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| SAI Global Corporate Law Bulletin No.170**>** |  |

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| **Bulletin No. 170**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, The University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Piper](http://www.dlapiper.com/Australia/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1.     [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/170-October-2011.html#h1)2.     [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/170-October-2011.html#h2)3.     [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/170-October-2011.html#h3)4.     [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/170-October-2011.html#h4)5.     [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/170-October-2011.html#h5)6.     [Contributions](http://www.law.unimelb.edu.au/bulletins/170-October-2011.html#7)7.     [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)  |

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| **1. Recent Corporate Law and Corporate Governance Developments**  |  | ext Section |

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| **1.1** **Financial market infrastructure reform proposals**On 21 October 2011, the Australian Treasury published a consultation paper on reforms to the oversight of Australia's financial markets. The proposals include new powers to require certain systemically-important market infrastructure to have key aspects of their operations located in Australia and overseen by 'fit and proper' persons, as well as increased power for regulators to intervene in the event of infrastructure experiencing substantial difficulties.In April 2011, the Treasurer requested the Council of Financial Regulators to establish a working group to consider reforms to strengthen the regulatory framework. This followed the Treasurer's decision to prohibit the acquisition of ASX Limited by Singapore Exchange Limited, based on advice from the Foreign Investment Review Board that the proposal was contrary to the national interest. The reasons for the decision included, among other concerns, the advice of regulators that no transaction should be allowed to compromise Australia's full regulatory sovereignty over financial market infrastructure (FMI). FMIs relevant to the review include operators of financial markets, and of clearing and settlement facilities.A key consideration addressed in the consultation paper is preserving the integrity of Australia's financial infrastructure and the ability of supervisors to maintain robust oversight and appropriate control in all market conditions, including in the advent of a range of different ownership structures for FMIs of systemic importance to the Australian financial system.More broadly, the increasing interconnectedness of global markets means that the Australian regulatory framework must keep pace with developments offshore. In that regard, if Australian FMIs are to link with an offshore FMI, or offshore owned FMIs are to operate in domestic markets, there is a need to maintain robust oversight and appropriate control of such infrastructures. The proposals addressed in the consultation paper are:Location requirements Pre approval of directors of FMIs and parent entities to ensure they are fit and proper persons Responsibility for making listing rules Strengthened directions powers and increased sanctions for breach of conditions to buttress the regulators' capacity to ensure that FMIs remain robust on an ongoing basis (broadening the types of direction, streamlining the issuance of directions, applying sanctions to directors and officers, applying sanctions to related bodies corporate, and broadening sanctions for breach of conditions) Step in powers to resolve a crisis situation in relation to a systemically important FMI Establishing criteria for identifying systemically important FMIs to which some or all of these requirements would apply Client protection through portability Compensation fund arrangements for securities Consideration of competition matters for clearing and settlement. The consultation paper is available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=&ContentID=2201" \t "_new).etailed Contents**1.2** **IOSCO publishes recommendations on market integrity**On 20 October 2011, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published its 'Final Report on Regulatory Issues Raised by the Impact of Technological Changes on Market Integrity and Efficiency', containing recommendations aimed at promoting market integrity and efficiency and to mitigate the risks posed to the financial system by the latest technological developments including high frequency and algorithmic trading.The report sets out recommendations to assist securities markets regulators in mitigating these effects. These are designed to:help regulators to identify the practical impact that technological developments have had and the regulatory issues to which they may give rise;promote a consistent approach amongst global regulators to the latest technological developments; and mitigate the risk that technological change may pose to the integrity and efficiency of financial markets. The recommendations set out high level guidance to address issues in two specific areas: **(a) Trading venue operators and trading participants**Recommendation 1: Regulators should require that trading venue operators provide fair, transparent and non-discriminatory access to their markets and to associated products and services.Recommendation 2: Regulators should seek to ensure that trading venues have in place suitable trading control mechanisms (such as trading halts, volatility interruptions, limit-up-limit-down controls, etc.) to deal with volatile market conditions. Trading systems and algorithms should be robust and flexible such that they are capable of dealing with, and adjusting to, evolving market conditions. In the case of trading systems, this should include the ability to adjust to changes (including sudden increases) in message traffic.Recommendation 3: All order flow of trading participants, irrespective of whether they are direct venue members or otherwise, must be subject to appropriate controls, including automated pre-trade controls. These controls should be subject to the regulatory requirements of a suitable market authority or authorities. In addition, regulators should identify any risks arising from currently unregulated direct members/participants of trading venues and, where any are identified, take concrete steps to address them.**(b) Regulators**Recommendation 4: Regulators should continue to assess the impact on market integrity and efficiency of technological developments and market structure changes, including algorithmic and high frequency trading. Based on this, regulators should seek to ensure that suitable measures are taken to mitigate any related risks to market integrity and efficiency, including any risks to price formation or to the resiliency and stability of markets, to which such developments give rise.Recommendation 5: Market authorities should monitor for novel forms or variations of market abuse that may arise as a result of technological developments and take action as necessary. They should also review their arrangements (including cross-border information sharing arrangements) and capabilities for the continuous monitoring of trading (including transactions, orders entered or orders cancelled) to help ensure that they remain effective.The report is available on the [IOSCO website.](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD361.pdf%22%20%5Ct%20%22_new)etailed Contents**1.3** **European Commission reform of (a) criminal sanctions for insider dealing and market manipulation and (b) financial markets****(a) Insider dealing and market manipulation**On 20 October 2011, the European Commission published proposals to introduce criminal sanctions for insider dealing and market manipulation. Investors who trade on insider information and manipulate markets by spreading false or misleading information can currently avoid sanctions by taking advantage of differences in law between the 27 EU Member States. Some countries' authorities lack effective sanctioning powers while in others criminal sanctions are not available for certain insider dealing and market manipulation offences. The European Commission has proposed EU-wide rules to ensure minimum criminal sanctions for insider dealing and market manipulation. For the first time, the Commission is using new powers under the Lisbon Treaty to enforce an EU policy through criminal sanctions. The proposed Directive requires Member States to take the necessary measures to ensure that the offences of insider dealing and market manipulation are subject to criminal sanctions. Member States will also be required to impose criminal sanctions for inciting, aiding and abetting market abuse, as well as for attempts to commit such offences. **(b) Financial markets**  On 20 October 2011, the European Commission published proposals to reform the Markets in Financial Instruments Directive (MiFID) which governs the provision of investment services in financial instruments (such as brokerage, advice, dealing, portfolio management, underwriting, etc.) by banks and investment firms and the operation of traditional stock exchanges and alternative trading venues (so-called multilateral trading facilities). The key elements of the reforms are:More robust and efficient market structures: MiFID already covers Multilateral Trading Facilities and regulated markets, but the revision will now bring a new type of trading venue into its regulatory framework: the Organised Trading Facility (OTF). These are organised platforms which are currently not regulated but are playing an increasingly important role. For example, standardised derivatives contracts are increasingly traded on these platforms. Taking account of technological innovations: The revised MiFID will introduce new safeguards for algorithmic and high frequency trading activities which have drastically increased the speed of trading and pose possible systemic risks. These safeguards include the requirement for all algorithmic traders to become properly regulated, provide appropriate liquidity and rules to prevent them from adding to volatility by moving in and out of markets. Finally, the proposals will improve conditions for competition in essential post-trade services such as clearing, which may otherwise frustrate competition between trading venues. Increased transparency: By introducing the OTF category, the proposals will improve the transparency of trading activities in equity markets, including "dark pools" (trading volumes or liquidity that are not available on public platforms). Exemptions would only be allowed under prescribed circumstances. It will also introduce a new trade transparency regime for non-equities markets (i.e. bonds, structured finance products and derivatives). Reinforced supervisory powers and a stricter framework for commodity derivatives markets: The proposals will reinforce the role and powers of regulators. In coordination with the European Securities and Markets Authority (ESMA) and under defined circumstances, supervisors will be able to ban specific products, services or practices in case of threats to investor protection, financial stability or the orderly functioning of markets. The proposals also foresee stronger supervision of commodity derivatives markets. They introduce a position reporting obligation by category of trader. This will help regulators and market participants to better assess the role of speculation in these markets. In addition, the Commission proposes to empower financial regulators to monitor and intervene at any stage in trading activity in all commodity derivatives, including imposing position limits if there are concerns about disorderly markets. Stronger investor protection: Building on the rules already in place, the revised MiFID sets stricter requirements for portfolio management, investment advice and the offer of complex financial products such as structured products. In order to prevent potential conflict of interest, independent advisors and portfolio managers will be prohibited from making or receiving third-party payments or other monetary gains. Finally, rules on corporate governance and managers' responsibility are introduced for all investment firms.Further information about the proposals is available on the [European Commission website.](http://ec.europa.eu/internal_market/securities/news/index_en.htm%22%20%5Ct%20%22_new)etailed Contents**1.4** **Draft stockmarket supervision regulations**On 18 October 2011, draft regulations to allow the Australian Investments and Securities Commission (ASIC) to recover costs from market operators and market participants (i.e. stockbrokers) for the supervision of Australia's new and competitive equities market were released for consultation.In the past the ASX supervised the share market, recovering its costs through fees on market participants. Now ASIC is responsible for market supervision across multiple markets, those costs need to be borne by market operators and market participants directly.It is intended that the draft regulations will be in place to commence 1 January 2012.The draft Corporations (Fees) Amendment Regulations 2011 are available on the [Treasury website.](http://www.treasury.gov.au/contentitem.asp?NavId=&ContentID=2191" \t "_new)etailed Contents**1.5** **Study of results of first use of 'say on pay' for US companies**The Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 included a requirement that most publicly traded companies include in their annual shareholder meeting agendas an advisory vote to approve the remuneration paid to named executive officers in the most recent fiscal year (the "say on pay" vote) and an advisory vote on the frequency of future say on pay votes (the "say when on pay" vote). The 2011 proxy season was the first proxy season that included these mandatory say on pay and say when on pay votes. On 17 October 2011, Foley and Lardner published research analysing the outcomes of these votes in 2011. The key findings of the analysis are: The vast majority of companies received majority shareholder support for their say on pay votes (through to 25 September 2011, 2,746 companies reported annual meeting results that included say on pay votes. Of these companies, only 38 (less than two percent) did not receive majority shareholder support for their say on pay votes);For the frequency of future say on pay votes, shareholders favoured annual say on pay votes by a wide margin;Withhold vote campaigns against compensation committee members decreased in 2011 compared to 2010;There was a correlation between failed say on pay votes and negative vote recommendations from proxy advisory services;  Leading factors contributing to failed say on pay votes in 2011 included a perceived disconnect between pay and performance and the presence of disfavoured pay practices. The full research is available on the [Foley and Lardner website.](http://www.foley.com/publications/pub_detail.aspx?pubid=8580" \t "_new)etailed Contents**1.6** **Board composition and non-executive director pay in the top Australian 100 companies**On 14 October 2011, the Australian Council of Institutional Investors (ACSI) published its latest research on board composition and non-executive director remuneration in the largest Australian listed companies.The key findings are: The proportion of female directors across the Top 100 pool increased from 11.1 percent in 2009 to 12.2 percent in 2010. The proportion of Top 100 board seats held by women also increased, from 12.1 to 13.5 percent. Progress remains slow, with women accounting for 8 percent of Top 100 directors and 9.2 percent of directorships in 2001. Top 100 entities with no women on their board fell from 29.4 percent of the 2009 sample to 23.9 percent in 2010 (and two of these entities appointed women at or shortly after their 2010 AGMs). Top 100 boards continued to be dominated by independent non-executive directors. In 2010, 83.7 percent of all Top 100 board seats were non-executive, up from the prior record in 2009 of 82.9 percent, and 70.3 percent of all board seats were held by independent non-executive directors (surpassing the prior record, in 2009, of 69.1 percent). In 2001, the first year of the ACSI longitudinal study into board composition and pay, 77.1 percent of board seats were held by non-executive directors. For a third straight year, new entrants to the Top 100 director pool - those who had not previously been a director of a Top 100 entity - made up a majority of new non-executive director appointments. Of the 75 individuals appointed to non-executive roles in 2010, 50 were newcomers to the Top 100 director pool, up substantially on 52.2 percent in 2009 and 50.6 percent in 2008. The non-executive director pool however continued to age in 2010, with the average age of a non-executive director increasing from 60.5 in 2009 to 60.8 in 2010. This was the fifth consecutive year the average non-executive director age has increased. In 2001 the average non-executive director was 58.6. Of the 598 individuals in the sample, 10 received total remuneration of more than $1 million in 2010 from serving as non-executive directors of entities in the S&P/ASX 100 sample.  Director fees increased modestly in 2010. The average non-executive director fee in 2010 was $208,141 in 2010, up 4 percent after increasing 3.6 percent in 2009. The average and median chairperson fee in 2010 fell, with the average chairperson in 2010 receiving $431,233, down 3.3 percent from 2009 as a handful of entities paying their chairperson very high fees had incumbent chairpersons retire during the 2010 year and so were excluded from the sample. Individuals holding three Top 100 board roles in the 2010 sample received an average of $248,498 in fees per board in 2010. In 2001, the average fee per board for a director holding three Top 100 board roles was $110,768.The report is available on the [ACSI website](http://www.acsi.org.au/images/stories/ACSIDocuments/detailed_research_papers/board_comp_and_non-exec_director_pay_in_top_100_companies_2010.oct_11.pdf%22%20%5Ct%20%22_new).etailed Contents**1.7** **Report on the role of proxy advisers** On 12 October 2011, the Australian Institute of Company Directors published a report titled 'Institutional share voting and engagement: Exploring the links between directors, institutional shareholders and proxy advisers'. The report explores the effectiveness of the communication and engagement between companies, proxy advisers and institutional investors. The research was undertaken by Mercer who surveyed and interviewed directors of ASX 200 companies, representatives of superannuation funds, managed funds and investor relations personnel. Mercer also interviewed key industry participants in the share voting process.  The report contains nine main findings (the following is extracted from the key findings section of the report): Finding 1: The institutional share voting environment is characterised by high volume decision making in a compressed time, and this has an impact on how institutional share owners (both managed funds and superannuation funds) conduct share voting - in particular what functions they do themselves, and what functions they outsource.About 80 per cent of votes cast by institutional investors on listed company resolutions occur in a six- to eight-week period (the "peak proxy season"); approximately 80 percent hold their annual general meetings in October - November each year. At the peak of the season there may be 30 or more company meetings to be considered in a week.Superannuation funds and large managed funds are broadly invested, often including small-capitalisation ("small cap") investments. This means they will have resolutions from 300 public company meetings or more to deal with in a year. The pressure generated by this number and concentration of meetings has an effect on how institutional investors organize their share voting activities - there is a strong incentive to outsource parts of the process (including research/proxy advice) to service providers for cost and efficiency reasons, while the 'lumpiness' of the work in the proxy voting season means also that there is a disincentive to in-source.Finding 2: That institutional share voting is a high volume, compressed time business, shapes how the parties in the institutional share voting process communicate with each other.Access by companies to institutional share owners and proxy advisory firms is limited in the peak proxy season with communication restricted to exceptional matters - institutional share owners are busy with voting lodgment at this point. Company directors, however, wish to have greater access to institutional share owners and proxy advisers during the peak proxy season.Communication between companies and institutional share owners is likely to be more effective outside of the peak proxy season.Although opinion is divided on this matter, most participants (including company directors) do not think that continuous disclosure provisions pose any real barrier to effective communication with share owners prior to the issue of the Notice of Meeting for instance, discussions could be held following interim results, and/or discussions could focus on principles rather than specific outcomes (for example, on remuneration matters).Finding 3: Institutional share owners have been increasingly active in voting their shares and are increasingly willing to vote "against" company resolutions if it is in their interests to do so - there is also some evidence (from interviews) that superannuation funds are becoming more active in voting and that they are doing more of the voting themselves rather than leaving this function with managed funds.Finding 4: When directors think of institutional share owners, they think of managed funds rather than superannuation funds. Although this is changing, directors tend to underestimate the importance of superannuation funds.The directors interviewed for the research tended to automatically think of managed funds as the investor, and would generally not speak of superannuation funds at all if not prompted to do so. Nonetheless, directors were aware of the power of superannuation funds even if they did not first think of them as the "investor".Directors did not have a clear idea on how to communicate with superannuation funds - nor were they clear on who they would contact within a superannuation fund.Finding 5: Share voting policies of institutions, proxy advisers and industry groups are important influences on institutional share voting.There are many share voting and governance policies, such as the Financial Services Council's "Blue Book" and the Australian Council of Superannuation Investors' (ACSI) 'Governance Guidelines'. Companies listed on the Australian Securities Exchange (ASX) must report against the ASX 'Corporate Governance Principles and Recommendations'. These policies are very similar, differing only at the margins.Almost all participants in the system say these share voting policies are (or should be) guidelines only and that votes should be determined according to companies' individual circumstances. However, there is a risk that guidelines become de facto rules because of volume and time pressures.Companies should be aware of these share voting policies and guidelines. If a proposal is important, a company should be prepared to explain to share owners why it should be approved, even if it varies from guidelines.The existence of published share voting policies and guidelines means companies should not be surprised at a high "against" vote on a resolution that contravenes general policy (according to the interviews conducted for this research, few directors are now surprised by high "against" votes).Finding 6: Proxy advisory firms are an important influence on institutional share voting in Australia.That proxy advisers are influential is a near universal view of all key participants in the share voting system: company directors, managed funds and superannuation funds.The high-volume, time-pressured environment means proxy advisers perform a function that most institutional share owners would consider prohibitively costly to do themselves.A theme that emerged from the interviews is the growing acceptance of the role of proxy advisory firms and the evolving relationship between companies and these firms, which is becoming less adversarial and more professional in tone.Finding 7: A significant minority of company directors think proxy advisers are improperly influential. They believe too much has been outsourced by institutional investors, making proxy advisory firms de facto decision makers.A significant number of directors felt very strongly that it was the clear responsibility of institutional investors to actively make voting decisions and to devote sufficient time and resources to think about the issues involved. To do otherwise, they argued, was to abrogate an important responsibility.It is significant and logical that where directors held these concerns they also had concerns about the capacity to understand share owner value, independence, training, experience, resourcing and general competence of proxy advisory firms.These views are reflected in the survey results: 49 per cent of directors thought proxy advisers were influential; however, 60 per cent of directors thought they had insufficient experience, expertise or knowledge to do their job. This assessment contrasted strongly with the views of institutional share owners (particularly superannuation funds).Finding 8: Companies and directors are often not communicating with the real decision makers in institutional investors. Whereas companies think the decision makers are, or should be, at the peak of the organisation (for example, the chief executive or chief investment officer), the reality is that voting decisions are made lower down the organisational chain, at the portfolio manager, analyst or governance officer level.A common assumption on the part of the directors surveyed and interviewed was that communication should be at the most senior level to be effective. This view was at odds with the views of institutional share owners.The difficulty of mapping who (or what role) is responsible for making decisions on share voting should be acknowledged. Nevertheless, this is crucial knowledge for a company that wants to effectively communicate the basis for a resolution that may be controversial or "outside policy".Finding 9: There are basic problems with the share voting process and machinery which lead to "lost" and miscounted votes.Discussions with custodians, sub-custodians and registry companies reveal a common story: most voting communication, from the custodian or sub-custodian to the registry company, is still by fax and not by electronic lodgement and there is currently no effective audit trail for institutional share voting in Australia. It is likely that the problems with the voting system identified by AMP Capital Investors in 2007 which led to lost votes have not substantially changed.Share registries expressed difficulties reconciling the votes received with the correct number of shares held by the share owner within the 48 hours between the receipt of proxy forms and the company meeting.The report is available on the [AICD website](http://www.companydirectors.com.au/Director-Resource-Centre/Research-reports/~/media/Resources/Director%20Resource%20Centre/Research/AICD%20%20ISVotingWeb_FINAL.ashx%22%20%5Ct%20%22_new).etailed Contents**1.8** **US Securities and Exchange Commission developments: (a) Proposed rules for registration of securities-based swap dealers and major security-based swap participants; (b) Proposed prohibitions and restrictions on proprietary trading; (c) Summary report of examinations of credit rating agencies; (d) Updated market-wide circuit breaker proposals to address extraordinary market volatility; (e) Proposed rule to prohibit conflicts of interest in certain asset-backed securities transactions****(a) Proposed rules for registration of securities-based swap dealers and major security-based swap participants**On 12 October 2011, the Securities and Exchange Commission (SEC) voted to propose rules that lay out the process by which security-based swap dealers and security-based swap participants must register with the Commission. The rules stem from Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. In 2010, Congress passed the Dodd-Frank Act that established a comprehensive framework for regulating the over-the-counter swaps markets. Title VII of that Act divides regulatory authority over swaps between the SEC and the Commodity Futures Trading Commission (CFTC). Under the law, the SEC has authority over "security-based swaps," which are broadly defined as swaps based on (1) a single security or (2) a loan or (3) a narrow-based group or index of securities or (4) events relating to a single issuer or issuers of securities in a narrow-based security index. The CFTC, on the other hand, has primary regulatory authority over all other swaps. In creating the new regulatory regime, Title VII envisions that some individuals or entities will act as dealers of security-based swaps, while others will be major participants in a transaction. As such, the Dodd-Frank Act mandates that anyone acting as either a "security-based swaps dealer" or "major security-based swaps participant" must first be registered with the SEC. Consequently, the Dodd-Frank Act authorises the SEC to issue rules setting out the registration process for these security-based swap entities. Separately, the SEC has previously proposed rules together with the CFTC and in consultation with the Board of Governors of the Federal Reserve System further defining the terms "security-based swap dealer" and "major security-based swap participant." The SEC and the CFTC are considering comments to that proposal. The proposed rules are available on the [SEC website](http://www.sec.gov/rules/proposed.shtml%22%20%5Ct%20%22_new).**(b) Proposed prohibitions and restrictions on proprietary trading**On 12 October 2011, the SEC voted to propose a rule implementing the so-called "Volcker Rule" requirements. The requirements stem from section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The SEC issued the proposal jointly with the Federal Deposit Insurance Corporation, the Federal Reserve Board, and the Office of the Comptroller of the Currency. The proposed rule is intended to curb the proprietary trading of commercial banks and their affiliates.  Section 619 of the Dodd-Frank Act, among other things, generally prohibits two activities of banking entities. It prohibits federally insured depository institutions and their affiliates (banking entities) from engaging in short-term proprietary trading of any security, derivative, and certain other financial instruments for a banking entity's own account. It prohibits owning, sponsoring, or having certain relationships with a hedge fund or private equity fund.   To implement section 619, the SEC is considering - along with other financial regulators - a proposal that would clarify the scope of the section's prohibitions and, consistent with statutory authority, provide certain exemptions. Under the proposed rule, banking entities would be required to establish an internal compliance program subject to supervisory oversight and designed to ensure and monitor compliance with the prohibitions and restrictions of section 619. The proposal also would require firms with significant trading operations to report to the appropriate federal supervisory agency certain quantitative measurements designed to assist the supervisory agency and banking entities in identifying prohibited proprietary trading from permitted activities. At the same time, the proposal would exempt transactions in certain instruments from the prohibition on proprietary trading, including obligations of:The US Government or a US Government agency The government-sponsored enterprises State and local governments.   Additionally, the proposal would exempt activities such as: Market making Underwriting Risk-mitigating hedging.   Notwithstanding the general prohibition on investments in and certain relationships with hedge funds and private equity funds, the statute contains several exemptions. The proposal, for example, would exempt: Organising and offering a hedge fund or private equity funds under certain conditions, including limiting investments in such funds to a de minimus amountMaking risk-mitigating hedging investmentsMaking investments in certain non-US funds. The jointly-proposed rule includes regulatory commentary intended to assist banking entities in distinguishing permitted market making-related activities from prohibited proprietary trading activities, and in identifying permitted activities in hedge funds and private equity funds. It also includes a number of elements intended to reduce the effect of the proposal on smaller, less-complex banking entities. For example, the proposal limits the extent to which smaller banking entities are required to report quantitative measurements.The proposed rule is available on the [SEC website](http://www.sec.gov/rules/proposed.shtml%22%20%5Ct%20%22_new).**(c) Summary report of examinations of credit rating agencies**On 30 September 2011, the SEC issued a report summarising its observations and concerns arising from the examinations of ten credit rating agencies registered with the SEC as Nationally Recognized Statistical Rating Organizations ("NRSROs") and subject to Commission oversight.The report notes that despite changes by some of the examined credit rating agencies to improve their operations, Commission staff identified concerns at each of the NRSROs. These concerns included apparent failures in some instances to follow ratings methodologies and procedures, to make timely and accurate disclosures, to establish effective internal control structures for the rating process and to adequately manage conflicts of interest. The report notes that the staff made various recommendations to the NRSROs to address the staff's concerns and that in some cases the NRSROs have already taken steps to address such concerns. The report is available on the [SEC website](http://www.sec.gov/news/studies/2011/2011_nrsro_section15e_examinations_summary_report.pdf%22%20%5Ct%20%22_new).**(d) Updated market-wide circuit breaker proposals to address extraordinary market volatility**On 27 September 2011, the SEC announced that the national securities exchanges and the Financial Industry Regulatory Authority (FINRA) have filed proposals to revise existing market-wide circuit breakers that are designed to address extraordinary volatility across the securities markets. When triggered, these circuit breakers halt trading in all exchange-listed securities throughout the US markets.The proposals would update the market-wide circuit breakers by among other things reducing the market decline percentage thresholds necessary to trigger a circuit breaker, shortening the duration of the resulting trading halts, and changing the reference index used to measure a market decline.If approved by the Commission, the new market-wide circuit breaker rules would replace the existing market-wide circuit breakers, which were originally adopted in October 1988 and have only been triggered on one day in 1997.The proposals would revise the existing market-wide circuit breakers by: Reducing the market decline percentage thresholds necessary to trigger a circuit breaker from 10, 20, and 30 percent to 7, 13, and 20 percent from the prior day's closing price.  Shortening the duration of the resulting trading halts that do not close the market for the day from 30, 60, or 120 minutes to 15 minutes.  Simplifying the structure of the circuit breakers so that rather than six there are only two relevant trigger time periods - those that occur before 3:25 p.m. and those that occur on or after 3:25 p.m.   Using the broader S&P 500 Index as the pricing reference to measure a market decline, rather than the Dow Jones Industrial Average.  Providing that the trigger thresholds are to be recalculated daily rather than quarterly. The market-wide circuit breakers were not triggered during the severe market disruption of 6 May 2010, which led the exchanges and FINRA in consultation with SEC staff to assess whether the circuit breakers needed to be modified or updated in light of today's market structure. In addition, the Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues recommended in February 2011 that the SEC and CFTC review the current operation of the market-wide circuit breakers, and consider appropriate modifications. **(e) Proposed rule to prohibit conflicts of interest in certain asset-backed securities transactions**On 19 September 2011, the SEC voted unanimously to propose a rule intended to prohibit certain material conflicts of interest between those who package and sell asset-backed securities (ABS) and those who invest in them. The proposal, which is not intended to prohibit traditional securitisation practices, implements section 621 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.The proposed rule would prohibit securitisation participants of an ABS for a designated time period from engaging in certain transactions that would involve or result in any material conflict of interest. Two criteria to determine whether the transaction involves a material conflict of interest are set out in the rule proposal.The proposed rule is available on the [SEC website](http://www.sec.gov/rules/proposed.shtml%22%20%5Ct%20%22_new).etailed Contents**1.9** **Financial Stability Board publishes second progress report on OTC derivatives market reforms implementation**On 11 October 2011, the Financial Stability Board (FSB) published its second six-monthly progress report on implementation of over-the-counter (OTC) derivatives market reforms. The report provides a detailed review of progress toward meeting the commitment of G20 Leaders at the Pittsburgh 2009 Summit that, by end-2012, all standardised OTC derivative contracts be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties; that OTC derivative contracts be reported to trade repositories; and that non-centrally cleared contracts be subject to higher capital requirements. For each of the G20 commitments, the report provides an assessment of progress in the three key steps that need to be taken: the development of international standards and policy; the adoption of legislative and regulatory frameworks; and actual implementation through changes in market practices.The report notes that, as of now, with only just over one year until the end-2012 deadline for implementing the G20 commitments, few FSB members have the legislation or regulations in place to provide the framework for operationalising the commitments. While recognising the implementation challenges and the complexity of the needed laws and regulations, the report concludes that jurisdictions should aggressively push forward to meet the G-20 end-2012 deadline in as many reform areas as possible.The FSB has been aware from the outset that there is a risk that overlaps, gaps or conflicts in legislative and regulatory frameworks, if not addressed, could compromise achievement of the G20 objectives. The report describes a number of these issues. One such potential gap which the FSB has identified concerns the applicability of the G20 commitments to standardised derivatives that are moved onto exchanges or electronic trading platforms (and therefore no longer traded "OTC"). The report clarifies that in order to achieve the G20 objective of mitigating systemic risk, full implementation of the G20 commitments needs to cover these derivatives, irrespective of whether they continue to trade OTC or are moved onto organised platforms.The report is available on the [FSB website](http://www.financialstabilityboard.org/publications/r_111011b.pdf%22%20%5Ct%20%22_new).etailed Contents**1.10** **Changes to UK Corporate Governance Code regarding board diversity**On 11 October 2011, the UK Financial Reporting Council (FRC) announced its decision to amend the UK Corporate Governance Code to strengthen the principle on boardroom diversity which was first introduced into the Code in June 2010. The amendments require listed companies to report annually on their boardroom diversity policy, including gender, and on any measurable objectives that the board has set for implementing the policy and the progress it had made in achieving the objectives. The FRC will also update the Code to include the diversity of the board, including gender, as one of the factors to be considered when evaluating its effectiveness. The current revised Code, which came into effect in June 2010, included for the first time a principle recognising the value of diversity in the boardroom, which states that, "[t]he search for board candidates should be conducted, and appointments made, on merit, against objective criteria and with due regard for the benefits of diversity on the board, including gender". etailed Contents**1.11** **Financial Stability Board publishes follow-up peer review on compensation/remuneration practices**On 11 October 2011, the Financial Stability Board (FSB) published the follow-up peer review report on compensation/remuneration practices, which assesses progress made both by national authorities and by significant financial institutions in implementing the FSB Principles for Sound Compensation Practices and their Implementation Standards.Compensation practices at large financial institutions were a key contributing factor to the global financial crisis. The FSB Principles and Standards, endorsed by G20 Leaders at their Summits in London in April 2009 and Pittsburgh in September 2009, were developed to align compensation with prudent risk-taking, particularly at significant financial institutions.This follow-up review finds that relevant authorities and firms in FSB member jurisdictions have made good progress in implementing the Principles and Standards - many national authorities have taken the necessary regulatory actions, supervisory oversight has intensified, and the governance of compensation schemes at firms has improved. Since last year's peer review, an additional seven jurisdictions have implemented all 9 Principles and 15 Standards, bringing the total to 13 of the 24 FSB member jurisdictions, while five other jurisdictions have implemented all but one or two Standards.Despite these considerable strides, more work is necessary to achieve sound compensation practices - both to overcome constraints to full implementation by individual national authorities and to address concerns over different interpretations of the standards that may give rise to an uneven playing field in the market for highly skilled employees. Those concerns have focused particularly on differences in the way that jurisdictions have implemented Standards 6-9 (pay structures), 11 (guarantees) and 14 (hedging) as well as in the identification of material risk takers. Increased transparency of supervisory policies and guidance would help to mitigate such concerns, while more detailed data would be required to substantiate concerns that averages may conceal variation in pay structures for key employees within firms.The report is available on the [FSB website](http://www.financialstabilityboard.org/publications/r_111011a.pdf%22%20%5Ct%20%22_new).etailed Contents**1.12** **APRA releases final package for refinements to the prudential framework for general insurance groups**On 5 October 2011, the Australian Prudential Regulation Authority (APRA) released the final package relating to refinements to the prudential and reporting standards for general insurance groups.The refinements to the prudential framework address minor issues identified since the implementation of APRA's prudential framework for the supervision of general insurance groups in 2009. Refinements to the reporting framework align aspects of general insurance group reporting with the reporting framework for individual APRA-authorised general insurers.The refinements reflected in the final prudential and reporting standards are largely consistent with APRA's proposals in the May 2011 discussion paper. Some additional minor amendments have also been made as a result of feedback received in submissions and these are detailed in the response to submissions.The prudential standards are effective on 1 December 2011.The reporting standards are effective for reporting periods ending 31 December 2011 and the first set of reporting is due in March 2012.The response to submissions and final package of standards, along with marked up versions of the prudential standards, reporting forms and instructions indicating the changes made, are available on the [APRA website](http://www.apra.gov.au/GI/PrudentialFramework/Pages/Refinements-to-the-prudential-framework-for-general-insurance-groups-October-2011.aspx%22%20%5Ct%20%22_new).etailed Contents**1.13** **European regulation of derivatives**On 4 October 2011, the European Council announced that it has agreed a general approach on a draft regulation aimed at increasing transparency and reducing risk in the over-the-counter (OTC) derivatives market.The agreement will enable the presidency, on behalf of the Council, to start negotiations with the European Parliament, with a view to reaching agreement at first reading. The draft regulation calls for reporting of all derivative contracts to trade repositories (ie central data centres) and the clearing of standardised OTC derivative contracts through central counterparties (CCPs) in order to reduce counterparty risk (ie the risk of default by one party to the contract). This is aimed at preventing the default of one market participant causing the collapse of other market players, thereby putting the entire financial system at risk. To be authorised, a CCP would have to hold a minimum amount of capital.The regulation is aimed at implementing commitments made by G-20 leaders in September 2009. It would apply from the end of 2012.Further information is available on the [European Council website](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/124903.pdf%22%20%5Ct%20%22_new).etailed Contents**1.14** **Financial Stability Board financial regulatory policy proposals** On 3 October 2011, the Financial Stability Board (FSB) announced that it has approved a number of policy proposals to be submitted to the G20 Summit in November, including on a package of measures to address the "too big to fail" problem. The following financial regulatory reforms were part of the FSB announcement: **(a) Addressing systemically important financial institutions (SIFIs).** The FSB reviewed and approved the package of policy measures to be submitted to the G20 to address the "too big to fail" problems posed by SIFIs. The policy package includes:Key Attributes of Effective Resolution Regimes for Financial Institutions, which will form a new international standard for the features all national regimes should have to enable failing financial institutions to be resolved safely and without exposing the taxpayer to the risk of loss. A requirement that individual globally important SIFIs (G-SIFIs) have recovery and resolution plans, informed by resolvability assessments, and that home and host authorities develop institution-specific cooperation agreements and cross-border crisis management groups.Additional loss absorbency requirements for those banks determined to be G-SIFIs, based on the methodology developed by the Basel Committee on Banking  Supervision for assessing the global systemic importance of banks.Measures to enhance the intensity and effectiveness of supervision, in particular of SIFIs. Recommendations will include improved data systems for risk management at SIFIs and assessments of the adequacy of supervisory resources. The enhancement of international standards for the robustness of core financial market infrastructures. **(b) Shadow banking.** The FSB has reviewed workplans to strengthen the oversight and regulation of shadow banking. The FSB will conduct annual monitoring exercises to assess global trends and risks. Workstreams have been launched to cover regulation in five areas: (i) banks' interaction with shadow banking entities; (ii) money market funds; (iii) other shadow banking entities; (iv) securitisation; and (v) securities lending and repos. **(c) Over-the-counter (OTC) derivatives.** Members approved the conclusions of the second progress report on implementation of OTC derivatives reforms. They noted delays, and urged jurisdictions to achieve the end-2012 deadline for full implementation of the reforms agreed by the G20 in as many areas as possible. Members agreed to strengthen their coordination of work to address potential inconsistencies and gaps in the implementation of reforms, which cover standardisation, central clearing, exchange or electronic platform trading, and reporting to trade repositories. Members also discussed mutual recognition. The progress report clarifies that the reforms to OTC products committed to by the G20, and set out in more detail in the FSB October 2010 report, are to be fully implemented irrespective of whether those products continue to trade OTC or are moved onto organised platforms. **(d) Commodities and securities markets.** The FSB reviewed and approved two reports by the International Organization of Securities Commissions (IOSCO) on principles for the regulation and supervision of commodity derivatives markets, and on regulatory issues raised by the impact of technological changes on market integrity and efficiency. **(e) Coordination framework for implementation monitoring.** Financial reforms agreed within the G20 and FSB must be fully and consistently implemented. Accordingly, members agreed on an enhanced framework under which the FSB, in coordination with standard-setting bodies, will monitor and publicly report on country-by-country implementation. The framework will draw on monitoring undertaken by individual standard setters as well as by the FSB. This will include particularly detailed monitoring in priority areas for reforms. **(f) Compensation/remuneration practices.** The FSB approved the report of its follow-up peer review on implementation of principles and standards for compensation practices. The report finds that progress has been made since last year by both national authorities and firms in implementing the FSB Principles and Standards but more work needs to be done, and sets out recommendations to address remaining gaps and impediments. **(g) Credit rating agencies (CRAs).** The FSB encouraged further progress by standard-setters and regulators in implementing the FSB principles for reducing reliance on CRA ratings. Members agreed to study the further practical steps that need to be taken to implement the principles. etailed Contents**1.15** **IMF paper 'Making banks safer'**On 1 October 2011, the International Monetary Fund published a research paper titled 'Making banks safer: can Volcker and Vickers do it?'.  The paper assesses proposals to redefine the scope of activities of systemically important financial institutions. Alongside reform of prudential regulation and oversight, these have been offered as solutions to the too-important-to-fail problem. It is argued that while the more radical of these proposals such as narrow utility banking do not adequately address key policy objectives, two concrete policy measures - the Volcker Rule in the United States and retail ring-fencing in the United Kingdom - are more promising while still entailing significant implementation challenges. A risk factor common to all the measures is the potential for activities identified as too risky for retail banks to migrate to the unregulated parts of the financial system. Since this could lead to accumulation of systemic risk if left unchecked, it appears unlikely that any structural engineering will lessen the policing burden on prudential authorities and on the banks.The research paper is available on the [IMF website](http://www.imf.org/external/pubs/cat/longres.aspx?sk=25289" \t "_new).etailed Contents**1.16** **Government releases draft audit reforms**On 30 September 2011, the Australian Government published the Corporations Legislation Amendment (Audit Enhancement) Bill 2011. The reforms contained in the draft legislation include: maintaining the existing five year mandatory rotation period for audit partners and the current two year time out period, with an option to extend the rotation period up to an additional two years, provided the directors and audit committee are satisfied that the extension is necessary to safeguard the quality of the audit and would not give rise to an auditor independence conflict of interest situation;  requiring the larger audit firms to prepare annual transparency reports which would be placed on their websites; replacing the auditor independence function of the Financial Reporting Council (FRC) with a strategic audit quality policy advisory role, eliminating duplication with ASIC's ongoing audit inspection program; permitting ASIC to publish reports on firms that have failed to address, within six months, an audit deficiency identified by ASIC; and empowering ASIC to communicate directly with a company, its directors or its audit committee in relation to significant matters relating to the company's compliance with its financial reporting and continuous disclosure obligations or the conduct of the audit of the company. The Bill and explanatory material, including the Regulation Impact Statement are available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2177" \t "_new).etailed Contents**1.17** **Report on the evolving role of the auditor** On 29 September 2011, the US Center for Audit Quality (CAQ) published a report titled 'Observations on the Evolving Role of the Auditor: A Summary of Stakeholder Discussions'. The report reflects discussion facilitated by the CAQ between financial reporting stakeholders - CEOs, CFOs, board and audit committee members, investors, auditors, former regulators, attorneys and academics - to explore how the auditor's role might change in response to the evolving needs of investors. The report is available on the [CAQ website](http://www.thecaq.org" \t "_new).etailed Contents**1.18 F****urther guidance on board effectiveness and executive pay** On 28 September 2011, the Association of British Insurers (ABI) published its first report on 'Board Effectiveness' and issued its revised 'Principles of executive remuneration'. According to the ABI, the two documents help companies to better understand the views of institutional investors on effective boardroom performance and executive pay. The ABI report on Board Effectiveness focuses on three key issues that help make an effective board: Board Diversity - including women in the boardroom; Succession planning - board engagement in planning for succession for all senior management; andBoard evaluation - including discussions on risk management, corporate strategy, geographic markets of operation and reporting.   It highlights existing best practice amongst FTSE 350 companies and makes clear that greater progress and transparency on these issues is needed to ensure an effective board and a successful company. The revised Principles of Remuneration are the latest update to ABI guidance which has evolved over thirty years. They address investors' renewed concern on executive pay. Key principles of the guidance show that company boards should: Support appropriate reward for exceptional performance;Strongly resist any payment for failure;Understand that excessive or undeserved remuneration undermines the efficient operation of the company, adversely affects its reputation and is not aligned with shareholder interests; andNot engage in crude benchmarking when seeking to justify increases.   The ABI's first report on Board Effectiveness and the revised Principles of Remuneration are available on the [ABI website](http://www.abi.org.uk/Media/Releases/2011/09/UK_boardrooms_given_clear_guidance_on_executive_pay_and_effective_performance.aspx%22%20%5Ct%20%22_new).etailed Contents**1.19** **APRA releases discussion paper on prudential standards for superannuation** On 28 September 2011, the Page Content Australian Prudential Regulation Authority (APRA) released for consultation a discussion paper introducing its proposals for prudential standards for the superannuation industry. The paper outlines the range of topics to be covered in prudential standards and the key requirements APRA expects to include in each standard. APRA intends to introduce prudential standards covering matters common to other APRA-regulated industries - on Governance, Fit and Proper, Risk Management, Business Continuity Management, Outsourcing, and Audit and Related Matters - as well as the superannuation-specific matters of Conflicts of Interest, Investment Governance, Insurance in Superannuation, Defined Benefit Funding and Solvency, and Operational Risk Financial Requirement. The discussion paper, 'Prudential standards for superannuation' is available on the [APRA website](http://www.apra.gov.au/Super/Pages/superannuation-prudential-standards-consultation.aspx%22%20%5Ct%20%22_new).etailed Contents**1.20** **Report on high-frequency trading in the foreign exchange market**On 27 September 2011, the Markets Committee of the Bank for International Settlements (BIS) released a report titled 'High-frequency trading in the foreign exchange market'. The report examines the facts about high-frequency trading (HFT) in foreign exchange, including its definition, effect on other market participants, behaviour in normal and stressed times, and key differences compared with HFT in equities. It also identifies areas that may warrant further investigation. The report is available on the [BIS website](http://www.bis.org/publ/mktc05.htm%22%20%5Ct%20%22_new).etailed Contents**1.21** **Not-for-profit sector governance report**On 27 September 2011, the Australian Institute of Company Directors (AICD) published the 'Directors Social Impact Study 2011', which examines the governance of the not-for-profit (NFP) sector. The study reveals that on average non-executive directors of NFP organisations spend the equivalent of seven working weeks a year on their role as a director, with 89 per cent of these directors fulfilling this role on a voluntary basis. The report notes that the NFP sector contributes $43 billion to Australia's GDP. The report is available on the [AICD website](http://www.companydirectors.com.au/General/Header/Media/Media-Releases/2011/~/media/Resources/Media/Media%20Releases%20and%20Speeches/2011/270911%20Directors%20Social%20Impact%20Study%20%20Report.ashx%22%20%5Ct%20%22_new).etailed Contents**1.22 A****PRA releases revised proposals for financial claims scheme** On 26 September 2011, the Australian Prudential Regulation Authority (APRA) released a response paper and draft prudential standard for a third round of consultation on the implementation of the Financial Claims Scheme (FCS) for authorised deposit-taking institutions (ADIs). The FCS was established in October 2008 and is designed to protect depositors by providing them with timely access to their deposits, up to a defined amount, in the event that their ADI becomes insolvent and is placed into liquidation. APRA consulted with industry twice in 2010 on FCS data requirements, including through industry workshops and meetings. The current paper responds to issues raised in submissions from industry and sets out proposed changes to the FCS data requirements. The key changes include: removing the need for ADIs to submit FCS-related data to APRA on a regular basis for testing and other purposes. ADIs will still need to maintain the systems and data for testing purposes to ensure that the data are readily accessible in a failure situation; allowing ADIs to use data matching as the basis for their 'Single Customer View'; and increasing the transition period on commencement of the standard to two years for all ADIs.  Since APRA no longer intends to require ADIs to submit FCS-related data to it on a regular basis, the legal instrument has changed from a reporting standard to a prudential standard. However, the general nature of the proposals is unchanged. Subject to industry feedback, APRA will release the final prudential standard in late 2011, to take effect from 1 January 2012.  Allowing for the two-year transition period, ADIs will need to comply with the standard not later than 31 December 2013, unless they are granted an extended transition. The consultation package is available on the [APRA website](http://www.apra.gov.au/CrossIndustry/FCS/Pages/ADI-FCS-Consultation-September-2011.aspx%22%20%5Ct%20%22_new).etailed Contents**1.23** **UK government discussion paper on executive remuneration** On 19 September 2011, the UK Department for Business Innovation and Skills published a discussion paper on executive remuneration. The discussion paper explores the factors which may have contributed to the considerable growth in pay for FTSE 100 CEOs over the last decade, which has outstripped the increase of the FTSE 100 index. The paper considers a number of options for improving the link between pay and performance, including: Role of shareholders - whether shareholders should have a binding, rather than merely advisory, vote on directors' remuneration and considers how this might work in practice. Views are also sought on further measures which could be taken to prevent directors being rewarded for failure and whether shareholder representatives should sit on nomination committees, which would give shareholders an active role in the selection of new directors. Role of remuneration committees - whether steps could be taken to strengthen remuneration committees. These include having independent members on the committee, involving employees in the process of setting executive remuneration and addressing potential conflicts of interest for remuneration committees, which may arise for example as a result of cross-directorships and the use of remuneration consultants. Structure of remuneration - if changes could be made to the structure of executive remuneration packages to improve the link between pay and performance. For example, it considers whether companies should defer a larger percentage of directors' pay for more than three years, and whether remuneration packages should be simplified or be subject to claw-back mechanisms.   The discussion paper is available on the [BIS website](http://www.bis.gov.uk/Consultations/executive-remuneration-discussion-paper).etailed Contents**1.24** **IOSCO publishes commodity derivatives markets supervisory principles** On 15 September 2011, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published its report on 'Principles for the Regulation and Supervision of Commodity Derivatives Markets'. The Report, prepared by the Task Force on Commodity Futures Markets, addresses the G20's November 2010 request for further work on regulation and supervision of physical commodity derivatives markets.The Principles update and add to the guidance in the 1997 Tokyo Communiqué which set benchmarks for contract design, market surveillance and information sharing for physical commodity derivatives markets. They are primarily intended to apply to exchange-traded futures contracts, futures contracts options and options referenced to a physical commodity, index or price series which may settle in cash or by physical delivery, although many of the principles will also be applicable to over-the-counter (OTC) markets. In developing these Principles the Task Force have added to the areas of guidance in the Tokyo Communiqué to take account of their experiences and to respond to contemporary trends in commodity derivatives markets. These trends include: the scale, speed and cross-border nature of trading on markets; novel forms of market abuse; investors focus on commodities as an asset class and the impact of new investor classes and futures trading on physical commodity prices; the rapidly evolving regulation of OTC derivatives markets; and regulation of market participants. The Principles address the following areas: Design of Physical Commodity Derivatives Contracts - focused on establishing design concepts for futures contracts; Surveillance of Commodity Derivatives Markets - including the basic framework for surveillance, powers needed to access information for both on-exchange, OTC, and cash market transactions; Disorderly Markets -sets out the powers needed by market authorities to intervene in the markets to address disorderly conditions; Enforcement and Information Sharing - addresses the basic framework for a successful enforcement program, including required powers; and Enhancing Price Discovery and Transparency - how to improve this to the public and regulators through the publication of open interest according to certain categories of traders, the establishment of formalised systems to allow regulators to impose position limits and the promotion of the reporting of OTC derivatives to trade repositories.   The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD358.pdf). etailed Contents**1.25** **Melbourne Law Masters in 2012** Melbourne Law School has unveiled its Melbourne Law Masters program for 2012. The program offers masters degrees and graduate diplomas across 21 specialist legal areas including corporate and securities law, banking and finance law, construction law and competition law.   All classes are small and interactive, giving participants the opportunity to network with teachers and other students. Most Melbourne Law Masters subjects are taught intensively over a week, making study practicable for students in full-time employment anywhere in Australia. The intensive format also enables the Law School to draw on experts from across the world to teach many of the cutting edge subjects in the program. In 2012, there will be close to 60 international visitors teaching in the Melbourne Law Masters.    Programs in commercial law include the Master of Laws (LLM), the Master of Commercial Law and the Graduate Diploma in Corporate and Securities Law. All subjects may also be undertaken individually, either with or without assessment. Subjects may meet Continuing Professional Development (CPD) requirements.  For further information on the Melbourne Law Masters, including course and subject details and application information, visit the [Melbourne Law Masters website](http://www.law.unimelb.edu.au/masters%22%20%5Ct%20%22_new).In 2012 the Melbourne Law Masters will offer a large range of subjects in the commercial law arena, including: **Corporate and General Commercial Law**Commercial Law in Asia Company TakeoversComparative Companies Law in AsiaComparative Corporate GovernanceCorporate and White Collar Criminal LawCorporate Governance and Directors' DutiesCorporate Insolvency and ReconstructionInternational Corporate InsolvencyRegulation of Securities Markets **Banking and Finance Law**Banking and Finance in AsiaBanking and Finance Law: Principles and TransactionsDebt Capital MarketsFinancial Services Law International Financial System: Law and Practice International Financial Transactions: Law and Practice Project FinanceSecured Transactions: The Personal Property Securities Act 2009 (Cth)Superannuation Law **Commercial Obligations and Remedies**Commercial Law: Principles and Policies Commercial Unconscionability Comparative Tort Law: The United States and Australia Contract Interpretation Equity and Commerce Global Commercial Contract Law Remedies in Commercial Law The Law of Restitution **Communications and Media Law**Defamation Law Film and Television Law: Production, Financing and DistributionInformation Technology Contracting LawInternet Law Privacy Law **Competition Law** Australian Consumer Law Behavioural Law and Economics Competition Law and Intellectual Property Economics for Competition Lawyers International and Comparative Competition LawLaw and Economics of Access Regulation Market Power and Competition Law   **Construction Law**Advanced Construction LawConstruction Contract Analysis and Drafting Construction Dispute Resolution Construction Law Construction: Principles into Practice Construction Risk: Allocation and Insurance Infrastructure Delivery Law International Construction LawPayment Matters in Construction Projects Principles of Construction Law Public Private Partnerships Law Remedies in the Construction Context Residential Construction Law   **Dispute Resolution**Advanced Civil LitigationAlternative Dispute ResolutionClass ActionsCurrent Issues in Family LawExpert EvidenceProof in Litigation**Employment and Labour Relations Law**Bargaining at WorkEmployment Contract LawEquality and Discrimination at WorkInternational Employment LawLabour Standards under the Fair Work Act (Cth)Principles of Employment Law Workplace Health and Safety   **Environment, Energy and Resources Law** Climate Change Law Energy Regulation and the Law Environmental Rights Indigenous Peoples, Land and Resources Law International Environmental Law International Petroleum Transactions Mineral and Petroleum Tax Mineral Law Resources Joint Ventures Water Law and Natural Resources Management   **Intellectual Property Law** Copyright LawDesigns Law and PracticeFundamentals of Patent DraftingIntangible Asset Valuation: Law and PracticeInternational Issues in Intellectual PropertyInterpretation and Validity of Patent Specifications Licensing Law and Technology Transfer Patent Law Patent Practice Trade Mark Practice Trade Marks and Unfair Competition US Intellectual Property Law   **International Economic and Trade Law**   Developing Countries and the WTO Global Financial Order: IMF and World Bank International Trade, Intellectual Property and Public Health International Business Transactions International Commercial Arbitration International Economic Law International Investment Law and Arbitration International Trade Law Trade, Human Rights and Development WTO Law and Dispute Settlement   **Sports Law** Event Management LawGambling, Policy and the LawInternational Sports Employment Law Sport, Commerce and the LawSports Law: Entities and Governance   **Tax** Advanced International Tax: Offshore EntitiesCapital Gains Tax: Problems in Practice Comparative Corporate Tax Corporate Tax A (Shareholders, Debt and Equity) Corporate Tax B (Consolidation and Losses) Fiscal Reform and Development Foundations of Tax Law Goods and Services Tax Principles International Tax: Principles and Structure Taxation of Business and Investment Income Taxation of Mergers and Acquisitions Taxation of Small and Medium EnterprisesTaxation of SuperannuationTaxation of TrustsTax Avoidance and Planning Tax Litigation Tax TreatiesTransfer Pricing: Practice and ProblemsUS Corporate and International Tax etailed Contents |

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| **2.1** **Consultation on equity market structure issues** On 20 October 2011, ASIC released a second-phase consultation paper on equity market structure issues arising from recent and anticipated developments in Australia's financial markets. Consultation Paper 168 'Australian equity market structure: Further proposals' seeks views on proposed market integrity rules relating to: automated trading including high frequency trading; volatility controls for extreme price movements; enhanced data for supervision; the product scope of best execution; and pre-trade transparency and price formation in the market.   This follows ASIC's confirmation that market competition can commence from 31 October 2011. Furthermore, it builds on the findings of Consultation Paper 145 'Australian equity market structure: Proposals' issued in November 2010, which canvassed issues related to the introduction of competition to exchange markets in Australia and the release on 29 April 2011 of new market integrity rules for competition. These rules provide a regulatory framework to enable the introduction of competition and are intended to manage existing regulatory issues such as dark pools, high frequency trading, automatic trading entry and order entry controls. Consultation Paper 168 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \t "_new).etailed Contents**2.2** **ASIC seeks improvement in consumer credit insurance sales practices** On 19 October 2011, ASIC published a report in which it is indicated that there are significant improvements that can be made to the practices of banks, credit unions and building societies that offer consumer credit insurance (CCI) to reduce the risk the product may be mis-sold. The report contains 10 recommendations to improve the way in which CCI is sold. The recommendations cover the areas of sales practices, disclosure, training programs and monitoring systems. The 15 authorised deposit-taking institutions (ADIs) ASIC reviewed, which included banks, credit unions and building societies, have all agreed to implement the relevant recommendations and many have already made the necessary changes to their practices and processes (including those against which ASIC had previously taken compliance action). ASIC's Report 256 'Consumer credit insurance: A review of sales practices by authorised deposit-taking institutions' looked at data provided by the 15 ADIs that distributed CCI in conjunction with home loans, personal loans and credit cards in the period from 1 January 2009 to 31 December 2009. In its review of sales practices ASIC identified the following risks: consumers not being made aware that they have purchased CCI or that CCI is optional;consumers not being asked whether or not they wish to purchase CCI;consumers not being eligible to claim on all components of the CCI policy they have purchased; the potential for consumers to be pressured or harassed by sales staff; and consumers not understanding the cost or the duration of the CCI policy.   For the ADIs reviewed by ASIC, an average of 15.9% of claims were denied - a relatively high proportion. ASIC plans therefore to conduct a further review of claims handling and insurer practices for CCI, and industry has indicated support for the second stage of the review. The Financial Services Council has committed to produce guidance for life insurers that issue CCI, based on any relevant recommendations arising from both stages of the review. CCI is designed to protect consumers if something happens to them that affects their ability to meet their credit repayments. Typically, CCI covers consumers in the event of: death; permanent disablement; or loss of income due to injury, illness or involuntary unemployment. The data ASIC obtained from the 15 ADIs reviewed showed that - in this segment of the market, at least - 661,902 CCI policies were sold. Of these policies, 52.7% were sold with credit cards, 36.1% were sold with personal loans and 11.2% were sold with home loans. The overall conversion rate for CCI policies sold by the 15 ADIs was 19.4% (i.e. 19.4% of consumers who purchased home loans, personal loans or credit cards from these ADIs also purchased CCI).  Report 256 is available on the [ASIC website](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Reports%22%20%5Ct%20%22_new).etailed Contents**2.3** **Class waiver relief to ASX 24 market participants** On 14 October 2011, ASIC issued class waiver relief to allow market participants of the ASX 24 Market to insert a limitation of liability (LOL) clause in their client agreements with trustees, subject to certain conditions. The class rule waiver relieves ASX 24 market participants of their obligations under Rule 2.2.5(1)(b)(vi) of the ASIC Market Integrity Rules (ASX 24 Market) 2010, which imposes a requirement that the agreement must contain an acknowledgment by the client that the client is responsible to pay in cash any deficit owing in relation to a margin to the market participant after the closing out of a contract and that, if the client defaults in payment of such a deficit, the market participant may realise any securities held by the market participant and apply the proceeds against that deficiency. The effect of the class rule waiver is that ASX 24 market participants can include a limitation of liability clause in an agreement with a client who is a trustee of a trust, and/or, an operator of a managed investment scheme. This is consistent with current business practice, and means the client's liability to pay deficits in margins is limited to the extent that the client has a right to be indemnified for that liability from the assets of the trust or fund operated by the trustee client. The waiver is subject to certain conditions. These conditions include that the market participant maintain a written record of all clients for whom the waiver is relied upon, as well as having an agreement that allows the market participant reasonable access to the accounts and records of the client to enable assessment of exposure to the trust or fund. etailed Contents**2.****4 Further extension of relief - funded representative actions and funded proof of debt arrangements** On 30 September 2011, ASIC announced it will extend the interim class order relief granted to lawyers and funders involved in legal proceedings structured as funded representative proceedings and funding claims lodged with liquidators to prove in the winding up of an insolvent company. The extension of ASIC's relief in Class Order [CO 10/333] 'Funded representative proceedings and funded proof of debt arrangements' until 29 February 2012 (provided under Class Order [CO 11/942]) 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 a litigation funding arrangement and a proof of debt funding arrangement that is otherwise characterised as a financial product, including an interest in a single member arrangement, 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 in [CO 10/333] has been extended to allow additional time for the federal government to implement the 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. **Background** 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 Corporations 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 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 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 Corporations Act. On 27 July 2011, the Assistant Treasurer and Minister for Financial Services and Superannuation 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 Corporations Act. These exemptions are conditional on appropriate arrangements being put in place to manage conflicts of interest. Class orders [CO 10/333] and [CO 11/942] are available on the [ASIC website](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Instruments%22%20%5Ct%20%22_new).etailed Contents**2.5** **Updated guidance on schemes of arrangement** On 22 September 2011, ASIC released an updated Regulatory Guide 60 'Schemes of arrangement'. This follows specific industry consultation on the issue of objectors to schemes and an internal review of ASIC's policy on schemes since the last update in 2009. ASIC also released a report on the key issues that arose out of its consultation with industry. ASIC has updated its guidance in Regulatory Guide 60 to provide that: ASIC will consider any objections to a scheme, in determining whether ASIC will give its typical 'no intentions' statement to the court in relation to the scheme; ASIC will closely consider schemes that offer collateral benefits and/or unequal consideration; and ASIC will examine schemes that result in a reverse takeover on a case-by-case basis.   Regulatory Guide 60 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \t "_new). Report 254 'Response to submissions on CP 127 Schemes of arrangement: Statements under s411(17)(b)' is also available on the [ASIC website](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Reports%22%20%5Ct%20%22_new).etailed Contents**2.6 New** **ePayments Code** On 20 September 2011, ASIC released the new ePayments Code which provides a best practice consumer protection regime for electronic payment products. PayPal Australia has welcomed the new ePayments Code and has agreed to sign up to the revised code by the end of the transition period which is 20 March 2013. ASIC expects it to be joined by banks, credit unions and building societies who are members of the existing version of the code. ASIC is also in discussion with a number of other providers of new payment services about subscribing to the new code. The ePayments Code provides key consumer protections in cases of fraud and unauthorised transactions and plays an important role in the regulation of electronic payment facilities in Australia. The Code replaces the existing Electronic Funds Transfer Code of Conduct and will regulate consumer electronic payments including ATM, EFTPOS, debit and credit card transactions (including contactless transactions), online payments, internet banking and BPAY. Traditionally all banks, credit unions and building societies that provide retail banking products signed up to the EFT Code. ASIC expects all to continue with the new ePayments Code. ASIC has begun re-subscribing current EFT Code subscribers to the new Code: existing subscribers have an 18 month transition period to move to the new Code. Subscribers must comply with the new Code by 20 March 2013. The new Code has been designed to deal with recent consumer issues and developments in the electronic payment industry. Changes incorporated into the Code include: a tailored set of light touch requirements for low value products (with a maximum balance of $500); a new regime to resolve mistaken internet banking payments; and plain English drafting that is product and technology neutral.   The ePayments Code is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/ePayments-Code?openDocument" \t "_new). etailed Contents**2.7** **Quarterly report on relief decisions** On 15 September 2011, ASIC released a report outlining decisions on relief applications between 1 February and 31 May 2011. The report also discusses the various publications released during this period. The report, 'Overview of decisions on relief applications (February to May 2011)' (Report 252), aims to improve the level of transparency and the quality of publicly available information about decisions ASIC makes when asked to exercise its discretionary powers to grant relief from provisions of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act), the [National Consumer Credit Protection Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "_default) (National Credit Act) or the [National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111363" \t "_default) (Transitional Act). ASIC uses its discretion to vary or set aside certain requirements of the law where the burden of complying with the law significantly detracts from its overall benefit, or where ASIC can facilitate business without harming other stakeholders. Report 252 is available on the [ASIC website](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Reports%22%20%5Ct%20%22_new).etailed Contents |

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| **3.1** **Release of consultation paper on disclosure rules for mining and oil & gas companies** On 5 October 2011, ASX released a consultation paper on the ASX Listing Rule reporting requirements applicable to reserves and resources reporting by listed mining and oil and gas exploration and production companies. The consultation paper is the first stage of a review aimed at enhancing reserves and resources disclosure.    The review is aimed at:   responding to stakeholder interest in improving the standards of public reporting of reserves and resources; reducing the potential for the disclosure of reserves and resources information to be misleading; promoting greater efficiency in the capital formation process for listed mining and oil and gas companies; and ensuring that reporting requirements are aligned with international best practice, but without a disproportionate compliance burden for listed companies.   ASX invites comments from interested stakeholders on the key reporting issues and the proposals examined in the consultation paper by 27 January 2012.   This is the [consultation paper](http://www.asxgroup.com.au/media/PDFs/ASX_LRs_Review_Issues_Paper_mining_and_oil_gas_reserve_and_resource_reporting_20111005.pdf%22%20%5Ct%20%22_new).   etailed Contents**3.2** **ASX and S&P announcement on impact of alternate trading venues on the calculation of S&P/ASX indices** On 20 September 2011, ASX and S&P announced that the introduction of alternate trading venues to the Australian market will not affect the index methodology or calculations for the index suite. S&P/ASX index values will continue to be calculated based on activity on ASX TradeMatch until such time that trading activity on alternate trading venues develops such that the index would benefit from the inclusion of this data.   This is the [media release](http://www.asxgroup.com.au/media/PDFs/110920SPASX_index_calculation-final.pdf%22%20%5Ct%20%22_new).   etailed Contents**3.3** **ASX Limited Annual General Meeting**   On 22 September 2011, ASX Limited held its Annual General Meeting, where ASX Chairman David Gonski and outgoing CEO and Managing Director Robert Elstone discussed the Annual Report released on 18 August 2011.    Here are the the [Transcript of the AGM Q&A](http://www.asxgroup.com.au/media/PDFs/110923Edited_Transcript_of_ASX_2011_AGM_QandA_final.pdf%22%20%5Ct%20%22_new) and the [AGM Results](http://www.asxgroup.com.au/media/PDFs/110922_22Sep_AGM_Results_Final_1.pdf%22%20%5Ct%20%22_new).etailed Contents**3.4** **Reports**   On 6 October 2011, ASX released:   the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/111006ASX_Group_Market_Activity_Report.pdf%22%20%5Ct%20%22_new); the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2011/notice2011_184.pdf%22%20%5Ct%20%22_new); and the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/111006ASXCompliance_Monthly_Activity_Report.pdf%22%20%5Ct%20%22_new) for September 2011. etailed Contents |

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| **4.1** **Gladstone Pacific Nickel Limited 02 - Panel declines to make a declaration of unacceptable circumstances** On 14 September 2011, the Takeovers Panel announced that it has declined to make a declaration of unacceptable circumstances in response to an application dated 19 August 2011 by Robash Pty Ltd, a shareholder of Gladstone Pacific Nickel Limited, in relation to the affairs of Gladstone. The application related to a prospectus lodged by Gladstone with ASIC on 12 August 2011 in relation to a proposed 11 for 1 non-renounceable rights issue at $0.08 per share. Companies owned and controlled by Mr Clive Palmer currently own 56.4% of Gladstone (Palmer Companies). The applicant submitted, among other things, that the rights issue constituted unacceptable circumstances because: the offer ratio is punitive and there has been no attempt to mitigate the effect of the offer on shareholders who do not participate in the rights issue; shareholders have not been adequately informed of the identity of persons who propose to acquire a substantial interest in Gladstone;shareholders, other than Palmer Companies, are unlikely to have an equal opportunity to participate in the rights issue due to its ratio and pricing; and an inappropriate procedure is being followed as a preliminary to compulsory acquisition of voting shares in Gladstone.   The Panel considered that Gladstone had not taken all reasonable steps to minimise the potential control effect of the rights issue and that the prospectus did not adequately disclose, among other things, the potential effect on control if no shareholders took up their rights (other than the Palmer Companies) and the intentions of the Palmer Companies as regards exercising their voting rights and should they become entitled to proceed to compulsory acquisition. The Panel was minded to make a declaration of unacceptable circumstances in relation to the affairs of Gladstone and was minded to make orders that the rights issue not proceed unless the resulting acquisition by the Palmer Companies was approved by shareholders (other than the Palmer Companies). However, on 9 September 2011, Gladstone announced on its website that it had withdrawn the prospectus.  The Panel decided that Gladstone's withdrawal of the prospectus had removed the ground on which it was previously minded to declare that the rights issue was likely to lead to unacceptable circumstances in relation to the affairs of Gladstone. Accordingly, the Panel declined to make a declaration of unacceptable circumstances in relation to the affairs of Gladstone. The reasons for the decision are available on the [Takeovers Panel website](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=reasons_for_decisions/2011/016.htm&pageID=&Year=" \t "_new).etailed Contents |

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| **5.1** **Responsible entities able to act unilaterally to modify a trust's constitution in order to amend pricing provisions** (By Katherine Payne, Blake Dawson) In the matter of Centro Retail Limited [2011] NSWSC 1175, Supreme Court of New South Wales, Barrett J, 5 October 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1175.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1175.html%22%20%5Ct%20%22_new) **(a) Summary** Justice Barrett in the Supreme Court of New South Wales held that Centro MCS Manager Ltd, the responsible entity and trustee of the Centro Retail Trust, was justified in modifying the constitution of the trust under section 601GC(1)(b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) to vary the pricing of new issues of units. **(b) Facts** Centro MCS Manager Ltd is the responsible entity and trustee (by operation of section 601FC(2) of the Corporations Act) of the Centro Retail Trust (CRT), a registered managed investment scheme.  The units of CRT are stapled to shares in the capital of Centro Retail Ltd (CRL), so that each "stapled security" consists of one CRT unit and one CRL share. The Centro Group has announced a complex restructure proposal to aggregate a number of Centro entities into a single entity.  To achieve this aggregation, Centro MCS Manager Ltd proposes to issue new CRT units to the responsible entities of two other registered managed investment schemes or their members at a fixed price. In order to carry out this issue, it is proposed that the CRT constitution be altered to include a new provision to the effect that new units to be issued under the proposed aggregation will be priced by direct reference to the net value of the trust assets.  Under the current pricing provisions in the CRT constitution new units are priced based on the market value of the existing units.   Centro MCS Manager Ltd applied to the New South Wales Supreme Court under section 63 of the [Trustee Act 1925 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "_default) for judicial advice on whether it would be justified in acting unilaterally to make the proposed modification of the scheme's constitution or whether the proposal must be put to the members at a meeting for adoption by special resolution. ASIC appeared as amicus curiae and submitted that such a modification should not be able to be made unilaterally. **(c) Decision**  Section 601GC of the Corporations Act provides that: The constitution of a registered scheme may be modified, or repealed and replaced with a new constitution:            (a) by special resolution of the members of the scheme; or            (b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights. Counsel for both Centro MCS Manager Ltd and ASIC referred to the decisions in *ING Funds Management Ltd v ANZ Nominees Ltd* [2009] NSWSC 243 (ING case) and *Premium Income Fund Action Group Inc v Wellington Capital Ltd* [2011] FCA 698 (Premium case).   Justice Barrett noted the similarity between the Centro proposal before the Court and the facts of the Premium case.  In the Premium case, Gordon J considered whether section 601GC(1)(b) allowed for the modification of the constitution so that an issue price based on net asset backing was replaced by an issue price based on the market value of the units.  The Premium proposal was therefore the reverse of the Centro proposal.  Justice Gordon concluded that the proposal in the Premium case did adversely affect members' rights. Justice Barrett noted that central to Gordon J's conclusion in the Premium case was her finding that there was a right conferred on Unit Holders that the issue price of a Unit would be determined by reference to the constitution.  The provision of the constitution setting the issue price for new units was therefore viewed as a contractual right of every existing member to insist that no new unit should be issued except at that price and if any new units were to be issued at all, those units should be issued at that price and not any other price. Justice Barrett also noted, however, that Gordon J's actual decision was that section 601GC(1)(b) had not authorised the responsible entity to make the modification because the responsible entity had not, as a matter of fact, considered the impact of the rights issue on the members' right to have the new units issued according to the constitution and not otherwise.  The responsible entity therefore lacked the state of mind contemplated by the words "reasonably considers the change will not adversely affect members' rights." Counsel for Centro MCS Manager Ltd referred to a number of cases concerning the modification of shareholders' rights.  Justice Barrett found that these company law cases argued against the proposition that in company law a member has a "right" of membership attaching to shares that is "affected" just because new members are introduced or because new shares are issued at prices difference from those that applied upon the issue of existing members' shares. Justice Barrett then turned to the question of whether the members of a managed investment scheme have a "right" to prevent the issue of new shares otherwise than at the price prescribed by the constitution.  His Honour rejected the proposition that members' have a "right" to see the scheme administered and operated in accordance with the constitution.  Noting this and also the difference between something that "affects" members' "rights" as such and something that affects the enjoyment or value of members' rights, he found that it was open to Centro MCS Manager Ltd as responsible entity to form on reasonable grounds the opinion that no "right" of members would be affected by the proposed amendment to the constitution. Having concluded that the power under section 601GC(1)(b) was available, Barrett J then considered whether it may be properly exercised.  His Honour concluded that, like all powers exercised by a responsible entity, the power under section 601GC(1)(b) is subject to the irreducible duty of a trustee to perform the trust honestly and in good faith, for the benefit of the beneficiaries.  Justice Barrett noted that matters of dilution and loss of value would be of crucial relevance assessing whether the modification under section 601GC(1)(b) was for the benefit of the beneficiaries. A responsible entity, in exercising its power under section 601GC1(b), should therefore proceed in two stages:First it must decide whether the proposed modification adversely affects members' rights; then Second, if it decides that there is no adverse effect on rights, it must consider whether the proposed modification is for the benefit of the beneficiaries. Turning to Centro's proposal, Barrett J found that the responsible entity's directors had turned their minds to the question of whether any members' rights would be adversely affected by the proposed amendment, as recorded in the minutes of a directors' meeting on 27 September 2011.  Furthermore, the directors considered an independent expert's report which indicated that the value of existing stapled securities (and therefore the value of existing units) would be increased by the proposed restructure and that the benefits of the overall transaction were significant and would clearly outweigh any disadvantages. Justice Barrett was therefore satisfied that:The proposed modification of the scheme constitution would not affect members' rights; Centro MCS Manager Ltd as responsible entity was entitled to conclude that the modifications would not adversely affect members' rights and was correct in so concluding; and Centro MCS Manager Ltd as trustee considered whether the modification would benefit the members as beneficiaries and came to the view that it would.etailed Contents**5.2** **Determining retrenchment and leave entitlements of an excluded employee** (By Tarryn Brown, Clayton Utz)McGrath v Sturesteps; Sturesteps v HIH Overseas Holdings Ltd (in liquidation) [2011] NSWCA 315, New South Wales Court of Appeal, Bathurst CJ, Macfarlan JA and Sackville AJA, 30 September 2011The full text of this judgment is available at:[http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=154883](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=154883" \t "_new)**(a) Summary**This decision of the NSW Court of Appeal considers both an appeal by the liquidators of HIH Casualty & General Insurance Limited (in liquidation) ("HIH Casualty") and a cross-appeal by Mr Sturesteps, a former director of HIH Casualty.  The liquidators' appeal was in relation to the determination of retrenchment payments in light of section 556(1C) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the "Act").  Mr Sturesteps cross-appeal was in relation to priority of annual leave entitlements pursuant to section 556(1B) of the Act, interest on annual leave or redundancy payments and reimbursement of various expenses. In this decision the key issues considered by the Court of Appeal were:The construction of the clause in an employment agreement which provided for the payment of redundancy;The extent to which a redundancy payment due to an employee be attributed to the period in which they were a director for the purpose of section 556(1C) of the Act;The extent to which accrued annual leave due to an employee be attributed to the period in which they were a director for the purpose of section 556(1B) of the Act; andWhether payment of post-liquidation interest to a creditor or class of creditors can be other than in accordance with section 563B of the Act.Importantly, the Court of Appeal overturned a decision on the construction of section 556(1C) and held that the section assumes that a payment can be in part attributed to priority days and in part to non-priority days.  The effect being that even though the liability in respect of a redundancy payment does not arise until termination, that does not effect whether the payment (or part thereof) was attributable to non-priority days.  **(b) Facts**Mr Sturesteps was employed by M W Payne Liability Agencies Pty Ltd on 10 January 1969 ("Payne").  Due to a change of control, Payne became a member of the HIH group of companies and changed its name to C E Heath Underwriting Agencies Pty Limited of which Mr Sturesteps was employed until 12 December 1988.  Following this, Mr Sturesteps was employed by HIH Casualty until 18 April 2001.  During his employment with HIH Casualty, Mr Sturesteps:was appointed a director from 24 April 1989 until 12 September 2000; andon 24 September 1999 entered into an "executive employment agreement" with HIH Casualty (the "Agreement") which provided for the calculation of a redundancy payment in clause 17.On 15 March 2001 provisional liquidators were appointed to HIH Casualty and Mr Sturesteps employment was subsequently terminated on 18 April 2001.Mr Sturesteps lodged a formal amended proof of debt in the administration of HIH Casualty claiming various amounts due to him under the Agreement and amounts arising out of his employment with HIH Casualty. Mr Sturesteps issued proceedings in the Supreme Court (the subject of this appeal) as a result of the liquidators failure to deal with the proof of debt to his satisfaction.**(c) Decision on appeal****(i) Construction of clause 17 of the Agreement**Clause 17 provided that HIH Casualty would pay the redundancy payment for the period of Mr Sturesteps' service with HIH Casualty.  The primary judge concluded that despite the words of the Agreement, the surrounding context was such that the parties would reasonably have understood the clause to have caught service with a predecessor, namely Payne, by reason that:it was group practice to calculate redundancy payments by reference to total service with the group rather than service with a particular company;the clause referred to the fact that payment was for past services; andin the course of negotiating the Agreement there was no suggestion that its effect would be to interrupt a continuity of service.The Court of Appeal disagreed with the primary judge, allowing the appeal on this issue, and determined that:there was nothing "commercially absurd" in the termination payment being paid by HIH Casualty and limited to service with that company;group practice for calculating redundancy payments did not affect the terms of the Agreement; andthere was no reason to depart from the literal construction of clause 17 to consider the surrounding circumstances.**(ii) Extent redundancy payment attributable to non-priority days**Section 556(1)(h) of the Act provides that priority in respect of retrenchment payments is limited by section 556(1C) for excluded employees.  The words of section 556(1C) provide that the payment under section 556(1)(h) in respect of an excluded employee must not include an amount attributable to non-priority days.  Mr Sturesteps fell within the definition of "excluded employee".The primary judge held that none of the retrenchment payment was attributable to non-priority days because:retrenchment payments provided for by an industrial award were payments in lieu of monies the employee would have received had the employment not been terminated; and retrenchment pay does not accrue or arise over a period, it accrues or arises upon a particular event, being the date of termination of employment.The Court of Appeal held that the approach to the construction adopted by the primary judge was incorrect and determined that:the words in section 556(1C) assume that a payment can be in part attributed to priority days and in part to non-priority days;not all employment agreements will provide that the payment is provided for loss of future employment and the reason for which the payment is made needs to be determined.  If the reason for the whole or part of the payment was to compensate the employee for past services including a time at which the employee was a director, then a portion of the payment will be attributable to non-priority days; andliability in respect of retrenchment payments arises on the event of termination but that does not affect whether the payment (or part thereof) was attributable to non-priority days.Clause 17 of the Agreement specifically provided that the retrenchment payment was made in recognition of past services.  Accordingly, to the extent that those services occurred on days on which Mr Sturesteps was a director, any payment attributable to those days would not receive a priority pursuant to section 556(1)(h).The Court of Appeal then had to consider the appropriate method of attribution.  The Agreement provided that the retrenchment payment would be made up as follows:"your annual Remuneration Package plus 5/52 of your annual Remuneration Package for each completed year of service, or part of any year of service, with HIH up to a maximum total of three times your annual Remuneration Package." The Court of Appeal held that the correct approach in relation to the aspect of "5/52 of your annual Remuneration Package for each completed year" was to apportion it between the period when Mr Sturesteps was a director and the period when he was not. In respect of the method of attribution for the "Annual Remuneration Package" Bathurst CJ (Sackville AJA agreeing) determined that, as this part was not attributable to a particular period, it should be attributed to the whole period of service and apportioned between priority and non-priority days. Macfarlan JA disagreed and considered that this part of the retrenchment payment comprised Mr Sturesteps' remuneration package at the date of the Agreement, rather than at the date of redundancy.  Accordingly, this amount should be apportioned between priority and non-priority days falling within the period up to the date of the Agreement.**(iii) Annual leave entitlement**The primary judge used the rule in Clayton's case (*Devaynes v Noble* (1816) 35 ER 781) concluding that leave taken should be debited against the earliest period of leave which had accrued. The consequence of this was that the whole of the remaining annual leave entitlement, except for the period after he resigned as director, would be attributed to non-priority days.  The Court of Appeal agreed with the primary judge's findings and the cross-appeal on this issue was dismissed. **(iv) Post-liquidation interest** Mr Sturesteps counsel argued that pursuant to section 477(1)(b) of the Act the liquidators should award compensation to Mr Sturesteps for the loss he suffered in being "kept out of his money" and that in the event the liquidators did not do so, the Court had power to make such an order under section 1321(1) of the Act.  The Court of Appeal held that as this point was not raised in the Supreme Court proceedings the point should not be permitted to continue.  However, Bathurst CJ did state that, in his opinion, section 477(1)(b) of the Act does not empower a liquidator to pay post-liquidation interest to a creditor or class of creditors other than in accordance with section 563B (Interest on debts and claims from relevant date to date of payment).  Accordingly, the Court would not be able to exercise its powers under section 1321.The appeal also involved a claim by Mr Sturesteps for expenses said to be repayable pursuant to an oral agreement that the HIH group would compensate him for any loss incurred whilst residing in the USA for the purpose of his employment.  There was no evidence to support such an agreement and the cross-appeal on this issue was dismissed.etailed Contents**5.3** **Receivers and managers may remain in office after primary debt discharged to determine potential capital gains tax liability** (By Patrick Clark, Blake Dawson) Goldana Investments Pty Ltd (receivers and managers appointed) v National Mutual Life Nominees Ltd [2011] NSWSC 1134, Supreme Court of New South Wales, Ward J, 22 September 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1134.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1134.html%22%20%5Ct%20%22_new)   **(a) Summary** Goldana Investments Pty Ltd (Goldana) sought orders compelling the receivers and managers (Receivers) appointed by National Mutual Life Nominees Ltd (NMLNL) to terminate their receivership and account to Goldana for the surplus assets, Goldana's primary debt to NMLNL having been discharged. Ward J of the New South Wales Supreme Court refused to make the orders sought. Ward J accepted that a receivership could not be continued for a collateral purpose unrelated to the terms of the appointment or the scope of the security instruments.  However, her Honour held that it was legitimate for receivers and managers to remain in office in order to satisfy themselves of a potential capital gains tax liability, as that issue was relevant to the security and would affect the surplus assets to be returned to the debtor company. It was salient to Ward J's reasoning that it was the failure of Goldana's sole-director, Mr Kwok, to produce the company books and records that had prevented the Receivers' determining the existence and amount of any capital gains tax liability. **(b) Facts** Goldana owned the Greystanes Shopping Centre in New South Wales, which it had purchased in 1997 for about $13.1 million.  Goldana entered into two security instruments in favour of NMLNL for a loan of some  $19.4 million, being a mortgage over the Shopping Centre and an all assets fixed and floating charge.Goldana defaulted on its obligations in late 2010 and, as a result, NMLNL appointed the Receivers to the undertaking and assets of Goldana, under the mortgage and charge.  The Deed of Appointment provided that NMLNL would indemnify the Receivers against all claims made against them, and that NMLNL would be responsible for all fees, costs, expenses and charges to which the Receivers were entitled under the terms of the Deed of Appointment.On 6 June 2011, the Receivers completed the sale of the Greystanes Shopping Centre, the net proceeds being about $24.55 million.  On 10 June 2011, the Receivers paid NMLNL the full amount of the debt then owed by Goldana (being about $23.8 million including interest) and retained the balance in the receivership bank account. The Receivers were uncertain as to whether any capital gains tax liability flowed from the sale. The liability (if any) could not be determined because the Receivers could not obtain the relevant books and records of Goldana for the period prior to their appointment.Goldana's sole-director, Mr Kwok, had not provided a report as to Goldana's affairs and provided no assistance to the Receivers. Mr Kwok was the subject of bankruptcy proceedings, and Mr Kwok's solicitors were unable to obtain instructions regarding the books and records (despite apparently receiving other instructions, an anomaly which remained unexplained).  Further, despite the orders of White J made on 29 August 2011, Mr Kwok failed to provide an affidavit detailing the existence and location (or otherwise) of Goldana's records prior to the Receivers being appointed.On 27 July 2011, Goldana, by its residual powers, commenced proceedings against the Receivers and NMLNL. The company sought to compel the Receivers to terminate the receivership and account to Goldana for the surplus from the sale of the Shopping Centre.Goldana argued that, as the debt to NMLNL had been discharged, the Deed of Appointment should be terminated and the Receivers ordered to pay the surplus proceeds to Goldana.  Goldana submitted that this was required by the general duty of receivers and managers to terminate their receivership by handing over surplus assets to the company to which they are appointed, as soon as the interests of the appointor have been satisfied.**(c) Decision** Ward J rejected Goldana's arguments and refused to order the termination of the receivership. Ward J accepted that receivers and managers could not remain appointed to a company by reason of any consideration which was "extraneous or collateral" to their appointment. Her Honour analysed the Deed of Appointment and the relevant security documents, and observed that:         the Receivers' duty to account to Goldana for surplus assets required the Receivers to first properly determine that surplus (which, in turn, required an assessment of capital gains tax issues related to the sale of Goldana's assets); and under the security documents, any expenses for which the Receivers may become liable in connection with the receivership (including a capital gains tax liability) would form part of the secured money.  Ward J concluded that the Receivers' continuation of the receivership was not due to some extraneous or collateral consideration, but was justified in order to determine any tax liability.Ward J found that the Receivers had a sufficient basis for concern that they may have accrued a substantial contingent personal liability for capital gains tax. As the Shopping Centre was sold at a sum considerably in excess of the initial purchase price, it appeared that the Receivers had derived "profits or gains of a capital nature" for which they would be "answerable as taxpayer" under the [Income Tax Assessment Act 1936 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6606" \t "_default). Without Goldana's books and records, the Receivers could not determine that liability. Further, NMLNL was liable to indemnify the Receivers for that liability, which Ward J accepted would fall within the definition of moneys secured under the mortgage and charge.The Receivers intended to seek company records and tax returns before attempting to calculate Goldana's capital gains tax liability, and Ward J accepted that this proposal fell within the terms of the Receivers' appointment.Goldana relied on section 423(1)(b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), which provides that where a person complains to the Court about an act or omission of a controller of property in performing their duties, the Court may inquire into the matter and take such action as it thinks fit. The Defendants argued that section 423 did not provide the relief sought.Ward J noted that Goldana had made no criticism of the Receivers' conduct, other than the failure to pay over the surplus and terminate the receivership. Ward J found "compelling" the argument that a receiver's decision as to whether to retire was not an act or omission contemplated by section 423, which is instead directed at receivers who are not performing their functions properly. By contrast, under section 434B only a liquidator may seek orders removing a "redundant controller".While Ward J doubted that section 423 would allow the Court to order the removal of receivers and managers without first inquiring into their conduct. However, her Honour did not need to decide the reach of section 423. Her Honour found that, even if section 423 was enlivened, it would not be appropriate to make an order terminating the receivership in these circumstances.etailed Contents**5.4** **The Court's power to validate an invalid appointment of administrators** (By Alexandra Phelan, Solicitor, Mallesons Stephen Jaques) National Australia Bank Ltd v Horne [2011] VSCA 280, Court of Appeal of the Supreme Court of Victoria, Buchanan and Mandie JJA and Almond AJA, 21 September 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSCA/2011/280.html](http://www.austlii.edu.au/au/cases/vic/VSCA/2011/280.html%22%20%5Ct%20%22_new) **(a) Summary** The appellants, National Australia Bank Ltd ("NAB") and Capital Finance Australia Limited ("Capital Finance"), unsuccessfully sought to overturn a decision of the trial judge to validate the appointment of Messrs Horne and Vrsecky as administrators of Australian Property Custodian Holdings Ltd (the "Company").  While the Court of Appeal found that the administrators' appointment under section 436C of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) was invalid, the Court of Appeal exercised the power granted to it under section 447A to treat the appointment as if it were valid. **(b) Facts**    The Company and its 18 wholly owned subsidiaries together comprise the "Prime Group". At June 2010, the Company had total assets of approximately $16 million, $5 million of which was held on term deposit with NAB to satisfy the net tangible asset requirement of the Company's Australian Financial Services Licence.  In 2008, Daytree Pty Ltd ("Daytree") had registered a charge securing all of the assets and undertaking of the Company (but excluding the $5 million held on term deposit with NAB).   On 18 October 2010, Daytree appointed Stirling Lindley Horne and Petr Vrsecky as joint and several administrators of the Company and another company in the Prime Group.  This power to appoint administrators was based on section 436C of the Corporations Act, which provides that a chargee may appoint an administrator where the chargee is entitled to enforce a charge on the whole, or "substantially the whole", of a company's property.  On 18 and 19 October 2010, in light of the appointment of Messrs Horne and Vrsecky as administrators of the Company, the directors resolved to appoint Messrs Horne and Vrsecky as administrators of the balance of the companies in the Prime Group. On 19 October 2010, Capital Finance (the second appellant) assigned to NAB a debt of $6.5 million that included part of an amount due and payable by the Company under loan facilities.  In subsequent correspondence NAB raised a concern that the administrators had not been duly appointed. The Company and the administrators therefore made application to the court to seek clarification.  NAB and Capital Finance appeared as interveners by leave of the Court and submitted that Daytree was not entitled to appoint administrators under section 436C of the Corporations Act. The trial judge found that Daytree's charge was not over "the whole, or substantially the whole, of [the Company's] property" and therefore the appointment of the administrators was not a valid appointment.  In reaching this conclusion, the Court held that a charge over 68% of the Company's assets (approximately $16 million less the $5 million on term deposit with NAB) did not equal "substantially the whole" of a company's assets. The trial judge found that "[t]he exclusion of a substantial asset [the $5 million term deposit] must, inevitably, lead to the conclusion that a charge is not over the whole, or substantially the whole, of a company's property".   Although the trial judge found that the administrators had not been appointed validly under section 436C of the Corporations Act, the Court exercised its power under section 447A of the Corporations Act to make an order that Part 5.3 of the Corporations Act operate as if the administrators had been validly appointed by the board of the Company.  As a result of evidence tendered by a director of the Company, the Court held that the directors of the Company would have otherwise appointed administrators by resolution of the board as permitted under section 436A, and while they did not do so because they assumed the validity of the appointment of Messrs Horne and Vrsecky, "everyone intended [that a valid appointment] be done and acted on the basis that it was done".   NAB and Capital Finance appealed the decision at first instance, submitting that the trial judge:erred in law in making valid an invalid appointment;failed to accord natural justice to the appellants; anderred in fact in finding that "everyone intended [that a valid appointment] be done and acted on the basis that it was done" (in circumstances where the evidence did not support the conclusion).**(c) Decision**   **(i) Overview** The Court of Appeal held that the trial judge erred in finding that the Company would have appointed Messrs Horne and Vrsecky as administrators.  Accordingly, the Court of Appeal set aside the trial judge's orders and exercised its discretion afresh based on the same material. Having considered the material afresh, the Court of Appeal ordered that the insolvency provisions of the Corporations Act (Part 5.3A) are to operate in relation to the Company as if the appointment of the administrators Horne and Vrsecky pursuant to section 436C by Daytree was valid. **(ii) Error of fact** The Court of Appeal examined the evidence before the trial judge and concluded that it was not open for the trial judge to find that the directors would have appointed Horne and Vrsecky had they not already been appointed by Daytree, and that "at its highest, [the] evidence on this issue establishes that administrators, but not necessarily Horne and Vrsecky, would have been appointed to the Company". The Court of Appeal held that the trial judge erroneously came to this conclusion, and "exercised his discretion on an incorrect factual premise which was material".  The Court of Appeal therefore set aside the trial judge's order. **(iii) Error of law** The respondents sought declaratory relief that the appointment of the administrators was valid.  The Court of Appeal upheld the trial judge's finding that Daytree was unable to validly appoint administrators under section 436C, as it was not entitled to enforce a charge on the whole or substantially the whole of the Company's property. Accordingly, the Court of Appeal declined to grant the declaratory relief sought. In the alternative, the respondents sought an order pursuant to section 447(1) of the Corporations Act appointing Messrs Horne and Vrsecky as administrators of the Company, or an order that the appointment was valid.  Accordingly, the Court of Appeal considered whether it had power under section 447(1) to make the orders, and if so, whether it would be a proper exercise of discretion. The Court of Appeal referred to the High Court case of *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 ("Australasian Memory"), which considered the extent of the power given to the Court by section 447A and held that, consistent with the decision in Australasian Memory, the power granted to the Court under section 447A of the Corporations Act is broad and would enable the making of orders that alter how Part 5.3A of the Corporations Act is to operate. The Court of Appeal held that there was no "insuperable discretionary obstacle" (such as third party rights) that would prevent the validation of the appointment by Daytree of Horne and Vrsecky as administrators of the Company from 18 October 2010.   In concluding that no error of law had been made, the Court of Appeal applied the discretion granted under section 447A in a similar manner to the trial judge, but made valid the otherwise invalid appointment under section 436C by allowing Daytree to enforce a charge on a substantial portion of the Company's property, rather than substantially the whole of the Company's property.  The Court of Appeal ordered that the appointment of the administrators by Daytree on 18 October 2010 was to be treated as if it were a valid appointment under section 436C of the Corporations Act.etailed Contents**5.5** **Opposing a statutory demand - an opportunity not to be missed** (By Tian Xu, Solicitor, Mallesons Stephen Jaques) In the matter of Kay Investment Holdings Pty Ltd v North East Developments Pty Ltd (in liq) [2011] NSWSC 1121, Supreme Court of New South Wales, Ward J, 19 September 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1121.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1121.html%22%20%5Ct%20%22%20_new)  **(a) Summary** This case involved a series of proceedings to set aside a statutory demand.  The Court emphasised the role of the statutory demand regime as an early warning sign on the road to winding up.  A statutory demand gives the party on which the demand is served an early opportunity to dispute the debt claimed in the statutory demand and to stop progression to a winding up.  The Court held that such opportunity is not to be lightly taken away from a party for minor procedural oversights.   **(b) Facts**    Kay Investment Holdings Pty Ltd ("Kay Investment") was the lessee of certain shopping centre premises of which North East Developments Pty Ltd ("North East Developments") was the lessor.  A dispute arose between the parties and North East Developments served a statutory demand on Kay Investment under section 459E of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), asserting that Kay Investment owed debts to it under a lease between the parties.  Under section 459E, a creditor may serve on a company a demand relating to one or more debts owed by the company to the creditor, provided that debts are due and payable and above the statutory minimum amount. Due to administrative and procedural oversights by both parties, Kay Investment was not aware that its original application to set aside the statutory demand had been listed for hearing.  As a result, it failed to appear at its own application to set aside the statutory demand and the application was dismissed (the "Dismissal Decision").   As the original application to set aside was dismissed and Kay Investment did not otherwise comply with the statutory demand, a statutory presumption of insolvency arose against Kay Investment by operation of section 459F of the Corporations Act.  North East Developments then applied to wind up Kay Investment on the basis of that presumption.   Kay Investment applied to set aside the Dismissal Decision, and reasons for the decision of White J were delivered on 15 August 2011.  White J held that it was partially due to North East Developments' failure to comply with procedural rules that caused Kay Investment to miss its original application hearing.  Further, if the parties proceeded to a winding up application, Kay Investment would have very limited scope to present the arguments it could have relied on to set aside the original statutory demand.  On balance, White J held that the merits favoured Kay Investment.  An order was made effectively reviving Kay Investment's application to set aside the statutory demand. Kay Investment's application to set aside the statutory demand was listed for hearing, and North East Developments' winding up application was listed for mention, on 9 September 2011.  At the hearing, North East Developments applied for a stay of the statutory demand application on the basis that it had filed notice of intention to appeal the 15 August 2011 decision. **(c) Application to set aside the statutory demand and North East Developments' appeal** The application before Ward J therefore essentially involved two components:North East Developments' application to stay the proceedings given its appeal against the decision of White J; andKay Investment's application to set aside the statutory demand.Ward J held that a stay should not be granted and that the statutory demand should be set aside pursuant to section 459G of the Corporations Act because there was a genuine dispute or off-setting claim. **(i) North East Developments' application for a stay of the proceedings** North East Developments sought a stay of the statutory demand application on the basis of its appeal of the 15 August 2011 decision.  Ward J considered whether there was a proper basis for the stay that was fair to all parties. Kay Investment submitted, among other things, that in order to justify a stay, it must be shown that there is an arguable case that the appeal will be successful. North East Developments appealed on several technical grounds, including:the principle of natural justice, that a party be given a reasonable opportunity to present its case, does not extend to the situation where a claiming party fails to appear in court to press its claim due to its own oversight; andthe court did not have the power to retrospectively set aside the judgment so that it had no effect.Ward J held that while it could not be said that there was not an arguable case for appeal on some grounds, it was "by no means clear that even if an appeal on the grounds presently contemplated were to succeed this would have the effect of preserving the presumption of insolvency for all purposes".Her Honour noted that even if North East Developments succeeded on the specific grounds contemplated, White J would still have made the same decision under Part 36 r 16 of the [Uniform Civil Procedure Rules 2005 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "_default). Her Honour emphasised that an application to set aside a statutory demand is effectively the only opportunity to oppose winding up procedures at an early stage and that Kay Investment would be seriously prejudiced if it were denied that opportunity. **(ii) Setting aside the statutory demand** The original statutory demand served by North East Developments against Kay Investment was ultimately set aside on two main grounds. First, there were a number of defects with the statutory demand, including:the statutory demand simply stated that a stated amount was due under the lease and did not give any clue as to the basis of the debt; andthe person who made the affidavit verifying the statutory demand did not appear to be a director, secretary or executive officer of North East Developments, as required under the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "_default).  Secondly, Kay Investment was able to establish that there was a genuine dispute and counterclaim concerning the debt in the statutory demand, at the time the demand was served.  Ward J observed that all that is required to establish a genuine dispute is to show that the basis of the dispute is not "spurious, hypothetical, illusory or misconceived."  The court did not engage in a balancing exercise between the relative merits of the parties' arguments.  Here, separate proceedings had already been instituted by Kay Investment disputing the debt and counterclaiming damages against North East Developments.  Ward J found that Kay Investment had set out the basis of the dispute and counterclaim with sufficient certainty. Ward J considered whether the dispute and counterclaim existed at the time the statutory demand was served, as the separate proceedings were not instituted until some time afterwards.  Ward J dismissed the argument that a dispute only arises when proceedings have been instituted, holding that it may subsist between parties even though it has not been articulated. Ward J also considered whether the application to set aside the statutory demand could itself be invalidated by Kay Investment's failure to comply with procedural rules.  However, Ward J held that such non-compliance is readily rectified and should not result in the application being invalidated.etailed Contents**5.6** **UK High Court refuses to grant permission to continue a derivative claim** (By Laura Loftus, DLA Piper Australia) Kleanthous v Paphitis [2011] EWHC 2287 (Ch), England and Wales High Court (Chancery Division), Newey J, 7 September 2011 The full text of this judgment is available at:[http://www.bailii.org/ew/cases/EWHC/Ch/2011/2287.html](http://www.bailii.org/ew/cases/EWHC/Ch/2011/2287.html%22%20%5Ct%20%22_new) **(a) Summary** The Companies Act 2006 (the 'Act') (UK) introduced a new regime for derivative claims.  In order to be granted permission to continue a derivative action the member bringing the claim must meet two hurdles.  First, they must show the court that they have a prima facie case for permission to continue a derivative claim. If this is successful, the claimant must meet the second hurdle, which involves persuading the court to grant permission to continue the claim. At the second hearing the court must consider the factors set out in section 263 of the Act in deciding whether a claim should proceed. In this case, the claimant, Mr Kleanthous, brought a claim by way of derivative action against one of the directors, Mr Paphitis and the company, alleging that the directors committed serious breaches of their fiduciary duties.   The court refused to allow Mr Kleanthous permission to continue the claim on the basis that it was not of such strength and size to make it appropriate for permission to be granted.   **(b) Facts**    Mr Kleanthous was a shareholder in Ryman Group Limited (RGL).  At the relevant time, RGL had three subsidiaries, one carrying on a stationary business (RL), another a mobile telephone business and the third, named Contessa (Ladieswear) Limited ('Contessa') carried on a lingerie business.  The three shareholders were Mr Kleanthous (15.5%), Mr Childs (12.1%) and Mr Paphitis (72.4%).  Mr Childs and Mr Paphitis were directors, in addition to three other individuals.  Mr Kleanthous was not a director.   In 1998, Mr Paphitis was approached by Suzie Shier, a retailer in Canada and the United States, who was looking for buyers in its 60.2% shareholding in La Senza, a lingerie business listed on the London Stock Exchange's AIM market.  Mr Paphitis discussed this approach with the other directors of RGL and the directors determined that it would not be appropriate for RGL to acquire La Senza.  Mr Paphitis was approached again in mid-1998 and, when the directors remained of the view that RGL should not undertake the acquisition, Mr Paphitis decided (with the blessing of other directors) that he would acquire the La Senza shares in a personal capacity.   A new shelf company (Xunely) was set up and this was used to purchase Suzie Shier's share of La Senza.  Mr Paphitis approached the other directors of RGL and asked for a loan to Xunely to finance its acquisition of La Senza.  In June 1998, RGL formally offered to lend Xunely £1.8 million to enable it to purchase all of the issued shares in La Senza not already owned by Xunely.   Xunely declared dividends in favour of Mr Paphitis of some £2.7 million in 2004 and £4 million in 2006.  In 2006, Xunely sold 90% of its shares in La Senza to a private equity group called Lion Capital for more than £100 million. Mr Kleanthous brought a claim by way of derivative action against Mr Paphitis, RGL and RL, alleging that the directors committed serious breaches of their fiduciary duties by diverting a significant business opportunity (the purchase of the shares in La Senza) away from RGL in order to develop the opportunity for the benefit of Mr Paphitis and his company, Xunely.  Subsequently the claim was widened to include the other directors.   The Boards of RGL and RL set up committees to seek professional advice and make decisions in relation to the derivative proceedings.  Both committees recommended that RGL and RL should not continue the claim brought derivatively by Mr Kleanthous.    **(c) Decision**   The court considered a number of the factors listed in section 263 of the Act to determine whether it should grant permission for the derivative action to be continued.  In particular, the court considered:Whether a person acting in accordance with section 172 (a duty to promote the success of the company) would not seek to continue the claim - on this basis, the court determined that it must refuse permission to continue the claim as against one of the directors. The importance that a person acting in accordance with section 172 would attach to continuing the claim - one of the directors submitted a number of reasons for considering that the claim would be very damaging to the business and the court accepted these reasons.  Whether the company has decided to pursue the claim - the court gave weight to the fact that the committees (established by the company) decided against bringing or continuing a claim. Whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the Company - Newey J considered that Mr Kleanthous was able to seek an alternative remedy in the form of an unfair prejudice petition. Views of members with no personal interest in the matter - the court considered the views of one of the other directors, who had a shareholding of a similar size of that to Mr Kleanthous.  This director did not believe it was in the best interests of the company for permission to be granted to continue the derivative claim. The court concluded that permission should not be granted for the claim to be continued.   Newey J considered that the claim Mr Kleanthous wished to pursue was not of such strength and size (even in the case of Mr Paphitis) as could make it appropriate to grant permission when:that course was strongly opposed, on a reasoned basis, by the Ryman Companies' independent committees as well as by one of the directors;it was open to Mr Kleanthous to seek redress by means of an application under section 994 of the 2006 Act; and if any money was recovered from the director defendants, it could be expected that much of it would be returned to the directors by way of distribution. Further, Newey J explained that the above factors would have caused him to hesitate to grant permission even if he had been persuaded that the proposed claim was a strong one.etailed Contents**5.7** **Selective distribution of liquidated assets and assessing whether a liquidator's remuneration is fair and reasonable**  (By Steven Grant, Minter Ellison) Australian Securities and Investments Commission v Groundhog Developments Pty Ltd [2011] QSC 263, Supreme Court of Queensland, Dalton J, 6 September 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/qld/QSC/2011/263.html](http://www.austlii.edu.au/au/cases/qld/QSC/2011/263.html%22%20%5Ct%20%22_new) **(a) Summary** This proceeding was commenced in 2001 by the applicant, ASIC, to restrain the respondents, Groundhog Developments Pty Ltd (Groundhog), Malcolm Wayne Andrew, Enterprise Management Systems (Australia) Pty Ltd (EMS) and Maurine Catherine Buckett, from operating an unregistered investment management scheme.  In 2003 an order was made appointing liquidators to Groundhog, EMS and to the investment scheme.  In this matter, the liquidators sought directions as to the distributions they proposed pursuant to sections 479 and 601EE of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  The sections respectively permit a liquidator to apply to the court for directions in relation to a matter arising under a winding up and permit the court to make orders in relation to the winding up of an unregistered managed investment scheme.  The liquidators also sought approval of their remuneration pursuant to the order appointing them.  This case addresses the manner in which distributions are made and the factors the court will consider when assessing whether a liquidator's remuneration is fair and reasonable.  **(b) Facts**   The respondents solicited money from two classes of people, namely:A group of approximately 160 referred to as Groundhog Investors, who responded to invitations on Groundhog letterhead to invest in unit trusts of which Groundhog would be trustee and EMS would be administration manager.  Groundhog Investors were told that funds raised would be lent to a company registered in the United States of America which would invest in property.  Approximately $3.6 million was invested by Groundhog Investors and was deposited into a bank account held by Groundhog, with the exception of Mr Stephen Andrew, who deposited monies into an account held by EMS.  The liquidators' enquiries revealed that almost all the funds in the Groundhog bank account were paid to third parties overseas and were irrecoverable with the exception of $89,400 paid into the EMS account. A group of 114 investors referred to as Bank Investors invested approximately $1.7 million with EMS, supposedly to purchase memberships of overseas banks.  Money received from Bank Investors was either paid to the EMS account or into another account named the Butler Hardy Trust Account.  The liquidators did not find any evidence that the banks in which memberships were sold existed. At the time the liquidators took control of the Groundhog bank account it contained only $19 whilst the EMS account contained an amount of $526,890.  During March and April 2001 a large number of payments were made to Groundhog Investors from the EMS account, each in the sum of $1,000, purportedly as interest on their investments.  The result was that, although money belonging to Groundhog Investors was paid into the EMS account, Groundhog Investors as a group received almost 10 times that amount by way of these 'interest payments'. The records kept by the respondents were poor and incomplete and consequently it was not possible to form a comprehensive view of the financial dealings of the respondents.  After some investigations the liquidators sought approval from the creditors in May 2003 to conduct further investigations in an effort to trace monies which were apparently sent overseas.  However, approval was not granted. The liquidators proposed to distribute the remaining funds to Bank Investors only, and to treat Mr Stephen Andrew as a Bank Investor because, unlike all the other Groundhog Investors, his money was paid into the EMS account.  The liquidators sought orders to this effect and in respect of their remuneration. **(c) Decision**  **(i) Distribution of funds**Dalton J observed that whilst it may be possible to discover the whereabouts of some of the Bank Investors' money, any attempt to do so would involve time and expense well beyond what could be justifiable given what little remained of the total amount invested with the respondents.  For practical purposes, it would be impossible to identify any particular money as being that of any particular investor.  In these circumstances, Dalton J considered the appropriate course to be for the liquidators to make a rateable distribution of funds.  Dalton J then considered how the rateable distribution should be made.  Whilst there was no doubt that the investments made by Groundhog Investors were received by Groundhog and all of those funds were irrecoverable except for approximately $89,000 paid into the EMS account, Dalton J observed that Groundhog Investors have received almost 10 times that amount by way of 'interest payments' from the EMS account.  In this respect Bank Investors as a whole has subsidised 'interest payments' to the group of Groundhog Investors.  In these circumstances, Dalton J considered it appropriate for the remaining funds to be rateably distributed between the Bank Investors only whilst treating Mr Stephen Andrew as a Bank Investor and made directions to this effect. **(ii) Remuneration of liquidators** At the outset, Dalton J noted that where liquidators are appointed as officers of a company which is a trustee, only costs which are attributable to the administration of trust property are able to be recovered from trust assets and work solely concerned with the winding up and not with the administration of trust assets cannot ordinarily be charged against trust assets.      Dalton J then considered whether the liquidator's proposed remuneration was fair and reasonable.  In this case the court order appointing the liquidators required that they charge in accordance with a scale of fees and charges, essentially time-costing.  When using this method of costing, Dalton J observed that liquidators do not discharge the onus of showing that their costs are fair and reasonable merely by proving that their staff spent a certain amount of time performing work described in very broad terms. Rather there must be material before the court which shows that the work undertaken was appropriate and necessary. During the hearing Dalton J flagged concerns to counsel for the liquidators that the sworn descriptions of work by the liquidators, and their lawyers, were too general to enable the court to have any real understanding of what work was performed and why it was necessary or appropriate.  On the other hand, information in the time-costing schedules exhibited to those affidavits was far too detailed to allow the court to have any real understanding of what the liquidators aimed to achieve and how they went about that, in order to judge the reasonableness of the type of work performed, and the value of that work.  As a consequence, counsel for the liquidators sought 14 days in which to file further affidavit material and submissions to address the court's concerns and further affidavits were received from the liquidators and the solicitors. Having regard to the work performed by the liquidators as set out in their affidavit, Dalton J generally observed that the liquidation was small and uncomplicated with all the identifiable assets obtained by April 2003, and the creditors having voted against making any further enquiries by May 2003.  With further enquiries which were prompted by representations made to the liquidators finalised by 2004, Dalton J observed that the work of liquidating the companies and scheme was virtually over by 2004. However, the liquidations did not come to an end then with over six years spent essentially preparing for the application to the court. Dalton J then considered the time spent on preparing for the application and made the following observations:both the time spent, and the inefficiency in achieving any useful result, was extraordinary and unjustified; during this time the creditors of the respondents were denied what little money remained of their investments; the gross inefficiency impacted upon the costs incurred by the liquidators and the lawyers as a result of the law changing twice after the initial advice was provided, the inability to exclude all time spent as a result of changes in staff and the additional time spent by staff re-familiarising themselves with the detail of both the accounting and legal work which fed into the application and the affidavits supporting it after lengthy delays; the main affidavit was excessive in the material it exhibited and, so far as it dealt with the liquidators' claim to remuneration, was not sufficient to enable the court to understand the work performed for the purpose of the application; and the amount of time and cost which was spent preparing for the application was disproportionate to the amount of time and cost which was spent in liquidating the companies and the scheme. On this basis, Dalton J made orders approving liquidators' fees and disbursements already paid in the amount of $147,370.94 having made significant reductions to the amount of liquidators' fees and disbursements which were considered to be fair and reasonable.  Dalton J then made similar criticisms in relation to the legal fees incurred by the liquidators before making orders approving $112,514 of unpaid disbursements, making a total of $259,885 together with the amount approved for liquidators' fees and disbursements.etailed Contents**5.8** **No oppression of minority shareholders who created crisis** (By Celeste Koravos, DLA Piper) Nutectime International Pty Limited v Timentel Pty Limited [2011] NSWCA 257 (5 September 2011), New South Wales Court of Appeal, Giles JA, Handley and Tobias AJJA, 5 September 2011 The full text of this judgment is available at: <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2011/257.html> **(a) Summary** The case concerned whether conduct of the affairs of Timentel Pty Ltd (the Company) was oppressive to, unfairly prejudicial to and unfairly discriminatory against the minority shareholders. The crisis facing the Company and the other shareholders (the latter being the Defendants) was created by the failure of the minority, in breach of their contractual obligations, to pay their share of the Company's expenses. Accordingly it was held that the Defendants conduct was aimed at resolving the crisis and was not oppressive. **(b) Facts**    **(i) Background** Mrs Ehsman invented a wristwatch, and applied for patents in Australia and the United States. She met Mr Brady and they agreed to work together to develop the invention. The Company was incorporated, with Mrs Ehsman owning 50% of the shares and Mr Brady the other 50%. Other parties became interested in the project and were allotted shares. Mr and Mrs Ehsman and Mr Brady became directors of the Company. **(ii) Oppression proceedings** Mrs Ehsman, a minority shareholder, brought oppression proceedings against the Company, the Defendants and their company Nucetime International Pty Ltd, under sections 232 and 233 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).  Section 232 relevantly provides: The Court may make an order under section 233 if:(a) the conduct of a company's affairs; or (b) an actual or proposed act or omission by or on behalf of a company; or (c) a resolution, or a proposed resolution, of members or a class of members of a company; is either: (d) contrary to the interests of the members as a whole; or (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity. **(iii) Supreme Court decision** In the Supreme Court, Gzell J (the trial judge) held that:the execution by the Company of a loan facility in favour of the Defendants gave the Defendants a preference over the existing loan of Mr and Mrs Ehsman. The transactions were therefore oppressive to, unfairly prejudicial to, and unfairly discriminatory against Mrs Ehsman; andthe completion of the sale agreements whereby a company controlled by the Defendants (Nutectime International Pty Ltd) purchased the assets of the Company and the application of the purchase price to pay off the Defendants' secured loan were oppressive to, unfairly prejudicial to, and unfairly discriminatory against Mrs Ehsman.**(c) Decision**   **(i) Sale of Company assets** The Court of Appeal held that the Defendants plan was to cope with the situation created by the Ehsmans' refusal to contribute their share of development costs. Given the Ehsmans' refusal to contribute the share of the development costs, and the disclosures made, the sale was not oppressive or unfairly prejudicial. The Defendants, having invested over $2 million in the project, invested a further $246,000 in the form of a secured loan. After the sale they invested further money. Two years later they had nothing to show for their further investment. The watch was not marketable and technical problems were greater than anyone realised at the time.  Counsel for the respondents submitted that the Defendants "set up a situation" through the short-term secured loan and charge to enable them to acquire the assets for themselves. However the Court noted that Mrs Ehsman was kept fully informed at each stage. In April 2005, she could have paid her arrears and contributed her share of the fresh funds needed to secure the patent, but elected not to do so. In August 2005 she could have made a counter offer for the assets and either taken over the project or driven up the price. She could also have offered to make contributions to the cost of developing the watch. She knew that when she did nothing, the Defendants would end up buying the assets at the price they nominated. **(ii) Discharge of Defendants' loan** The discharge of the secured loan did not confer any preference on the Defendants and did not discriminate against the Ehsmans. Contrary to the findings at first instance, if the Company's assets were not worth more than the purchase price, the sale did not discriminate against the Ehsmans. Gzell J held that the Company's failure to repay the secured loan enabled the Defendants "to exercise their charge in preference to the discharge of Mr and Mrs Ehsmans' loans and in preference to the discharge of the debts of any other creditors". However, the Court of Appeal held that the Defendants did not "exercise their charge" because section 267 of the Act prevented its enforcement. They exercised their powers as directors. The Court of Appeal held that the Defendants and DNB had been "carrying" the Ehsmans for a considerable time as the Ehsmans had refused to contribute their required share of the money. In such circumstances the Defendants were entitled to require security for any further advances that they made without appropriate contributions from the Ehsmans. The Ehsmans were invited to participate, but declined. The Court held that there was full disclosure, no discrimination, and no oppression. The Court explored the alternatives that were open to the Defendants. The Court noted that the Defendants were not obliged to make further unsecured loans to the Company to support Mrs Ehsman's equity. Doing nothing was not an option because the Defendants would have lost any chance of recouping their loans. In these circumstances, it was held that the Defendants did not act unreasonably in making a secured loan to the Company to enable it to pay its overdue debt to DNB and secure further patent protection. The Court concluded that the Defendants kept the project alive for the benefit of all shareholders and loan creditors, by injecting fresh funds which were advanced on a secured basis. **(iii) Orders** The Court of Appeal allowed the appeal and ordered that the order of the trial judge that Timentel be wound up be set aside, unless within 14 days a consent order is filed signed by or on behalf of the appellants. etailed Contents**5.9** **A responsible entity of a managed investment scheme is allowed to act in its own interests if acting in accordance with the trust deed**  (By Katrina Sleiman and Grant Mason, Corrs Chambers Westgarth) National Nominees Limited v Agora Asset Management Pty Ltd (No 2) [2011] VSC 425, Supreme Court of Victoria, Davies J, 1 September 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2011/425.html](http://www.austlii.edu.au/au/cases/vic/VSC/2011/425.html%22%20%5Ct%20%22_new) **(a) Summary** National Nominees Limited (First Plaintiff) held approximately $150 million worth of units in a public unit trust known as the Agora Absolute Return Fund II (Fund) on behalf of the Commonwealth Superannuation Corporation (Second Plaintiff). The Plaintiffs were the major investors in the Fund. Agora Asset Management Pty Ltd (Defendant) was the funds manager and the trustee and responsible entity of the Fund.  The Plaintiffs sought a withdrawal of their investment in the Fund (Withdrawal Request). The Defendant accepted that request and informed the Plaintiffs that they would be liable to pay an exit fee of approximately $8 million.  The Plaintiffs claimed that:the Defendant had not given proper notice of the exit fee; the exit fee claimed by the Defendant was excessive, in breach of its fiduciary duties as trustee; or in the alternative that the Defendants could charge the exit fee claimed, the Plaintiffs were allowed to cancel their Withdrawal Request. The Court found that the Plaintiffs' case failed on each claim.  **(b) Facts**    In early December 2010, the Second Plaintiff received advice from its investment advisor that the Defendant was underperforming. The board of the Second Plaintiff "resolved to terminate its investment in the Fund" and contacted the Defendant to inform it that the Second Plaintiff would require a full redemption of its investment by 31 May 2011.   On 5 May 2011, the Second Plaintiff made a formal request to the Fund's administrative services provider for redemption of the entirety of its unitholding. A formal request was also made by the First Plaintiff as the units were held by the First Plaintiff as Nominee for the Second Plaintiff (Withdrawal Request).  On 20 May 2011, an Order Receipt Confirmation was sent to the Second Plaintiff which said that there would be an exit fee charged of 'up to 5%' or an 'estimated' $7,855,878.74. An exact figure was not provided. On 23 May 2011, the CEO of the Second Plaintiff (Mr Seton) contacted the principal for the Defendant (Mr Apostopoulos) to say that the Second Plaintiff had not been aware of the exit fee and that the Board may wish to cancel the Withdrawal Request. Mr Apostopoulos responded by saying that he would not cancel the Withdrawal Request unless the Defendant and the Second Plaintiff were going to have an ongoing relationship. There was no resolution at the meeting.  On the morning of 24 May 2011, Mr Apostopoulos initiated a process for transferring the shares, which required several days so that the funds would be cleared before 31 May 2011.  On the afternoon of 24 May 2011, the Second Plaintiff purported to cancel the Withdrawal Request.  On 25 May 2011, the Defendant informed the Second Plaintiff that it did not consent to the cancellation of the Withdrawal Request.  On 27 May 2011, the Plaintiffs sought and obtained an injunction restraining the Defendant from acting upon the Withdrawal Request.  That injunction was extended until the finalisation of the legal proceedings. **(c) Decision**  **(i)   Was the Defendant able to charge an exit fee?** The relevant Trust Deed stated that the Defendant "may determine that a Unitholder has to pay a fee (Exit Fee) not exceeding 5% of the proceeds of a Withdrawal Request".  The Information Memorandum (IM) provided to the Plaintiffs when they applied to join the Fund stated that the exit fee was "nil" and that investors would be given "30 days' written notice of any proposed changes to these fees". On 16 May 2008, the Plaintiffs signed the application form which stated that they agreed to be bound by the terms of the IM and the trust deed as amended from time to time.  On 24 November 2010, the Second Plaintiff received an updated IM which included an exit fee of "up to 5% of the withdrawal request at the absolute discretion of [the Defendant]" and provided for "increases in fees charged ... within the amounts permitted to be charged by the Fund's Trust Deed". The Plaintiffs argued that the IM had to be considered in its commercial context and read in conjunction with the Trust Deed and therefore that: the Defendant was required to determine an exact amount of an exit fee prior to charging that fee; and the purpose of the 30 days' written notice requirement was to allow investors a reasonable time within which to decide whether to remain with the Fund following any fee change. Davies J rejected "both the literal and the purposive constructions ... contended for by the plaintiff" stating that the IM should be construed on its terms. Even though the IM had contractual force, it was able to be changed. The Trust Deed provided the maximum fees that could be charged within which any IM had to operate.  Her Honour therefore found that proper notice of an exit fee had been given to the Plaintiffs, through the amended IM.  The terms of the Trust Deed provided discretion to the Defendant in determining the amount of an exit fee and the Defendant had operated within that discretion.  **(ii) Was the exit fee charged excessive?** The Plaintiffs argued that the Defendant breached its fiduciary duties by determining to impose a fee of 5% as it was not referrable to actual financial impacts on the Defendant and had therefore preferred its own interests.  Davies J noted that the Defendant was not required to fix the fee by reference to or with regard to any actual costs or losses. Her Honour concluded that the fact that the Defendant had imposed the maximum fee was not, of itself, evidence that the Defendant had not acted in good faith.  **(iii) Was the cancellation of the Withdrawal Request valid?**  Clause 2.30 of the Trust Deed stated that "a Withdrawal Request may not be withdrawn without the consent of the [Defendant]". The Plaintiffs argued that it was unreasonable for the Defendant to withhold its consent and that to do so was a breach of the Defendant's fiduciary duties.  The Court agreed that the Defendant, in exercising its powers under the constitution must act honestly and in good faith and that it must refrain from acting "irresponsibly, capriciously or wantonly but with due consideration to the purpose for which the powers are conferred on it and not for some ulterior purpose".  However, the fiduciary relationship between the Defendant and the members of the Fund was circumscribed by the terms of the contractual relations between them, including the terms of the Trust Deed and any IM.  Davies J found that there had been no evidence that the Defendant had acted for an improper purpose and that since its actions were otherwise in accordance with the terms of the Trust Deed there was no reason why the Defendant should be forced to consent to the cancellation of the Withdrawal Request. etailed Contents**5.10** **Limits on the authority of the managing director**(By John O'Grady and Christie Jones, Corrs Chambers Westgarth) Smith v Butler [2011] EWHC 2301 (Ch), England and Wales High Court (Chancery Division), Behrens J, 1 September 2011 The full text of this judgment is available at:[http://www.bailii.org/ew/cases/EWHC/Ch/2011/2301.html](http://www.bailii.org/ew/cases/EWHC/Ch/2011/2301.html%22%20%5Ct%20%22_new) **(a) Summary**Contact Holdings Limited ("the Company") was the subject of a bitterly fought dispute in respect of its control by its two shareholders, Mr Smith (the majority shareholder and chairman) and Mr Butler (the minority shareholder and managing director).  Mr Butler purported to suspend Mr Smith at a board meeting.  However, under the Company's Articles of Association, two directors (one of whom must be Mr Smith) were required for a quorum at a director's meeting.  Mr Smith commenced proceedings against Mr Butler and the Company seeking a declaration that the decision to suspend him was unlawful.  Mr Butler also requested the Court to make an order, pursuant to section 306 of the Companies Act 2006 (UK) ("Companies Act"), to force a general meeting to take place with a quorum of one in order to remove Mr Butler as director. Behrens J held that Mr Smith's suspension was not a valid act of the Company and ordered that a general meeting take place as requested by Mr Smith.  His Honour rejected the argument that Mr Butler, as managing director, had the implied authority to suspend Mr Smith.  It was, his Honour held, for the board, and not Mr Butler, to suspend the chairman.  The Court also considered whether Mr Butler had authority to authorise the active defence of the proceedings issued by Mr Smith against the company.  Behrens J held that an active defence of a dispute between directors could only be authorised by resolution of the board.**(b) Facts**The Company had three directors, Mr Smith who held 68.8% of the shares, Mr Butler who held 31.2% of the shares and Mr Harris, the Group Financial Director, who held no shares.Article 10.3 of the Articles of the Company provided that no business could be transacted at a meeting of members unless a quorum of two was present, one of whom had to be Mr Smith.  Similarly, Article 17.2 provided that the quorum necessary for the transaction of business by the Directors was two, one of whom had to be Mr Smith.  During the period 2002 to 2005, Mr Smith was allegedly involved in cheque fraud where he directed funds from subsidiaries of the Company to himself.  The alleged fraudulent conduct of Mr Smith came to light, and was brought to the attention of Mr Butler, in 2009.  However, following an internal investigation no action was taken against Mr Smith.  Having earlier expressed his concern as to how the business was being run, in March 2011 Mr Smith made clear his intention to utilise his powers as majority shareholder and appoint a chief executive officer to the Company.  Mr Butler objected to this course of action.  In May 2011, Mr Butler, on behalf of the Company, instructed solicitors to investigate the abovementioned alleged fraudulent conduct of Mr Smith.A board meeting was convened on 1 July 2011 wherein Mr Butler purported to suspend Mr Smith as chairman.  There was no valid board resolution authorising such suspension.  Subsequently, Mr Butler and Mr Harris conducted the business of the Company to the exclusion of Mr Smith.On 18 July 2011, Mr Smith requested that the Company hold an extraordinary general meeting for the purpose of considering the removal of Mr Butler and Mr Harris as directors.  As Mr Butler refused to attend a deadlock occurred as the meeting would have been inquorate.  Proceedings were then commenced by Mr Smith seeking declaratory relief on the basis that the decision to suspend him was invalid and seeking an order that a general meeting take place at which the quorum be one pursuant to section 306 of the Companies Act.  Such an order was intended to facilitate the passage of a board resolution which would enable the removal of Mr Butler as director. In defence of the proceedings, Mr Butler instructed solicitors to act on his behalf, and another firm of solicitors to act on behalf of the Company.  Mr Butler further instructed the solicitors acting for the Company to engage forensic accountants Ernst & Young to investigate the alleged fraudulent conduct by Mr Smith.Counsel for Mr Smith submitted that, in the absence of a resolution by the board, Mr Butler had no power to instruct solicitors to actively defend the proceedings on behalf of the Company.Counsel for Mr Butler and the Company submitted that Mr Butler had implied authority as managing director to suspend Mr Smith in his capacity as an employee pending investigation into his conduct.  They contended that Mr Butler had implied authority to instruct solicitors to actively defend the proceedings on the basis that this was an employee dispute, and not one between shareholders, and therefore a board resolution was unnecessary.  Further, counsel for Mr Butler and the Company submitted that the Court should refuse to order a meeting pursuant to section 306 of the Companies Act pending the conclusion of the investigation into the allegedly fraudulent conduct of Mr Smith by Ernst & Young.**(c) Issues** Behrens J considered the following issues: whether the decision to suspend Mr Smith without a resolution of the Board was valid;whether the Court should order a board meeting under section 306 of the Companies Act to allow Mr Smith to pass a resolution removing Mr Butler as director of the Company;whether Mr Butler had authority to authorise the active defence of the proceedings issued by Mr Smith against the Company.**(d) Decision**As to the first issue, his Honour held that the decision to suspend Mr Smith was unlawful.  In reaching this decision, his Honour accepted Mr Smith's submission that the dispute was properly classified as one between shareholders, not one between employees.  His Honour held that the suspension of Mr Smith, as chairman, was not a commercial decision occurring within the day to day running of the business and thus fell outside the scope of Mr Butler's authority. In further support of his findings, his Honour noted that the powers of a managing director depend upon the articles of a company and relied upon articles 10.3 and 17.2 which were designed to protect Mr Smith's position as majority shareholder and enabled him to ensure a board resolution could not be passed to dismiss him.  As to the second issue, his Honour made an order, pursuant to section 306 of the Companies Act, authorising a quorum of one at a board meeting for the purpose of removing Mr Butler as a director and appointing a replacement.  His Honour, in rejecting the assertion that the alleged cheque fraud should prevent Mr Smith from exercising his rights as majority shareholder, noted that this was a case where the will of the majority was being thwarted by the refusal of the minority shareholder to attend meetings of the company so as to render the meetings inquorate.  On this basis, his Honour found that Mr Smith, as majority shareholder, ought to be entitled to exercise his ordinary voting rights to remove and appoint directors.  As to the third issue, his Honour held that Mr Butler had no authority to instruct solicitors on behalf of the Company to actively defend the proceedings.  In so finding, his Honour repeated his findings that this was a dispute between shareholders and that the articles of the company were designed to protect Mr Smith's position as majority shareholder.  Further, his Honour noted that Mr Butler was not powerless as a consequence of the alleged fraudulent conduct of Mr Smith as he had the ability to bring a minority shareholder's petition (under section 994) or bring a derivative action (under section 260) of the Companies Act.etailed Contents |

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