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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/175-March-2012.html%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/175-March-2012.html%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1****BIS consults on shareholder rights and remuneration**   On 14 March 2012, the UK Department for Business, Innovation and Skills (BIS) released a consultation paper on measures to give company shareholders greater influence over executive pay, through enhanced voting rights.  The consultation sets out a range of measures including:   * an annual binding vote on future remuneration policy * increasing the level of support required on votes on future remuneration policy * an annual advisory vote on how pay policy was implemented in the previous year * a binding vote on exit payments of more than one year's salary.   Under these proposals, companies will have to report each year on how they have responded to shareholder concerns and taken previous votes into account.  The objective is to promote better engagement between companies and those that invest in them, and create a stronger link between pay and performance.   The proposals are part of a wider package of measures announced by the UK Business Secretary in January 2012, aimed at addressing failings in the corporate governance framework for executive remuneration.  This includes:   * empowering shareholders and promoting engagement through enhanced voting rights * greater transparency in directors' remuneration reports * increasing the diversity of boards and remuneration committees * encouraging employees to exercise their right to information and consultation arrangements * working with investors and business to promote best practice on pay-setting.   The purpose of the consultation is to seek evidence on the impact, costs, benefits and likely behavioural effects of the proposals.   The consultation paper is available on the [BIS website](http://www.bis.gov.uk/assets/biscore/business-law/docs/e/12-639-executive-pay-shareholder-voting-rights-consultation.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.2****IOSCO consults on exchange traded funds regulation**   On 14 March 2012, the Technical Committee of the International Organization of Securities Commissions (IOSCO) released a consultation report, 'Principles for the Regulation of Exchange Traded Funds', which examines the key regulatory issues regarding exchange traded funds (ETFs).  It also proposes 15 principles against which both the industry and regulators can assess the quality of regulation and industry practices relating to ETFs regarding investor protection, sound functioning of markets and financial stability.    Interest in ETFs has increased worldwide as evidenced by the significant amount of money invested in these types of products. This dynamic growth has drawn the attention of regulators who are concerned about the potential impact of ETFs on investors and the marketplace.    To address these concerns, the Consultation Report proposes 15 principles that reflect a level of common approach and are a practical guide for regulators and industry practitioners. The proposed principles address ETFs that are organised as Collective Investment Schemes (CIS) and are not meant to encompass other Exchange-Traded Products (ETPs) that are not organised as CISs.    Fourteen of the proposed principles are categorised under the following three headings:   * Principles related to ETF classification and disclosure * Principles related to marketing and sale of ETF shares * Principles related to the structuring of ETFs.   The Consultation Report also considers the potential broader risks to financial stability arising from ETFs and other ETPs. It suggests that regulators should bear in mind that recommendations made for the ETF industry may be applied elsewhere to other areas of financial services.  These potential broader risks include the following:   * Risks arising on secondary markets (the risk of shock transmission) * ETFs and market integrity (risk of misconduct) * Risks to financial stability.   The 15th principle for the regulation of ETFs relates to the broader risk of liquidity shocks and transmission across correlated markets.    IOSCO's Standing Committee on Investment Management seeks comments on the proposed principles, as well as on the other specific concerns, such as the following:   * Do the principles adequately address the regulatory issues raised by ETFs? * Are the potential financial stability issues raised by ETFs appropriately addressed? * Is there a need for further analysis of issues not exclusive to ETFs, for instance, by the Financial Stability Board?   Further information is available on the [IOSCO website](http://www.iosco.org/news/index.cfm?year=2012" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.3****Report on oversight of ASIC**  On 13 March 2012, the Parliamentary Joint Committee on Corporations and Financial Services published the latest in its series of reports titled 'Statutory Oversight of the Australian Securities and Investments Commission'.  The matters dealt with in the report include (1) fraud, failure and financial crime and (2) ASIC's responsibilities: education, protection and integrity. The Committee makes four recommendations in its report:   * Recommendation 1 - ASIC acquire empirical evidence of its resource allocation to its educative activities and outcomes of these activities. This information should be more fully publicised in ASIC's regular reports and other media accessed by investors especially retail investors. * Recommendation 2 - ASIC take steps to use available information to collate and analyse definitions of, and approaches to, financial crime, with a view to developing standard definitions and classifications that can be used across the Commonwealth. * Recommendation 3 - ASIC give particular attention to ways of distinguishing between criminal fraud and market failure, and the interventions available to ASIC in each case. * Recommendation 4 - The government provide the basis on which company registration fees are set and an explanation as to the process of determining late fees.   The report is available on the [Parliamentary Joint Committee website](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=corporations_ctte/index.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.4****BIS Quarterly Review discusses global market repercussions of euro area sovereign debt crisis**   On 12 March 2012, the Bank for International Settlements (BIS) released the March issue of its Quarterly Review, which discusses the global impact of European bank deleveraging.  The March issue also provides highlights from the latest BIS data on international banking and financial activity.   **(a)**  [European bank funding and deleveraging](http://www.bis.org/publ/qtrpdf/r_qt1203a.htm" \t "_new)  Following special policy measures introduced by central banks around the beginning of December, European banks' funding conditions improved.  Previously, many banks had been unable to raise funds in the unsecured senior bond market, and the cost of unsecured money market funding had risen to levels previously exceeded only during the 2008 crisis.  Dollar funding had become especially expensive.  Two three-year lending operations (LTRO) by the ECB and a wider set of collateral than was previously eligible relieved much of the stress.  Furthermore, the cost of swapping euros into dollars fell in December, as central banks reduced the costs of their international swap lines.  Short-term borrowing costs then declined and unsecured bond issuance revived.  At their peak in late 2011, funding strains fuelled fears that European banks would be forced to sell assets and reduce lending, thereby weakening real economic activity. New regulatory measures requiring banks to meet more stringent capital standards by mid-2012 added to these fears. European banks did sell certain assets and cut some types of lending, notably those denominated in dollars and those attracting higher risk weights.  But, as other lenders stepped in, there was little evidence of any major impact on either asset prices or lending volumes.   **(b)**  [Highlights from the BIS international statistics](http://www.bis.org/publ/qtrpdf/r_qt1203b.htm" \t "_new)  The aggregate cross-border claims of BIS reporting banks expanded slightly during the third quarter of 2011.  The overall rise was entirely accounted for by an increase in interbank claims.  By contrast, claims on non-banks recorded their largest decline since the fourth quarter of 2009.  Despite the overall increase in cross-border claims during the period, there were several notable signs of a slowdown in international banking activity.  First, cross-border lending to non-banks in all major developed economies (with the exception of Japan) contracted or remained virtually unchanged.  Second, internationally active banks reported sharp reductions in their foreign claims on residents of the euro area economies experiencing fiscal difficulties. Third, cross-border claims on emerging market economies declined for the first time in 10 quarters.  Internationally active banks reduced lending to the residents of emerging Europe and Africa and the Middle East.  The growth rate of cross-border claims on Asia-Pacific and Latin America and the Caribbean remained positive but well below that observed during the preceding two years.  In addition, the March issue features three articles:  1.  The impact of Federal Reserve asset purchase programmes: another twist  2.   FX volume during the financial crisis and now  3.   Bank stock returns, leverage and the business cycle.    Further information is available on the [BIS website](http://www.bis.org/publ/qtrpdf/r_qt1203.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.5****Latest research on board diversity**  In March 2012, a number of Australian and international research reports were released on the topic of board diversity.   **(a) Australian research**   On 8 March 2012, the Australian Council of Superannuation Investors (ACSI) released a '2012 ASX 200 stock take' of progress on board diversity.     According to ACSI, ASX 200 companies still have less than 15 per cent of board members who are female. ACSI state that there had been limited improvement since ACSI highlighted the poor gender diversity record of Australian company boards by world standards in 2010.    Key findings of the research include:   * over 70% of ASX 200 companies - 144 of them - currently underperform the base line set by ACSI in 2010 (ie they have none or only one woman on their board); * in aggregate, just 14% of ASX 200 board positions are held by women; * men hold 1000 more board positions than women (1259 men, 206 women); * 134 individual women serve on ASX 200 boards, with 44% holding multiple directorships; * no ASX 200 company board has a majority of women; and * the median company's board is made up of 6 men and 1 woman.   On the positive side, some 26% of new appointees to ASX 200 boards in 2011 were women, and there was a general trend towards larger companies having better gender diversity.   ACSI committed to monitor both the gender diversity policies and implementation practices of ASX 200 companies, with a stated target of every ASX 200 company to have at least two women directors by 2014.    In 2010, the ASX Corporate Governance Council issued new guidelines on disclosure of boards' gender diversity policies and their implementation.  For most companies, these guidelines will formally apply from the June 2012 financial year; although on a best practice basis the ASX considered most companies should have been in a position to comply earlier.    ACSI's research looked at the state of adherence to the ASX guidelines to date among the 144 companies in the ASX 200 that were identified in the initial analysis as having no or only one woman on their board.    Among these companies, the research found that:   * more than one in three (50 companies) have made no mention of the ASX diversity recommendations in their public disclosures to date; * a further seven companies invoked the "if not, why not?" provision to explain their non-adherence to the recommendations, although in ACSI's view four of these explanations were less than satisfactory; * all December year end companies whose 2011 reports are available, have in fact adhered to the disclosure requirements; and * whilst a majority of companies have diversity policies in place, the articulation of measurable objectives and progress towards reaching them lags behind.   **(b) UK research**   On 13 March 2012, Lord Davies released the UK's first annual progress report on his review of Women on Boards.  The report tracks the progress that has been made against each of Lord Davies's ten original recommendations.  His primary recommendation proposed that FTSE 350 boards should aim for a minimum of 25% female representation by 2015.  Since the review was published a year ago, the largest-ever annual increase in the percentage of women on boards in the UK has been seen.   Lord Davies's review was released alongside the Cranfield School of Management's 'Female FTSE Board Report 2012', which looks at female board representation in FTSE 100 companies.  It reports that there has been a "step change" in the number of women appointed to FTSE 100 boards following the publication of the Davies report in 2011.  The proportion of female directors on FTSE 100 company boards at the end of February 2012 was 15%.  The report's authors predict that if the changes seen in the past year continue, just under 27% of directors will be female by 2015, exceeding the target set by Lord Davies.   On 7 March 2012, the UK's House of Commons Library published a research note titled 'Women in public life, the professions and the boardroom', which reports that in February 2012, 12.5% of FTSE 100 company directors were women.  In the FTSE 250, 9.6% of directors were women.  **(c) International research**  On 5 March 2012, the Organisation for Economic Cooperation and Development (OECD) released research which indicates that women occupied only 10% of board posts in listed companies in OECD countries in 2009, the most recent year for which comparable data is available.  This percentage varies greatly across countries:   * in Norway, women occupied close to 40% of board posts, as a result of a mandatory quota introduced in 2006; * in Sweden, France, Slovak Republic and Finland, the proportion of women on boards is between 15% and 20%; and * in Germany, Japan and the Netherlands, women occupied less than 5% of board posts.   Spain, Iceland, France, the Netherlands, Belgium and Italy have all introduced laws to promote gender equality on boards, setting targets of between 20% and 40%.  While there is no conclusive evidence that a company's performance is boosted by having more women on the board, it is increasingly recognised that greater gender diversity in firms would increase the talent pool for top executives.  On 5 March 2012, the European Commissioner for Justice released a progress report on the representation of women on listed company boards.  The report notes that in January 2012, women represented 13.7% of directors of the largest listed companies in the European Union (EU).  Accompanying the report is a consultation paper in which the Commission seeks views on possible EU-wide measures to address the gender imbalance in company boards.  ACSI's '2012 ASX 200 stock take' is available on the [ACSI website](http://www.acsi.org.au/images/stories/ACSIDocuments/MediaReleases/08.03.12.media%20release.women%20on%20boards%20-%20not%20there%20yet.pdf" \t "_new).  Lord Davies's Report is available on the [UK Department of Business, Innovation and Skills (BIS) website](http://www.bis.gov.uk/news/topstories/2012/Mar/women-on-boards-one-year-on" \t "_new).  The Cranfield School of Managment's 'Female FTSE Board Report 2012' is available on the [Cranfield website](http://www.som.cranfield.ac.uk/som/dinamic-content/research/documents/2012femalftse.pdf" \t "_new).  The House of Common's Research Note is available on the [UK Parliament website](http://www.parliament.uk/briefing-papers/SN05170" \t "_new).  The OECD's research on board diversity is available on the [OECD website](http://www.oecd.org/document/20/0,3746,en_21571361_44315115_49820628_1_1_1_1,00.html" \t "_new).   The EU's progress report is available on the [EU website](http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/women_on_board_progress_report_en.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.6****FRC proposals for monitoring of third country auditors**   On 8 March 2012, the Professional Oversight Board, part of the UK's Financial Reporting Council (FRC), published for consultation its proposals for the monitoring of third country auditors.     The monitoring is required by the Statutory Audit Directive (2006/43/EC).  The Directive sets requirements for the regulation of 'third country auditors' of companies incorporated outside the EU that have issued securities admitted to trading on regulated markets within the EU, including on the main market of the London Stock Exchange.   At the end of December 2011 there were 106 third country audit firms registered in the UK.  Most of these were members of one of the four largest international 'networks' of accountancy firms.   The Directive requires that in certain circumstances EU Member States apply their system for the external monitoring of audit work to third country auditors and the relevant audit engagements.  This requirement applies for the most part where there is no equivalent system of audit regulation and external monitoring in the third country, and no plans to introduce such a system.   The purpose of the consultation paper is to seek the views of interested parties - in particular investors, third country auditors, issuers from outside the EU, and other regulators ] on proposals for the system of external monitoring that the Oversight Board should apply to third country auditors.   The consultation paper is available on the [FRC website](http://www.frc.org.uk/images/uploaded/documents/Consultation%20-%20Monitoring%20the%20Work%20of%20Third%20Country%20Auditors1.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.7****EU proposal for improved securities settlement in Europe**  On 7 March 2012, the European Commission announced its proposal to set up a European common regulatory framework for the institutions responsible for securities settlement, called Central Securities Depositories (CSDs).  The proposal seeks to bring more safety and efficiency to securities settlement in Europe.  It also seeks to shorten the time it takes for securities settlement and to minimise settlement fails.  In the European Union (EU), transactions worth over one quadrillion euro were settled by CSDs in the last two years.  The proposal aims to introduce common standards across the Union for securities settlement and CSDs to ensure a true single market for the services provided by national CSDs.  The proposal contains the following key elements:   * The settlement period will be harmonised and set at a maximum of two days after the trading day for the securities traded on stock exchanges or other regulated markets (currently two to three days are necessary for most securities transactions in Europe). * Market participants that fail to deliver their securities on the agreed settlement date will be subject to penalties, and will have to buy those securities in the market and deliver them to their counterparties. * Issuers and investors will be required to keep an electronic record for virtually all securities, and to record them in CSDs if they are traded on stock exchanges or other regulated markets. * CSDs will have to comply with strict organisational, conduct of business and prudential requirements to ensure their viability and the protection of their users. They will also have to be authorised and supervised by their national competent authorities. * Authorised CSDs will be granted a 'passport' to provide their services in other Member States. * Users will be able to choose between all 30 CSDs in Europe. * CSDs in the EU will have access to any other CSDs or other market infrastructures such as trading venues or Central Counterparties (CCPs), whichever country they are based in.   Further information is available on the [European Commission website](http://ec.europa.eu/commission_2010-2014/barnier/headlines/news/2012/03/20120307_en.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.8****BIS Committee debt management report**   On 7 March 2012, the UK House of Commons' Business, Innovation and Skills Committee released its debt management report.     The report calls for improvements in the regulation of the debt and credit industry.  Two particular areas of concern were identified as payday loans and commercial debt management companies.   In relation to the regulation of consumer debt, the Committee recommends that the UK Government put in place the following reforms:   * that higher licensing fees should be charged for higher-risk credit businesses to allow for greater levels of assessment of competence and fitness to operate; and * that a fast-track procedure be developed to suspend credit licences; * that the regulator be given the power to ban harmful products.   In relation to payday loans, the Committee recommends a number of measures, including:   * a compliance review of payday loan companies; * adoption of credit databases to capture credit checking of consumers and recording of all loan transactions by payday lenders; * limitation to the practice of switching between payday loan companies and the subsequent rolling over of loans; * clear rules on payday loan companies' use of continuous payment authority as the method of receiving payments; and * possible statutory regulation in place of industry self-regulation.   Greater transparency in the commercial debt advice market is also recommended.  This includes a requirement that companies publish figures on the cost of their debt advice and their outcomes, and the urgent establishment of effective auditing of debt management companies' client accounts.   The report is available on the [UK Parliament website](http://www.publications.parliament.uk/pa/cm201012/cmselect/cmbis/1649/1649.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.9****IMF working paper on Islamic derivatives**   On 1 March 2012, the International Monetary Fund (IMF) released a working paper titled 'Operative Principles of Islamic Derivatives - Towards a Coherent Theory'.       The paper explains how derivatives are few and far between in countries where the compatibility of financial transactions with Islamic law requires the development of shari'ah-compliant structures.   Islamic finance is governed by the shari'ah, which bans speculation and gambling, and stipulates that income must be derived as profits from the shared generation of goods and services between counterparties rather than interest or a guaranteed return.      The paper outlines the fundamental legal principles underpinning Islamic finance with a view towards developing a cohesive theory of derivatives subject to shari'ah principles.   After critically reviewing accepted contracts and the scholastic debate surrounding existing financial innovation in this area, the paper offers an axiomatic perspective on a principle-based permissibility of derivatives under Islamic law.   The working paper is available on the [IMF website](http://www.imf.org/external/pubs/cat/longres.aspx?sk=25752.0" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.10****Kay review of equity markets interim report**  On 29 February 2012, Professor John Kay published an interim report on his Independent Review of investment in UK equity markets and its impact on company performance and governance.  The Review was announced by the UK Secretary of State for Business in June 2010.  It is examining the way investors, shareholders, regulators and the boards of UK quoted companies can best serve the long-term interests of British business and the economy.  This followed concerns that short-term incentives and pressures can have a damaging effect on the way companies are owned and managed in the UK.  Professor Kay's review is assessing to what extent equity market participants are excessively focused on short-term outcomes to the detriment of these core purposes and what actions might be taken to address this.  It is seeking to examine the incentives, motivations and timescales of all participants in the equity markets - from end investors, through pension funds, advisers, fund managers, and the markets, to company boards - and the relationships between them.  The Interim Report provides an overview of submissions received in response to a call for evidence in September 2011, and reflects the many conversations the review team has had with business leaders and other experts over the last few months.  The interim report discusses a wide range of issues affecting equity markets in the UK submitted to the Review, including:   * the purpose of equity markets, both economically and in facilitating stewardship and corporate governance; * the company and the board, including directors' duties, takeovers, voting rights and executive pay; * performance measurement and the effect of financial reporting; * market practices and corporate governance standards; * asset management, including the role of regulation in driving investment behaviour and the Stewardship Code; and * intermediation in the investment chain.    The interim report is available on the [BIS website](http://www.bis.gov.uk/kayreview" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.11****APRA releases annual superannuation figures**    On 29 February 2012, the Australian Prudential Regulation Authority (APRA) released its Annual Superannuation Bulletin for the financial year to 30 June 2011.  Total superannuation assets increased during the year by $137.4 billion, or 11.5 per cent, to $1.34 trillion.  During this period, public sector funds' assets increased by 21.9 per cent.  Small funds, which include self-managed super funds (SMSFs), single-member approved deposit funds and small APRA funds, increased by 11.5 per cent, industry funds by 10.8 per cent, retail funds by 8.9 per cent and corporate funds by 3.7 per cent.  In the year to 30 June 2011, the average rate of return (ROR) for large funds (more than four members) was 7.8 per cent.  Industry funds recorded an ROR of 9.0 per cent, public sector funds 8.9 per cent, corporate funds 7.7 per cent and retail funds 6.5 per cent.   In the 10 years to 30 June 2011, the average ROR for large funds was 3.8 per cent per annum.  Public sector funds recorded an ROR of 4.7 per cent per annum, industry funds 4.5 per cent per annum, corporate funds 4.3 per cent per annum and retail funds 2.9 per cent per annum.  For the year to 30 June 2011, contributions to all superannuation entities totalled $104.8 billion, with employers contributing $71.4 billion and members contributing $32.5 billion.  Contributions to large funds totalled $81.2 billion, of which retail funds received 33.3 per cent ($27.1 billion), industry funds 32.5 per cent ($26.4 billion), public sector funds 29.4 per cent ($23.9 billion) and corporate funds 4.8 per cent ($3.9 billion).  For large funds, total accumulation retirement benefits are estimated to be 82.2 per cent of their total assets, or $731.3 billion, at 30 June 2011, with 17.8 per cent or $158.2 billion in defined benefits.   The Bulletin also includes features on the volatility of superannuation returns and on superannuation fund reserves (unallocated benefits).  The feature 'Volatility of superannuation returns' examines the long-term ROR and volatility of RORs for superannuation funds over the 15 years to 30 June 2011.  The analysis found that the five-year average ROR for 2007-2011 was lower than the two preceding five-year periods.  It also found that the volatility of RORs for 2007-2011 was higher than the two preceding five-year periods.  Increased volatility of superannuation RORs leads to greater uncertainty around members' final retirement outcomes.  Over the 15 years to June 2011, the average industry-wide ROR was 5.2 per cent per annum.  The second Bulletin feature 'Superannuation fund reserves' examines the size and use of fund reserves.  The analysis found that around half of superannuation funds held no reserves (unallocated benefits) within the fund at 30 June 2011.  Some funds may rely on access to financial support outside the fund, including support from the employer sponsor or the trustee, which may affect the use and size of reserves held by the fund.  The Annual Superannuation Bulletin is available on the [APRA website](http://www.apra.gov.au/Super/Publications/Pages/annual-superannuation-publication.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.12** **UK's Financial Services Consumer Panel paper on consumer responsibility**   On 29 February 2012, the UK's Financial Services Consumer Panel (FSCP) released a briefing paper on consumer responsibility.    The Financial Services Bill, which is currently before Parliament, contains a proposal that the new Financial Conduct Authority (FCA) should "have regard" to the principle that consumers should take responsibility for their decisions.  The Panel's paper explains why it is unreasonable to expect consumers to understand the detail of highly complex financial products and services and the risks for consumers this principle creates.    The Panel argues that the overwhelming advantage firms have in knowledge and understanding means that it is essential for the regulator to ensure that products and services provided by the industry should do what consumers reasonably expect.  As a result, the Panel believes that the new FCA should be able to make rules to impose fiduciary responsibilities on the industry.   The briefing paper is available on the [FSCP website](http://www.fs-cp.org.uk/publications/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.13****Legislation to enhance audit quality**   On 29 February 2012, the Australian Government introduced into Parliament the [Corporations Legislation Amendment (Audit Enhancement) Bill 2012](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=130357" \t "_default).     The Bill will introduce a range of reforms to improve the standard of audits in Australia, following on from a Treasury review of audit quality and extensive stakeholder consultation.  Measures in the Bill include:   * Requiring audit firms to publish an annual transparency report if they conduct audits of 10 or more significant entities. * Providing more powers to ASIC to issue an audit deficiency report in relation to an individual audit firm if it identifies an audit deficiency in the auditor's quality control system or the conduct of an audit that may be detrimental to the overall quality of the audit. * Removing duplication of audit inspection responsibilities so that ASIC continues its audit inspection program and the Financial Reporting Council (FRC) focuses on providing strategic policy advice and reports in relation to the quality of audits conducted by Australian auditors. * Allowing ASIC to communicate directly with an audited body. The current law prevents ASIC from being able to disclose information, because of confidentiality requirements, to an audited body or its audit committee where it becomes aware of significant matters affecting the audit of a company. * Maintaining the five-year auditor rotation requirement but allowing a two-year extension where it will not give rise to a conflict of interest and will prevent the loss of knowledge and experience in situations where rotation could undermine the quality of the audit   The Bill is available on the [Parliament of Australia website.](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4764" \t "_new)  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.14****IOSCO recommendations on OTC derivative mandatory clearing**   On 29 February 2012, the Technical Committee of the International Organization of Securities Commissions (IOSCO) released its Final Report on 'Requirements for Mandatory Clearing'.     The report outlines recommendations that authorities should follow in establishing a mandatory clearing regime for standardised over-the-counter (OTC) derivatives in support of the G20's Leaders Commitments to improve transparency, mitigate systemic risk and protect against market abuse in these markets.   The Report has been prepared by the IOSCO Task Force on OTC Derivatives Regulation in order to provide guidance consistent with the Financial Stability Board's (FSB) Recommendation 12 in its report on 'Implementing OTC Derivatives Market Reforms'. This report asked IOSCO to coordinate the application of central clearing requirements on a product and participant level, and any exemptions from them, as a means of minimising the potential for regulatory arbitrage.   The Report outlines 17 recommendations that authorities should follow in establishing a mandatory clearing regime within their jurisdiction. These are in relation to:   * determination of whether a mandatory clearing obligation should apply to a product or set of products; * consideration of potential exemptions to the mandatory clearing obligation; * establishment of appropriate communication among authorities and with the public; * consideration of relevant cross-border issues in the application of a mandatory clearing obligation; and * monitoring and reviewing the overall process and application of the mandatory clearing obligation.   The Report itself is targeted at authorities that are developing and implementing a mandatory clearing requirement pursuant to the G-20 Commitments.  Those stakeholders that may be affected by mandatory clearing requirements include: those engaged in OTC derivative transaction such as financial and non-financial companies, sovereigns or other public-sector bodies; those bodies such as CCPs and other firms who centrally clear OTC derivatives or act as clearing members of CCPs on behalf of customers; and entities that facilitate trading or provide services to counterparties, clearing members, or CCPs in connection with trading, which may include trading platforms, trade repositories and information vendors.   The Report is available on the [IOSCO website](https://www.iosco.org/library/pubdocs/pdf/IOSCOPD374.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.15****UK national statistics on share ownership**   On 28 February 2012, the UK's Office for National Statistics released its latest survey of the ownership of listed company shares in the UK.     The report, based on the share register at 31 December 2010, indicates that over 41% of shares are owned by those outside of the UK, up from 30.7% in 1998.  56% of these shares are owned by those in North America.    The survey reports an increase in the proportion of shares owned by UK individuals, up from 10.2% in 2008 to 11.5% in 1998.  This compares to individual share ownership in 1998, which was 16.7%.  In 1963, individuals owned 54% of UK quoted shares in terms of total value.   The proportion of shares owned by insurance companies continues to fall and now stands at 8.6% (down from 13.4% in 2008 and 21.6% in 1998), with pension funds now holding 5.1% (down from 12.8% in 2008 and 21.7% in 1998).  These are the lowest percentages since the share ownership survey began in 1963.     The survey is available on the [Office for National Statistics website](http://www.ons.gov.uk/ons/dcp171778_257476.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.16****Remuneration report voting in 2011**   On 23 February 2012, law firm Ashurst (formerly Blake Dawson) published an analysis of remuneration report voting in 2011, which includes the first votes occurring under the new 'two strikes' rule and re-election framework.    Findings include:   * Approximately 5% of S&P/ASX200 companies with financial years ending between 30 June and 30 September 2011 received a first 'strike' on their remuneration reports.  A number of companies outside the S&P/ASX 200 also received their first 'strike'. * Around 54% of S&P/ASX 200 companies put the remuneration report resolution to a vote on a show of hands.  It appears that polling was used as the voting method by all S&P/ASX 200 companies who received the first 'strike'. * Many of the 'strikes' were attributable to shareholder concerns with remuneration, including the quantum of CEO pay, the granting of bonuses despite the failure to achieve performance targets, and the payment of cash bonuses. * Not all 'strikes' appeared to be the sole result of shareholder concerns with remuneration. Some 'strikes' were attributable to shareholder resentment over declining profitability and poor share price performance.   The full report is available on the [Ashurst website](http://www.ashurst.com/publication-list.aspx?id_Content=1361&expandExpertiseList=true&id_queryContent=5422" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.17****Short selling: more transparency and stricter rules**  On 21 February 2012, the EU's Economic and Financial Affairs Council adopted new rules for short selling and certain aspects of credit default swaps.  The regulation introduces common EU disclosure requirements and harmonizes the powers that regulators may use in exceptional situations where there is a serious threat to financial stability.   The regulation, which also had to be agreed by the European Parliament, covers all types of financial instruments, but given the potential risks posed by short selling, this form of trading is a central element to be governed by the new rules.  **(a)  Transparency rules**  For significant net short positions in shares of EU listed companies, the regulation creates a two-tier reporting model.  At a lower threshold, positions must be reported privately to regulators so that the latter can detect and investigate short sales that might constitute abuse or create systemic risks.  At a higher threshold, positions must be disclosed to the market in order to provide useful information to other market participants.  For sovereign debt, significant net short positions relating to issuers in the EU will always require private disclosure to regulators.  The text also provides for notification of significant positions in credit default swaps that relate to EU sovereign debt issuers.  **(b)  Restrictions for uncovered short selling**  To mitigate the greater risks created by uncovered short sales, anyone entering into a short sale must at the time of the sale have borrowed the instruments, entered into an agreement to borrow them or made other arrangements to ensure they can be borrowed in time to settle the deal.  These restrictions do not apply to the short selling of sovereign debt if the transaction serves to hedge a long position in debt instruments of an issuer.  Furthermore, if the liquidity of sovereign debt falls below a specified threshold, the restrictions on uncovered short selling may be temporarily suspended by the regulator.  **(c)  Regulators' powers in exceptional situations**   In exceptional situations regulators may temporarily require further transparency or restrict short selling and credit default swap transactions.  In such a situation the European Securities and Markets Authority (ESMA) would coordinate action between regulators to ensure that measures are truly necessary and proportionate. The ESMA is also given powers to take measures where the situation has cross-border implications.  Further information is available on the [European Council website](http://www.consilium.europa.eu/homepage/showfocus?lang=en&focusID=80909" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.18****Further executive remuneration reforms**   On 21 February 2012, the federal government announced that it would be introducing further reforms to strengthen Australia's executive remuneration framework.  It will also implement several recommendations made by the Corporations and Markets Advisory Committee (CAMAC) to improve disclosure in remuneration reports.   Under the reforms, amendments will be made to the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), requiring listed companies to disclose to shareholders through the remuneration report the steps they have taken to "clawback" bonuses and other remuneration where a material misstatement has occurred in relation to the company's financial statements.  If the company has not clawed back any remuneration, the board will be required to provide a detailed explanation to their shareholders.  If shareholders are unhappy with the company's actions, they would be able to use their powers under the "two-strikes" rule to vote down the remuneration report and potentially spill the board.  The reforms aim to ensure that executive pay remains closely linked to the performance of a company.  In response to CAMAC's 2011 report on executive remuneration, the federal government will be improving disclosures contained in remuneration reports, by requiring more transparent disclosure of termination payments or 'golden handshake' payments.  Unnecessary disclosure requirements will be removed to simplify remuneration reports, and clearer categorization of pay will be introduced to better enable shareholders to understand the company's remuneration arrangements.  Other proposed reforms to the executive remuneration framework include:   * relieving certain unlisted entities from the obligation to prepare a remuneration report, which will significantly reduce the regulatory burden on companies that are not subject to the 'two-strikes' mechanism; and * inserting disclosure requirements relating to related party transactions into the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "_default), as these disclosure requirements will be removed from the accounting standards from 1 July 2013.   Draft legislation to enact these reforms is expected to be released for public consultation in the latter half of 2012.   Further details of the federal government's response to CAMAC's report on executive remuneration are available on the [Treasury website](http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/007.htm&pageID=003&min=djb&Year=&DocType" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.19****IOSCO consults on suitability requirements for complex financial products**   On 21 February 2012, the Technical Committee of the International Organization of Securities Commission (IOSCO) released a consultation report titled 'Suitability Requirements with respect to the Distribution of Complex Financial Products'.   The report sets out proposed principles relating to the customer protections, including suitability and disclosure obligations, which relate to the distribution by intermediaries of complex financial products to retail and non-retail customers.    The report was prompted by concerns regarding the assessment of customer suitability in relation to the distribution of complex financial products arising out of and in connection with recent market turmoil.  It also supports the call by the G20 for action to review business conduct rules.   The proposed principles on suitability requirements are as follows:   **1.  Classification of customers**   **Principle 1:** Intermediaries should be required to adopt and apply appropriate policies and procedures to distinguish between retail and non-retail customers when distributing complex financial products. The classification of customers should be based on a reasonable assessment of the customer concerned, taking into account the complexity and riskiness of different products and services. The regulator should consider providing guidance to intermediaries in relation to customer classification.   **2.  General duties irrespective of customer classification**   **Principle 2:** Irrespective of the classification of a customer as retail or non-retail, intermediaries should be required to act honestly, fairly and professionally and take reasonable steps to manage conflicts of interest that arise in the distribution of complex financial products, including through disclosure, where appropriate.    **3.   Disclosure requirements**    **Principle 3:** Investors should receive or have access to material information to evaluate the nature, costs and specific risks of the complex financial product. Any information communicated by intermediaries to their customers regarding a complex financial product should be communicated in a fair, comprehensible and balanced manner.   **4.  Protection of customers for non-advisory services**    **Principle 4:**  Even when an intermediary sells to a customer a complex financial product on an unsolicited basis (no management, advice or recommendation), the regulatory system should provide for adequate means to protect customers from associated risks.   **5.  Suitability protections for advisory services**    **Principle 5:**  Whenever an intermediary recommends to a customer that it purchase a particular complex financial product, including where the intermediary advises or otherwise exercises investment management discretion, the intermediary should be required to take reasonable steps to ensure that recommendations, advice or decisions to trade on behalf of such customer are based upon a reasonable assessment that the structure and risk-reward profile of the financial product is consistent with such customer's experience, knowledge, investment objectives, risk appetite and capacity for loss.   **Principle 6:**  An intermediary should have sufficient information in order to have a reasonable basis for any recommendation, advice or exercise of investment discretion made to a customer in connection with the distribution of a complex financial product.   **6.  Compliance function and internal suitability policies and procedures**    **Principle 7:**  Intermediaries should establish a compliance function and develop appropriate internal policies and procedures that support compliance with suitability obligations, including when developing or selecting new complex financial products for customers.   **7.  Incentives**    **Principle 8:**  Intermediaries should be required to develop and apply proper policies that seek to eliminate any incentives for staff to recommend unsuitable complex financial products.   **8.  Enforcement**    **Principle 9:**  Regulators and self-regulatory organizations should supervise and examine intermediaries on a regular and ongoing basis to help ensure firm compliance with suitability and other customer protection requirements relating to the distribution of complex financial products. Enforcement actions should be taken by the competent authority, as appropriate. Regulators should consider the value of making enforcement actions public in order to protect investors and enhance market integrity.   The consultation report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD373.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.20****EU  consults on future of European company law**    On 20 February 2012, the European Commission launched a wide-ranging consultation on the future of European company law.    The issues on which views are sought include:   * the objectives and scope of European company law * the relationship between company law and corporate governance * the possible codification of European company law * the future of European company law entities * cross-border mobility for companies * corporate groups * the existing minimum legal capital requirements and rules on capital maintenance.   Further information is available on the [EU website](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/149&format=HTML&aged=0&language=EN&guiLanguage=en" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.21****IOSCO consults on principles for ongoing disclosure for asset backed securities**   On 20 February 2012, the Technical Committee of the International Organization of Securities Commission (IOSCO) released a consultation report titled 'Principles for Ongoing Disclosure for Asset Backed Securities'.   The report contains principles designed to provide guidance to securities regulators who are developing or reviewing their regulatory regimes for ongoing disclosure for asset-backed securities (ABS).   The objective of the ABS Ongoing Disclosure Principles is to enhance investor protection by facilitating a better understanding of the issues that should be considered by regulators in developing or reviewing their ongoing disclosure regimes for ABS.   The ABS Ongoing Disclosure Principles were developed as a complement to the Disclosure Principles for Public Offerings and Listings of Asset-Backed Securities, issued in April 2010, which provides guidance on disclosure regimes for offerings and listings of ABS but do not expressly address continuous reporting disclosure mandates or requirements to disclose material developments.   The ABS Ongoing Disclosure Principles recommend disclosures for those securities that are primarily serviced by the cash flows of a discrete pool of receivables or other financial assets - either fixed or revolving - that by their terms convert into cash within a finite period of time. These principles would not apply to securities backed by asset pools that are actively managed, such as securities issued by investment companies or collateralised debt obligations, or that contain assets that do not by their terms convert to cash.   The consultation report is available on the [IOSCO website](http://www.iosco.org/news/pdf/IOSCONEWS224.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.22****Hedge Fund Standards Board strengthens standards with international dimension**    On 17 February 2012, the Hedge Fund Standards Board (HFSB) announced a series of changes to make its Standards more international and to strengthen them in the light of the financial crisis.    The amendments, which follow a consultation with investors and managers, pave the way for an HFSB drive to increase support among investors and hedge fund managers in the US and Asia.   The changes to the Standards make them more suitable for managers outside the European market which have a different governance structure.  HFSB's priority is now to build on the growing interest in Asia and the US.   HFSB has also strengthened the Standards in several areas, notably disclosure to investors, risk management and ensuring managers have suitable safeguards in place to prevent market abuse.  The key change to make the Standards more international involves strengthening fund governance so that investors have a vote on significant issues if there is no independent governing body to protect their interests.    The changes come into force with effect from 1 September 2012, giving signatories six months to incorporate them.   Nearly 60 hedge fund managers accounting for US$230 billion of assets under management are signatories, and over 50 of the leading international investors in hedge funds support the initiative.   The amendments to the Standards are available on the [HFSB website](http://www.hfsb.org/?page=11474" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.23****FRC paper on its 'comply or explain' approach to corporate governance**  On 15 February 2012, the UK Financial Reporting Council released a paper titled 'Report of discussions between companies and investors: What constitutes an explanation under 'comply or explain'?'.  The paper seeks to promote a better understanding of explanations under its 'comply or explain' approach to corporate governance.  The paper, which is based on discussions between senior company and investor representatives facilitated for the FRC by the London Business School, notes a very high level of compliance with the UK Corporate Governance Code.  It says that a large majority of companies who do not comply with one or more provisions of the Code provide a full explanation of their reasons.  However, a minority do not, and the paper is intended to help address this by setting out clearly what practitioners expect.  Key elements of an explanation identified in the discussion are that it should:   * set out the background, * provide a clear rationale which is specific to the company, * indicate whether the deviation from the Code's provisions is limited in time, * state what alternative measures the company is taking to deliver on the principles set out in the Code and mitigate any additional risk.   Participants in the discussion also felt that the starting point should be an improvement in the general quality of disclosure around corporate governance and a clear articulation by each company of how its governance arrangements support its business model.  The paper is available on the [FRC website](http://frc.org.uk/press/pub2709.html" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1)  **1.24** **Research study - company securities trading policies**  The latest research study of the Centre for Corporate Law and Securities Regulation has been published. It is titled 'Company Securities Trading Policies: An Empirical Study' and authored by Ian Ramsay and Chander Shekhar.  On 1 January 2011, the Australian Securities Exchange (ASX) introduced into its listing rules a requirement for listed companies to adopt and disclose a policy relating to trading in the company's securities by key management personnel during prohibited periods. The introduction of the requirement followed a report of the Corporations and Markets Advisory Committee which recommended that there should be "a more prescriptive approach to the trading by directors and executive officers in the securities of their company during sensitive periods". However, little is known about the securities trading policies of companies prior to the introduction of the listing rules requiring such policies.  In this paper the authors present the results of a study of the securities trading policies of listed companies prior to the introduction of the ASX listing rules in order to gain insight into (1) the extent to which listed companies voluntarily adopted securities trading policies, and (2) the content of these policies and the types of restrictions contained in them.  The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009106" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h1) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1****Consultation on regulatory approach to platforms**   On 13 March 2012, ASIC announced that it is reviewing its regulatory approach to platforms as part of broader efforts to promote investor confidence in the sector.  The platforms sector attracts significant funds.  In the last decade the level of non-superannuation-related investment in platforms has doubled to around $100 billion of funds under management.  In response to this shift in investor behaviour, ASIC proposes additional requirements for platform operators to enhance investor rights associated with investments made through platforms.  ASIC also proposes to require platform operators to disclose how they select financial products for inclusion on investment menus, information that can have an influence on the investment decision of a client.  Consultation Paper 176 'Review of ASIC policy on platforms: Update to RG 148' is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp176" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h2)  **2.2****Updated guidance for making a credit licence application**   On 9 March 2012, ASIC released its updated guidance for people wanting to apply for a credit licence.  Regulatory Guide 204 'Applying for and varying a credit licence' (RG 204) was first issued in December 2009 for guidance to prospective credit licensees on the implementation of the [National Consumer Credit Protection Act 2009 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "_default) (National Credit Act).  The Guide has been updated to reflect changes made to the credit licence application form because of:   * the end of the transition period between credit registration and credit licensing; * some minor legislative changes that have been made since the previous update to RG 204 in June 2010; * changes to ASIC's policy on organisational competence and representative training for credit licensees that provide home loans, as set out in Regulatory Guide 206 'Credit licensing: Competence and training'; and * changes to ASIC's assessment process for credit licence applications to require provision of bankruptcy checks for fit and proper people of the applicant instead of a credit history report.   These amendments are part of ASIC's continuing focus on maintaining an efficient registration and licensing system, particularly for small business.   Regulatory Guide 204 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg204" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h2)  **2.3****Guidance and policy proposals for carbon financial products**   On 9 March 2012, ASIC released regulatory guidance to help business comply with its legal requirements leading up to the introduction of Australia's carbon pricing mechanism later this year.  From July 1 2012, emissions units recognised under the carbon pricing mechanism will be financial products under the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).  ASIC will be responsible for regulating entities and individuals that provide financial services in relation to emissions units.  ASIC's Regulatory Guide 236 'Do I need a licence to participate in carbon markets?' (RG 236) is designed to help entities and individuals understand whether they require an Australian financial services (AFS) licence to provide financial product advice and other financial services in relation to carbon markets and emissions units, and, if so, details the next steps and where people can find more information.  RG 236 provides:   * an introduction to ASIC's role in relation to carbon markets and emissions units; * details regarding which emissions units are financial products and when you are likely to require an AFS licence; and * an outline of the steps required to apply for an AFS licence or vary an existing licence.   ASIC will accept applications for new AFS licences or licence variations relating to emissions units when regulations amending the Corporations Act are finalised.  This is likely to occur by May 2012.  ASIC is also consulting on proposals for applying its current AFS licensing policies to licensees providing financial services in relation to emissions units.  Consultation Paper 175 'Carbon markets: Training and financial requirements' invites feedback on ASIC's proposals for applying its current polices on training for financial product advisers and financial requirements to these licensees.  ASIC will continue to publish information on its website about the new regulatory framework, including the licensing process, general obligations and the timetable in which requirements will take effect.   [Regulatory Guide 236](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg236" \t "_new) and [Consultation Paper 175](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp175" \t "_new) are available on the ASIC website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h2)  **2.4****Multilingual financial resources**   On 6 March 2012, ASIC launched multilingual resources to assist people who have migrated to Australia, to help them learn about Australia's financial system.  Part of the Government's credit and debt education campaign, the resources aim to assist newly arrived community members develop their financial literacy and numeracy skills.  The resources include fact sheets, audio and video content and teaching resources.  Topics include household budgeting, saving money, paying bills, contracts, banking, credit, debt, insurance and superannuation.   The resources can be downloaded from ASIC's consumer website, [MoneySmart](https://www.moneysmart.gov.au/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h2)  **2.5****Guidance for new business names register**   On 1 March 2012, ASIC released regulatory guidance to help businesses prepare for its new national register of business names.   Commencing on 28 May 2012 (subject to the passage of legislation through state parliaments), the new business names register will allow businesses to register their name nationally through an online service.  Businesses will only need to register their name once and will no longer be required to register separately in each state and territory they operate in.  Existing business names currently registered in a state or territory will be automatically transferred to the new register.   Once the new service is launched, businesses will be able to check the availability of a business name and register, maintain and renew that business name with ASIC.  The general public will also be able to search the national register for a business name to identify the entity that has registered it and how to contact them.   Regulatory Guide 235 'Registering your business name' (RG 235) aims to assist new businesses to prepare for the change, providing details on when and how to register a business name and maintaining a business name once it is registered.  RG 235 also gives guidance for businesses with existing business names, providing information about how the automatic transfer to the new register will occur, accessing the new register, checking details are up to date, and how ASIC will contact businesses to renew their registration before their business name expires.   Regulatory Guide 235 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg235" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h2)  **2.6****Further extension of relief granted for funded representative actions and funded proof of debt arrangements**   On 29 February 2012, ASIC announced it will extend the interim class order relief granted to lawyers and funders involved in legal proceedings structured as funded representative proceedings.  ASIC will also extend relief on funding claims lodged with liquidators to prove in the winding up of an insolvent company.  The extension of the relief until 30 September 2012 (provided under Class Order [CO 12/158] will enable the temporary operation of a litigation funding scheme and a proof of debt funding scheme that is characterised as a managed investment scheme without having to comply with the requirements of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).  It will also exempt litigation and proof of debt funding arrangements that are otherwise characterised as financial products from complying with the requirements in the Corporations Act.  These requirements include:   * holding an Australian financial services (AFS) licence covering the provision of financial services in relation to the arrangement; * the general obligations imposed on the holder of an AFS licence, for example the requirement to have in place adequate arrangements to manage conflicts of interest and internal and external dispute resolution procedures; * preparing a Product Disclosure Statement; and * providing ongoing disclosure.   The relief has been extended to allow additional time for the federal government to implement legislative reform it previously announced and avoid any interim disruption that could adversely impact plaintiffs, or interfere with the timely and efficient running of litigation.  Following any law reform in this area, ASIC will consider issuing further regulatory guidance about these schemes after public consultation.   ASIC's decision to extend its relief follows a decision by the Full Court of the Federal Court in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147.  The Court held that a funded class action constituted a 'managed investment scheme' within the meaning of the Corporations Act. This decision may result in litigation funders being forced to comply with the requirements for a managed investment scheme under Chapter 5C and Chapter 7 of the Act.   On 4 May 2010, the federal government announced its plan to exempt representative proceedings and proof of debt arrangements from the definition of 'managed investment scheme' in section 9 and Chapter 7 of the Corporations Act provided appropriate arrangements are in place to manage conflicts of interest.   Subsequently, in *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50, the NSW Court of Appeal unanimously held that a litigation funding agreement was a financial product under section 763A of the Corporations Act because it was a facility thorough which financial risk was managed. This decision means that a funded class action that is not a managed investment scheme may still be characterised as a financial product and need to comply with the requirements under Chapter 7 of the Act.   On 27 July 2011, the Government released for public consultation an exposure draft of proposed regulations to clarify that litigation funding schemes and proof of debt funding schemes are not managed investment schemes under the Corporations Act. The proposed regulations also provide exemptions from the licensing, conduct and disclosure requirements in Chapter 7 of the Act.  These exemptions are conditional on appropriate arrangements being put in place to manage conflicts of interest.  ASIC's interim relief is contained in Class Order [CO 10/333] 'Funded representative proceedings and funded proof of debt arrangements'.  [Class Order 12/158](http://www.asic.gov.au/asic/asic.nsf/byheadline/2012+Class+Orders?openDocument" \l "co12-158" \t "_new) and [Class Order 10/333](http://www.asic.gov.au/asic/asic.nsf/byheadline/2010-Class-Orders?openDocument" \l "co10-333" \t "_new) are available on the ASIC website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h2)  **2.7****Call for better executive remuneration disclosure** On 29 February 2012, ASIC released its review of remuneration reports, following its examination of 50 reports drawn from 300 of Australia's biggest companies.  ASIC undertook a similar review last year of 60 remuneration reports.  ASIC has called on companies to improve the disclosure of their remuneration arrangements for directors and executives.  According to ASIC, this year's review showed that companies could still improve their disclosure in order to provide shareholders with a better understanding of why directors have adopted the remuneration arrangements they have.  ASIC also surveyed how listed companies have managed the new voting exclusions that prohibit key management personnel (KMP) and their closely related parties voting on the resolution to adopt the remuneration report.  ASIC examined procedures adopted by 12 ASX300 companies that held their annual general meeting between 21 October 2011 and 23 November 2011.  Procedures used by some companies that others could adopt to provide the Chair of the meeting with greater confidence that only those votes that are permitted under the law have been counted, include:   * requesting the KMP to advise their closely related parties of the voting prohibitions; * providing members of the KMP with a pro forma letter with instructions for nominee companies or trusts on not voting their shares; * seeking assurances from KMP that they will not cast votes; and * confirming that the share registry service provider, if used, has excluded the relevant votes.   On 10 November 2011 Chartered Secretaries Australia (CSA) issued guidelines to assist companies to manage voting exclusions on remuneration-related resolutions.  On 21 February 2012 the former Parliamentary Secretary to the Treasurer, The Hon David Bradbury MP, announced law reform proposals to provide more disclosure of remuneration arrangements in annual reports (see Item 1.18 above, under 'Recent Corporate Law and Corporate Governance Developments' ). These, if implemented, will supplement the current provisions which were the subject of ASIC's review.  Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12%E2%80%9334MR+ASIC+calls+for+better+executive+remuneration+disclosure?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h2)  **2.8****Draft disclosure guidance for hedge funds**   On 23 February 2012, ASIC released for consultation draft regulatory guidance with new disclosure benchmarks and principles for hedge funds to improve investor awareness of the risks associated with these products.  The guidance, contained in Consultation Paper 174 'Hedge funds: Improving disclosure — Further consultation', sets out the specific features and risks of hedge funds that should be addressed in a Product Disclosure Statement (PDS) for these products.  The proposed principles and benchmarks cover a range of disclosures relating to the responsible entity, the individuals making the investment decisions for the fund, service providers, fund strategies and fund assets.  Where a hedge fund has invested 25% or more of its assets in an underlying hedge fund or structured product, the disclosure principles and benchmarks should be taken to apply to each such underlying fund or structured product.  Hedge funds must disclose whether they meet the benchmarks and if not, why not. 'Why not' means explaining how they will deal with the business factor or the issue underlying the benchmark.  Where ASIC has provided guidance on a disclosure principle, this identifies a particular feature or risk of hedge funds that ASIC considers a responsible entity should clearly and prominently address in the PDS.  CP 174 also addresses ASIC's response to submissions on Consultation Paper 147 'Hedge funds: Improving disclosure for retail investors' which was published in 2011.  [Consultation Paper 174](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp174" \t "_new) and [Consultation Paper 147](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp147" \t "_new) are available on the ASIC website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h2) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1****Reports**   On 6 March 2012, ASX released:   * the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Group_Monthly_Activity_Report_-_Feb_2012.pdf" \t "_new); * the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2012/notice2012_063.pdf" \t "_new); and * the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Compliance_Monthly_Activity_Report_-_February_2012.pdf" \t "_new)   for February 2012.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h3)  **3.2****RP Data, Rismark and ASX introduce world-first daily home value index**   On 1 March 2012, in conjunction with national property data and analytics group RP Data and property research group Rismark International, ASX announced the launch of the RP Data-Rismark Daily Home Value index.   Designed to be a tradable index, the RP Data-Rismark Daily Home Value index will provide the most up-to-date and sophisticated measure of value movements across the Australian housing market.   The RP Data-Rismark Daily Home Value index is the first commercially-available residential index to track value movements across the market portfolio of all dwellings.  Historically, house price indices have only included dwellings that have been sold during the measurement period, by definition ignoring the vast majority of the housing stock.   Further information is available on the [ASXGroup.com.au](http://www.asxgroup.com.au/media/PDFs/Property_Indices_MediaReleaseFinal.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h3)  **3.3****Introduction of ASX 3 Month Overnight Index Swap Futures**   On 27 February 2012, ASX launched the 3 Month Overnight Index Swap Futures (3 Month OIS Futures).  The first contract month available for trade will be the June 2012 expiry month.  The contract allows users to hedge against fluctuations in the official cash rate, better manage their cash exposures and take advantage of outright and spread trading opportunities.   The ASX 24 Notice is available on the [ASXGroup.com.au](http://www.sfe.com.au/content/notices/2012/notice2012_012.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h3)  **3.4****ASX Limited Half-Year Report - 31 December 2011**   On 16 February 2012, ASX released its results for the half-year ending 31 December 2011.   Mr Elmer Funke Kupper, ASX Managing Director and CEO, said: "ASX has achieved a sound result in challenging market conditions, producing growth in revenue, profit and dividend.  The Group's diversified earnings profile enabled total revenue to increase, despite activity declines in some markets".   The [ASX Media Release](http://www.asxgroup.com.au/media/PDFs/Media_Release_16Feb12.pdf" \t "_new) and the [2012 Half-Year Report](http://www.asxgroup.com.au/media/PDFs/Half_Year_Financial_Statements_2012_%283%29.pdf" \t "_new) are available on ASXGroup.com.au.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h3)  **3.5****ASX submission to ASIC re Australian equity market structure**   On 10 February 2012, ASX released its submission in response to ASIC Consultation Paper 168 'Australian equity market structure: Further proposals'.     ASX identified two key matters with the potential to impact the role and efficient operation of Australia's capital markets:   * A regulatory standard should be put in place that safeguards the role of licensed "lit" markets as the main venue for price formation for Australian equities.  It is important that ASIC establishes a standard that ensures a balance is struck between competing interests so that the price formation process, which is of fundamental importance to the Australian economy, is not undermined. * "Flash crash" controls have recently been implemented for the equity market. ASIC should observe how these controls work before introducing further complexity and cost for all market users.   The detailed ASX submission is available on [ASXGroup.com.au](http://www.asxgroup.com.au/media/asx_submission_CP168.PDF" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h3)  **3.6****ASX announces Australian Resources Conference 2012**   On 9 February 2012, ASX announced that the Australian Resources Conference and Trade Show (ARC 2012) will be held in Perth from 12 to 14 November 2012.  ARC 2012 is the first event of its kind in Australia to bring together all facets of the resources sector, in one city and at one time, providing a comprehensive overview of the Australian resources industry to domestic and international delegates.   ARC 2012 is a joint initiative of ASX and the Financial Review, with the assistance of the Western Australian Government and Commonwealth Department of Resources and Energy.   ARC 2012 will feature presentations from government and international experts on a wide range of industry issues, including the latest products and services, and economic outlook.  There will also be sessions focused on professional development and a dedicated investor exchange to promote Australian-listed resources companies to domestic and international investors.   More information about ARC 2012, including speakers and session topics, is available on the [Australian Resources Conference and Trade Show website](http://www.arc2012.com.au/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h3) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1****Ludowici Ltd**  On 9 March 2012, the Takeovers Panel announced that it had declined to conduct proceedings on a review application dated 29 February 2012 from The Weir Group PLC and a review application dated 1 March 2012 from FLSmidth & Co. A/S (FLS), each seeking a review of the Panel's decision in Ludowici Limited 01.  On 28 February 2012, the Panel made a declaration of unacceptable circumstances and final orders in relation to an application dated 13 February 2012 by The Weir Group PLC in relation to the affairs of Ludowici Limited.  On or about 23 January 2012, Ludowici announced it had entered into a Process Agreement with FLS in relation to an indicative non-binding proposal by FLS to acquire by scheme of arrangement all the shares in Ludowici at $7.20 per share.  Following an interview with the chief executive officer of FLS, an article was published on Reuters, dated 23 January 2012, titled "FLSmidth says A$7.20 per share Ludowici bid final" (Reuters article). The article stated, among other things, that FLS's "chief executive said the Danish engineering group's A$7.20 per share bid to acquire Australia-listed company Ludowici c was final and would not be raised." In the body of the article it said "He answered with a 'no' when asked if he would consider raising the bid".   On 31 January 2012, the Australian newspaper published an article referring to the Reuters article. On or about 31 January 2012, FLS issued a press release stating "Certain Australian media today comment on [FLS's] ability to raise the indicated offer price of AUD 7.20 per share, if it should wish to do so, under Australian takeover regulation. ... If [FLS] decides to make a binding offer, it does not currently intend to make or increase any such offer at a price above AUD 7.20 per share, but reserves the right to do so". On or about 31 January 2012, Reuters published a further article titled "UPDATE 1-FLSmidth won't rule out higher Ludowici bid".  The Panel noted, among other things, that the Reuters article:   * was available to market participants in Australia in that it was available to Reuters subscribers, including brokers and * was not corrected until on or about 31 January 2012. This was despite FLS and its legal advisers becoming aware of the Reuters article on 23 and 24 January respectively.   The Panel considered that, by FLS not issuing the correction until on or about 31 January 2012, the acquisition of control over Ludowici shares did not take place in an efficient, competitive and informed market between the publication of the Reuters article and the issue of the correction.  The Panel made orders to the effect that, among other things:   * FLS place advertisements in newspapers stating that Ludowici shareholders who disposed of a net number of Ludowici shares between the publication of the Reuters article and the correction may have a right to compensation * FLS appoint an arbitrator to assess claims for compensation made by Ludowici shareholders and * FLS compensate any eligible Ludowici shareholder an amount determined by the arbitrator but not to exceed the difference between $7.20 (being the price offered by FLS which the Reuters article referred to as 'final') and $9.87 (being the volume-weighted average price of Ludowici shares on the day of the announcement of FLS's $10 offer).   The Panel did not prohibit FLS from proceeding with any offer for Ludowici in excess of $7.20 per share.  Weir sought a review of the initial Panel's final orders.  FLS sought a review of the initial Panel's decision to make a declaration and orders.  The review Panel concluded there was no reasonable prospect that it would make a different decision to the decision of the initial Panel.  Accordingly, the review Panel declined to conduct proceedings on both reviews.  The reasons for the decision are available on the [Takeovers Panel website](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=reasons_for_decisions/2012/004.htm&pageID=&Year" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h4)  **4.2****RCL Group Ltd**  On 17 February 2012, the Takeovers Panel announced that it had declined to conduct proceedings on an application dated 10 February 2012 from Payce Industries Pty Ltd in relation to the affairs of RCL Group Limited (RCL).  The application concerned certain clauses in financing facilities that gave rise to a 'review event' (or 'event of default') upon changes to RCL's board of directors (or key persons), which the applicant submitted entrenched the incumbent directors and certain management and acted as a 'poison pill'.  The Panel was satisfied that the exercise of the lender's contractual rights as a consequence of changes to RCL's board of directors or key persons, was not, without more, a control transaction in the relevant (Chapter 6 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default)) sense.   The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the Panel declined to conduct proceedings.  The reasons for the decision are available on the [Takeovers Panel website](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=reasons_for_decisions/2012/002.htm&pageID=&Year" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h4) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%237) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  |  |  |  |  |  |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | | **5.1****Setting aside a statutory demand**    (By Steven Grant, Minter Ellison)   V & M Davidovic Pty Ltd v Professional Services Group t/as Rosier Partners Lawyers [2012] NSWSC 134, Supreme Court of New South Wales, Black J, 29 February 2012   The full text of this judgment is available at:  [http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=157142](http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=157142" \t "_new)   **(a) Summary**   This case considers the various ways in which a statutory demand can be set aside, particularly in the context of the specified period in which an affidavit supporting the application must be filed with the Court and a copy of the application and supporting affidavit must be served on the person who served the demand on the company.   **(b) Facts**     The plaintiff, V & M Davidovic Pty Limited (VMD) applied to set aside a statutory demand dated 1 July 2011 (the Demand) served by Professional Services Group Pty Limited trading as Rosier Partners Lawyers (Rosier Partners).  The Demand claimed the amount of $68,027.35 which was identified as a judgment debt and reflected the amount of a certificate issued by a costs assessor on 1 July 2011.    A preliminary question arose in this matter as to whether the Court has jurisdiction to set aside the Demand under section 459G of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Corporations Act).  Section 459G provides that an application to set aside a statutory demand may only be made within 21 days after the demand is served, and an application is made in accordance with the section only if, within those 21 days, an affidavit supporting the application is filed with the Court and a copy of the application and supporting affidavit are served on the person who served the demand on the company.  The time limit imposed by section 459G is an essential condition of the right to apply for an order setting aside a statutory demand, and the Court has no jurisdiction to order the demand be set aside if the things which are required to happen within that specified period do not happen.  VMD sought to have the Demand set aside.  VMD also made a number of other submissions as to the grounds on which the Demand should be set aside.   **(c) Decision**    **(i)  Whether the Court has jurisdiction to set aside the Demand**   Firstly, Rosier Partners contended that service of the Demand was effected by facsimile on 1 July 2011 such that the 21 day period expired on 22 July 2011.  Mr Rosier's evidence was that, on 1 July 2011, he sent a covering letter and the Demand to a facsimile number to which he had frequently sent letters and other material the receipt of which had been acknowledged by VMD.  That letter, Demand and the facsimile confirmation were in evidence.  Mr Miroslav Davidovic (Mr Davidovic) who was a director and shareholder of VMD, gave evidence in response to Mr Rosier's affidavit, but did not specifically address whether or when VMD had received the facsimile which Mr Rosier claimed to have sent on 1 July enclosing the Demand.  Black J inferred that the facsimile was received by VMD on the date it was transmitted on the basis that the evidence established its transmission and Mr Davidovic had not specifically sought to controvert its receipt by his evidence in the proceedings.  On the basis that the Demand was served on 1 July 2011 and excluding the day of service, an application to set aside the Demand and supporting affidavit would have had to be filed and served by VMD on or before 22 July 2011 in order to satisfy the 21 day period.  That did not occur, since that application and affidavit was not filed until 25 July 2011.  That was sufficient to establish that the Court does not have jurisdiction to entertain the application to set aside the Demand.    Secondly, there was also evidence that the Demand was sent by ordinary pre-paid post to VMD's registered address on 1 July 2011 and Mr Davidovic admitted receipt of the Demand presumably in that form, by 7 July 2011.  On the basis that service of the Demand was effected on that date, then the application to set aside the Demand and supporting affidavit would need to have been filed and served on or before 28 July 2011 in order to satisfy the 21 day period.  As noted above, the application to set aside the Demand was filed on 25 July 2011.  VMD tendered evidence that the Demand and supporting affidavit were sent by registered post on 27 July 2011 and was still awaiting collection by Rosier Partners from the post office on 28 July 2011.  Black J considered that this evidence did not establish that the application to set aside the Demand and supporting affidavit was served within the 21 day period, even if the Demand had not been served until 7 July 2011. There was strong evidence to the contrary, since an email sent by Mr Davidovic to Mr Rosier on 18 August 2011 stated that the documents relating to the application to set aside the Demand were posted by registered mail on 27 July 2011 but "this mail was recently returned to us" and requested Mr Rosier's advice as to whether he would accept service of the documents if they were posted by ordinary post.  Furthermore, Mr Rosier's evidence was that he did not in fact become aware of the existence of the application to set aside the Demand until 18 August 2011.    For these reasons, Black J held that the Court lacked jurisdiction to make an order setting aside the Demand under section 459G of the Corporations Act and the application to set aside the Demand must be dismissed.  Nonetheless, Black J considered the remaining submissions in turn.   **(ii)  Other submissions**   **Whether a genuine dispute is established**   VMD also sought to set aside the statutory demand under section 459H(1)(a) of the Corporations Act on the basis that that it had a genuine dispute as to the amount of the demand.  VMD relied on proceedings which it has brought in the Supreme Court of New South Wales which sought, inter alia, an order that the judgment derived from the costs assessment be set aside (although the basis of that order was not identified) and also advance a claim for negligence against Rosier Partners.    Black J observed that the Demand reflected the amount of a costs assessment, which had been filed with the Supreme Court of New South Wales.  Section 368 of the [Legal Profession Act 2004 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=82258" \t "_default) (Legal Profession Act) provides for the issue of a certificate setting out a costs assessor's determination.  Section 369 provides that, on the filing of the certificate in the registry of a Court having jurisdiction to order the payment of that amount of money, that certificate is taken to be a judgment of that Court for the amount of unpaid costs.  The only matter raised in the Statement of Claim which potentially impeached the claim for costs arising from the costs assessment is a conclusory pleading that "[t]he plaintiff disputes the defendant's entitlement to any fees and in the circumstances disputes the validity and basis of the application to assess fees".   Black J did not consider that matter to be sufficient to establish a genuine dispute as to the amount of the costs certificate and accordingly, did not consider the claim for a genuine dispute under section 459H(1)(a) was established.   **Whether an offsetting claim was established**   VMD also sought to set aside the Demand on the basis that it has an offsetting claim under section 459H(1)(b) of the Corporations Act.   Black J did not consider that the material filed in respect of the application established a genuine offsetting claim on the basis that there was not sufficient evidence to establish the quantum of the damages claimed even to the relatively undemanding standard required to establish an offsetting claim.  The amount of the offsetting claims were contingent on the outcome of separate proceedings.  Accordingly the damages claimed depended on whether VMD was unsuccessful in the separate proceedings or did not recover the full loss and damage it incurred in those proceedings.  Black J considered that there was no evidence before the Court which would allow the Court to assess the likelihood that VMD would in fact succeed in the separate proceedings  and recover the entirety of the loss of claims in those proceedings.  It seemed to follow from the structure of the relief claimed that if VMD was successful in the separate proceedings, it would have no claim for damages against Rosier Partners and no evidence had been led before the Court which would allow any assessment of the likelihood of that result.   **Whether some other reason to set aside the Demand was established**    VMD also sought an order setting aside the Demand on the basis that some other reason to set aside the Demand existed for the purposes of section 459J(1)(b) of the Corporations Act.  That section permits the Court to set aside a statutory demand if it is satisfied that, inter alia, there is some other reason that the demand should be set aside.  The Court's power under that section exists to maintain the integrity of the process provided under Pt 5.4 of the Corporations Act and is to be used to counter an attempted subversion of the statutory scheme, but is not exercised by reference to subjective notions of fairness.   VMD sought an order setting aside the Demand under section 459J(1)(b) on three different grounds:   * The first ground was that Rosier Partners did not allow VMD 21 days to come to an agreement or pay the debt.   Black J considered that there was no basis on which a creditor is obliged to afford its debtor a further period for negotiation before issuing a statutory demand, particularly where any payment made under an agreement reached between a creditor with a company which was insolvent or near insolvent might ultimately be set aside as a preference once a winding-up order had been made. * The second ground was that Rosier Partners entered judgment against VMD on the same day on which the certificate of costs assessment was issued.   Black J did do not see any reason why Rosier Partners had to allow any particular period between the issue of the certificate of costs assessment and its filing that certificate with the Court so as to give rise to a judgment in accordance with section 369 of the Legal Profession Act. * The third ground was that the Demand was not accompanied by a verifying affidavit.  However, the relevant debt was treated as a judgment debt by reason of section 369 of the Legal Profession Act, so an affidavit verifying it was not required.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h5)  **5.2****Whether a short term high interest loan is void as a penalty or constitutes unconscionable conduct**    (By Bing Han, Ashurst)    PSAL Ltd v Kellas-Sharpe [2012] QSC 31, Supreme Court of Queensland,  Applegarth J, 28 February 2012   The full text of this judgment is available at:   [http://www.austlii.edu.au/au/cases/qld/QSC/2012/31.html](http://www.austlii.edu.au/au/cases/qld/QSC/2012/31.html" \t "_new)   **(a)  Summary**   In this case, Applegarth J considered whether a short term loan of two months with interest charged at a standard rate of 7.5% per month and a concession rate of 4% per month while not in default should be void as a penalty.  Further, whether the application of the standard rate of 7.5% per month during a long default period, and the capitalisation of the interest rate amounted to unconscionable conduct through breach of section 12CC of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default) (ASIC Act) and section 51AC of the repealed Trade Practices Act (TPA).    **(b) Facts**      Ms Kellas-Sharpe entered into a contract dated 29 October 2009 for her company, Goldiway Pty Ltd (Goldiway) to purchase a property in Cooroibah that she estimated to be worth $2,200,000 for $1,000,000.  Settlement date was 14 December 2009 and the contract was not subject to finance.  Ms Kellas-Sharpe paid a non-refundable deposit of $100,000.    Ms Kellas-Sharpe failed to obtain the finance she had hoped and as a result, obtained short term finance from PSAL Ltd (PSAL).  Ms Kellas-Shapre, Goldiway, and PSAL entered into a Loan Agreement on 17 December 2009 for a facility of $1,139,368 which comprises the principal $1,000,000, interest for two months at 4% per month, and other fees and legal costs. The repayment date was two months from the loan, 17 February 2010.  Interest was at a standard interest rate of 7.5% per month, but a concessional rate of 4% per month while the borrower was not in default.  PSAL also had a right to elect capitalisation of interest for any non-payment.    As security, PSAL took a first registered mortgage over the Cooroibah property, a first registered mortgage over a property owned by Goldiway valued at $250,000, a first registered charge by Goldiway, as well as some other smaller assets.  Ms Kellas-Sharpe's company, OPM Holdings Qld Pty Ltd, also acted as the guarantor for the loan and was to give a charge over its shopping centre property in the event of default.    Ms Kellas-Sharpe failed to obtain refinance and defaulted under the Loan Agreement. PSAL gave Ms Kellas-Sharpe additional time to obtain refinance and the parties entered into several discussions in an attempt to settle the debt without success.  On 14 December 2010, PSAL advised Ms Kellas-Sharpe the outstanding amount of over $2 million. By 24 December 2010, Ms Kellas-Sharpe had repaid to PSAL $819,368 in four separate payments.    PSAL commenced proceedings on 4 May 2011 seeking recovery of the secured property, as well as $1,745,166.25 as the balance of the loan account as at 20 April 2011, with interest of 7.5% capitalised each month.     **(c) Decision**     Applegarth J held that the interest rate provisions in the Loan Agreement is in a form that does not attract the doctrine concerning penalties.  It was noted that in any event, the agreed rate of 7.5% rate is not out of all proportion to the damage likely to be suffered as a result of a breach.    However, PSAL contravened section 12CC of the ASIC Act and section 51AC of the TPA because its conduct in capitalising the interest rate was not reasonably necessary to protect its legitimate interest, and at such a high rate over an extended time was not reasonable under all the circumstances.    **(i) Penalty issue**    Applegarth J considered the well-established rule on the doctrine of penalties which applies in an agreement that stipulates a higher interest rate after default. The rule  in effect allows a mortgagee to stipulate a higher interest in default by reserving the higher rate as interest payable under the mortgage and provide for its reduction in case of punctual payment.  This rule has been criticised as favouring form over substance.  Applegarth J held that it was not open to him as a judge at the first instance to alter a rule that is too well established in Australian law, particularly when the rule has been confirmed in recent times by intermediate appellate courts.     In this case, the interest provisions in its current form (standard interest rate of 7.5% per month or concession rate of 4% per month whilst not in default) does not provide for a higher rate of interest after default. The interest rate is therefore not a penalty.      Applegarth J stated that even if he did not follow the rule, he considered that Ms Kellas-Sharpe has not discharged the onus of proving the propounded penalty is "extravagant and unconscionable in amount".  The 4% interest rate was sufficient to cover PSAL's cost of borrowing and overheads but does not compensate PSAL for the cost of administering a loan in default, or the risk to it in recovering its loan after default, which the 7.5% interest rate was designed to do.     **(ii) Unconscionable conduct**    The same considerations applied to section 12CC of the ASIC Act and section 51AC of the since repealed TPA and these were considered together by Applegarth J.    Applegarth J held that a finding of unconscionable conduct requires an examination of all of the circumstances, and is not established simply because a party is in a situation of disadvantage in negotiation (quoting *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 at [291] and *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 64).    Applegarth J considered a number of factors.  First, he found that the relative strength of bargaining power is not a significant factor, and that PSAL did not exploit Ms Kellas-Sharpe's vulnerability in negotiating the loan because Ms Kellas-Sharpe chose to access the short term loan rather than forfeit the sale contract.    Second, Applegarth J found that Ms Kellas-Sharpe had not proved the amount of security it provided to PSAL warranted a lower interest rate that she contended.  The pleaded value of the property at Cooroibah of $2,200,000 is unproven and PSAL's practice was to only charge lower interest rates in rare cases which required very low LVRs or very good cash flow.    Third, the standard rate of 7.5% is not an exorbitant rate.  The 3.5% interest difference to the non-default interest of 4% is justified by reference to losses associated with the default, which the entitlements under the Loan Agreement did not fully cover.     The critical issue is whether the capitalisation of interest over a lengthy period of time was reasonably necessary to protect PSAL's legitimate interest and was unconscionable in all circumstances.  Applegarth J found that the standard rate of 7.5% was not unconscionable for the original term and a period of few months when the borrowers were given a reasonable opportunity to refinance.  However, the exercise of capitalisation of interest every month increased the loan balance markedly but the cost of funds to PSAL did not change.  It has the potential to be crushing to a borrower.  Capitalisation of interest rate cannot be explained by the need to cover certain costs and expenses as a result of default.      At a certain point, Ms Kellas-Sharpe lost any realistic prospect of being able to refinance the mortgage debt and PSAL knowingly put itself at risk of not being able to recover the growing loan.  It was found that PSAL contravened section 12CC of the ASIC Act and section 51AC of the TPA.    **(iii) Remedies**    Applegarth J ordered the Loan Agreement to be varied such that the standard rate of 5% be substituted for 7.5% and the provision for capitalisation of unpaid interest be deleted.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h5)  **5.3****Directors found guilty of charges arising from untrue statements made in offer documents**   (By David Friar, Bell Gully)  R v Graham [2012] NZHC 265, High Court of New Zealand, Dobson J, 24 February 2012  The full text of this judgment is available at:  [http://www.nzlii.org/nz/cases/NZHC/2012/265.html](http://www.nzlii.org/nz/cases/NZHC/2012/265.html" \t "_new)  **(a)   Summary**  The High Court of New Zealand has again found that the directors of a failed finance company are guilty of breaches of the NZ Securities Act.  The directors of Lombard Finance and Investments Ltd (Lombard) were found guilty of charges arising from untrue statements made in offer documents. The decision does not set a new benchmark for directors, as some commentators have suggested.  However, the verdict of Justice Dobson contains important reminders and lessons for directors as they seek to comply with securities laws and their duties as directors.  Key lessons for directors are as follows:   * Liability under the Securities Act is not limited to misleading statements. Directors may also be liable if offer documents contain a material omission. * Directors may be criminally liable under the Securities Act even if they acted honestly and were not reckless. The offence is a "strict liability" offence, with no form of mental intent required. * The purpose of offer documents is to give investors adequate information on material matters so that they can make decisions for themselves. Directors cannot escape this responsibility by arguing that investors instead "relied on the directors to make commercial judgments". * Offer documents must disclose "everything of relevance that is likely to be material to the investment decision". * If a discernable pattern emerges revealing information that is important to investors - such as the company repeatedly missing key management forecasts - this should be disclosed, notwithstanding its potentially damaging effect on the marketability of an offer. * Although directors can generally rely on information provided by management, they must adequately monitor and test the competence of management, and investigate further if put on notice of any issues. * Directors cannot rely on the absence of any red flags raised by professional advisers in substitution of their own duty to review the offer documents. * Directors' obligations in relation to the accuracy of offer documents are "non-delegable".  Directors ultimately must exercise their own judgment about the documents. * Directors must ensure that they receive draft offer documents in sufficient time to properly review them (this is consistent with Australian case law). * If there is a tension between downplaying risk to protect existing investors and shareholders and complying with the Securities Act, the Securities Act prevails.   **(b)  The facts**  **(i)  Background**   * Lombard predominantly raised money from the public to lend to property developers.  By late 2007, the finance company sector was under significant stress, with receivers appointed to Bridgecorp and Nathans Finance.  In December 2007, Lombard distributed an amended prospectus and three investment statements (the offer documents), and raised NZ$10.5 million from the public. * However, Lombard's position deteriorated, and in April 2008 receivers were appointed.  The Crown subsequently charged the directors of Lombard in relation to the contents of the offer documents.   **(ii)  The law**  Under section 58 of the NZ Securities Act, the Crown was required to prove beyond reasonable doubt that each document (1) included an untrue statement (such as a misleading statement or material omission); (2) was distributed; and (3) that the director signed the prospectus or was a director at the time of distribution of the investment statement.  In assessing whether the offer documents contained untrue statements, Justice Dobson ruled that the documents must disclose "everything of relevance that is likely to be material to the investment decision", rejecting a defence argument that this "set the bar too high".  The court also said that the target audience for the documents is a "prudent but non-expert person".  Such an investor includes someone who understands technical words and financial jargon, but who may have "less than a complete understanding of all content" and who may not seek financial advice.  The Crown was not required to prove that the directors were dishonest or reckless, or any other form of mental intent.  Section 58 creates what the law calls a "strict liability" offence.  However, this does not mean that if an offer document is misleading, the directors must be convicted, as one commentator has asserted.  The directors have a defence if they prove on the balance of probabilities that the misstatement or omission was immaterial, or that they believed - and had reasonable grounds to believe - that the statement was true.  **(c)  Decision**  The Crown alleged that the offer documents were misleading or contained material omissions in three relevant respects for present purposes, concerning: (1) liquidity risk; (2) loan impairment; and (3) adherence to lending and credit policies.   |  |  |  | | --- | --- | --- | | **Alleged untrue statement** | **Verdict** | **Comment** | | **Liquidity**  The offer documents described Lombard's liquidity risk conditionally - that is, that if the company failed to manage its liquidity, problems could arise.  The documents did not express a concern about an existing liquidity risk. | **Guilty**  There was an existing liquidity risk that should have been set out in the offer documents.  For the prior four months, management had consistently and substantially overstated projected loan recoveries.  Although the December 2007 cash balance was projected just one month earlier to be NZ$22.9 million, the actual cash balance was NZ$8.1 million.  The chairman had said in an email that Lombard was now "sailing very close to the wind". | Justice Dobson recognised that "marketing advisers might suggest that there was little point in issuing a prospectus in such cautionary terms".  However, he ruled that these considerations "cannot influence the analysis of what was required to provide adequate and accurate disclosure". | | **Impairment of loans**  The offer documents failed to state that Lombard's loan book was impaired. The loans were allegedly impaired because:   * loans ran overdue and were renewed because of the lack of any alternative; * interest was capitalised; * property values were falling due to market conditions; and * Property Law Act notices were issued but not followed through with. | **Not guilty**  For all but one of the loans, none of these factors established impairment at the time the offer documents were distributed.  One loan was impaired because of a number of red flags, including lending well above valuation. However, the misstatement of one loan was not material. | The court made it clear that it was not prepared to review the loans on the basis of hindsight.  Instead, the court considered what was known to the directors at the time the offer documents were distributed in December 2007. | | **Adherence to policies**  The offer documents stated that Lombard adhered to its lending and credit policies, when in fact Lombard:   * failed to adhere to the Loan to Value Ratio (LVR) in its policy; * failed to monitor its loan book; * relied on "completed" valuations of property, even through the development was far from complete; and * implied that there was utility in enforcing its securities, even though this would often be futile. | **Not guilty**   * LVR failures were not occurring to a great extent; * there was no on-going pattern of non-compliance with loans; * the court had reservations about disclosure of this risk, but accepted it was touched on in the documents; and * the implication as to utility might not occur to a notional investor, and so there was no misstatement. | The court was troubled in particular by the statements concerning completed valuations and the utility in enforcing securities.  However, given the criminal standard of proof, the court was not prepared to find the statements untrue. |   **(i)  The directors' defence**  The directors raised the defence that they believed - and had reasonable grounds to believe - that the documents were true.  The directors first argued that they were required to balance their obligations under the Securities Act with their commercial obligations to existing investors and shareholders not to be overly pessimistic about risks which might jeopardise Lombard's business.  The court promptly dismissed this argument.  The directors also argued that they properly relied on management and external professional advisers, such as the auditors, the trustee and solicitors.  Justice Dobson held that such reliance was not a two-way street.  A director cannot ignore an issue with an offer document raised by a professional adviser.  But the same relevance cannot "be attributed in the positive sense to the absence of warning signals from competent external advisers".  The absence of such warnings may make it "marginally easier" for directors to make out reasonable belief, but ultimately "directors' obligations in relation to the accuracy of content of offer documents are non-delegable".  The same is true for reliance on management.  The court ruled that as long as directors adequately monitor management, and there is nothing to put the directors on notice of the need for further inquiry, "reliance on information provided by management in their delegated areas of authority will generally be appropriate".  However, the court also observed that "[d]irectors are appointed to exercise judgment and that extends to testing the competence of management within areas in which managers are relied upon".  Justice Dobson concluded that the directors had not shown on the balance of probabilities that their belief in the accuracy of the statements in the offer documents concerning liquidity was reasonable.  **(ii)  Comment**  The Lombard case is the second in a trilogy of finance company cases to come before the court in the past year. In the Nathans Finance case, one director pleaded guilty and the other three directors were found guilty under the Securities Act.  The Bridgecorp case is still before the court, with two directors having pleaded guilty and three directors defending charges under the Securities Act.  In contrast to Lombard, the Nathans Finance case involved significant related-party lending, a board that failed to meet, and less reliance on external advisers.  Although the Crown achieved convictions in both cases, the differences in culpability between the directors may well be reflected in sentencing.  New Zealand's securities legislation is in the process of a substantial overhaul with the Financial Markets Conduct Bill currently making its way through Parliament. The Bill removes strict liability for defective disclosure and adds an element of mental intent - under the proposed law, directors will only be guilty of a criminal offence if they 'know' or are 'reckless' as to whether the disclosure is defective.  If passed, these changes will provide further protections to directors facing criminal charges arising from the contents of offer documents.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h5)  **5.4****Jumping at shadows? Federal Court guidance on the definition of de facto director and accessorial liability**   (By Andrew Lumsden and Danielle Cutrupi, Corrs Chambers Westgarth)   Grimaldi v Chameleon Mining NL (No 2) [2012] FCAFC 6 (21 February 2010), Federal Court of Australia, Full Court, Finn J, Stone J and Perram J, 21 February 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2012/6.html](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2012/6.html" \t "_new)    **(a)   Summary**   The Full Federal Court has dismissed appeals (on all grounds) against the decision of Jacobson J, finding that Phillip Grimaldi (Grimaldi), as director and officer, breached both his equitable fiduciary and statutory duties to Chameleon Mining NL (Chameleon).  Finn, Stone and Perram JJ, affirmed Jacobson J's decision, holding that:   * despite having never been appointed, Grimaldi acted in the position of a director of Chameleon so as to warrant the imposition on him of the duties, statutory and fiduciary, of a director; * as a result of his participation in certain transactions, Grimaldi was guilty of contraventions of sections 181 and 182 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) and in breach of his fiduciary duties; and * the primary judge was correct in finding the accessorial liability of Murchison Metals Ltd (Murchison) and Winterfall (Crosslands Resources Ltd), two third party companies, for their respective participation in the breaches of Grimaldi under the two limbs of *Barnes v Addy* and under the accessorial liability provisions of section 79(a) and (b) of the Act.   **(b)   Facts**   The subject of the appeal arose out of transactions during 2004 that, at its simplest, resulted in the allocation and transfer of certain funds and shares from Chameleon to Murchison.    The first transaction, the "Cadetta transaction" involved the purchase by Chameleon of gold mining interests in consideration for an issue of its shares.  On allotment of the shares to Murchison, Grimaldi arranged for their sale.  The proceeds of the sale were provided by Murchison to Winterfall, through which Murchison could obtain a controlling stake in a Western Australia iron ore tenement known as "Iron Jack".   As part of the share issue, five million shares were provided to Murchison for no consideration, which were found by the primary judge to be a "commission" payable to Grimaldi for facilitating the transaction.    The second transaction, which was proceeded by a series of agreements, involved the misapplication of two cheques totaling $152,750.  The cheques, which were drawn on Chameleon's bank account, were procured by Grimaldi and made payable to an Iron Jack vendor.  Essentially, the funds allowed Murchison to pay its debt owed to Winterfall, who in turn was able to pay its obligations to the Iron Jack vendors.    Relevantly, upon Winterfall meeting its obligations to the Iron Jack vendors, Murchison proceeded to effect a reverse takeover of it with consummation of the takeover resulting in Grimaldi receiving 10 million shares as a "spotter's fee".  Grimaldi failed to make disclosure of this fee to the other directors of Chameleon.   **(c)    Decision**   **(i)  The law of de facto directors**  Following a consideration of both the United Kingdom and Australian legislative regimes, the Court held that the law had now developed beyond the traditional concept of de facto director; that is, a persons who has been appointed (albeit ineffectively) to the position of director, or who has held over after their appointment has been terminated.  Now, a person may be found to be a 'de facto director' or 'shadow director' if they fall within the extended definition of 'director' in section 9(b)(i) of the Act.  Namely, a person may be a director even without any purported appointment where "they act in the position of a director".  The formula "acts in the position of a director" contemplates that the person has been "doing the work of a director."  What constitutes the work of a director will be a question of fact depending upon the commercial context, operations and governance structure of the company.   Whether the company held the person out as a director will be a relevant but not decisive of the issue.  While the perception of others can be of some contextual evidentiary significance, it is not determinative of the issue of the proper characterisation of the person as a director.   The Court upheld Jacobson J's decision that Grimaldi engaged in a number of actions which constituted the performance of tasks that would typically be expected of a director of Chameleon.  Grimaldi was at all relevant times the "controlling mind of, and the moving force" of Chameleon and that the actions which he undertook showed an exercise of "unconstrained authority" and were a fundamental part of the rationale for the business operations of Chameleon. Some of these actions included:   * undertaking high level management decisions on matters affecting Chameleon's financial standing; * negotiating the acquisition of mining interests; * preparing and deciding the contents of a company prospectus and finding investors to raise funds under that prospectus; and * negotiating with third parties in relation to the provision of funding.   Grimaldi argued that he should be precluded from being a de facto director in light of the fact that Chameleon had acting directors apart from him and a properly constituted, functioning board.  This argument was rejected by the Court, which considered that neither of those factors were of relevance in determining whether a person was acting in the capacity of a de facto director.  Similarly, the argument that a person's consultancy to a company precludes a finding that that person is a director of that body was rejected.   **(ii)  Breach of duties - sections 181 and 182 of the Act and fiduciary duties**   With respect to the Cadetta Transaction, the Court agreed with Jacobson J's conclusions that the five million shares Grimaldi directed to Murchison constituted a secret commissions, obtained without Chameleon's fully informed consent.  The receipt of that commission, as with all secret commission, they held characteristically transgressed both the conflict of interest duty and the misuse of position proscriptions under sections 181(1)(a) and (b) and 182(1)(a) of the Act. The Court further noted that to suggest that the payment of the shares was a gift was no answer to the claim of breach of fiduciary duty and emphasised that secret commissions or bribes often take the form of gifts.    In relation to the $152,000 misapplied cheques, the Court affirmed the primary judge's decision that in drawing the cheques, Grimaldi breached section 181(1)(a) of the Act insofar as he diverted the funds raised by Chameleon for its own purposes, to Murchison, for only Murchison's benefit.  It held that Grimaldi further exercised a direct conflict of duty and interest by way of the "spotter's fee" and in so doing, breached his fiduciary obligations, together with section 182(1) of the Act through an improper use of his position in order to gain a personal advantage.     **(iii)  Accessorial liability**    Upholding the primary judge's finding, the Court agreed that Grimaldi had actual knowledge of:   * the misapplication of the cheques which were to be applied for purposes not of benefit to Chameleon; and * the personal interest that would result from the "spotter's fee".   In turn, they affirmed that Murchison was a knowing recipient of trust property and liable as an accessory under the first and second limbs of *Barnes v Addy* for knowing receipt and knowing assistance in relation to the five million shares and the two misapplied cheques.  So too did the Court uphold that Winterfall was a knowing recipient in relation to the cheques and similarly liable.   The Court's decision on third party liability provided guidance in relation to the principles of *Barnes v Addy*.  Namely, they held that it extends to corporate property, subject to the control and the fiduciary responsibilities of a company's directors.  In this respect, they held that the cheques were relevantly trust property.  The Court also noted that the principles of *Barnes v Addy* have relevance where the liabilities sought to be imposed on third parties are for gains made by the fiduciary and third party, rather than merely losses, as it is in the usual instance.    In relation to the level of knowledge required for 'knowing receipt', the Court held that it was sufficient that the third party had knowledge of the circumstances which indicated the facts to an honest person.  They rejected Murchison's argument that the knowledge of Grimaldi should not be imputed to it on the basis of the fraud exception.  In this regard they held that while a director's knowledge will not be imputed to a company where the director's activities are directed against the interests of the company, it will be where the fraud itself benefits the company.  In Murchison's case, they noted, the drawing of the cheques was partly for its benefit.    **(iv)  Relief**   At first instance, Chameleon claimed a constructive trust or an account of profits over a proportion of the shares arising from Murchison's holding in Winterfall.   Jacobson J however refused to impose a constructive trust over any of Murchison's shareholding in Winterfall on the basis that the shares obtained in Winterfall could not be sufficiently connected with the breach and the profit which resulted from it.  The Court, after canvassing its duty to afford "practical justice" and "appropriate" relief, upheld the primary judge's reasoning and refused to impose proprietary relief by way of an imposition of a constructive trust.   The Court held that Grimaldi was liable to account for such of the 10 million shares which he held under his control for his benefit, together with all of the profit derived from the total issue of shares in the Cadetta transaction.  This liability to account for profits they held arose notwithstanding that his breach of duty was one of several sources of the profit.  Further, he was liable to pay compensation to Chameleon pursuant to section 1317H of the Act for the amount of profits he obtained resulting from his contraventions of sections 181 and 182.  Providing obiter generally on the remedies for secret commissions, the Court noted that, unlike under English law, the remedy of constructive trust was discretionary in Australia.  In light of this, they were disinclined to follow the English case of *Lister & Co v Stubbs* which provides that a bribed agent is accountable not as constructive trustee, but as a debtor in equity. The Court suggested that to adopt this principle was to exclude the bribed fiduciary from the deterrent effects of the constructive trust in the very situation where deterrence is likely to be most needed.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h5)  **5.5****Unauthorised proceedings - failure of company to properly institute proceedings**     (By Tim Jeffrie, King & Wood Mallesons)   Cranes 'R' Us Pty Ltd v Busselton Mini Crane Hire Pty Ltd [2012] WADC 24, District Court of Western Australia, Sweeney DCJ, 17 February 2012    The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/wa/WADC/2012/24.html](http://www.austlii.edu.au/au/cases/wa/WADC/2012/24.html" \t "_new)   **(a) Summary**   The Court granted an appeal from a decision of the West Australian Magistrates' Court on the basis that a director of the respondent was not authorised to initiate legal proceedings seeking recovery of a debt from the appellant.   The appeal was upheld even though the decision originated from a second application to have proceedings dismissed and the appellant had not raised the issue of lack of authority in the first application.    **(b) Facts**      Mr Demarte had been involved in the crane industry in Bunbury and Busselton for over 15 years.  On 15 May 2002, he registered the appellant Cranes 'R' Us (WA) Pty Ltd (Cranes R Us) with all four issued shares owned beneficially by his wife (Mrs Demarte).  On 25 May 2003 the respondent, Busselton Mini Crane Hire Pty Ltd (Busselton), was registered.  The company had two directors, Mr Demarte and Mr Perrott.  The company had two issued shares: Demarte held one share and Perrott and his wife held the other jointly.  Demarte and Perrott both contributed funds to purchase a crane which was then hired by Busselton.    Perrott and Demarte initially shared 40% of the monthly turnover from the operation of the crane, the remainder was retained by Busselton.  Perrott later purchased Demarte's interest in the crane as a part of a larger transaction that saw Perrott purchase a 25% stake in Cranes R Us.  Some time later, the 25% stake was sold back to Demarte.   **(i) First application**   The claim arises out of a series of unpaid invoices issued by Busselton to Cranes R Us from late 2007 to late 2008 totalling $32,259.32.  In December 2009, Busselton lodged a general procedure claim in the Magistrates' Court claiming the unpaid amount (First Application).  Cranes R Us attempted to lodge a defence to the First Application, although it accidentally lodged a new claim against Busselton for money owed instead of lodging a defence.  As the Magistrates' Court did not receive a response to Busselton's claim, default judgement was entered against Cranes R Us.  On 18 February 2010, Cranes R Us applied to set aside the default  judgement, claiming that the debt had been forgiven in various negotiations when Demarte bought back the 25% stake in Cranes R Us from Perrott.  The Magistrate dismissed Cranes R Us' application and the default judgment remained.     **(ii) Second application**    The next day, Demarte, acting as a director of Busselton, purported to discontinue the First Application on behalf of Busselton (Second Application).  Busselton (through Perrott) then sought to remove the notice of discontinuance from the court file and sought an injunction restraining Demarte from filing further notices on behalf of Busselton.  Demarte argued that Busselton did not have authority to initiate proceedings in the First Application on the basis that the directors did not resolve to do so.  Perrott argued that Demarte should be estopped from making that argument because he did not make it in the First Application.  The Magistrate found in favour of Busselton and ordered the notice of discontinuance filed by Demarte to be removed from the court file.  His Honour set out a number of reasons for dismissing the Second Application including:   * Cranes R Us was estopped from raising the lack of authority to issue proceedings in the Second Application; * it was not in the interests of justice to set aside the decision; and * the result of setting aside the judgment would lead to the same outcome because Perrott could call a meeting of Busselton to issue proceedings and Demarte would not be able to vote because of a conflict of interest.   Cranes R Us appealed the decision.    **(c) Decision**     The Court granted Cranes R Us' appeal and found that the First Application was instituted without authority of Busselton.  On appeal, his Honour held that Magistrate Edwards erred in deciding that Cranes R Us was estopped from arguing that Perrott did not have the authority to initiate proceedings on behalf of Busselton.  Sweeney DCJ struck out the proceeding and ordered Busselton's solicitor to pay costs.    In assessing the case, his Honour dealt with three specific issues:   (i)   whether Cranes R Us was estopped from arguing that the Busselton had no authority to bring proceedings in the Second Application; (ii)  whether board approval was needed to initiate the First Application; and (iii)  whether the Second Application was superfluous because Perrott could cure the lack of authority by holding a directors meeting.    **(i) Estoppel**   First, his Honour rejected Magistrate Edwards' characterisation of Cranes R Us' Second Application as being a second attempt to have the default judgment set aside.  The Second Application was a challenge to the validity of the proceedings itself and Cranes R Us ought not have been estopped from challenging the validity of the proceedings.   Secondly, his Honour rejected both estoppel points that were argued before Magistrate Edwards: issue and Anshun estoppel.  His Honour noted that this was not issue estoppel as Perrott's lack of authority was not adjudicated on in the first application.  Further, his Honour rejected Magistrate Edwards' findings that it was Anshun estoppel.  Sweeney DCJ outlined that Anshun estoppel applies where the matter relied on in the second action is so relevant to the subject matter of the first action that it was unreasonable not to rely on it in the first action.  His Honour held that this was not a second proceeding, the defendant was not seeking to re-open the case in subsequent litigation, and the Second Application was a part of the same litigation.    Finally, his Honour assessed whether the application could be rejected under the inherent power of the Court to guard against abuse of process.  However, Sweeney DCJ held that this was not an issue of "judge shopping", and accepted the explanation of Demarte that the "lack of authority" argument was not raised in the first application because of time pressures surrounding that application.    **(ii)  Board approval**   His Honour rejected Perrott's submissions that he did not need a meeting of directors to initiate proceedings.  Noting the decisions in *Horizon Star Pty Ltd v Carina Hodlings Pty Ltd* [2003] WASCA 94 and *Deputy Commissioner of Taxation (Vic) v Players Entertainment Network Pty Ltd* (1988) 6 ACLC 902, his Honour held that a resolution of the board could not be dispensed with on the basis that the outcome of the board meeting could only go in one direction.  Furthermore, Sweeney DCJ held that the fact that a defendant may not have a defence on the merits does not override the need for the proceedings to be properly commenced.    Sweeney DCJ also rejected Busselton's submission that the board had delegated powers to Perrott in such a way as to allow him to initiate proceedings on the company's behalf.  His Honour noted that there was no resolution under section 198D of the Corporations Act 2001 (Cth) (the Act) which would have given authority enabling the delegation.  Further his Honour dismissed Perrott's claim that the delegation should be inferred on the basis that Perrott was exclusively managing Busselton from the beginning.  While Perrott had some control over Busselton, on the facts it was not exclusive.  His Honour held that even if Perrott had exclusive control, the fact that he carried out a large amount of the day-to-day business of the company did not of itself give him the power to initiate proceedings on the company's behalf.    **(iii)  Matter was easily cured**   Sweeney DCJ found that Magistrate Edwards erred in rejecting the application because the lack of authority could be easily cured.  Magistrate Edwards had erred in concluding that Demarte would not be able to vote on a resolution relating to the proceedings because he had a material personal interest (and therefore any such resolution would have passed).  In fact, because Cranes R Us is a proprietary company Demarte could have voted on such resolutions as long as he disclosed the nature of his interest.  Therefore the outcome of the board meeting was not a foregone conclusion and the error could not be easily cured.    **(iv)  Should proceedings be stayed rather than struck out?**   Relying on authority, his Honour held that the claimant in the First Application was not "before the court" because it did not consent, therefore proceedings are a nullity and cannot be stayed.  His honour therefore struck out the First Application.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h5)  **5.6****The power of a court to terminate or stay the winding up of a company in circumstances where debts owed by the company are in dispute**     (By Katrina Sleiman and Andrew Turner, Corrs Chambers Westgarth)    In the matter of Yelin Group Pty Ltd v Jin [2012] NSWSC 74, Supreme Court of New South Wales, Ward J, 15 February 2012   The full text of this judgment is available at:  [http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=156941](http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=156941" \t "_new)      **(a)  Summary**   In July 2011, Yelin Group Pty Ltd (Yelin) was the subject of a winding up order as a result of non-compliance with a statutory demand and the corresponding statutory presumption of insolvency. This statutory demand was overlooked as a result of an administrative error whilst the sole director, Mr Li, was overseas, and related to a relatively small amount of money ($4,731) which Yelin owed for strata levies which were undisputed and were promptly paid once the oversight was discovered.    Yelin and Mr Li sought an order pursuant to section 482 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) to have that winding up order terminated.  The respondent, Mr Jin, opposed the relief sought, claiming that the company was, and had been for some time, insolvent and contended that he was owed more than $600,000 by Yelin.  The applicants disputed this and claimed that Mr Jin owed Yelin approximately $500,000.    Ward J had to consider whether it was appropriate to terminate or stay the winding up order in circumstances where the solvency of the company depended on the existence of a disputed debt.    **(b)  Facts**      Yelin's sole trading activity is the renting out of three commercial units in Parramatta and its primary income is derived from the ownership of those units. Its sole member is Australia Shoppingtown Development Pty Ltd of which Mr Li is the sole director and shareholder.    Mr Li, his wife, and Mr Jin, had been involved in various commercial dealings relating to this Parramatta development. These dealings were the subject of another ongoing dispute which was due to be heard in the weeks following this matter in the Supreme Court of New South Wales.  In that matter, Yelin claimed that Mr Jin was liable in respect of a guarantee given to the financier of the property development in 2003. Mr Jin denied liability under the guarantee and instead claimed that he was owed over $600,000 by Yelin.    In July 2011, an order for the winding up of Yelin was made as a result of non-compliance with a statutory demand in relation to debts for strata levies for the Parramatta property and the resulting statutory presumption of insolvency which arose. Mr Li was overseas when the statutory demand was sent to Yelin's registered office and only through administrative oversight was the demand ignored. Mr Li claimed that he would have taken steps to address the matters if he was aware of the existence of the statutory demand.    After becoming aware of the winding up order, Mr Li promptly filed a notice of motion seeking to have the order terminated.  Mr Jin opposed this application, in what was accepted by Ward J as an attempt to 'preserve the position in which Yelin has found itself as a result of the inadvertence that led to the winding up order being made'.  It is unlikely Mr Jin would have been able to rely on the statutory demand procedure because the existence of the debt was clearly in dispute.   Section 482(1) of the Corporations Act provides that:   "At any time during the winding up of a company, the Court may, on application, make an order staying the winding up either indefinitely or for a limited time or terminating the winding up on a day specified in the order."    **(c)  Decision**     After a lengthy discussion of the legal principles, Ward J summarised the factors to be taken into account when the court considers the termination of a winding up order:   * the circumstances in which the winding up occurred; * the interests and attitude of the liquidator, creditors and contributories; * the solvency and financial position of the company; and            questions of commercial morality or public interest.  Ward J also noted strong statements in the authorities that a court ordered termination or stay of a winding up order is not to be used:   * to resolve disputed debts; * by a creditor whose debt is the subject of a genuine dispute as a debt-collecting mechanism; and * as an instrument of oppression to be held over the head of a company otherwise trading satisfactorily.   **(i)     The circumstances in which the winding up occurred**    Ward J accepted Mr Li's explanation that the statutory demand was overlooked only as a result of inattention at an administrative level, noting that Mr Li had arranged for payment of the liquidators' and creditors' costs.    **(ii)    The interests and attitude of the liquidator, creditors and contributories**    Ward J noted that the sole contributory, Mr Li, was bringing the present application and all acknowledged creditors had been paid. In discussing the 'hotly' contested debt either owing to or owed by Mr Jin, her Honour noted that where there has been no attempt to have the statutory demand set aside (which is the "proper avenue for raising issues about the genuineness of the debt claimed by the party moving for winding up": *Brolrik v Sambah* [2001] NSWSC 1171 at [32], Barrett J), the presumption of the debt stands, unless rebutted by evidence (*Redglove Holdings Pty Ltd v GNE & Associates Pty Ltd* [2001] NSWSC 867 at [33] Palmer J).    **(iii)   The solvency and financial position of the company**   Her Honour stated that the 'potential' that the debt to Mr Jin would be established (in the forthcoming proceedings) must be taken into account when considering the 'solvency of the company as at today's date and the likelihood of its solvency in the near future.'     **(iv)   Questions of commercial morality or public interest**   Her Honour noted that the court must consider the public interest of terminating the winding up order, given the implications that this may have for those who deal with the company  in the future if the order was to be terminated (*Brolrik v Sambah* [2001] NSWSC 1171 at [31], Barrett J).  However, her Honour found that, with the exception of the money claimed by Mr Jin which was the subject of the other dispute, there was no reason to think that the company is not or would not remain solvent in the future.    **(v)    Commercial reality**   The court must look to the "commercial reality" of the position in assessing solvency (*Lewis v Doran*, at [106]-[112] and [119]) and Ward J was of the opinion that Yelin could meet its debts as and when they fell due and payable as a result of the ongoing support of Mr Li.    Her Honour needed to consider, however, the concern that Yelin may, pending the outcome of the proceedings against Mr Jin, be shortly rendered insolvent by an adverse finding in that matter.    **(vi)   Conflict and resolution**   Ward J's decision centred on what was described as "the tension between the very firm statements in the authorities that the winding up jurisdiction is not to be used for the resolution of disputed debts and the equally firm statements as to the public interest in an insolvent or potentially insolvent company not being permitted to re-enter the commercial world".   Her Honour decided it was not in the public interest to terminate the winding up order, given the uncertainty pertaining to the status of the substantial debt that company may owe Mr Jin.    However, her Honour held that the public interest would be adequately protected if there were to be a stay of the winding up pending the outcome of the proceedings which were shortly to be heard, subject to an undertaking by Mr Li and Yelin that they preserve the assets of Yelin until the matter of the debt to, or owed by, Mr Jin was resolved.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h5)  **5.7****Recovery by receivers of moneys transferred to administrator on account of fees for service**  (By Sarah Horan, DLA Piper)  Webster, in the matter of Willmott Forests Limited (Receivers and Managers Appointed) (Administrators Appointed) v Fernandez [2012] FCA 82, Federal Court of Australia, Dodds-Streeton J, 13 February 2012  The full text of this judgment is available at:   [http://www.austlii.edu.au/au/cases/cth/FCA/2012/82.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/82.html" \t "_new)   **(a)  Summary**   In this case, Streeton-Dodds J considered an application by the joint and several receivers of the "Charged Property" of Willmott Forests Limited (WFL) to recover $200,000 from WFL's administrator, Avitus Fernandez (Fernandez), which had been transferred from WFL's National Australia Bank (NAB) account to Fernandez after the appointment of the receivers.   The key issues for determination were:   * Whether the moneys held in the NAB account formed part of the "Charged Property" for the purpose of the deeds of charge at the time of the receivers' appointment; * If so, whether the receivers were entitled to take possession of the moneys in the NAB account at the time of the receivers' appointment; * Whether Fernandez, as former administrator of WFL, had a lien over the funds which had priority over the deeds of charge; and * Whether the funds transferred to Fernandez could be traced to the proceeds of sale of the "Bombala Land" and, if so, whether Fernandez had any entitlement to the funds on that basis.   The court concluded that there was no apparent lawful basis for Fernandez's entitlement to and retention of the $200,000.   **(b)  Facts**    On 6 September 2010, CBA Corporate Services (NSW) Pty Ltd (CBA) appointed Bryan Webster (Webster), Mark Korda and Mark Mentha, partners of KordaMentha, as joint and several receivers and managers of all the assets charged by WFL under four charges (collectively "receivers").   In the course of taking control of the assets subject to the deeds on the day of his appointment, Webster wrote to the manager of NAB requesting, inter alia:   * the details of any accounts operated by WFL; * that any accounts held by WFL be frozen immediately; * that any amounts deposited in any accounts held by WFL from the date of [the receivers'] appointment be held on trust for the benefit of WFL, such funds to be transferred to a new account to be set up in the receivers' name.   Later on the same day, the board of WFL passed a resolution to place WFL into voluntary administration and to appoint Fernandez as administrator.  Unbeknownst to the receivers, at the request of Mr Derham and Mr Madgwick (Madgwick), directors of WFL, the Financial Controller of WFL transferred $200,000 from WFL's NAB account to Feranadez's firm's trust account for the costs and expenses of administration.     Madgwick deposed that the directors of WFL and its subsidiaries believed that the proceeds of sale (settlement having occurred on 1 September 2010) of unencumbered land situated at Bombala (Bombala land) had been deposited into bank accounts held at the CBA and NAB.  Madwick further deposed that as the Bombala land fell within the definition of "Excluded Property" under the relevant charges, the directors believed the proceeds of sale would remain unencumbered assets of WFL, despite having been banked.   On 8 September 2010, Webster requested that NAB transfer all funds in the NAB account into the receivers' name.  Notwithstanding a competing request for the NAB funds made by Fernandez, the parties ultimately resolved that the balance of the NAB account be transferred to the receivers' trading account for WFL.   On 26 October 2010, for reasons not detailed in the judgment, Fernandez was removed as voluntary administrator of WFL by an order of the Federal Court and members of PPB Advisory were appointed as joint and several administrators of WFL.   On 20 January 2011, the receivers became aware of the 6 September 2010 transfer of $200,000 from the NAB account to Fernandez's firm and wrote to Fernandez demanding repayment of the funds.   On 16 February 2011, the receivers applied to the Federal Court seeking:   * a declaration that, for the purposes of the deeds of charge, the "Charged Property" (as defined in the deeds of charge) included all money held in the NAB account; and * a direction that the receivers were lawfully entitled to possession of the sum of $200,000.   Fernandez contended that he was entitled to retain the moneys:   * on the basis of either a statutory or equitable lien superior to the secured creditors' rights under the charges, and also or alternatively,            because the funds could be traced to the proceeds of sale of the Bombala land, which was "Excluded Property" excluded from the charges, in which he had a pre-existing equitable interest.  **(c)  Decision**   **(i)  Was the money "Charged Property"?**   Whilst the definition of Charged Property was slightly different under each deed of charge, in essence, it included "all of the Chargor's assets, undertakings and rights, both present and future, including the assets, undertaking and goodwill of the business of the Chargor and the capital, but excluding any Excluded Property".  Excluded Property was defined as including "the Bombala land".   Streeton-Dodds J considered the deeds of charge and concluded that the moneys held in the NAB account fell within the definition of "Charged Property," and did not constitute "Excluded Property".   **(ii)  Were the receivers entitled to take possession of the NAB moneys?**   Streeton-Dodds J held that the $200,000 paid to Fernandez's firm from the NAB account constituted property of WFL subject to a floating charge under the deeds of charge which, on the appointment of the receivers on 6 September 2010, crystallised and became a fixed charge, entitling the receivers to immediate possession of the moneys in the NAB account.   In support of this conclusion, her Honour noted that the deeds of charge created a fixed charge over the Charged Property as set out in clause 2.2 of the deeds, and a floating charge over all other Charged Property.  The deeds further provided for the automatic crystallisation of the floating charge if an "Event of Crystallisation" occurred.  Relevantly, an Event of Crystallisation encompassed an "Insolvency Event", the definition of which included where "a controller, administrator or similar officer is appointed..."   **(iii) Did the administrator of WFL have a lien over the funds which had priority over the deeds of charge?**   Streeton-Dodds J determined that Fernandez did not have a statutory or equitable lien over or interest in the $200,000 which would entitle him to priority over the deeds of charge.   Fernandez's argument regarding a statutory lien was unsupportable given that:   * Fernandez did not appear to dispute that by virtue sections 443E(1)(b) and 443E(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) any statutory lien would, in the circumstances of this case, have priority over the charges only to the extent to which the chargee had agreed to give his indemnity priority over debts secured by the floating charge; and * Fernandez did not contend that the chargee had agreed to afford his right of indemnity priority over the debts secured by the floating charge to any extent.   As such, the principle issue for consideration turned upon the alleged existence of an equitable lien.  In contemplating the nature of an equitable lien, Streeton-Dodds J referred to *Hewett v Court* (1983) 149 CLR 639, in which Deane J noted:  "An equitable lien is a right against property which arises automatically by implication of equity to secure the discharge of an actual or potential indebtedness ... Though called a lien, it is, in truth, a form of equitable charge over the subject property ... in that it does not depend upon possession and may, in general, be enforced in the same way as any other equitable charge, namely, by sale in pursuance of court order or, where the lien is over a fund, by an order for payment thereout ... Importantly, for this case, these principles confirm that the liquidator may assert a lien even though he is not in possession of the fund and may enforce it by an order for payment out."   Her Honour also considered Dixon J's analysis in *Re Universal Distributing Co Ltd* and various authorities referring thereto, noting that costs and expenses incurred by a liquidator, administrator or receiver for the exclusive purpose of caring for, preserving or realising the company's property, (as opposed to the costs and expenses of administration more generally) should be "charged upon the fund".     In this case, Streeton-Dodds J determined that there was no evidence to suggest that the $200,000 in question, or any part thereof, related to the actions, efforts or expenditure of, or costs reasonably incurred by Fernandez in preserving or realising WFL's property.  Accordingly, her Honour held that Fernandez did not to have an equitable lien over the moneys with priority over the secured creditors' interests under the deeds of charge.   It was recognised, however, that had Fernandez been found to have an equitable lien, it could have attracted a higher priority than that accorded by, or consonant with, the statutory scheme.   **(iv)  Could the funds be traced to the proceeds of sale of the "Bombala land"?**   In respect of Fernandez's tracing claim, Streeton-Dodds J ultimately held that the proceeds of sale of the Bombala land were not traceable to the NAB account.  Her Honour found that the evidence indicated the proceeds of sale of the Bombala land were paid into the WFL CBA account and the receivers' cheque account, and had not at any time been deposited into the NAB account.     **(v)  Relief granted**   Streeton-Dodds J concluded that the receivers were lawfully entitled to possession of the sum of $200,000, plus interest on that sum from 6 September 2010.  Fernandez was ordered to pay the receivers' costs of the proceeding.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h5)  **5.8****Joint venture gone wrong; fiduciary duty found to exist**    (By Jack Hill, Solicitor, King & Wood Mallesons)   Fast Financial Services Pty Ltd v Crawford and Battye [2012] NSWSC 40, Supreme Court of New South Wales, Barrett J, 10 February 2012   The full text of this judgment is available at:   [http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=156802](http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=156802" \t "_new)   **(a)  Summary**   This decision analyses whether a fiduciary relationship can exist between parties in a contractual joint venture.  It confirms that a limited fiduciary obligation can co-exist with contractual obligations, and that vulnerability of some kind, coupled with reliance, is the source of fiduciary duty.   **(b)  Facts**    Mr Crawford and Mr Battye met in 2006.  Pursuant to two written agreements the parties agreed to purchase a property at Garland Valley and the Halfway Roadhouse business which was located on the property.  The acquisitions were made through Garland Valley Holdings Pty Ltd (GVH), a joint venture company formed by the parties.  Crawford and Battye held the shares in GVH in equal portions and were the only directors.     GVH completed the purchase of the business and property in December 2006, after which Crawford conducted the business and had complete control of the operations and the finances.  Battye never played an active role in the operations and made only occasional visits to the property.     Some months after the acquisitions were completed Crawford proposed that GVH obtain a short-term loan.  A loan agreement was entered into with Fast Financial Services Pty Ltd (FFS) and executed on 31 October 2008.  The loan was repayable three months after the date of the advance.  An establishment fee, other fees and charges and interest for the full term were to be payable at inception. As security, GVH granted to FFS a mortgage over the property and a fixed and floating charge over all of the Roadhouse business assets.  Crawford and Battye also gave personal guarantees, while Crawford gave FFS a second mortgage over a property he owned in Windsor.     Following receipt of a second valuation of the property and the business, and before funds were advanced under the loan, it was agreed by all parties to reduce the principal amount of the loan.   In early November 2008 the loan proceeds were transferred to an account operated by Crawford on Crawford's instructions.  The loan was never repaid.  In February 2009 FFS appointed receivers and FFS realised the security by selling the joint venture property some time later.   **(i)  Decision dealt with two proceedings**     In the first proceeding GVH claimed that FFS had engaged in unconscionable conduct by refusing to produce the certificate of title which prevented GVH from obtaining registration of a purported lease over part of the joint venture property.  Key parts of GVH's claim were that:   * if the lease had been registered, GVH would have been able to obtain alternative financing, that in the absence of registration it was unable to obtain; and * the lease would have been registered if FFS produced the certificate of title.   In the second proceeding FFS sought to claim against the personal guarantees granted by Crawford and Battye.  In response, Crawford argued that FFS had acted unconscionably by providing a false document to St George Bank (the existing mortgagee of the Windsor property) and by reducing the amount that could be borrowed after the loan documentation had been executed.   In connection with the second proceeding, Battye filed cross-claims against both Crawford and FFS.  Of particular interest was Battye's claim that Crawford owed him a fiduciary duty which had been breached.  Battye alleged that FFS never advanced the loan funds to GVH, or, if it did, that the proceeds were appropriated by Crawford in breach of his fiduciary duty.   **(c)  Decision**     **(i)  Battye's cross-claim against Crawford**    The court held that Crawford had breached a fiduciary duty he owed to Battye.  It found that Crawford was "under a fiduciary duty to act in all relevant things so as to promote and protect the parties' joint interests and to subordinate his own interest to those joint interests".  It determined that the structure of the relationship between the two men (being the two written agreements and their interests in GVH) was subsidiary and peripheral to the parties' personal relationship which was a relationship in which Crawford had ascendency and Battye a position of vulnerability and reliance.    In assessing Battye's cross-claim, Barrett J first examined whether a fiduciary relationship existed between the parties. His Honour noted that "the individuals became associated together to pursue a common purpose.  Their relationship was based on mutual confidence that they would engage in a particular activity for their joint advantage only".  His Honour noted that there is a distinction between a joint venture in this sense and a 'simple contractual relationship'.   Barrett J then considered the capacity of a contract or other legal structure to provide the foundation for a fiduciary relationship and analysed the decisions of the High Court in *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 49 and *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19.  From those decisions his Honour distilled that three factors are crucial in determining whether a fiduciary relationship exists between parties associated together under a recognised legal structure:   * the nature and incidents of that recognised legal structure; * whether there exists a special kind of vulnerability or reliance; and * whether there is a strong degree of trust and custodianship.   Barrett J found that the contracts that the parties had entered into and the way in which they became associated through GVH were not of themselves sufficient to permit a finding of fiduciary duty.  However, "they were in no sense a comprehensive charter of rights and obligations".  His Honour determined that Battye's claims could only be sustained "if the facts disclose[d] some vulnerability on his part and related reliance by him warranted by circumstances existing over and above the relationships created by the contracts and through the company".  His Honour found that the facts disclosed such a vulnerability, and held that a fiduciary duty existed.  In reaching this conclusion, Barrett J acknowledged Crawford's unchecked control over the business and finances and Battye's lack of possession and control over money, his remoteness to the business, his exclusion from business decision making and his personality.  Battye was seen to be "specially disadvantaged" and vulnerable given Crawford's superior position.   Having found that a fiduciary relationship existed, the court was satisfied that Crawford breached his duty by taking substantially all of the funds of the venture and depositing them into his own bank account, and by conducting the business on his own account and for his own benefit.  It found that "to the extent that Crawford, in these ways, utilised the joint venture assets and goodwill and received moneys attributable thereto, he did so for the benefit and account of the venture and came under a duty to account accordingly".  The court held that Crawford had breached his duty to account.   The relief to be awarded to Battye will be determined at a later hearing.   **(ii)  First proceeding**    The court found that there was no evidence to support the propositions underpinning GVH's claim.  The lease was not in registerable form and there was nothing to justify a finding that another financier would have been willing to provide replacement finance if the lease was registered.  Further, the court found that by granting the lease, GVH had clearly breached an express covenant of the mortgage agreement and that failure of FFS to produce the certificate of title was reasonable and did not involve any unconscionability on FFS's part.  GVH's claim therefore failed.   **(iii) Second proceeding**   The court held that FFS was entitled to judgment against both Crawford and Battye jointly and severally.  It dismissed Crawford's defence finding that there was no operative unconscionability on the part of FFS.     **(iv) Battye's cross-claim against FFS**   Battye's cross-claim against FFS was rejected.  The court held that Battye could not properly bring the cross-claim as the claim sought a benefit for GVH.  The court also found that the claim would fail even if it were properly brought as FFS was entitled to act upon the instructions given by Crawford in respect of GVH.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h5)  **5.9****Disclaiming of leases by liquidators of landlords - can the tenant be removed?**    (By Will LeMass and Scott Sharry, Clayton Utz)   Re Willmott Forests Ltd (In Liq) [2012] VSC 29, Supreme Court of Victoria, Davies J, 9 February 2012     The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2012/29.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/29.html" \t "_new)   **(a) Summary**   The liquidators of Willmott Forests Ltd (Receivers and Managers Appointed) (In Liquidation) (WFL) applied to the Court for approval of a series of contracts to sell real property owned by WFL.  In order to sell the relevant properties free from a number of leases that WFL had granted, the liquidators proposed to disclaim, pursuant to the provisions of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act), the relevant leases.  The Court was asked to determine, as a preliminary issue, whether the liquidators' proposed disclaimer would enable the properties to be sold unencumbered by the relevant leases.  This decision is in relation to that preliminary issue.   The Court determined that a disclaimer of the relevant leases by the liquidators would not extinguish the lessees' leasehold estate in the relevant land.  The Court found that this is because of the distinction between the contractual rights under the lease, which would be extinguished by the disclaimer, and the lessees' proprietary interest in the land which is conferred by the lease.  The Court held that the lessee's proprietary interest would not, applying the provisions of the Act, be extinguished by the proposed disclaimer.     The effect of this decision is that the disclaimer of a lease by the liquidators of a lessor will not extinguish the lessee's right to occupy the relevant property for the remaining duration of the lease.  This decision significantly reduces the practical benefit of the ability of a liquidator of a lessor to disclaim a lease, particularly where the liquidator is seeking to pass title to the relevant property to a third party unencumbered by the relevant lease.   **(b) Facts**      WFL owns and leases a number of parcels of land which are used for forestry operations.  WFL is also the responsible entity and/or manager of a series of registered and unregistered managed investment schemes.  The members of the relevant managed investment schemes (the Growers) have rights to grow and harvest trees on WFL's property under "project documents" which include lease and licence arrangements with WFL.   The liquidators of WFL entered into a series of contracts to sell the land owned by WFL conditional on, amongst other things, the property being unencumbered by the leases to the Growers.  The liquidators sought Court approval of the entry into the sale agreements under section 511 of the Act.  In order to pass title to the relevant property unencumbered by the leases, the liquidators proposed to, pursuant to section 568 of the Act, 'disclaim' the relevant leases.  Section 568 of the Act permits a liquidator to disclaim property (which includes a contract) of a company in liquidation.  The judgment explains that the purpose of this provision is to enable a liquidator to relieve the company of obligations or liabilities that would prevent a prompt and efficient winding up of the company.     The Court was asked to determine, as a preliminary issue to the approval of the relevant sale contracts, the effect of the liquidators disclaiming the relevant leases on the rights of the lessees.  The liquidators argued that the Court ought to determine that by disclaiming the leases, the lessees' rights and interest in the land would be extinguished, thereby enabling the liquidators to pass title to the land to the purchaser unencumbered by the leases.   In support of this submission the liquidators referred to *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70 which considers the equivalent UK legislative provisions.  The decision in Hindcastle held that where the liquidator of a lessee disclaims the lessee's interest in the lease, the lessee's proprietary interest in the land ceases to exist.  As a result the lessor's rights and obligations under the lease cease to exist altogether.  The liquidator argued that the principle identified in this case ought apply equally to the disclaimer of a lease by a lessor.  The liquidator argued that, in light of Hindcastle, disclaimer by the lessor ought to also extinguish both the lessor and lessee's rights and obligations under the lease altogether.   **(c) Decision**     Her Honour rejected the liquidator's argument that the principle in Hindcastle applies equally to the disclaimer of a lease by a lessor.  Her Honour found that the rights of a lessor under a lease are significantly different to the rights of a lessee and, consequently, the effect of the disclaimer of a lease is different when undertaken by a lessor.     A lease, according to Her Honour, confers on the lessee contractual rights as well as a proprietary interest in the relevant land.  Therefore, when a lessee disclaims a lease, the lessee is terminating both its proprietary and contractual rights, causing its rights in the land to revert to the lessor.  Her Honour held that on the other hand, a lease does not confer any additional proprietary interest on the lessor (beyond that which they already possess).  Consequently, only contractual rights are conferred on a lessor by a lease.  As a result of this distinction, her Honour found that the disclaiming of a lease by a lessor, although causing termination of any contractual rights under the lease, does not extinguish the lessee's proprietary interest in the land.     The liquidators then argued that, if that were correct, there would be little point in an insolvent landlord seeking to disclaim a lease. The Court held that this possibility does not change the effect of section 568D which provides that a disclaimer only releases the insolvent party from "liabilities", and a tenant's leasehold interest is not a liability of the landlord.  Her Honour supported this conclusion by reference to the terms of section 568D(1) of the Act which provides that the effect of a disclaimer under the Act is that the relevant company's rights, interests, liabilities and property in respect of the relevant property are terminated and that this termination "does not affect any other person's rights or liabilities except so far as is necessary in order to release the company and its property from liability".  Her Honour found that extinguishing the Grower's leasehold interest in the relevant properties was not necessary in order to release WFL from its contractual liability under the lease:   "First, it is not apt to describe a leasehold estate as a liability nor is it apt to characterise it as an encumbrance on the landlord's property. A leasehold estate is a grant of property right and the grant of property right confers on the tenant different legal rights in the property than the rights attaching to the landlord's reversionary interest. It is therefore unnecessary to extinguish the Growers' leasehold estates in order to release WFL's property from its liability. Moreover, it is to be borne in mind that the property proposed to be disclaimed is the contract for lease, under which WFL has already leased the land to the Growers. It is therefore unnecessary to interfere with the Growers' property rights in order to release WFL from its liability to lease because the leases have been effected. Accordingly, the answer is that the proviso in section 568D has no application."   The practical effect of this decision is that a liquidator of an insolvent lessor will not be able to pass title to property owned by the lessor, unencumbered by the relevant lease, by disclaiming that lease.  The leasehold interest conferred on the lessee by the lease will survive the liquidator's disclaimer.  As a result, this decision may result in liquidators seeking to identify defaults to allow termination of a lease in order to sell the relevant property unencumbered.  However, this decision will not affect the ability of a liquidator of a tenant to disclaim a lease and extinguish that lease altogether.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h5)  **5.10** **Who should pay the costs of an unsuccessful challenge to a selective capital reduction?**   (By Tanya Mangold, Clayton Utz)   Elkington v CostaExchange Ltd [2012] VSCA 10, Supreme Court of Victoria, Court of Appeal, Neeve JA and Kyrou AJA, 3 February 2012   The full text of this judgement is available at:  [http://www.austlii.edu.au/au/cases/vic/VSCA/2012/10.html](http://www.austlii.edu.au/au/cases/vic/VSCA/2012/10.html" \t "_new)   **(a)  Summary**   This decision dealt with an application by a minority shareholder for leave to appeal against an adverse costs order following an unsuccessful objection to a selective capital reduction. The Court of Appeal held that there was no reason to depart from the rule that costs should follow the event.   **(b)  Facts**   The costs order arose out of an application by the appellant, Dr G B Elkington, for an injunction to restrain the respondent from making a selective reduction of its capital by cancelling the minority shares.    An independent expert's report had concluded that the price offered by the company for the minority shares exceeded the value of the shares and that the reduction was fair and reasonable to the shareholders as a whole.  A general meeting had approved the cancellation of the minority shares.    The judge at first instance found that the capital reduction was fair and reasonable, dismissed the application for the injunction and ordered costs against the applicant.  The applicant applied for leave to appeal against the costs order. The main ground of appeal considered by the Court of Appeal was that the judgment in *Winpar Holdings Ltd v Goldfields Kalgoorlie Limited* [2000] NSWSC 855 (Winpar) was authority for importing principles from other parts of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) into Part 2J.1 of the Act, such that the usual rule that costs follow the event should not apply to an objector to a selective capital reduction.  The other substantive issue considered by the Court of Appeal was the relevance of a shareholder acting individually in objecting to a selective reduction.  **(c) Decision**   **(i)  Winpar**   The Court of Appeal rejected the argument that Winpar is authority for extending the cost allocation principles found in section 664F(4) of the Act to other parts of the Act.   In Winpar, Santow J referred to section 664F(4) of the Act, which provides that in the event of a compulsory acquisition:  "The 90% [holder](http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s9.html" \l "hold" \t "_new) must bear the costs that a [person](http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s761a.html" \l "person" \t "_new) incurs on legal proceedings in relation to the application unless [the](http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s58aa.html" \l "the_court" \t "_new) [Court](http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s58aa.html" \l "the_court" \t "_new) is satisfied that the [person](http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s761a.html" \l "person" \t "_new) acted improperly, vexatiously or otherwise unreasonably. The 90% [holder](http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s9.html" \l "hold" \t "_new) must bear their own costs."  Santow J said that the absence of a similar provision in Part 2J.1 of the Act did not did not create an expressio unius assumption that an unsuccessful objector to a selective reduction would not be entitled to costs.  He noted that a selective reduction could be functionally equivalent to a compulsory acquisition.  In that situation, he said, an objector's right to costs should not be dependant upon the statutory route by which the minority shareholders were removed from the company.  He therefore favoured an approach under which the costs regime applying to a selective reduction would be similar to that applying to a compulsory acquisition.   This approach was rejected by the Court of Appeal, which held that the issue is to be determined simply by having regard to Part 2J.1 of the Act (which governs capital reductions) and that there is no statutory provision allowing costs principles from one part of the Act to be applied to another part of the Act.  (The Court of Appeal also noted that selective capital reductions had once required Court approval and that, even under that regime, the Court had a discretion on whether to order costs in favour of an objector).  The Court at first instance was thus correct in holding that Winpar was not authority for extending the application of section 664F(4) to Part 2J of the Act (that the costs provision in section 664F was not applicable to a selective capital reduction).  **(ii) Individual objection**  The Court of Appeal also rejected an argument that the Court at first instance should not have taken into account the fact that the applicant had acted alone in seeking an injunction against the capital reduction.   In reaching this conclusion, it appears to have been influenced by two factors:   * 81.23% of those voting at the meeting had voted in favour of the reduction; and * although a number of other shareholders had voted against the reduction, none had joined the applicant in seeking an injunction against it.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h5)  **5.11****Release from undertakings given to the Court by liquidators not to produce certain documents to a litigation funder**   (By Magdalena Pitsis, Freehills)   ABC Learning Centres Limited, in the matter of ABC Learning Centres Limited; application by Walker (No 11) [2012] FCA 40, Federal Court of Australia, Cowdroy J, 3 February 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/40.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/40.html" \t "_new)   **(a) Summary**   The liquidators of ABC Learning Centres Limited (in liquidation) (ABC Learning) sought orders to be released from undertakings not to provide a litigation funder, IMF (Australia) Ltd (IMF) with access to documents produced during public examinations by the Commonwealth Bank of Australia and a syndicate of seven other banks (banks).   In this case, it was found that although there may be confidential information in the banks' documents, the liquidators are required to investigate the affairs of ABC Learning. Such investigation can only be effective provided funding is available from IMF. The court found that the banks' interests in the continuation of the undertaking did not outweigh the greater public interest in ensuring that the liquidators fulfil their statutory obligations.   The banks sought orders to set aside the Court's previous orders for production of documents or alternatively, to be excused from further production.    The Court found that orders for production of documents relating to the internal operations and activities of the banks are not documents within the ambit of examinable affairs of ABC Learning and the banks are entitled to the relief they seek with respect to those documents.    However, documents relevant to the trading activities of ABC Learning were found to fall within the definition of examinable affairs. The liquidators were entitled to have access to these documents.    **(b) Facts**      Prior to December 2007, the banks lent approximately $1.3 billion without security to ABC Learning pursuant to a syndicate facility agreement.   On 25 June 2008 ABC Learning executed a fixed and floating charge (charge) in favour of the banks over the assets of ABC Learning.    On 2 June 2010, creditors of ABC Learning passed a resolution to the effect that it was insolvent and appointed Peter Walker and Gregory Moloney as joint liquidators of ABC Learning.   The liquidators conducted examinations to investigate whether the charge given to the banks by ABC Learning constituted a voidable transaction as being an "uncommercial transaction" or an "unfair preference".    On 22 October 2009 the liquidators entered into a litigation funding agreement with IMF in relation to the funding of proposed public examinations.    The liquidators' application sought orders to release the liquidators from an undertaking previously given to the Court not to provide certain documents to IMF produced during examination.    The banks sought to set aside certain orders for production or alternatively, to be excused from further production.    **(c) Decision**     **(i)  Whether the undertakings given by the liquidators were binding and whether they outweighed the broader interests of enabling the liquidators to fulfil their statutory duties**   Justice Cowdroy found that the liquidators were to be released from their undertakings given to the Court which prohibited them from providing certain documents produced under public examinations to IMF.  In reaching this conclusion Cowdroy J stated that:   * an undertaking to the Court should be maintained unless there are 'very sound reasons' for altering or discharging the undertaking; * an undertaking can be modified where 'special circumstances' exist; * for 'special circumstances' to exist it is enough that there is a special feature of the case which affords a reason for modifying or releasing the undertaking; * the undertakings given by the liquidators did not outweigh the broader interests of enabling the liquidators to fulfil their statutory duties; * IMF held 'a critical position' in the proceedings as the only possible facilitator of the inquiries being made by the liquidators; and * so long as the material provided to IMF was kept confidential the Court considered that the liquidators were justified in providing access to the documents to IMF.   **(ii)   Whether the proposed confidentiality regime and undertakings to be provided by the litigation funder IMF were adequate in protecting banks' interests**   The banks argued that:   * the Court could have no confidence that the proposed confidentiality regime will be effective; * IMF is the largest litigation funder in Australia and is currently funding a shareholder action against ABC Learning; and * there is no evidence of any safeguards (i.e. physical separation of documents from different departments, an education program, careful and strict procedures to ensure that 'Chinese Walls' are not breached, monitoring by compliance of officers and disciplinary sanctions for breaches) to ensure that disclosure of the banks' confidential information does not occur.   The Court found that:   * the implied undertakings which will extend to any person to whom the banks' documents are made available will ensure that there is adequate protection provided to the banks; * the fact that the documents were provided solely for the purpose of this litigation constituted a sufficient reason for the Court to conclude that the objection by the banks was not sustainable; * the form of proposed undertaking imposed a significant obligation upon persons authorised to inspect the banks' records; and * the possibility of production of confidential information as part of the production of documents did not outweigh the greater public interest in ensuring that the liquidators fulfil their statutory duties.   **(iii)  Whether the documents required to be produced related to 'examinable affairs' of ABC Learning**   The banks submitted that:   * the confidential interests of the banks will prevail over any interest of the liquidators; * since no examination is pending, there is legitimate interest in those documents; * many documents recording the banks' policies and procedures relating to their approaches to risk assessments and credit ratings are highly commercial and commercially sensitive (including containing trade secrets); * an order requiring production of documents which are not required for an examination is oppressive and made in excess of power; and * orders requiring production of documents relating to the internal operations and activities of the banks could not constitute examinable affairs of the ABC Learning Group.   Justice Cowdroy took the view that the power conferred by section 597(9) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) empowers a court to order production of documents that is confined to those documents 'relevant to matters to which the examination relates or will relate'.  For this reason the Court noted that the examination must be confined to records relating to ABC Learning's examinable affairs.    As such the Court found that documents relating to internal operations and activities of the banks did not fall within the ambit of examinable affairs.  Whereas, documents relating to ABC Learning fell within the ambit of examinable affairs because they were relevant to the trading activities of ABC Learning.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h5)  **5.12****Whether contractual entitlements payable to a CEO on termination were 'termination benefits' and required shareholder approval**    (By Sarah Shnider, Freehills)   White v Norman; In the Matter of Forest Enterprises Australia Limited (Receivers and Managers Appointed) (in Administration) [2012] FCA 33, Federal Court of Australia, Besanko J, 2 February 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/33.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/33.html" \t "_new)   **(a)  Summary**   Between 2003 and 2009, Mr White (the Plaintiff) was employed as CEO of Forest Enterprises Australia Limited (FEA) pursuant to multiple contracts of employment.  The Federal Court was asked to determine whether Mr White's entitlements on termination under his employment contract could be paid to him pursuant to Part 2D.2, Division 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 regulates the payment of "termination benefits" to those who hold "a board or managerial office".   Specifically, the Court examined whether the benefits payable to Mr White were "in connection" with his retirement from office and if so, whether a statutory exception applied so as to enable those termination benefits to be paid to him without the need to seek member approval.   The Court was also asked to decide whether Mr White's annual and long service leave entitlements had priority over certain other claims in the winding up of FEA.   The Court held:   * Mr White's contractual entitlements on termination were provided "in connection" with his retirement from the office and therefore Part 2D.2, Division 2 of the Act applied to the payment of those entitlements by FEA; * the entitlements were given to Mr White as consideration for him agreeing to hold the office of CEO and did not exceed the statutory cap. Accordingly, member approval was not required to pay those entitlements to Mr White; and * Mr White's annual and long service leave entitlements did not have priority over other claims in the winding up as they were not due on the relevant date.   The court noted that Part 2D.2, Division 2 of the Act has been amended in November 2009 but that the amendments did not apply in this case.   **(b)  Facts**      Between 2003 and 2009, Mr White was employed as CEO of FEA pursuant to five consecutive contracts of employment, the last of which was entered into in July 2009 (the 2009 Contract).  In each contract the statement of the Plaintiff's employment duties was identical.  On termination, Mr White was entitled to a number of payments, including annual and long service leave, as well as payment of non-discretionary (ie fixed) and discretionary remuneration in lieu of notice (where some or all of the 12 months' notice was not provided).   On 19 April 2010, Mr White's employment was terminated by the joint receivers and mangers of FEA (the Defendants).  The Defendants advised Mr White that, as a consequence of receivership, his services were no longer required and his employment was terminated.  The Defendants also advised Mr White that FEA would abide by the terms of his employment agreement.  A dispute arose in May 2010 when the Defendants indicated the actual amount they believed FEA was required to pay to Mr White under the 2009 Contract.    Pursuant to section 200B of the Act, a person must not give a benefit to another person in connection with their retirement from a board or managerial office without member approval under section 200E.   Section 200F provides exceptions to the prohibition on payment of termination benefits, including where:   * the benefit is a payment by way of damages for breach of contract (section 200F(2)(a)(i)); or * the benefit is given to the person under an agreement made between the company and the person before the person became the holder of the office as consideration, or part of the consideration, for the person agreeing to hold the office (section 200F(2)(a)(ii)); and * the value of the benefit does not exceed the statutory cap, which is calculated by reference to the "relevant period" during which the person held the office (section 200F(2)(b)).   **(c) Decision**     **(i) Whether the contract was repudiated**   Mr White argued that the termination of his employment without payment of his entitlements was a repudiation of the employment contract and accordingly, he accepted the repudiation and had a claim for damages for breach of contract (ie he was entitled to be paid).   The Court noted that in stating that FEA would abide by the terms of the contract, the Defendants effectively agreed that the company would pay Mr White his entitlements on termination.  The failure to make the actual payment on 19 April 2010 was not critical as the Defendants had a reasonable time within which to make the payment. Accordingly, the Court found Mr White's entitlement was to a payment under the contract (as opposed to damages for breach of contract).   **(ii) Whether the benefits were given "in connection with" Mr White's retirement from office**   Mr White argued that his entitlements were not termination benefits as they were not payments "in connection with" his loss of office.  Rather, they were derived from the fact that the required period of 12 months' notice was not provided.   The Court found that while the payments were not "directly linked to the loss of office per sec the words 'in connection with' are words of wide import and there is no need for a direct link".  Accordingly, the payments were termination benefits subject to Part 2D.2 of the Act.   **(iii) Whether the benefit had been approved by members**    Mr White argued that as there had been a resolution at the previous Annual General Meeting of FEA adopting the remuneration report, his termination benefits had effectively been approved by members in accordance with section 200E.   The Court rejected this argument because:   * the details of the benefit required to be disclosed under section 200E(2) were not included in the remuneration report; and * the members' vote on the remuneration report is advisory only and does not bind the company.   **(iv) Whether the benefit fell within an exception - section 200F(2)(a)**   The Court had already determined that the contract had not been repudiated and the correct construction of Mr White's entitlement was as a payment under the contract. Accordingly, section 200F(2)(a)(i) did not apply.   The Court then considered whether the benefit was given in consideration, or part consideration, for Mr White agreeing to hold office pursuant to section 200F(2)(a)(ii). The defendants argued that the entitlements on termination were given in consideration for Mr White holding the office under the first agreement in 2003. As Mr White already held that office before the 2009 Contract was entered into, those benefits could not be construed as consideration for agreeing to hold that office.   The Court rejected that construction and held that "consideration" refers to "the consideration given by the company from time to time". Accordingly, section 200F(2)(a)(ii) was satisfied, notwithstanding that Mr White had held the same position since 2003.   **(v) Whether the benefit was below the statutory cap - section 200F(2)(b)**   The defendants argued that the "relevant period" for the purpose of calculating the cap under section 200F(2)(b) was the period during which Mr White held office under the 2009 Contract (ie from July 2009 to April 2010). When calculated based on this relevant period, Mr White's entitlements on termination exceeded the statutory cap.    The Court noted that section 200F(5) defines relevant period and refers to a number of periods. Where there are a number of periods, the relevant period is an aggregation of those periods of time. Therefore "successive periods of time serving in the same office should be aggregated to constitute the relevant period". When the statutory cap was calculated based on a relevant period commencing in 2003, Mr White's termination benefits could be paid by FEA without member approval.   **(vi) Priority of payments when a receiver is appointed**   The Court was asked to consider whether Mr White's entitlements to annual and long service leave were "due" on the "relevant date" (being the date the Defendants were appointed as receivers on 14 April 2010) and therefore enjoyed priority over certain other claims under section 556(1) of the Act.   The Court found that no payments were "due" until Mr White's employment was terminated on 19 April 2010. Accordingly, such payments were not "due" on or before the relevant date and those payments did not take priority over other claims under section 556(1) of the Act.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h5)  **5.13****Court removes liquidator: comments on the importance of impartiality and the standard of disclosure expected by liquidators**   (By Lincoln Verass, DLA Piper)  Pinklillies Pty Ltd (Trustee), in the matter of Northwest Motel Group Pty Ltd (in liq) v Huxtable [2011] FCA 1543, Federal Court of Australia, Logan J, 19 December 2011  The full text of this judgment is available at:   [http://www.austlii.edu.au/au/cases/cth/FCA/2011/1543.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/1543.html" \t "_new)   **(a) Summary**   A liquidator was appointed by the Federal Court's West Australian District Registrar. Matters giving rise to a potential conflict were not disclosed by the liquidator to the Registrar at the time of the liquidator's appointment.  Pinklillies Pty Ltd as a creditor of Northwest Motel Group Pty Ltd (in liquidation) (NMG) objected to this appointment following the discovery that the liquidator was employed by a company that was a related to another creditor of NMG, being the firm Summerslegal.    The Court held that the liquidator should be removed because, firstly, a conflict of interest was a real possibility in the circumstances and, secondly, that even if measures were taken to limit the exposure of the liquidator to scenarios where a conflict may arise, the perception by an outside observer that the liquidator was conflicted was sufficient grounds to justify removal.    **(b) Facts**      The West Australian District Registrar made orders that NMG be wound up following an unsuccessful application that the winding up application be stayed.  Mr Huxtable accepted the role of liquidator in relation to NMG's winding up.    Some time later, the plaintiffs became aware of several details concerning Mr Huxtable's relationship with one of NMG's other creditors, Summerslegal.  These details were that, at the relevant times:   * Mr Huxtable was employed by a company, Somepart Pty Ltd (Somepart). * Somepart was ultimately controlled by a Mr Paul Summers (Mr Summers). * Somepart was a service company. It provided services to a firm, Summerscorporate, for the purpose of managing insolvency services. Summerscorporate was a business name registered to Mr Summers. One of the services Somepart provided was the provision of staff, including Mr Huxtable. * Summerscorporate, since 1 July 2011, had been owned and controlled by Corporate Solvency Solutions Pty Ltd. * Corporate Solvency Solutions Pty Ltd was owned and controlled by Mr Summers. * Summerslegal was a legal firm. It too was owned and controlled by Mr Summers.   These details were not fully disclosed to the Registrar before the time of appointment.  Mr Huxtable disclosed the existence of these relationships, although not the commonality of control by Mr Summers.  The plaintiffs argued that had there been full disclosure, Mr Huxtable would not have been appointed as liquidator of NMG and this now justified the Court using its powers under section 473 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) to remove him.   It was argued that by virtue of the relationship between Mr Huxtable and Summerslegal, there was potential for conflict to arise in the course of Mr Huxtable carrying out his duties as a liquidator.    **(c) Decision**     His Honour Justice Logan discussed the authority for appointing and removing a liquidator. His Honour came to the conclusion that:   "The test, in relation to the removal of a liquidator, is whether, having regard to the liquidator's conduct as a whole, it can be said to be such as to give rise in the mind of a fair minded observer to a perception of a lack of impartiality as between the various interests that he or she as liquidator must serve, and a lack of objectivity in serving those interests".   Applying this test to the facts of the matter his Honour found that the plaintiffs discharged their onus to show cause for the removal of Mr Huxtable as liquidator.   Specifically, his Honour found that the appointment of Mr Huxtable as liquidator of NMG placed him in a position where he may be conflicted.  Namely, in discharging his duties as a liquidator, he may be called upon to determine the validity of a proof of debt of a firm controlled by the very same person who controls his employer.  It was put on behalf of Summerslegal that one way of rectifying this, short of ordering Mr Huxtable's removal, was to appoint a "special purpose liquidator" to deal with this aspect of the liquidation.  However, his Honour rejected this proposal as, in such circumstances, Mr Huxtable would still be required to make decisions with respect to other debts and recovery proceedings which would necessarily impact on the amount of a dividend which might flow to Summerslegal as one of NMG's creditors.    His Honour also remarked on the conduct of Mr Huxtable and the standards expected of liquidators generally as persons "who will be ... officer[s] of the Court".  His Honour noted the lack of candour by Mr Huxtable and articulated the relevant standard of disclosure for would-be liquidators as follows:   "It behoves a person whose appointment to [the office of liquidator] is in prospect to be candid with respect to matters that may give rise to a conflict as between duty and interest, or duty and duty. That disclosure requirement includes, but is not limited by, express disclosure requirements in the Corporations Act".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%23h5)  **5.14****The right to recover 'unfair preference' payments under section 588FA of the Corporations Act 2001**   (By Tuning Soebagjo, Ashurst)   Kassem and Secatore v Commissioner of Taxation [2012] FCA 152, Federal Court of Australia, Nicholas J, 29 February 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/152.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/152.html" \t "_new)   **(a)   Summary**   The Federal Court of Australia held that Ozem Kassem and Bruno Secatore (the Liquidators) are entitled to recover certain payments from Allianz (Allianz) and the Commissioner of Taxation (the Commissioner). These payments were found to be unfair preferences under section 588FA of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act).    **(b) Facts**  There were two proceedings before the court, one against the Commissioner and one against Allianz.  Mortlake Hire Pty Ltd (Mortlake) went into voluntary administration on 28 August 2007. The administrators were appointed as liquidators on 19 September 2007 after the creditors resolved that Mortlake be wound up.  The Liquidators seek to recover payments made to the Commissioner and Allianz in the six months prior to the commencement of the winding up.  On 26 March 2007, the Commissioner received payment of $40,000 and another $30,000 on 13 April 2007 which reduced the balance in Mortlake's Running Balance Account.  Those two payments were made with the purpose of reducing the superannuation guarantee charges owed by Mortlake.  On 21 August 2007, Allianz received $56,000 for the full payment of workers' compensation insurance premiums that were the subject of a statutory demand.   The Liquidators argued that the payments to the Commissioner and Allianz which were made by Antqip Pty Ltd (Antqip) (a company related to Mortlake), were in fact payments made by or on behalf of Mortlake.  In each proceeding, the Liquidators assert that the relevant payments were unfair preferences within the meaning of section 588FA of the Corporations Act.  **(c)   Decision**  The court held that the payments made to the Commissioner and Allianz were unfair preferences within the meaning of section 588FA of the Corporations Act. Section 588 FA(1) of the Corporations Act provides that:  "A transaction is an unfair preference given by a company to a creditor of the company if, and only if:  (a)  the company and the creditor are parties to the transaction (even if someone else is also a party); and (b)  the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company, in respect of an unsecured debt that the company owes the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;  even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency."               **(i) Liquidators v Allianz**  His Honour found that if Allianz had not received that payment, then it would have received less if it had proved for that amount in the winding up of Mortlake.  Thus the payment of $56,000 by Mortlake to Allianz on 21 August 2007 was an unfair preference.  **(ii) Liquidators v the Commissioner**  Section 555 of the Corporations Act recognises a general rule whereby all debts and claims proved in a winding up rank equally, and if the property of the company being wound up is insufficient to meet them in full, they must be paid proportionally. However, there is an exception to this general rule under section 556(1) of the Corporations Act.  In particular, under section 556(1)(e) of the Corporations Act that there is an exception in respect of excluded employees which gives priority to wages and superannuation contributions payable by the company for services rendered to the company by its employees.  The term superannuation contribution is defined in section 556(2) of the Corporation Acts as "... a contribution by the company to a fund for the purposes of making provision for, or obtaining, superannuation benefits for an employee of the company, or for dependants of such an employee".   The Commissioner argued that the payment of $70,000 made to it fell within the exception under section 556(1)(e) of the Corporations Act and therefore was not an unfair preference. However, Justice Nicholas disagreed with the Commissioner's argument and stated that on a winding up of Mortlake the Commissioner would not have received $70,000 in respect of the superannuation charge debt if the Commissioner had proved for it in the winding up.  Therefore, the Liquidators were entitled to orders requiring the Commissioner and Allianz to pay the amounts of the unfair preferences to the Liquidators together with interest from the date of demand.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/175-March-2012.html%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)".  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