  A corporate trustee's right of exoneration is for liabilities properly incurred in the administration of the trust and extends to providing for its liability to pay remuneration to its liquidator and administrator, but only to the extent that work has been done in connection with the administration of the trust.  The liquidators were winding up a former trustee rather than a 'serving' trustee.  Accordingly the liquidators could not claim to have been performing the company's duties as trustee when incurring the legal costs.  Whilst the company still held trust property, it did so as a bare trustee whose duties, powers and rights were limited to protecting the trust assets and the liquidators' duties, powers and rights cannot be any greater than the company's.  As the legal costs were not properly incurred in connection with the trust, the corporate trustee was not entitled to be indemnified out of the trust property.   **(b) Facts**  Bruton Holdings Pty Ltd (Bruton) was incorporated on 27 May 1997.  On 8 July 1997 a Deed had been made between Michael Aitken and Bruton whereby the Bruton Educational Trust was constituted with Mr Aitken as the settlor and Bruton the corporate trustee of the Trust.  On 28 February 2007 Richard Albarran and Geoffrey McDonald were appointed as administrators of Bruton and on 30 April 2007 Bruton's creditors resolved that Bruton be wound up, with the consequence that it was taken to have passed a resolution on that day under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act), that it be wound up voluntarily, with the administrators becoming its liquidators.  By virtue of the Corporations Act the winding up was taken to have commenced on 28 February 2007.   Bruton claimed to be a charitable entity entitled to be endorsed as exempt from income tax under the [Income Tax Assessment Act 1997 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=5495" \t "Default) and lodged an application with the Commissioner of Taxation (Commissioner), for endorsement as a tax exempt entity as from 1 July 2000.  That application was refused and Bruton lodged a Notice of Objection in respect of the Commissioner's decision, which was disallowed.  Bruton appealed against the objection decision of the Commissioner, however, the appeal was dismissed with costs.    On 26 March 2007 the Commissioner of Taxation issued a Notice of Assessment directed to 'The trustee for Bruton Educational Trust' which recorded the taxpayer's taxable income for the year ended 30 June 2004 as $15,909,018 and called for payment of $7,715,873.73 by way of tax ($7,477,238.46) and Medicare levy ($238,635.27), which was said to be due on 30 April 2007.  Following the passage of the resolution for the winding up of Bruton on 30 April 2007, the Commissioner lodged a proof of debt directed to the liquidators of Bruton for $7,715,873.73.   On 8 May 2007 the Commissioner of Taxation issued a notice to Piper Alderman requiring that firm (which had acted for Bruton in previous proceedings and held monies on Bruton's behalf in its trust account) to pay to the Commissioner the sum of $447,420.20.  The notice was said to have been given under section 260-5 of Schedule 1 of the [Taxation Administration Act 1953 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6441" \t "Default).  On 30 May 2007 Bruton, then in liquidation, instituted the proceedings against the Commissioner and Piper Alderman seeking a declaration that the notice issued under section 260-5 was void by virtue of section 500(1) of the Corporations Act, which provides that any attachment, sequestration, distress or execution put in force against the property of the company after the passing of the resolution for voluntary winding up is void.  Allsop J made a declaration that the notice was void.  The Full Court of the Federal Court allowed an appeal by the Commissioner from that decision.  Bruton then appealed to the High Court from the judgment of the Full Court following a grant of special leave to do so.  The High Court ordered that the appeal be allowed with costs.  It set aside the orders of the Full Court made on 25 February 2009 and, in their place, ordered that the appeal to the Full Court be dismissed with costs.     On or about 18 February 2008 and 12 March 2008 the monies held on trust by Piper Alderman were transferred into an account in the name of Bruton.  According to the solicitor with the conduct of the matter for the Commissioner, on or about 25 March 2009 Bruton 'paid over the amounts remaining from the fund after certain drawings relating to legal fees of the costs of the first instance proceedings and the appeal [to the Full Court]' ($296,590.24).  Subsequently, the fund appeared to have been paid to Bruton's solicitors.   The Commission then sought relief in these proceedings from Bruton, seeking inter alia, a declaration that Bruton was not entitled to indemnification by exoneration or recoupment out of the property of the Bruton Educational Trust for expenses incurred in the proceedings before Allsop J, the proceedings for special leave to appeal and on appeal to the High Court.     **(c) Decision**  All of the expenses in respect of which declaratory relief was sought were incurred in proceedings instituted on 30 May 2007, three months after the termination of Bruton's office as trustee of the Bruton Educational Trust, by virtue of the entry of Bruton into administration on 28 February 2007, and after the deemed passage of a special resolution under the Corporations Act that Bruton be wound up voluntarily.   As orders for costs were made against the Commission in those proceedings, it was acknowledged that, from a practical point of view, the Commissioner's case was in respect of the difference between Bruton's solicitor and client and party and party costs referable to those proceedings.  The Commissioner's case was that that difference should not be paid out of the remainder of the trust fund monies.   A trustee who, in discharge of the position of trustee, enters into business transactions is personally liable for any debts that are incurred in the course of those transactions.  However, the trustee is entitled to be indemnified against those liabilities from the trust property held by the trustee and for the purpose of enforcing the indemnity the trustee possesses a charge or right of lien over those assets.    Where a trustee company has a duty to incur debts for the purposes of the trust business, it also has a duty to pay those debts.  If the company's obligation as trustee to pay the debts incurred in carrying out the trust cannot be performed unless the liquidation of the trustee company proceeds, the liquidator's costs, expenses and remuneration should be regarded as debts of the trustee company incurred in discharging the duties imposed by the trust and as covered by the trustee's right of indemnity.  However, the indemnity only extends to work done in connection with the administration of the trust.   Bruton submitted that the litigation expenses incurred by Bruton as a bare trustee in this case were 'properly incurred' in preserving, realising or getting in property of the company.  However, Graham J held that the proceedings were not proceedings in which the involvement of Bruton could be said to have been at the request of the court and the expenses were not 'properly incurred' in preserving, realising or getting in property of Bruton.  Graham J noted that the liquidators were winding up a former trustee rather than a 'serving' trustee.  Accordingly the liquidators could not claim to have been performing Bruton's duties as trustee.  Whilst Bruton may have still held trust property, it did so as a bare trustee whose duties, powers and rights were limited to protecting the trust assets and the liquidators' duties, powers and rights cannot be any greater than Bruton's.    As a bare trustee of the assets comprising the trust fund as from 28 February 2007, it was no part of Bruton's functions or responsibilities to institute the current proceedings as it did on 30 May 2007.  The costs incurred were not 'properly incurred' by Bruton in the administration of the trust fund.  The action taken, albeit successfully, was not the action of a trustee in the discharge of its then trust obligations.  The liabilities that Bruton incurred in relation to the proceedings were not incurred in the proper performance of Bruton's duties or exercise of its powers.     Accordingly, Graham J declared that Bruton was not entitled to indemnification by exoneration or recoupment out of the property of the Bruton Educational Trust for expenses in the proceedings and made a declaration and awarded costs against Bruton.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h5)  **5.8 The objectives of Part 5.3D are vital to an application under section 440C of the Corporations Act**   (By Laura Keily and Olivia Draudins, Corrs Chambers Westgarth)   Rewards Land Pty Ltd (administrators appointed) (receivers and managers appointed) v Jones [2010] WASC 233, Supreme Court of Western Australia, Le Miere J, 2 September 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/wa/WASC/2010/233.html](http://www.austlii.edu.au/au/cases/wa/WASC/2010/233.html" \t "_new)   **(a) Summary**   Section 440C of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) provides that during the administration of a company, the owner or lessor of property that is used or occupied by or is in the possession of the company, cannot take possession of the property or otherwise recover it except with the administrator's written consent or with the leave of the court.  The plaintiffs in this case, two entities that had leased land to the defendants for the purposes of a managed investment scheme, sought to recover possession of these properties after the defendant companies were put into administration.   Le Miere J found that the interests of the property owners must be balanced against the interests of the company in administration, with regard also paid to the interests of members of the company and its creditors.  It was held that the evidence lead by the plaintiffs had not adequately established that it should be allowed to take possession of the properties to prevent them from being damaged and devalued due to a lack of proper maintenance.  It was also held that if the plaintiffs were allowed to take possession of the properties, it would be difficult, if not impossible, for the company that was in administration to enter into a deed of company arrangement that had been proposed, the prospects of which were to be assessed by the company's creditors.   The plaintiff's application for leave to take possession of the leased properties under section 440C of the Act was therefore refused.   **(b) Facts**   Rewards Projects was the responsible entity of a large number of managed investment schemes for the commercial cultivation of fruit or timber (the Schemes).  The Schemes were registered under the Act and carried out on behalf of the members of the Schemes.  Each Scheme was carried out on land owned by Rewards Land Pty Ltd (Rewards Lands) and The ARK Fund Ltd (ARK), which had been leased to Rewards Projects.  Rewards Projects was the wholly owned subsidiary of Rewards Group Ltd and was responsible for the operation and administration of the Schemes.  Rewards Management (another wholly owned subsidiary of Rewards Group Ltd) was responsible for establishing, managing, harvesting and selling the fruit or timber produced under the projects by way of a contract with Rewards Projects.   Administrators for Rewards Group Ltd and its subsidiaries, including Rewards Projects, Rewards Land and Rewards Management, were appointed on 16 May 2010.  Receivers and managers were appointed for the Rewards Group Ltd, Rewards Lands, Rewards Management and ARK on 1 June 2010 and 2 June 2010.  The plaintiffs in this case, Rewards Land, ARK and their receivers and managers (the Plaintiffs) sought an order under section 440C of the Act for leave to take possession of the properties that had been leased to Rewards Projects.  The administrators of Rewards Land, ARK, Rewards Group Ltd and its subsidiaries, Rewards Projects and Rewards Management (the Defendants) had taken possession of the leased properties after Rewards Projects had been put into administration.   Le Miere J first had to determine whether an application under section 440C of the Act was an interlocutory proceeding when a dispute about the admissibility of evidence arose.  Le Miere J then considered whether leave should be granted to allow the Plaintiffs to take possession of the properties that were in the possession of the Defendants.   **(c) Decision**   **(i) Interlocutory proceeding?**   Whether an application under section 440C of the Act is interlocutory or final needed to be determined as the Defendants argued an affidavit submitted by the Plaintiffs was inadmissible on the basis of hearsay.  The Plaintiffs submitted that the proceeding was interlocutory and therefore hearsay is admissible. Under Order 37 rule 6(2) of the [Rules of the Supreme Court 1971 (WA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=16410" \t "Default), an affidavit may contain statements of information or belief when used for the purposes of an interlocutory proceeding.   Le Miere J noted that there can be difficulty in determining whether a proceeding is interlocutory or final, but cited Gibbs J in the High Court case of Licul v Corney (1976) 180 CLR 213 to find that the ultimate test to resolve this question is whether the judgment or order, as made, finally disposes of the rights of the parties.     The Plaintiffs argued that an application under section 440C of the Act is incidental to the subsequent substantive proceedings in which the Defendants might seek to recover possession of the property of the Plaintiffs following the grant of leave under section 440C of the Act.  Le Miere J did not accept this argument and found that section 440C of the Act only imposes a moratorium on the recovery of property from a company in administration, which ends where leave is granted.  As the owner of the property does not have to commence any further proceedings to assert their rights, applications under section 440C of the Act are final.  The Plaintiffs' hearsay evidence was therefore inadmissible.   **(ii) Leave to take possession?**   Le Miere J assessed whether the Plaintiffs' application for leave to take possession of the properties that had been leased to Rewards Projects should be granted having regard to the objects of Part 5.3A of the Act, in which section 440C is found.  The focus of the application was placed on whether granting leave would:  detrimentally affect the chance of the company in administration continuing to exist; or  where the company could not continue to exist, whether the potential return for its creditors and members would be detrimentally affected.  In addition, particular focus was placed on the fact that the Explanatory Memorandum to the *Corporate Law Reform Bill 1992*, under which Part 5.3A was inserted into the Act, provided that the proposed Part 5.3A is intended to provide for an administrator to take over the affairs of a company, with a view to developing a deed of company arrangement, under which the company might be restored to financial health.   In determining whether the company, its creditors or its members would be detrimentally affected if leave under section 440C of the Act was granted, an analysis of previous case law indicated that regard must be paid to the legitimate interests of the party applying for leave on the one hand and the legitimate interests of the company, its creditors and its members on the other.  Le Miere J acknowledged that weight must be given to the proprietary interests of Rewards Land and ARK.  The detriment to Rewards Land and ARK if leave was not granted must be also be weighed against the detriment to the members and other creditors of Rewards Projects, and the effect on the chances of Rewards Projects continuing to exist if leave was granted.   The Plaintiffs led evidence that the properties had not been properly maintained and were at risk of deteriorating further.  Allowing the Plaintiffs to take possession was argued to be necessary to prevent continuing loss and damage and to mitigate the damage that had already occurred.  In response, the Defendants led evidence that various loan agreements had been entered into and argued that this funding would allow the proper maintenance of the properties to be carried out.   In noting that the Plaintiffs must satisfy the court that leave should be granted, Le Miere J found that the evidence did not establish that all the leased properties were unprotected and deteriorating due to non-performance of required maintenance, nor that the value of the leased land had deteriorated so that if it remained in the possession of Defendants, it was likely that the realisable value of the land would be less.     The Defendants also submitted that if the Plaintiffs retake possession of the leased land, it would be practically impossible for the Defendants to propound a deed of company arrangement that had been proposed by the company with significant forestry holdings and would enable the Schemes to continue in some form.  The Plaintiffs argued that the evidence to support this contention was insufficient.  Upon noting that the ability of a company to enter into a deed of company arrangement was of particular importance in *Re Java 452 Pty Ltd (Admin Appointed)*; *Permanent Trustee Australia Ltd (as trustee of Advanced Property Fund) v Stout* (1999) 32 ACSR 507 and *Canberra International Airport Pty Ltd v Ansett Australia Ltd* (2002) 41 ACSR 309, Le Miere J found that the evidence had established it was inherently plausible that a deed of company arrangement will not be able to be pursued if the Defendants did not remain in possession of the leased land.   For both these reasons, it was held that granting leave would not advance the objects of Part 5.3A of the Act, as set out in section 435A of the Act and would impede the chances of Rewards Projects, or as much as possible of its business, to continue to exist.  This would be to the detriment of Rewards Projects, as well as its members and creditors.  Refusing leave would advance the objectives of Part 5.3A of the Act, as the creditors will have an opportunity to assess their options, including whether a deed of company arrangement should be entered into.     Further, once the period of administration ends, the Plaintiffs have the ability to exercise their rights to take possession of the leased properties at general law.  The Plaintiffs' application for leave under section 440C of the Act was therefore refused.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h5)  **5.9 Variations to charges and ASIC registration requirements**   (By Katrina Sleiman and Tristan Blom, Corrs Chambers Westgarth)   Public Trustee of Queensland v Fortress Credit Corporation (Aus) 11 Pty Ltd [2010] HCA 29, High Court of Australia, French CJ, Gummow, Hayne, Kiefel and Bell JJ, 1 September 2010    The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/HCA/2010/29.html](http://www.austlii.edu.au/au/cases/cth/HCA/2010/29.html" \t "_new)    **(a) Summary**   This case involved an appeal by the Public Trustee of Queensland (the "Trustee") asserting that a variation to a company charge had occurred, invoking the registration requirements under sections 261-282 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the "Act"). If a variation was established and registration had not occurred, this would render the charge void against the administrator of the company under section 266(3) of the Act.   In a unanimous decision by the High Court, French CJ, Gummow, Hayne, Kiefel and Bell JJ held that a variation in the factual operation of a charge does not require registration, as it is not a variation to the terms of the charge. Only a document which varies a definition or an actual term of an agreement requires registration. This is consistent with previous industry understanding of variations.    **(b) Facts**   Conceptually, this case involved two separate loan agreements and securities for these agreements becoming interlinked by way of a Deed.   The first loan agreement was entered into on 31 May 2007. Fortress Credit Corporation (Australia) 11 Pty Ltd ("Fortress") entered into a loan agreement (the "Facility Agreement") with Octaviar Castle Pty Limited ("Octaviar Castle"), guaranteed by Octaviar Limited ("Octaviar"). This Facility Agreement was secured by a fixed and floating charge (the "Charge") from Octaviar in favour of Fortress, dated 1 June 2007. The Charge was registered in accordance with sections 262 and 263 of the Act on 6 June 2007.   The second loan agreement was signed on or about the same time as the Facility Agreement. Fortress entered into an agreement with Young Village Estates Pty Limited ("YVE"). Octaviar provided a guarantee for YVE's liabilities (the "YVE Guarantee") under this loan agreement. However, Octaviar did not secure the YVE Guarantee with a charge.    On 22 January 2008, Fortress, Octaviar and Octaviar Castle entered into a deed (the "January 2008 Deed") which provided that "the YVE Guarantee is a Transaction Document for the purposes of the Facility Agreement." The Facility Agreement defined "Transaction Document" to include every document that Fortress and Octaviar agreed in writing was a Transaction Document. This immediately extended a nexus between the YVE Guarantee and the Charge, as the Charge secured "all money, obligations and liabilities of any kind that are or may in the future become due, owing or payable... [by Octaviar to Fortress Credit] under or in relation to a Transaction Document."                                                In September 2008, Octaviar entered into Administration. The company later attempted to execute a Deed of Company Arrangement ("DOCA") under Part 5.3A of the Act. On 19 February 2008, the Trustee applied to the Supreme Court of Queensland for orders terminating the DOCA. The Trustee contended that the DOCA was premised upon the Charge being valid, and in actual fact it did not secure the YVE Guarantee. The question of the validity of the Charge was then brought before McMurdo J in the Queensland Supreme Court.   At first instance, McMurdo J found that a variation in the charge had occurred, as the January 2008 Deed increased the liability of the charge. To be effective in liquidation, the charge required registration with ASIC under section 266(3) of the Act. The Queensland Court of Appeal overturned this decision, stating that there must be a variation to the terms of a charge, not merely an increase in liabilities secured, which had already been contemplated in the original Charge document.    **(c) Decision**   The High Court was called upon to answer two questions. First, did the January 2008 Deed constitute a "variation in the terms" of the Charge, to which section 268(2) of the Act would then apply? Second, did the January 2008 Deed create a new charge, invoking the provisions of sections 262 and 263 of the Act? The court answered both of these questions in the negative.    To answer the first question, the court held that the critical phrase in section 266(3) was "a variation in the terms of a registrable charge ... having the effect of".  As the Charge always encompassed a prospective liability (i.e. "all money, obligations and liabilities ... that are or may in the future become due, owing or payable"), the January 2008 Deed did not vary the terms of the Charge. The terms already envisaged that the Charge secured a class of liabilities that could become owing in the future. This is precisely what occurred when the YVE Guarantee was brought under the umbrella term of "Transaction Document." Hence, this was not a variation in the "terms of the charge."   Further, the court held that section 268 was inapplicable to this scenario. If the parties had deliberately created a charge that was variable in its factual operation, then there is no variation every time a matter of fact is altered. The court offered a 'variable rate of interest' clause by way of analogy.   In answering the second question in the negative, the court considered that if there was no variation within the meaning of section 268(2), then a new charge could not have been created.    The court chose to address other arguments raised by the Trustee. The Trustee contended that it would be contrary to the scope and purpose of the registration system established by Chapter 2K of the Act if registration was not required. Otherwise, those dealing with companies would be unaware of the terms, effect and magnitude of a charge. This argument was rejected. In citing Wilde v Australian Trade Equipment Co Pty Ltd (1981) 145 CLR 590, the court held that the register was designed merely to put a prospective dealer on notice whether property is encumbered or not. To discover the terms and effect of a charge, one must look to the charge itself. The court noted that, upon initial establishment, a copy of the Charge had already been lodged as required under section 263(1) of the Act, and anyone searching the register would be on notice to perform further investigations to determine the nature of the liabilities secured.    In upholding the Court of Appeal's decision, the High Court quelled significant industry unrest stoked by the first instance decision. Had this decision stood, many lenders could have found themselves in an unsecured situation that they previously thought secured.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h5)  **5.10 The scope of the court's statutory jurisdiction to inquire into a liquidator's conduct under section 536 of the Corporations Act**  (By David Saunders, Blake Dawson)   BL & GY International Co Ltd v Hypec Electronics Pty Ltd [2010] NSWSC 959, Supreme Court of New South Wales, Barrett J, 31 August 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/959.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/959.html" \t "_new)   **(a) Summary**   This case examined the scope and intent of section 536 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act), which gives courts the power to conduct an inquiry into alleged misconduct by liquidators.  At issue in this case was whether the section was applicable in the particular circumstances of this case, which involved the conduct of a liquidator who had been removed and subsequently died.  In particular it considered whether or not orders made by the Supreme Court of New South Wales pursuant to section 536 should stand and whether the scope of the inquiry should be extended or whether it should be permanently stayed.     **(b) Facts**   **(i)  Background to the case**   In May 2001 the Supreme Court of New South Wales ordered Hypec Electronics Pty Ltd (Hypec) to be wound up and appointed David Patrick Watson as liquidator.  BL & GY International Co Ltd (BLGY) had applied for the winding-up order arguing that Hypec had failed to satisfy a statutory demand relating to a judgment debt arising from a default judgment.     In December 2004, following an interlocutory application alleging specific incidents of misconduct, the court ordered Mr Watson's removal from office and made orders against him, including that:     (a)  an inquiry be held pursuant to section 536(1)(b) of the Act to determine the amount of loss suffered by Hypec as a result of Mr Watson's misconduct; and (b)  Mr Watson pay Hypec the amount constituting the loss Hypec suffered as a result of Mr Watson's misconduct.   Among the claims made by Hypec were that he failed to take adequate steps to investigate and enforce claims by the company against: (c)  a related entity and its directors for having taken over the goodwill of Hypec's business; (d)  the same related company for repayment of a $25,000 debt; and (e)  two other companies for repayment of loans recorded in Hypec's accounts.   The court concluded that Mr Watson had not acted impartially and had favoured the interests of Mrs Lucy Guitar Mead over those of her estranged husband and fellow director of Hypec, Colin Anthony Mead, who filed the application.  At the time the winding up proceedings were ordered, the Meads were divorced and involved in litigation over property ownership.   Mr Watson died in July 2009 before the inquiry into his conduct had commenced.   **(ii) The present case**   The present case involved two related applications. Hypec, at the instigation of the incumbent liquidator, brought the first application seeking an order to expand the scope of the inquiry.  Hypec submitted that in addition to the misconduct by Mr Watson that was the subject of the original orders, Mr Watson had been derelict in his duty by not recognising and getting in other assets belonging to Hypec as part of the winding up proceedings. These were omissions, Hypec argued, that warranted an inquiry wider than the intended original inquiry.   Mr Watson's estate brought the second action, which sought an order either vacating or permanently staying the existing inquiry order.  The estate submitted that Mr Watson's death meant that it was now pointless to hold the inquiry ordered in December 2004.  Furthermore, the lack of availability of relevant documents made the prospect of a successful inquiry even more remote.   **(iii) Legislation**   Section 536 is a provision giving the court power to take action where there is a suggestion that a liquidator has acted improperly.  The section provides that:  (1) where: (a) it appears to the court or to ASIC that a liquidator has not faithfully performed or is not faithfully performing his or her duties or has not observed or is not observing:  i. a requirement of the court; or  ii. a requirement of this Act, of the regulations or of the rules; or  (b)  a complaint is made to the court or to ASIC by any person with respect to the conduct of a liquidator in connection with the performance of his or her duties; the court or ASIC, as the case may be, may inquire into the matter and, where the court or ASIC so inquires, the court may take such action as it thinks fit.   (2) ASIC may report to the court any matter that in its opinion is a misfeasance, neglect or omission on the part of the liquidator and the court may order the liquidator to make good any loss that the estate of the company has sustained thereby and may make such other order or orders as it thinks fit.    (3) The court may at any time require a liquidator to answer any inquiry in relation to the winding up and may examine the liquidator or any other person on oath concerning the winding up and may direct an investigation to be made of the books of the liquidator."    Proceedings under section 536 involve the following three stages:  a decision by the court, following an application, as to whether an inquiry into the liquidator's conduct is warranted;  the inquiry itself, which must be adversarial in nature; and  the court's decision, if it finds that the liquidator's conduct was deficient, whether or not to make an order or, in the words of the section, "take such action as it sees fit".  The second stage that is the inquiry itself is a prerequisite to making any order for the removal of a liquidator or any other appropriate remedial or protective action.  This seemingly obvious point is nonetheless significant in this case.  The court accepted that the order made in December 2004 that Mr Watson pay Hypec the amount calculated to be the loss suffered by Hypec was the result of some agreement between Mr Watson and Mr Mead.  It was not, in other words, the result of an inquiry by the court as required under section 536.  Therefore there was no jurisdictional basis for making the order.     **(c) Decision**   Barrett J held that a liquidator whose conduct is in question is a necessary party to any inquiry under section 536 so he or she may give an account of that conduct to the court.  In this case the liquidator was dead and nobody else, including his legal representative, could be expected to explain his actions satisfactorily in his absence.  Rather than, as Hypec sought, expanding the parameters of the inquiry, his Honour held that the order of an inquiry given in December 2004 should be permanently stayed and Hypec's application dismissed.   Furthermore, in view of the circumstances surrounding the order that Mr Watson pay any loss calculated to have been the result of his misconduct, his Honour held that the order should also be set aside.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h5)  **5.11 Legality of tape recordings of management committee meetings**   (By Carolyn Wong, Mallesons Stephen Jaques)    Alliance Craton Explorer Pty Ltd v Quasar Resources Ltd [2010] SASC 266, Supreme Court of South Australia, Sulan J, 27 August 2010    The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/sa/SASC/2010/266.html](http://www.austlii.edu.au/au/cases/sa/SASC/2010/266.html" \t "_new)   **(a) Summary**   Sulan J found that tape recording of management committee meetings was not prohibited by surveillance devices legislation because the proceedings of the meetings in question, although private, were not "conversations" within the meaning of the relevant Act. However, tape recording of the meetings may be prohibited by a ruling by the chairman exercising a procedural power or a resolution by the members through a majority vote.    **(b) Facts**   The plaintiff and the defendant were participants in a joint venture, holding 25% and 75% of the interest respectively. Each of them was entitled to one vote at the management committee meetings for each percentage point of interest held in the joint venture. A number of management committee meetings were held in which the plaintiff sought to make tape recordings of the meetings. At one meeting, the chairman made a ruling prohibiting electronic recordings. At a later meeting, a resolution was proposed to disallow the electronic recordings of that meeting and any further meetings. The plaintiff refused to vote on the resolution. The defendant voted in favour of the resolution and the chairman ruled that the resolution had been passed. The chairman adjourned the meetings where the plaintiff refused to comply with the ruling and resolution.    The plaintiff brought proceedings asserting its right to tape record the management committee meetings. The issues at trial were whether:  the electronic recording of a management committee meeting is in breach of the [Listening and Surveillance Devices Act 1972 (SA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=28645" \t "Default) ("the Act");  the rulings by the chairman were ultra vires, void and not binding on the plaintiff; and  the resolution passed by the management committee was sufficient to bind the plaintiff even if the rulings by the chairman were void.  **(c) Decision**   **(i) The Act**   Section 4 of the Act prohibits the recording of any "private conversation" without the consent of parties to that conversation. Sulan J found that the communications at the meetings were "private" in nature despite the fact that each party had a duty to report back to their respective principals after the meeting. The content of the meetings was of a highly confidential character and subject to confidentiality provisions in the joint venture agreement. However, the meetings were not "conversations" and therefore recording was not prohibited by section 4 of the Act. This was due to the fact that the communications at the meetings had a commercial character and purpose as well as a high degree of formality (e.g. there were formal written agendas upon which parties exchanged their positions orally or in writing and formal records of the meetings were kept).   Sulan J also considered in obiter whether an exception in section 7 of the Act would apply in the event that the recordings were prohibited by section 4, namely that the plaintiff was protecting its lawful interests in making recordings of the meetings. Sulan J held that section 7 would apply, given that the motions passed, or other decisions reached, at the management committee meetings would affect the substantive rights and obligations of both parties. Therefore, it was for the protection of both parties' lawful interests that accurate records of the meetings were kept. Sulan J also rejected a contention by the defendant that the plaintiff's motive was to delay the proceedings of the joint venture as there was insufficient evidence on this point.    **(ii) The rulings by the chairman**   Sulan J considered that the duty and function of a chairman is to preserve order and ensure that proceedings are conducted in an orderly and proper manner. In this instance, Sulan J held that the chairman's decision to prevent the tape recording of a meeting was procedural in nature because it did not deal with any matters of substance discussed at the meetings.    As to the ruling to adjourn the meetings, Sulan J concluded that it was a valid exercise of the chairman's powers to adjourn the meetings in circumstances where he was exercising a procedural control and the plaintiff's failure to comply with the ruling and resolution prevented the continuation of business at the meetings.    **(iii) The resolution passed by the management committee**   The defendant submitted that even if the rulings by the chairman were void, the resolution passed by the management committee (in which it held the majority vote) was valid and binding on the plaintiff. Sulan J held that the management committee had an inherent power to regulate its own affairs at a properly convened meeting in the absence of express provisions to the contrary. This extends to the regulation of matters which are incidental to the manner in which the meetings are conducted, including whether or not the proceedings of a meeting can be tape recorded. Therefore, the majority ruling by the management committee to this effect was valid and binding on the plaintiff.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/158%20October%202010.htm%23h5) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. 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/158%20October%202010.htm%23h1) | | | http://my.lawlex.com.au/alert/pic/spacer.gif |

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