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We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | |  | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%231) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1 Consultation on OTC derivatives**   On 19 July 2010, the Committee of European Securities Regulators (CESR) published two consultation papers on OTC derivatives. They are:   **(a) Standardisation and exchange trading of OTC derivatives**    In this paper CESR explores the need for taking regulatory actions in relation to further standardisation for credit, equity, interest rate, commodity and foreign exchange derivatives both as a means in itself and also in relation to the promotion of trading of these derivatives on organised markets. The paper does not analyse issues related to post-trading and in particular eligibility for clearing.   In relation to standardisation, CESR is of the opinion that firms should be able to retain the flexibility to customise aspects such as standard valuation, payment structures and payment dates given the role that OTC derivatives, and in particular bespoke products, play in meeting hedging needs. Nevertheless, CESR is of the view that greater standardisation of OTC derivatives contracts can deliver efficiency benefits to the market. In particular, CESR has identified the use of electronic confirmation systems as one measure which could potentially deliver benefits to the market.   In relation to exchange trading of derivatives currently traded OTC, CESR believes that trading on organised markets could deliver a number of benefits like providing a higher level of transparency, enhancing liquidity, ensuring efficiency and risk reduction and providing easy access for market participants. There are however also a number of limitations or pre-requisites to exchange trading of derivatives that may explain why the OTC segment of the market remains very large: the need for the contracts to be standardised, the inability to customise contracts according to individual customers' needs and the limited possibility for products innovation. As a preliminary opinion, CESR is in favour of incentivising the use of organised trading venues but continues to consider whether mandatory usage is desirable, taking into account the discussions currently taking place on this issue in other jurisdictions and international fora.   **(b) Transaction reporting on OTC derivatives and extension of the scope of transaction reporting obligations**   This consultation paper sets out CESR's proposal for the possible organisation of transaction reporting on OTC derivatives as well as for the extension of the scope of transaction reporting obligations.   The consultation papers are available on the [CESR](http://www.cesr.eu/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.2 Goldman Sachs to pay US$550 million to settle SEC charges related to subprime mortgage CDO**   On 15 July 2010, the US Securities and Exchange Commission (SEC) announced that Goldman, Sachs & Co will pay US$550 million and reform its business practices to settle SEC charges that Goldman misled investors in a subprime mortgage product just as the US housing market was starting to collapse. In agreeing to the SEC's largest-ever penalty paid by a Wall Street firm, Goldman also acknowledged that its marketing materials for the subprime product contained incomplete information.  In its 16 April 2010 complaint, the SEC alleged that Goldman misstated and omitted key facts regarding a synthetic collateralized debt obligation (CDO) it marketed that hinged on the performance of subprime residential mortgage-backed securities. Goldman failed to disclose to investors vital information about the CDO, known as ABACUS 2007-AC1, particularly the role that hedge fund Paulson & Co Inc played in the portfolio selection process and the fact that Paulson had taken a short position against the CDO.  In settlement papers submitted to the US District Court for the Southern District of New York, Goldman made the following acknowledgement:  "Goldman acknowledges that the marketing materials for the ABACUS 2007-AC1 transaction contained incomplete information. In particular, it was a mistake for the Goldman marketing materials to state that the reference portfolio was "selected by" ACA Management LLC without disclosing the role of Paulson & Co Inc in the portfolio selection process and that Paulson's economic interests were adverse to CDO investors. Goldman regrets that the marketing materials did not contain that disclosure."  This is the largest penalty ever assessed against a financial services firm in the history of the SEC.  Goldman agreed to settle the SEC's charges without admitting or denying the allegations by consenting to the entry of a final judgment that provides for a permanent injunction from violations of the antifraud provisions of the Securities Act of 1933. Of the US$550 million to be paid by Goldman in the settlement, US$250 million will be returned to harmed investors through a Fair Fund distribution and US$300 million will be paid to the US Treasury. The settlement also requires remedial action by Goldman in its review and approval of offerings of certain mortgage securities. This includes the role and responsibilities of internal legal counsel, compliance personnel, and outside counsel in the review of written marketing materials for such offerings. The settlement also requires additional education and training of Goldman employees in this area of the firm's business. In the settlement, Goldman acknowledged that it is presently conducting a comprehensive, firm-wide review of its business standards, which the SEC has taken into account in connection with the settlement of this matter. The settlement is subject to approval by the Honorable Barbara S Jones, United States District Judge for the Southern District of New York.  The settlement, if approved by Judge Jones, resolves the SEC's enforcement action against Goldman related to the ABACUS 2007-AC1 CDO. It does not settle any other past, current or future SEC investigations against the firm. Meanwhile, the SEC's litigation continues against Fabrice Tourre, a vice president at Goldman.  Further information is available on the [SEC](http://www.sec.gov/news/press/2010/2010-123.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.3 US Congress passes financial reform legislation**   On 15 July 2010, the US Senate voted to approve the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act) which followed the vote of the US House of Representatives on 30 June 2010. On 21 July 2010, President Obama signed the legislation into law.    The key aspects of the Act are the following:  **Mortgage Reform and Minimum Lending Standards.** The Act requires the establishment of minimum standards for originating mortgages and regulates the remuneration of mortgage brokers.    **Consumer Financial Protection Bureau.** The Act provides for the establishment of a Consumer Financial Protection Bureau that will have broad authority to develop and implement rules regarding most consumer financial products.   **Sale of Mortgage Loans.** The SEC and federal banking agencies are required to establish regulations to require any issuer of an asset-backed security to retain 5% of the credit risk for any asset, including certain residential mortgage assets that the issuer transfers, sells or conveys to a third party.   **Abolishment of OTS.** The Office of Thrift Supervision (OTS) will be merged into the Office of the Comptroller of the Currency (OCC); however, the thrift charter will continue to exist. The OCC will take over responsibility for supervising federal savings associations and is expected to create a separate division to supervise savings associations. The Federal Reserve will take over responsibility for supervising savings and loan holding companies and any other subsidiary (other than a depository institution) of a savings and loan holding company. The Federal Deposit Insurance Corporation (FDIC) will take over the OTS' duties in supervising state savings associations.   **Volcker Rule.** The Act amends the Bank Holding Company Act of 1956 to limit banking entities' ability to engage in proprietary trading and to own interests in hedge funds or private equity funds. A banking entity must limit its ownership interest in a hedge fund or private equity fund to 3% of the total ownership interests of the fund. The total aggregate of all of the banking entity's interests in such hedge funds or private equity funds may not exceed 3% of the Tier 1 capital of the banking entity. The term "banking entity" is defined to include an insured depository institution, any company controlling an insured depository institution and such company's affiliates and subsidiaries. A banking entity must bring activities and investments into compliance no later than two years after the requirements of this section become effective (three one-year extensions may be requested). The aim of this provision is to reduce the amount of speculative investments on large firms' balance sheets.   **Regulation of Derivatives/Swaps.** The Act establishes a regulatory framework for the derivatives market and restricts federally insured depository institutions from participating in some of the riskiest derivative and swap transactions.  - Derivatives Regulation.Requires the promulgation of new SEC and CFTC regulation of the over-the-counter derivatives market, including any puts, calls, caps, floors, collars or similar options based on the value of one or more interest rates or currency, commodity, security, instrument of indebtedness, index, quantitative measure or other financial or economic interest. In addition, the Act gives the CFTC the authority to issue rules requiring the public disclosure of swap transactions' pricing data.   - Banks Must Spin Off Derivatives Activities. A federally insured depository institution must establish a separately capitalized affiliate to engage in higher-risk swap transactions such as uncleared credit default swaps. The precise nature of the affiliations that will be permitted will be defined in regulations to be adopted.   - Certain Lower-Risk Activities Permitted. A bank must limit its own swap or derivatives activity to hedging, interest rate swaps or foreign exchange swaps, or similar risk-mitigating activities directly related to a traditional bank's activities, which generally includes assets that are permissible for investment by a national bank.  **Financial Services Oversight Council.** The Act creates a 10 member Council that is authorised and directed to determine which large bank and non-bank entities are systemically significant and should be subject to stricter regulation. The Council will include the Secretary of the Treasury, Chairman of the Federal Reserve, FDIC Chairman, Comptroller of the Currency, SEC Chairman, CFTC Chairman, Federal Housing Finance Agency Chairman, Director of the Consumer Financial Protection Bureau, Chairman of the National Credit Union Administration and an individual selected by the President. The Federal Reserve will have supervisory authority over the applicable bank holding companies (US$50 billion or more in assets) and non-bank entities designated by the Council and will have authority to set more stringent capital, liquidity and leverage requirements for these entities.   **Resolution Authority.** The Act creates an orderly liquidation procedure for the resolution of failing bank holding companies, non-bank financial institutions supervised by the Federal Reserve (pursuant to a determination by the Council described above) and any other company that is primarily engaged in activities that are financial in nature, which pose a significant risk to the financial stability of the United States.     **Corporate Governance Matters.** The Act includes a variety of provisions intended to increase shareholders' rights and improve disclosure of remuneration matters. The Act also directs the federal bank regulators to issue joint rules on remuneration paid by financial institutions with at least US$1 billion in assets.  - Say on Pay. The Act requires publicly traded financial services companies to obtain a non-binding shareholder vote to approve remuneration of named executive officers as disclosed in the proxy statement at least once every three years.   - Golden Parachutes. In any proxy vote in which shareholders of publicly traded financial services companies are asked to approve an acquisition, merger, consolidation or proposed sale, the company making such solicitation must disclose in the proxy any agreements or understandings that such a company has with any named executive officers of such issuer concerning any type of remuneration that is based on or otherwise relates to the acquisition, and the aggregate total of all such remuneration that may be payable to such executive officer upon consummation of the acquisition. Any such proxy must contain a non-binding shareholder vote to approve such agreements or understandings and remuneration as disclosed.   - New Executive Remuneration Disclosure; Clawbacks. The Act requires enhanced remuneration disclosure showing remuneration paid compared with financial performance of the issuer. In addition, each issuer will be required to develop policies for the recovery of incentive-based remuneration from any current or former executive that was paid based on erroneous accounting information.   - Shareholder Access. The Act authorises the SEC to issue rules that permit shareholders to include their nominees for director elections in the issuer's proxy solicitation materials.   - SOX 404(b) Exemption for Smaller Issuers. The Act also permanently exempts publicly traded companies with less than US$75 million in public float from complying with the requirement in section 404(b) of the Sarbanes-Oxley Act of 2002 to include an auditor attestation report on the issuer's internal control over financial reporting.   - Fiduciary Duty of Broker-Dealers. The Act authorises the SEC to establish a fiduciary duty for brokers and dealers when providing personalised investment advice to retail customers-this proposed duty is the same standard applicable to investment advisers.  **Hedge Funds.** The Act requires advisers to hedge funds and private equity funds to register with the SEC as investment advisers and provide information about their trades and portfolios necessary to assess systemic risk.  - Document Retention. The SEC is required to conduct periodic and special inspections of the records of hedge funds and private equity funds maintained by an investment adviser.     - Exemptions.There is a carve-out in the Act exempting investment advisers to venture capital firms (to be defined by the SEC within one year of the date of enactment of the Act) from the new registration requirements. The Act specifically exempts any investment adviser to hedge funds and private equity funds that has assets under management in the United States of less than US$150 million.  **Credit-Rating Firms.** The Act introduces a strict regulatory framework for credit-rating firms to improve quality of ratings, objectivity and accountability for poor analysis.  - SEC Oversight of Firms.The Act creates an Office of Credit Ratings at the SEC with its own compliance staff and authority to fine agencies. The SEC will be required to examine Nationally Recognized Statistical Ratings Organizations (NRSROs) at least once a year and publicise findings. NRSROs will be required to submit an annual report to the SEC that will contain an assessment of the effectiveness of the internal controls and an attestation of the chief executive officer of the NRSRO. The SEC will have the authority to suspend or revoke the registration of NRSROs if it determines that a firm does not have the financial and managerial resources to consistently produce credit ratings with integrity.     - Private Right of Action for Investors; Expert Liability. The Act also introduces a private right of action for investors against rating agencies for a "knowing or reckless" failure to conduct a reasonable investigation. NRSROs will also be subject to "expert liability" with the nullification of Rule 436(g) of the Securities Act, which provides an exemption for ratings provided by NRSROs from being considered part of the registration statement.  **Insurance.** The Act creates a new federal agency with respect to insurance. The Act establishes the Federal Insurance Office within the Treasury, which among other things will (i) monitor all aspects of the insurance industry, (ii) monitor the extent to which underserved communities have access to affordable insurance products, (iii) recommend to the Oversight Council that an insurer be regulated as a non-bank company by the Federal Reserve, and (iv) determine when state insurance measures are pre-empted.    The full text of the Act is available on the [Govtrack](http://www.govtrack.us/congress/bill.xpd?bill=h111-4173" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.4 Reform of capital and liquidity requirements for banks**   On the meeting held on 14-15 July 2010, the Basel Committee on Banking Supervision reviewed the design and overall calibration of the capital and liquidity frameworks, comments on its December 2009 consultation package, the results of its comprehensive quantitative impact study (QIS) and its economic impact assessment analyses.   Based on this review, the Committee has developed recommendations for completing its package of regulatory reforms. The Committee will present to the Central Bank Governors and Heads of Supervision concrete recommendations for the definition of capital, the treatment of counterparty credit risk, the leverage ratio, the conservation buffer and the liquidity ratios.    The Committee also reviewed proposals for the role of "gone concern" contingent capital in the regulatory capital framework and will issue shortly a proposal for consultation. It continues to assess proposals on contingent capital from a "going concern" perspective.    The Committee issued for consultation a countercyclical capital buffer proposal. The countercyclical buffer would be imposed when, in the view of national authorities, excess aggregate credit growth is judged to be associated with a build-up of system-wide risk. This will help ensure the banking system has an adequate buffer of capital to protect it against future potential losses. The Committee has already consulted on the capital conservation buffer, which was elaborated in the December 2009 reform package.    The Committee also continues to review specific proposals to address the risks of systemic banking institutions. These include a "guided discretion" approach for a systemic capital surcharge in combination with other mitigating regulatory and supervisory measures.    The consultation document is available on the [Bank for International Settlements](http://www.bis.org/publ/bcbs172.pdf?noframes=1" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.5 SEC seeks comment on US proxy system**   On 14 July 2010, the US Securities and Exchange Commission (SEC) voted unanimously to issue a concept release seeking public comment on the US proxy system and asking whether rule revisions should be considered to promote greater efficiency and transparency. The US proxy system governs the way in which investors vote their shares in a public company regardless of whether they attend shareholder meetings.    The SEC's concept release focuses on the accuracy and transparency of the voting process, the manner in which shareholders and corporations communicate, and the relationship between voting power and economic interest.  **(a) What is the US proxy system?**   The US proxy system governs how investors vote their shares on matters presented to shareholders at shareholder meetings. Most investors vote their shares by proxy - that is, they give authority to someone else to vote their shares according to their instructions. This means that investors can vote their shares without having to attend shareholder meetings.    Many investors are "record owners" - that is, their names are listed in the company's shareholder records - and they can vote their shares directly by granting a proxy. The vast majority of investors in US companies, however, hold their shares in "street name" - that is, in customer accounts with a securities intermediary, which is usually a broker or bank. To vote their shares, these investors, who are also known as "beneficial owners," typically give voting instructions to their securities intermediary or to a third party (known as a "proxy service provider") retained by the securities intermediary to receive voting instructions on its behalf.    In turn, the securities intermediary will reflect the beneficial owners' voting instructions when executing its proxy for shares held in its customer accounts. Ultimately, proxies from record owners and proxies from securities intermediaries (reflecting voting instructions from beneficial owners) are delivered to a vote tabulator to determine the outcome of the vote.   **(b) What issues does the concept release address?**   The concept release, which requests comment on matters relating to the US proxy system, is organized under three general areas:  Accuracy, transparency, and efficiency of the voting process.  Communications and shareholder participation.  Relationship between voting power and economic interest.  The specific matters covered in those areas are:   **Over-voting and under-voting of shares:** At times, a broker-dealer - or other securities intermediary - may cast more votes, or fewer votes, than the number of shares that the intermediary actually holds. This imbalance results from the way securities transactions are cleared and settled in the US markets.  Some securities intermediaries, primarily broker-dealers, have developed methods to reconcile their records and allocate votes to their customers in order to avoid "over-voting." One of those methods, however, may result in "under-voting," which occurs when investors who are allocated the ability to vote fail to do so, and other investors who do vote may be allocated a number of votes fewer than the number of shares they hold.   The concept release seeks comment on whether over-voting or under-voting is a problem, and if so, whether the method used by the broker-dealer to allocate votes should be disclosed, and whether the Commission should require the use of a particular method.   **Vote confirmation:** The concept release explores the possibility of requiring vote tabulators, securities intermediaries, and proxy service providers to provide each other with access to vote data so investors and issuers can confirm that votes have been received and tallied according to investors' voting instructions.   **Proxy voting by institutional securities lenders:** Institutional shareholders often lend their securities, and shares on loan generally cannot be voted by the lender unless the shares are recalled. Without sufficient advance notice of the matters to be voted on, lenders may not be able to recall shares in time to vote on matters of interest. The concept release examines whether shareholders would be helped by requiring the agenda items at shareholder meetings to be identified earlier, so that lenders can make a decision to re-call their shares and vote on issues important to them. In addition, the concept release explores whether mutual funds and closed-end funds should be required to disclose the number of shares that a fund votes at a particular meeting, in addition to how that fund votes.   **Proxy distribution fees:** Stock exchange rules, last revised in 2002, establish the maximum fees that a member broker-dealer may charge an issuer as "reasonable reimbursement" for forwarding proxy materials. In response to concerns about whether this fee structure continues to constitute reasonable reimbursement, the concept release discusses several potential actions, including having the stock exchanges revise the fee schedule or eliminate it in favour of allowing market forces to determine appropriate fees.   **Issuers' ability to communicate with beneficial owners of securities:** Some issuers have expressed concerns that they are limited in their ability to communicate directly with their shareholders. These issuers cite the "street name" system of ownership, as well as rules allowing beneficial owners to object to having their identities disclosed to issuers, as reasons for this concern. Among other things, the concept release seeks comments on whether to preserve, eliminate, limit, or discourage the use of objecting beneficial owner status.   **Potential means to facilitate retail investor voting participation:** The concept release presents several ideas that could potentially improve retail investor voting participation, including:  Improving investor education  Enhancing brokers' Internet platforms  Permitting advance voting instructions for retail investors  Enhancing investor-to-investor communications  Improving the use of the Internet for distribution of proxy materials.  **Data-tagging proxy-related materials:** At the suggestion of the SEC's Investor Advisory Committee, the concept release seeks comment on whether data-tagging proxy-related data, such as information relating to executive compensation and director qualifications, might enhance a shareholder's ability to analyse issuer disclosures to make informed voting decisions.   **Role of proxy advisory firms:** Some companies and investors have raised concerns that proxy advisory firms may be subject to conflicts of interest or may fail to conduct adequate research and base recommendations on erroneous or incomplete facts. As a result, the concept release seeks comment on improving disclosure of potential conflicts of interest, enhancing regulatory oversight over the formation of voting recommendations, and requiring eventual public disclosure by proxy advisory firms of their voting recommendations in Commission filings.   **Dual record dates:** Companies set a date - known as the "record date" - on which persons who are shareholders on that date are entitled to receive notice of a meeting and to vote at the meeting. If a shareholder sells after the record date, that person (who no longer holds the shares) still has the right to vote. This can mean that holders without an economic stake in the matter can influence the outcome of a vote.    Recent changes to state law, however, now allow for "dual record dates" - one for determining who is entitled to receive notice of the meeting and a later one for determining who can vote at the meeting. The concept release requests comment on whether the Commission's rules should be revised to accommodate dual record dates.    **"Empty voting":** The concept release requests comment on whether "empty voting" and related activities are being used to inappropriately influence corporate voting results. "Empty voting" occurs when a shareholder's voting rights substantially exceed its economic interest in the company - that is, its voting rights are "decoupled" from its economic interest. For example, if a holder of shares buys a put option to sell those shares, the holder retains voting rights on all of those shares, even though it has hedged away at least some of its economic interest. Empty voting can also occur if a shareholder sells its shares after the record date of a shareholder meeting, but before the meeting. In that instance, the shareholder retains the right to vote those shares, even though it no longer has an economic interest in those shares. The release requests comment on, for instance, whether the Commission should consider requiring disclosure of decoupling activities as a possible regulatory response.   With respect to each of these topics, the concept release describes the concerns that have been expressed by market participants, presents several possible regulatory responses to such concerns, and presents specific questions for public comment.   The concept release is available on the [SEC](http://www.sec.gov/rules/concept/2010/34-62495.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.6 EU Commission proposes package to boost consumer protection and confidence in financial services**  On 12 July 2010, the European Commission proposed changes to existing European rules to further improve protection for bank account holders and retail investors. The Commission also launched a public consultation on options to improve protection for insurance policy holders, including the possibility of setting up Insurance Guarantee Schemes in all Member States. For bank account holders, the measures adopted mean that in case their bank failed, they would receive their money back faster (within 7 days), increased coverage (up to ?100,000) and better information on how and when they are protected. For investors who use investment services, the Commission proposes faster compensation if an investment firm fails to return the investor's assets due to fraud, administrative malpractice or operational errors, while the level of compensation is to go up from ?20,000 to ?50,000. Investors will also receive better information on when the compensation scheme would apply and get better protection against fraudulent misappropriations where their assets are held by a third party - such as in the recent Madoff affair.    Information on the Deposit Guarantee Schemes is available on the [EC](http://ec.europa.eu/internal_market/bank/guarantee/index_en.htm" \t "_new) website.    Information on the Investor Compensation Scheme Directive is available on the [EC](http://ec.europa.eu/internal_market/securities/isd/investor_en.htm" \t "_new) website.   Information on the Insurance Guarantee Schemes is available on the [EC](http://ec.europa.eu/internal_market/insurance/guarantee_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.7 IOSCO transparency of structured finance products report**   On 9 July 2010, the Technical Committee (TC) of the International Organization of Securities Commissions (IOSCO) published a report titled 'Transparency of Structured Finance Products' (SFPs).   Most market participants consulted by the TC took the view that a carefully developed post-trade transparency regime with a phased implementation would be beneficial to market efficiency. All respondents to the earlier TC Consultation Report agreed that the level of post-trade transparency on any particular market needs to be carefully tailored on the basis of the characteristics of that particular market and the particular SFPs being traded.   In some other important ways, views from market participants varied considerably. In general, buy-side participants are supportive of increased post-trade transparency for SFPs. They expressed the view that increased transparency would assist them in valuing these products, and in general lead to an improvement in price discovery and liquidity. Buy-side participants were supportive of increasing trade transparency, starting with the most liquid and standardised SFPs, with further analysis needed by member jurisdictions before moving onto less liquid SFPs.   In contrast, sell-side participants raised some concerns about post-trade transparency in SFPs. While most sell-side participants agreed that post-trade transparency of some products could be beneficial, they stressed the need for regulators to carefully consider individual market characteristics before mandating post-trade transparency in even the most liquid SFPs. One of their primary concerns is that the non-standardised, complex and illiquid nature of structured finance products would make meaningful price comparability difficult or impossible. However some sell-side participants agreed that if carefully tailored to the particular product and market, and limited to the most liquid and standardised SFPs, increased post-trade transparency could be beneficial to market efficiency.   The TC recognises that there are divergent views about the merits of requiring enhanced post-trade transparency for SFPs, but nevertheless believes that greater information on traded prices would be a valuable source of information for market participants. The TC therefore recommends that member jurisdictions should seek to enhance post-trade transparency of SFPs in their respective jurisdictions taking into account the benefits of and issues related to post-trade transparency discussed in the report.    In the TC's view, member jurisdictions should work initially towards implementing post-trade transparency taking into account the factors mentioned below. To do this, member jurisdictions will need to gain a detailed understanding of how those factors apply in their market. Following the implementation of post-trade transparency for one or more particular types of securities, member jurisdictions should carefully analyse the impact of the transparency on the market for these SFPs, and look to extend post-trade transparency to other securities, when it deems it beneficial to do so.   In the TC's view, it is appropriate for post-trade transparency regimes to be tailored to take into account the unique nature of the market and participants in each jurisdiction, and each member jurisdiction is best placed to judge the appropriate time, scope and manner for enhancing post-trade transparency.  The TC believes that enhanced post-trade transparency should be provided in the most cost-effective way reasonably possible, but should at the same time seek to avoid a negative impact on efficiency and liquidity of markets. The TC believes that it would be appropriate to develop a post-trade transparency regime that provides for the transparency of trade-by-trade data or aggregate data, depending on the liquidity of the particular SFP. Over time, member jurisdictions should seek to move to greater trade-by-trade transparency, where it believes that doing so would provide an overall benefit to the market without revealing a substantial amount of private information.    In light of the above, the TC believes that, amongst other things, member jurisdictions should consider the following factors when seeking to develop a post-trade transparency regime for SFPs:  The degree of liquidity or secondary market trading for a particular SFP;  The initial and outstanding amount of the issue;  The rating of the issue;  Whether the SFP was publicly offered or offered via private placement;  Whether there is a broad investor base for the particular instrument;  The degree of standardisation of a particular SFP;  Costs of implementation of a post-trade transparency regime or costs of extending any existing post-trade transparency system to SFPs;  Any appropriate time delays in publishing trade information;  Whether to require the dissemination of trade-by-trade or aggregate trade information; and  Thresholds with respect to the disclosure of trade volumes and further measures to help ensure anonymity of the market participants.  The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD326.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.8 Release of Green Paper on phase two of national credit reforms**    On 7 July 2010, the Australian Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, announced the release of the Consumer Credit Reform Green Paper, 'National credit reform - Enhancing confidence and fairness in Australia's credit law', for public comment.    The release of the Phase Two Green Paper builds upon the completion of Phase One, the commencement of the new National Consumer Credit Code on 1 July 2010.   The Green Paper outlines the options for enhancing the new National Consumer Credit Law in particular areas such as credit cards, small business credit, reverse mortgages, and fringe lending.  The paper is available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=038&ContentID=1852" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.9 EU launches debate on the future of pensions**   On 7 July 2010, the European Commission published a consultation paper on how to ensure adequate, sustainable and safe pensions and how the EU can best support the national efforts. Ageing populations in all Member States have put existing retirement systems under massive strain and the financial and economic crisis has only increased this pressure.    The paper addresses the following issues:  Ensuring adequate incomes in retirement and making sure pension systems are sustainable in the long term;  Achieving the right balance between work and retirement and facilitating a longer active life;  Removing obstacles to people who work in different EU countries and to the internal market for retirement products;  Making pensions safer in the wake of the recent economic crisis, both now and in the longer term; and  Making sure pensions are more transparent so that people can take informed decisions about their own retirement income.  In 2008 there were four people of working age (15-64 years old) for every EU citizen aged 65 years or over. By 2060, that ratio will drop to two to one. The recent financial and economic crisis has aggravated and amplified the impact of these demographic trends. Setbacks in economic growth, public budgets, financial stability and employment have made it more urgent to adjust retirement practices and the way people build up entitlements to pensions.   The Green Paper and Commission staff working document are available on the [EC](http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=839&furtherNews=yes" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.10 Final report of superannuation review published**   On 5 July 2010, the final report of the Review of the Governance, Efficiency, Structure and Operation of Australia's superannuation system was published. The following is an edited extract from the 'Review Highlights' section of the report.   **MySuper -** is a product suitable for the majority of members. The MySuper concept is aimed at lowering overall costs while maintaining a competitive market‐based, private sector infrastructure for super. The concept draws on and enhances an existing and well-known product (the default investment option). MySuper takes this product, simplifies it, adds scale, transparency and comparability, all aimed at achieving better member outcomes.   **SuperStream -** is a package of measures designed to bring the back-office of superannuation into the 21st century. Its key components are the increased use of technology, uniform data standards, use of the tax file number as a key identifier and the straight-through processing of superannuation transactions.   **Regulating for efficiency -** APRA would have an increased mandate to oversee and promote the overall efficiency and transparency of the superannuation system. To this end, APRA would be given a standards-making power in superannuation as a tool for driving transparency and comparability of member outcomes.   **Self Managed Superannuation Funds (SMSFs) -** The SMSF sector is largely successful and well-functioning. Significant changes are not required, but measures relating to service providers, auditors and the regulatory framework are recommended.   **Scale matters -** There are substantial benefits for members arising out of increased scale in the superannuation industry. MySuper providers would be exposed to scrutiny and pressure on this issue and would be required to consider each year whether they had sufficient scale to optimise outcomes for members.   **Governance -** Nearly all the issues looked at in the Review link back to trustee governance in some way or other. Improving governance practices and structures is key to improving member outcomes. A Code of Trustee Governance is proposed.   **Helping members compare** - In order to make meaningful choices (or to understand their personal situation) members need to be able to make 'like with like' comparisons between competing superannuation products. Standard product 'dashboards' and standardised investment performance reporting are recommended.   **Insurance in super -** Commissions should be banned on all insurance products in super, including group risk and personal insurance. Trustees will continue to be able to offer life, TPD and income protection insurance in MySuper and choice investment options.   **Systemic transparency -** Each fund would be required to provide free of charge on its website, detailed financial and operational information about the fund (including its portfolio holdings) and about the fund's management to greatly increase accountability and availability of information to those who are interested.   **Whole of life focus -** The super system exists to enhance retirement incomes for working Australians, not simply to accumulate assets. MySuper should be a whole of life product and include a single type of retirement income stream product chosen by the trustee and not just cater for members in the pre‐retirement phase. Trustees would have a duty to address longevity, inflation and investment risks for retirement phase members in developing their strategies.   **Data -** Improving the quality and availability of data and research on the superannuation industry facilitates decision‐making, ensures participants in the industry are held to account by members, regulators and peers and gives confidence in the integrity of the system. The importance of this issue justifies regulatory intervention so APRA would have an increased role in this area.   **Dollar savings for the system -** Treasury estimates short‐term annual system savings of about $1.55B and long term annual system savings of around $2.7B as a result of MySuper and SuperStream.   **Dollar savings for members -** Treasury estimates that the MySuper and SuperStream proposals would, in the long‐run, see a cut of around 40 per cent in fees for the average member. This would lift their final superannuation balance by around $40,000 or 7 per cent after 37 years in the work force.   The report is available on the [Review](http://www.supersystemreview.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.11 Links between corporate law and human rights: Report**  On 5 July 2010, the Special Representative of the UN Secretary-General (SRSG) on Business and Human Rights published the Corporate Law Project (CL Project). It identifies whether and how corporate and securities law in over 40 jurisdictions currently encourages companies to respect human rights.   The surveys indicate that current corporate and securities law does recognize human rights to a limited  extent. Put simply, where human rights impacts  may  harm  the  company's  short  or  long term interests if  they  are  not  adequately  identified,  managed  and  reported, companies and their officers may risk non-compliance with a variety of rules promoting corporate governance, risk management and market safeguards. And even where the company  itself  is  not  at  risk, several states recognize through their corporate and securities laws that responsible corporate practice should not entail negative social or environmental consequences, including for human rights.  Yet  despite  these  links,  the  CL  Project  also  highlights  two  other  patterns.  One is a lack of clarity in corporate and securities law regarding not only what companies or  their officers  are  required  to  do  regarding  human rights but  in  some  cases  even  what  they  are  permitted  to  do.  The  other  is  the limited  (to  non-existent)  coordination  between corporate  regulators  and government  agencies  tasked  with  implementing  human  rights  obligations. As  a  result,  companies  and  their  officers  appear  to  get  little  if  any guidance  on  how  best  to  oversee  their  company's  respect  for  human rights.       The  following  is  a  brief  summary  of  the  main  trends  from  each  section  of this  paper:      **Incorporation  and  listing**:  The  surveys  suggest  that  most  jurisdictions bestow  some  form  of limited  liability and  separate legal  personality on companies  at  incorporation. Exceptions to the  applicability  of  these concepts are  rare,  with  regulators  and  courts  extremely  reluctant  to  "pierce  the  corporate veil"  except  in  limited  situations,  such  as  fraud.  Moreover,  none  of  the  surveys  indicate  that  incorporation  laws  expressly  require  companies  to  recognize  a  duty  to  society  at  the  point  of  incorporation,  although some contend  that  this  could be implied  from  obligations  to  incorporate  for  a  proper or  lawful  purpose,  especially  where  the  state  has  strong  laws  guaranteeing human  rights  protection.   The  act  of  listing  is  also  generally  not  linked  to any  recognition  of  a  duty  to  society,  although  some  listing  rules  are starting  to  encourage  companies  to  consider  and  act  on  human  rights-related  impacts,  mainly  using  environmental,  social  and  governance  language.      **Directors'  duties**:  The  surveys  indicate  that  in  most  jurisdictions  directors owe  their  duties  to  the  company  and  have  an  over-arching  duty  to  act in  the  company's  best  interests, which  generally means  the  shareholders' interests  as  a  whole. Some  jurisdictions  are  moving  towards  the "enlightened  shareholder  value"  approach,  which  means  incorporating sustainability concerns  into  assessments  of  the  company's  best  interests,  given  the potential  legal  and  reputational  risks  to  its  long  term  success  of  not  doing  so.       The surveys  suggest  that  directors  are  rarely  expressly  required  to consider non-shareholders'  interests,  such  as  those  of  employees,  customers or  community  members  impacted  by  the  company's  activities.  Nevertheless, most  surveys contend  that  if  not  considering  human  rights   impacts could  lead  to  the  company  breaching  the  law  or  encountering  reputational risk, and  thus  potentially damaging  the  company's  long-term  interests,  directors  should  consider  them  as  part  of  their  ordinary  duties  to  act  with due care  and  diligence. Most surveys also say that directors are   permitted  to  consider  such  impacts  provided  that  their  consideration  of  these  risks  accords  with  the  company's  best  interests.  But  they  also highlight that  regulators  generally  provide  little  guidance  as  to  how  to  make  such  balancing decisions,  even  where  states  have  express  legislative  provisions allowing directors to consider  social  or environmental  issues.         In  instances  where  directors  should  consider  non-shareholder  impacts, including  human  rights  impacts,  such  duties  appear  to  remain  at  the  oversight  level  and  subject  to  wide directorial  discretion.  For example, to  fulfill  these  duties directors  might  be  expected  to  help develop  processes  and  policies  to  prevent  and  address  negative  human  rights  impacts, but  they  would  not  be  responsible  for implementing  those policies and practices on a day-to-day  basis.     **Reporting**:  The  surveys  indicate that  in  most jurisdictions companies must disclose all  information that  is  "material"  or  "significant"  to their operations and financial condition. Where  a  human  rights  impact reaches that threshold,  the companies  generally  would  be required  to disclose  it. But  the surveys  also confirm  that  there  is  limited  regulatory guidance on when  a  human  rights  impact  might  reach that  threshold.   The surveys  highlight  that  some  countries  are  starting  to  require  separate corporate  social  responsibility  (CSR)  reports  for  particular  types  of  companies,  typically  listed  companies and  state-owned  enterprises. Such  provisions  tend  to  focus  on  reporting  of  policies  rather  than  impacts,  and  they  are not  subject  to  the  same  accessibility  and  verification requirements  as   financial  reports. Stock  exchanges and  voluntary  corporate  governance  guidelines  are  increasingly  encouraging  companies  to  report  on  their environmental  and social policies  but  again,  express  references  to  human  rights  are  rare.      **Stakeholder  engagement**:  The  surveys  suggest  that  there  are  generally few substantive  impediments  to  shareholders  including  human  rights  concerns in  shareholder  proposals  for  annual  general  meetings.  Moreover,  in  some  jurisdictions  there  appears  to  have  been  a  recent  shift  of  regulators being less  likely  to  agree  to  the  requests  made  by  some  companies  to  such proposals.   But there are procedural barriers.  For example, share quotas to  circulate  proxy  proposals  may  be  a  constraining  factor  for  minority  shareholders  wishing  to  raise  human  rights concerns  (such  as  socially  responsible  investors,  employees  and  community  members  impacted  by  the  company activities).  The  surveys  indicate  that  pension  fund  trustees  are  rarely  expressly required  to  consider  the  human  rights impacts of  their  investments,  although  some  are  asked  to  say  whether they have  a  socially  responsible  investment  policy. Nevertheless,  most  surveys  say  that if not considering such impacts  could  expose  the  fund  to  legal  or  reputational  risk,  then  a trustee would  need  to  consider  them. While  it  is rare  for  legislation  to  expressly  allow trustees to consider such impacts, there has been some governmental encouragement to do so.     **Other  Corporate  Governance  Issues**:  The  surveys  suggest  that  while  there  is  variation  in  the  ways  in  which  corporate  governance  codes  and  guidelines  address  CSR  issues, there  is  also  a  commonality  in  that  they are starting  to  deal  with  these  issues;  they  are  rarely  entirely "voluntary" in practice;  and  they  increasingly  rely  on  international  CSR  initiatives to  help frame  any  relevant  guidance.  Nevertheless, direct references to human rights in relevant codes and guidelines remain  rare.      According  to  the  surveys,  it  is  rare  to  require  representation  of  any constituencies  on  boards  apart  from  shareholders. Where  such  requirements exist,  typically  they  involve employees  or,  in  the  case  of  state-owned enterprises,  the  government.  It  is  also  rare  to  see  requirements  for gender  or  racial  representation  on  company  boards,  although  it  is common for  general  non-discrimination  laws  to  apply  to board  appointments.  In states  where  mandatory  gender  representation  has  been  considered  there  have  been  some constitutional  challenges  on  the  basis  that  such requirements  represent  impermissible positive discrimination.     The report is available [here](http://www.reports-and-materials.org/Ruggie-corporate-law-project-Jul-2010.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.12 Financial Reporting Council publishes UK Stewardship Code**  On 2 July 2010, the UK Financial Reporting Council (FRC) published the first Stewardship Code for institutional investors following the publication in May of the updated UK Corporate Governance Code for listed companies.   The Code includes principles on:  The monitoring of investee companies;  The escalation of activities taken to protect or enhance shareholder value;  Collective engagement;  Voting policy;  Managing conflicts of interest; and  Public reporting and reporting to clients.  The purpose of the Code is to improve the quality of corporate governance through promoting better dialogue between shareholders and company boards, and more transparency about the way in which investors oversee the companies they own.   The FRC is encouraging all institutional investors to report publicly on the extent to which they follow the Code. From the end of September 2010 the FRC will maintain on its website a list of all those who have done so.   The UK Stewardship Code is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/UK%20Stewardship%20Code%20July%2020103.pdf" \t "_new) website.  The implementation of the UK Stewardship Code is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/Implementation%20of%20Stewardship%20Code%20July%2020103.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.13 European Parliament limits bankers' bonuses**   On 2 July 2010, the European Parliament approved some of the strictest rules in the world on bankers' bonuses. Caps will be imposed on upfront cash bonuses and at least half of any bonus will have to be paid in contingent capital and shares. The Parliament also toughened rules on the capital reserves that banks must hold to guard against any risks from their trading activities and from their exposure to highly complex securities.   **(a) Bonus limit**   Upfront cash bonuses will be capped at 30% of the total bonus and to 20% for particularly large bonuses.  Between 40% and 60% of any bonus must be deferred for at least three years and can be recovered if investments do not perform as expected. Moreover at least 50% of the total bonus would be paid as "contingent capital" (funds to be called upon first in case of bank difficulties) and shares.   Bonuses will also have to be capped as a proportion of salary.  Each bank will have to establish limits on bonuses related to salaries, on the basis of EU wide guidelines, to help bring down the overall, disproportionate, role played by bonuses in the financial sector.   Finally, bonus-like pensions will also be covered.  Exceptional pension payments must be held back in instruments such as contingent capital that link their final value to the overall strength of the bank. This will avoid situations, similar to those experienced recently, in which some bankers retired with substantial pensions unaffected by the crisis their bank was facing.   **(b) Bailed out banks**   The law will introduce special measures for bailed out banks and it will restrain the overall amounts paid in bonuses.   **(c) Capital requirements for stable banks**   Two other key issues covered by the new legislation are: stricter capital rules on bank trading activities and higher standards for re-securitisations. New capital rules for re-securitisations and the trading book will ensure banks properly cover the risks they are running on their trading activity, including for types of investments such as mortgage-backed securities that were central to the crisis.  Studies show that the rules are expected to lead to banks having to hold three to four times more capital against their trading risk than they do at present.   **(d) Pay principles for all listed companies**   Separately, in a non-legislative resolution, the European Parliament called for remuneration policy principles to be extended to cover all companies listed on stock exchanges.  It proposes that listed companies be required to explain their remuneration policies if their directors' pay is deemed not to follow certain principles aimed at removing incentives to take excessive risk or to take decisions based on short-term considerations. The resolution also proposes that shareholders be given greater control over the directors of a listed company.   Finally, 'golden parachutes' handed to directors in cases of early termination should be limited to the equivalent of two years of the fixed component of the director's pay and severance pay should be banned in cases of non-performance or early departure, says the resolution, which was adopted by 594 votes to 24 with 35 abstentions.   **(e) Next steps**   The rules on bonus provisions are expected to take effect in January 2011 and those on capital requirements provisions no later than 31 December 2011.   The report on remuneration of directors of listed companies and remuneration policies in the financial services sector is available on the [European Parliament](http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2010-0208&language=EN&mode=XML" \t "_new) website.   The report on capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies is available on the [European Parliament](http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2010-0205&language=EN&mode=XML" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.14 Reform of EU investment fund market**   On 1 July 2010, the European Commission completed a program of improvements to the EU framework for investment funds. These funds known as UCITS (Undertakings for Collective Investment in Transferable Securities) accounted for over ?5 trillion of assets in 2009, which is equivalent to half of EU GDP. The new rules better empower investors by requiring a new standardised fund document, while also setting out in detail the high standards of conduct of business that UCITS fund managers must comply with. In addition, the new rules improve the efficiency of the UCITS market in the EU by introducing and facilitating new possibilities for the pooling of assets from different funds, by simplifying the cross-border distribution of UCITS and by better coordinating the work of national supervisors. The new rules are to take effect from 1 July 2011.   The Commission has adopted detailed requirements in the form of four acts (two Directives and two Regulations). Member States now have 12 months to implement the directives, while the regulations will apply from 1 July 2011. These acts cover the following areas:  Key investor information - a new standardised and harmonised disclosure document designed to empower investors to take effective investment decisions. An implementing Regulation covers the content and form of the document, including the use of plain language and a much more investor-friendly presentation of information about risk. The implementing regulation is supported by detailed methodologies on calculating a fund's level of risk and charges, which have been published by the Committee of European Securities Regulators (CESR).  Rules for the conduct of UCITS management companies - an implementing Directive aligns organisational requirements and rules of conduct for investment firms with the standards already applied across much of the financial services through the Markets in Financial Instruments Directive, otherwise known as MIFiD (see IP/07/1625). These rules also cover the prevention, management and disclosure of conflicts of interest. The Directive further obliges UCITS managers to employ sufficiently robust and effective procedures and techniques so that they are able to adequately manage the different types of risk the UCITS might face.  UCITS mergers and master-feeder structures - an implementing Directive details certain investor protection measures in relation to these asset pooling techniques, and establishes a common approach to the sharing of information between master and feeder UCITS. It also covers detailed rules on the liquidation, merger or division of a master UCITS.  Notification procedure and supervisory co-operation - an implementing Regulation sets out the details of standard documents and procedures to be used for electronic transmission in the notification procedure (used by a UCITS when it wishes to gain access to the market in another Member State). It also contains common procedures for enhancing supervisory cooperation in their oversight of fund managers' cross-border activity of fund managers.  Further information is available on the [European Commission](http://ec.europa.eu/internal_market/investment/ucits_directive_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.15 Guidance on incentive remuneration in US banks**   On 30 June 2010, the US Office of the Comptroller of the Currency (OCC), along with the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision, issued guidance on sound incentive remuneration policies and practices.  The guidance is intended to assist banking organisations in designing and implementing incentive remuneration arrangements that do not encourage imprudent risk-taking and that are consistent with the safety and soundness of the organisation (the guidance does not apply to banking organisations that do not use incentive remuneration).   Incentive remuneration arrangements can be useful tools in the successful management of banking organisations.  However, remuneration arrangements can provide executives and employees with incentives to take imprudent risks that are not consistent with the long-term health of the organisation.  Flawed incentive remuneration practices in the financial industry were one of many factors contributing to the financial crisis that began in 2007.  Banking organisations too often rewarded employees for increasing the organisation's revenue or short-term profit without adequate recognition of the risks the employees' activities posed to the organisation.   To be consistent with safety and soundness, incentive remuneration arrangements at a banking organisation should comply with the following principles:  Provide employees incentives that appropriately balance risk and reward;  Be compatible with effective controls and risk management; and  Be supported by strong corporate governance, including active and effective oversight by the organisation's board of directors.  The guidance is available is available on the [US Treasury](http://www.occ.treas.gov/fr/fedregister/75fr36395.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.16 IMF unveils online financial access database**  On 30 June 2010, the International Monetary Fund (IMF) launched a new online database of results from its inaugural Financial Access Survey, designed to underpin research into the provision of consumer financial services worldwide. The database allows public access to financial access indicators and accompanying metadata developed through the Access to Finance Project.   The database disseminates key indicators of geographic and demographic outreach of financial services, as well as the underlying data. The reach of financial services is measured by bank branch network, availability of automated teller machines, and by four key financial instruments: deposits, loans, debt securities issued, and insurance. The database aims at supporting policymakers and researchers to strengthen their understanding of the determinants and implications of financial access and usage. The disseminated financial access indicators can help identify knowledge gaps and appropriate policies for broadening financial access, and enable the authorities to monitor the effectiveness of policies over time.   The online database is available on the [IMF](http://fas.imf.org/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.17 Enhancing auditors' contribution to prudential regulation**   On 29 June 2010, the UK Financial Services Authority (FSA) and the UK Financial Reporting Council (FRC) issued a discussion paper which considers ways of enhancing auditors' contribution to regulation.   The purpose of the paper is to stimulate debate on the role of auditors following the financial crisis. The paper, therefore, explores how the FSA, the FRC and auditors can work together more effectively to enhance auditors' contribution to prudential regulation.  The paper:  Questions aspects of the quality of audit work relevant to prudential regulation - in particular, whether the auditor has always been sufficiently skeptical and has paid sufficient attention to indicators of management bias when examining key areas of financial accounting and disclosure which depend critically on management judgment;  Outlines the FSA's concerns about auditors' work on client assets and how auditors fulfil their legal obligation to report to the FSA;  Explores a variety of ways in which changes are being made and further changes could be made by the FSA, the FRC and auditors to increase the effectiveness with which auditors undertake their work; and  Examines the regulatory environment in which auditors operate more widely and suggests measures to enhance how auditors contribute to prudential supervision.  The Discussion Paper is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/DP/2010/10_03.shtml" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.18 Financial Stability Board Chairman reports to G20 Leaders on global financial reform**   On 27 June 2010, the Financial Stability Board (FSB) Chairman reported to the G20 Leaders on the progress and remaining challenges in the implementation of the G20 recommendations for strengthening financial stability, including the global effort to reduce the moral hazard posed by systemically important financial institutions.    In conjunction with the report the FSB also published:  A cover letter from the FSB Chairman to the G20 Leaders;  Interim report on reducing the moral hazard caused by systemically important financial institutions; and  Overview of progress in the implementation of the G20 recommendations for strengthening financial stability.  FSB Chairman Mario Draghi's letter to G20 Leaders noted that "good progress has been made in recent weeks towards new global standards to strengthen bank capital and liquidity, and limit leverage". He noted that "the quality and amount of capital in the banking system must be significantly higher to improve loss absorbency and resiliency" and that authorities "should provide transition arrangements that enable movement to robust new standards without putting the recovery at risk, rather than allow concerns over the transition to weaken the standards".   At the Pittsburgh Summit in September 2009, the FSB committed to develop measures to reduce the moral hazard risks posed by systemically important financial institutions (SIFIs), also known as "too big to fail". The interim report published on 29 June 2010 sets out six principles to guide the development of an international policy framework to address this problem.   According to these principles, all jurisdictions should:  have in place a policy framework to reduce the moral hazard risks associated with SIFIs;  have effective resolution tools that enable the authorities to resolve financial firms without systemic disruptions and without taxpayer losses;  have the capacity to impose supplementary prudential requirements on firms commensurate with their systemic importance;  have the powers to apply differentiated supervision requirements based on the risks they pose to the financial system; and  put in place or strengthen core financial market infrastructures to reduce   contagion risk.  And as the sixth principle:  FSB members will establish an ongoing peer review process to promote effective, consistent and mutually supportive policies to address SIFI risks.  The FSB also reported on advances made on the other items from the global regulatory reform agenda, including:  improving over-the-counter derivatives markets;  enhancing incentive structures and transparency; and  strengthening adherence to international financial standards.  The reports are available on the [FSB](http://www.financialstabilityboard.org/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.19 G-20 Summit declaration and financial sector reform**   The latest G-20 Summit was held in Toronto, Canada, on 26-27 June 2010. The Group of Twenty (G-20) Finance Ministers and Central Bank Governors was established in 1999 to bring together systemically important industrialised and developing economies to discuss key issues in the global economy.    The participants at the Summit issued a declaration and part of the declaration dealt with financial sector reform. The following is an extract from the declaration:   **Financial Sector Reform**  15.   We are building a more resilient financial system that serves the needs of our economies, reduces moral hazard, limits the build up of systemic risk, and supports strong and stable economic growth. We have strengthened the global financial system by fortifying prudential oversight, improving risk management, promoting transparency, and reinforcing international cooperation. A great deal has been accomplished. We welcome the full implementation of the European Stabilization Mechanism and Facility, the EU decision to publicly release the results of ongoing tests on European banks, and the recent US financial reform bill.   16.   But more work is required. Accordingly, we pledge to act together to achieve the commitments to reform the financial sector made at the Washington, London and Pittsburgh Summits by the agreed or accelerated timeframes. The transition to new standards will take into account the cumulative macroeconomic impact of the reforms in advanced and emerging economies. We are committed to international assessment and peer review to ensure that all our decisions are fully implemented.   17.   Our reform agenda rests on four pillars.   18.   The first pillar is a strong regulatory framework. We took stock of the progress of the Basel Committee on Banking Supervision (BCBS) towards a new global regime for bank capital and liquidity and we welcome and support its work. Substantial progress has been made on reforms that will materially raise levels of resilience of our banking systems. The amount of capital will be significantly higher and the quality of capital will be significantly improved when the new reforms are fully implemented. This will enable banks to withstand - without extraordinary government support 0- stresses of a magnitude associated with the recent financial crisis. We support reaching agreement at the time of the Seoul Summit on the new capital framework. We agreed that all members will adopt the new standards and these will be phased in over a timeframe that is consistent with sustained recovery and limits market disruption, with the aim of implementation by end-2012, and a transition horizon informed by the macroeconomic impact assessment of the Financial Stability Board (FSB) and BCBS. Phase-in arrangements will reflect different national starting points and circumstances, with initial variance around the new standards narrowing over time as countries converge to the new global standard.   19.   We agreed to strengthen financial market infrastructure by accelerating the implementation of strong measures to improve transparency and regulatory oversight of hedge funds, credit rating agencies and over-the-counter derivatives in an internationally consistent and non-discriminatory way. We re-emphasized the importance of achieving a single set of high quality improved global accounting standards and the implementation of the FSB's standards for sound compensation.   20.   The second pillar is effective supervision. We agreed that new, stronger rules must be complemented with more effective oversight and supervision. We tasked the FSB, in consultation with the IMF, to report to our Finance Ministers and Central Bank Governors in October 2010 on recommendations to strengthen oversight and supervision, specifically relating to the mandate, capacity and resourcing of supervisors and specific powers which should be adopted to proactively identify and address risks, including early intervention.   21.   The third pillar is resolution and addressing systemic institutions. We are committed to design and implement a system where we have the powers and tools to restructure or resolve all types of financial institutions in crisis, without taxpayers ultimately bearing the burden, and adopted principles that will guide implementation. We called upon the FSB to consider and develop concrete policy recommendations to effectively address problems associated with, and resolve, systemically important financial institutions by the Seoul Summit. To reduce moral hazard risks, there is a need to have a policy framework including effective resolution tools, strengthened prudential and supervisory requirements, and core financial market infrastructures. We agreed the financial sector should make a fair and substantial contribution towards paying for any burdens associated with government interventions, where they occur, to repair the financial system or fund resolution, and reduce risks from the financial system. We recognized that there are a range of policy approaches to this end. Some countries are pursuing a financial levy. Other countries are pursuing different approaches.   22.   The fourth pillar is transparent international assessment and peer review. We have strengthened our commitment to the IMF/World Bank Financial Sector Assessment Program (FSAP) and pledge to support robust and transparent peer review through the FSB. We are addressing non-cooperative jurisdictions based on comprehensive, consistent, and transparent assessment with respect to tax havens, the fight against money laundering and terrorist financing and the adherence to prudential standards.   The full declaration, which includes more detailed discussion of the above issues, is available on the [G-20](http://www.g20.org/Documents/g20_declaration_en.pdf" \t "_new) website  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.20 Simpler disclosure documents for certain financial products**   On 22 June 2010, new regulations to the Australian [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) commenced operation that prescribe the form and contents of short and simplified product disclosure statements (PDSs) for margin loans, superannuation products and simple managed investment schemes.    The regulations prescribe PDSs not exceeding eight pages in length for superannuation funds and simple managed investment schemes. Margin loan PDSs are required to be no longer than four pages.   The regulations prescribe the section headings and contents of the shorter PDSs, to ensure that consumers are provided with the key information they need to make an investment decision. Additional information can also be included provided the prescribed length is not exceeded. The prescribed content covers key information such as product features and benefits, risks, taxation, investment options and fees and costs. For margin loans, certain additional information specific to these products is prescribed, including an explanation of what a margin call is and how investors can manage the risk and consequences of receiving a margin call.   The regulations also provide for other material to be located outside the PDS document itself, with a reference included in the PDS telling readers where they can find this information. This is an important mechanism allowing disclosure documents to be kept short and concise, while providing full information elsewhere for those consumers who want to read it. Importantly, the material referred to in this way is deemed to be part of the PDS and the full range of liability and enforcement provisions of the law apply to it. This ensures that consumers continue to be effectively protected against any defective or misleading information included in disclosure documents and associated material.   The provisions for superannuation and managed investment scheme PDSs provide for a transitional period of 24 months for implementation. After the initial 12 months, businesses will have to comply with the new regime if they amend an existing PDS or offer new products requiring a new PDS. After 24 months, all PDSs will need to comply with the new regime. The margin loan PDS provisions apply from 1 January 2011, coinciding with the date when margin loans come under Commonwealth regulation.    The [Corporations Amendment Regulations 2010 (No 5)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=115102" \t "Default) are available on the [ComLaw](http://www.comlaw.gov.au/ComLaw/legislation/LegislativeInstrument1.nsf/asmade/bytitle/B8F9FED7F0F9F1D1CA25773D001FF5C6?OpenDocument" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.21 Parliamentary report on oversight of ASIC**   On 21 June 2010, the Parliamentary Joint Committee on Corporations and Financial Services published its latest report on the statutory oversight of the Australian Securities and Investments Commission (ASIC). The matters dealt with in the report include:  trading services reform and transfer of market supervision responsibility;  transition to the Commonwealth of regulation of consumer credit;  contracts for difference;  ASIC response to the collapse of Storm Financial;  'rumourtrage' and the work of ASIC; and  recent litigation by ASIC.  The report is available on the [Committee](http://www.aph.gov.au/senate/committee/corporations_ctte/asic/index.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1)  **1.22 Supreme Court of Victoria Law Conference - Current Issues in Commercial Law**   **Date:**         Friday, 13 August 2010  **Venue:**       Banco Court, Supreme Court of Victoria                       210 Williams St, Melbourne.  **Time:**         2.00pm - 5.45pm  **Cost:**         $200 + $20 GST = $220   **Topics and speakers: 2:00pm-2:15pm**     Welcome - The Hon Justice Marilyn Warren, Chief Justice of                                    Victoria and Professor Ian Ramsay, Melbourne Law School                                 **2:15pm-3:00pm**     Cross Border Insolvency - Lessons from Lehman Brothers -                                   Sandra Mayerson, Squire, Sanders & Dempsey LLP, New                                   York; Commentary - Leon Zwier, Arnold Bloch Leibler   **3:00pm-3:45pm**     Insider Trading and Market Manipulation - Tony D'Aloisio,                                    Chairman, Australian Securities and Investments                                    Commission  **3:45pm-4:15pm**     Afternoon tea  **4:15pm-5:00pm**   The Growing Importance of Schemes of Arrangement - Key                                    Legal Issues - Alan Archibald QC  **5:00pm-5.45pm**     Alternative Dispute Resolution - The Hon Justice James                                   Judd; Commentary - Professor Camille Cameron, Melbourne                                   Law School  **5:45pm**                Drinks in the Supreme Court Library   The flyer and registration form are available on the [CCLSR](http://cclsr.law.unimelb.edu.au/go/news/index.cfm" \t "_new) website.    The conference is co-sponsored by the Supreme Court of Victoria and the Centre for Corporate Law and Securities Regulation, Melbourne Law School, in association with the Victorian Bar Association and the Law Institute of Victoria.   For further information please contact:  Ms Josephine Peters Centre for Corporate Law and Securities Regulation The University of Melbourne Law School Victoria 3010   Email : [j.peters@unimelb.edu.au](mailto:j.peters@unimelb.edu.au) Tel:     03 8344 5281 Fax:    03 8344 5285  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1 ASIC updates disclosure guidance for capital protected products and retail structured or derivative products**   On 22 July 2010, the Australian Securities and Investments Commission (ASIC) released a report outlining its key findings from a review of selected Product Disclosure Statements (PDSs) for capital protected products and other structured or derivative products marketed to retail investors.  The report, 'Review of disclosure for capital protected products and retail structured or derivative products' (Report 201), is the result of a program commenced by ASIC in January 2009 and has involved the review of 64 PDSs for adequacy of disclosure.   ASIC focused on capital protected products as investors may be attracted to these investments due to a perception of capital safety without fully comprehending the inherent risks.  The report also reviews structured and derivative products marketed to retail investors given increased retail participation in these complex products where associated risks and costs may not be anticipated or understood.  Issuers of these types of products should take account of the findings of this report in order to make more effective disclosure to prospective investors. In particular, ASIC recommends issuers:  clearly explain counterparty risk, and include supporting financial information, to ensure retail investors can assess the issuer's financial ability to meet its counterparty obligations;  of capital protected products, ensure disclosure is sufficient so that investors can assess the likelihood of early termination or any other significant limitations of these products; and  provide better disclosure of break costs that may apply where an investor seeks to terminate or redeem a product before its maturity date.  ASIC will reflect the key findings of its review in updates to Regulatory Guide 168 Disclosure: Product Disclosure Statements (and other disclosure obligations) (RG 168).  ASIC has also released a factsheet for consumers, 'Get the facts: Capital guaranteed or protected investments', which outlines some important things investors need to consider before investing in capital guaranteed or capital protected products. This review was conducted as part of ASIC's first priority, which is to assist and protect retail investors and consumers in the financial economy.  The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP201-PDS-reviews-2010-7-14.pdf/$file/REP201-PDS-reviews-2010-7-14.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h2)  **2.2 ASIC releases guide to improve transparency for retail derivative investors**  On 12 July 2010, the Australian Securities and Investments Commission (ASIC) increased its focus on over-the-counter derivatives (OTC derivatives), such as contracts for difference, with the finalisation of a guide on client money which aims to promote better disclosure and help retail investors properly understand the handling of client money and associated counterparty risks.   ASIC's Regulatory Guide 212, Client money relating to dealing in OTC derivatives (RG 212), follows the release of Consultation Paper 114, Client money relating to dealing in OTC derivatives (CP 114), which invited public comment on its proposals to improve disclosure by a financial services licensee dealing in OTC derivatives and guidance on how it expects licensees to comply with the client money provisions in the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).   Client money, in this context, is broadly money paid by a client to a licensee, such as contracts for difference (CFD) issuer, before the client has traded as well as money that a client has left with a licensee after trading.  While client money must be held separate from the licensee's own money, RG 212 asks licensees to consider the adequacy of disclosures to investors, particularly where client money is:  held in the same account with the money of other clients;  used to meet a licensee's trading obligations for other clients; and  withdrawn from the client money account under the terms of the product disclosure statement or client agreement.  Investors need to be aware that these activities could result in them losing their money if they result in a shortfall in the account. A shortfall could arise if the issuer used the money for trading for another client but could not obtain that money from the other client or cover it themselves.   ASIC's guide aims to promote better disclosure regarding:  the treatment of money which is paid to, or left with, a licensee;  the timing and basis of any payments out of the client money account;  any use of client money to meet a licensee's trading obligations for other clients;  the treatment of interest earned on client money; and  the risks associated with client money.  The guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg212-9July2010.pdf/$file/rg212-9July2010.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h2)  **2.3 Report on investors' understanding of the risks of CFD trading**  Australian issuers of the derivative products called Contracts for Difference (CFDs) need to do much more to ensure investors understand the significant risks in trading these complex financial products, according to a study from the Australian Securities and Investments Commission (ASIC) published on 12 July 2010.  The study, Report 205 Contracts for Difference and Retail Investors (REP 205), also found retail investors are confused about how CFDs work, do not understand the significant risks in trading CFDs, do not seek financial advice before investing, and often do not receive sufficient information to make informed decisions about trading CFDs.  The ASIC study looked at:  CFD issuer business and pricing models  advertising by CFD issuers  CFD seminars  CFD Product Disclosure Statements (PDSs)  complaints by retail investors against CFD issuers.  It also contains the findings of investor research ASIC commissioned with CFD traders and potential traders.  In the report ASIC's recommendations for future action in the CFD market include:  disclosure benchmarks for OTC CFDS on an 'if not, why not' basis  continued monitoring of CFD advertising  publication of an investor guide to help retail investor understanding  possible law reform, in the event these actions deliver an unsatisfactory outcome.  ASIC is also soon to release a consultation paper on enhanced PDS disclosure benchmarks for OTC CFD issuers with the aim of raising the quality of information provided to investors. One potential benchmark under consideration is that OTC issuers should have clear client suitability policies in place.  The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep205.pdf/$file/rep205.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h2)  **2.4 Minister announces ASIC to take over supervision of Australia's financial markets from 1 August 2010**  On 8 July 2010, the Australian Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, announced that the transfer to ASIC of supervisory responsibility for Australia's domestic licensed financial markets will take place on 1 August 2010.    Minister Bowen also announced his intention to consent to ASIC's market integrity rules and to the consequential changes to the operating rules of the ASX Group. The Minister's in-principle consent to the ASIC market integrity rules will provide certainty to the market as to the rules which will govern it from 1 August. Formal approval will be granted once the [Corporations Amendment (Financial Market Supervision) Act 2010](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=113011" \t "efault) commences on 1 August 2010. The Act was proclaimed by the Federal Executive Council on 8 July 2010.    The Federal Executive Council also formalised the Corporations (Fees) Amendment Regulations 2010, which provide details of the proposed fee structure that ASIC will charge to recover the costs of supervision.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h2)  **2.5 Areas of focus for 2010 financial reports**  On 5 July 2010, the Australian Securities and Investments Commission (ASIC) released a number of suggested areas of focus for boards and those responsible for preparing 30 June 2010 financial reports.  ASIC intends to review the financial reports of 350 entities identified for scrutiny, including 250 listed entities and 100 unlisted entities with large numbers of users.   ASIC reviewed 31 December 2009 financial reports for 130 entities, comprising 70 full year reports and 60 half year reports. It is currently finalising its follow up of matters with some entities.  The areas of focus are:  Going concern  Asset impairment  Fair value of assets              - Investment properties             - Financial assets             - Intangible assets             - Off balance sheet exposures  Financial instruments  Current vs non-current classifications  Other issues related to current market conditions              - Adequate disclosure of significant judgments in applying accounting   appropriate revenue recognition, expense recognition; and              - Disclosure of subsequent events  Non-statutory profits  Operating and financial review  Segment reporting  Financial statement disclosure               - Business combinations              - Employee share plan loans   Further information is available on the [ASIC](http://www.asic.gov.au/ASIC/asic.nsf/byHeadline/10-147MR%20ASIC%20focuses%20attention%20on%202010%20financial%20reports?opendocument" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h2)  **2.6 ASIC consults on mortgage early exit fees**  On 27 June 2010, the Australian Securities and Investments Commission (ASIC) released a consultation paper on new laws regulating mortgage early exit fees which are unconscionable or unfair.   Under the National Credit Code, early exit fees which are unconscionable can be annulled or reduced by a court. Under the Australian Consumer Law, an unfair term requiring an early exit fee to be paid can be declared void. ASIC also has a number of new enforcement powers under the new consumer law provisions in the [Australian Securities and Investment Commission Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default) (ASIC Act).   ASIC's Consultation Paper 135 Mortgage early exit fees: Unconscionable fees and unfair contract terms (CP 135) contains proposals about its expectations for compliance with provisions in the National Credit Code and ASIC Act that apply to setting the price of and explaining mortgage early exit fees.   Under the National Credit Code at Schedule 1 of the [National Consumer Credit Protection Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "Default), a fee or charge payable on early termination of the contract is unconscionable if it appears to a court to exceed the lender's loss arising from the early termination.   Such fees will also be unfair under the ASIC Act if the term requiring the early exit fee to be paid:  would cause a significant imbalance in the parties' rights and obligations arising under the contract;  is not reasonably necessary to protect the legitimate interests of the lender; and  would cause the borrower detriment (whether financial or otherwise) if it were applied or relied on.  Both provisions commenced on 1 July 2010. The National Credit Code provisions apply to existing home mortgage contracts. The ASIC Act provisions apply to contracts entered or renewed on or after 1 July 2010 as well as terms in contracts varied on or after 1 July 2010.   ASIC will administer the National Credit Code and unfair contract terms provisions in the ASIC Act in a way that helps consumers avoid paying early exit fees which are unnecessarily high while also taking into account a lender's right to recover their reasonable costs and be flexible with their charging. ASIC has formulated the proposals in CP 135 in light of this objective.  Once the laws commence, if a borrower thinks that an early exit fee they have been charged is unconscionable or unfair, they can:  complain to their lender and, if needed, take the dispute to the lender's External Dispute Resolution Scheme;  complain to ASIC; and/or  challenge the fee in court proceedings.  The paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp135-1.pdf/$file/cp135-1.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h2)  **2.7 ASIC strengthens disclosure requirements for debentures and unsecured notes**  On 25 June 2010, the Australian Securities and Investments Commission (ASIC) released updated requirements for unlisted debentures and unsecured notes to improve disclosure to retail investors. The guidance is set out in an updated version of Regulatory Guide 69 Debentures and unsecured notes-improving disclosure for retail investors (RG 69).  The updated version of RG 69 sets out:  adjustments to the eight benchmarks that issuers should disclose against on an 'if not, why not?' basis from 1 September 2010, including those relating to minimum amounts of equity capital; adequate liquidity; and disclosure about loan portfolios and valuations  the plain-English explanations that issuers should provide in prospectuses from 1 September 2010 about the importance of their benchmark disclosures  information on naming restrictions that will apply to debentures and unsecured notes under section 283BH of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) from 1 July 2011.  From 1 July 2011, ASIC will no longer permit some products to be called debentures. It will discontinue its interim no action position announced in 2005 in relation to non-compliance with the naming restrictions in section 283BH limiting the types of financial products that can be called debentures. This will mean products not secured over tangible property (ie property with an actual physical existence) will need to be called unsecured notes or unsecured deposit notes. ASIC has adopted this approach following concerns that some issuers that have failed over the past two years have incorrectly described their products as debentures implying the products had a greater level of security than was actually the case.  The updated policy is subject to transitional periods and follows industry consultation as outlined in the newly released Report 200 Response to submissions on CP 123 Debentures: Strengthening the disclosure benchmarks (REP 200) discussing the submissions received on the proposals in the consultation paper and outlining ASIC's response to the submissions.  Finally, ASIC has also made consequential amendments to Regulatory Guide 156 Debenture and unsecured note advertising (RG 156), which sets outs ASIC's policy for issuers advertising debentures and unsecured notes, and will soon release updated versions of the ASIC investor guide regarding unlisted debentures and unsecured notes and Pro Forma 223 'Interim auditor's benchmark report.  This updated requirements are consistent with ASIC's first priority, which is to assist and protect retail investors and consumers in the financial economy.  RG 69 titled 'Debentures and unsecured notes-improving disclosure for retail investors is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg69.pdf/$file/rg69.pdf" \t "_new) website.   RG 156 titled 'Debenture and unsecured note advertising' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg156-a.pdf/$file/rg156-a.pdf" \t "_new) website.  Rep 200 titled 'Response to submissions on CP 123 Debentures: Strengthening the disclosure benchmarks' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep200.pdf/$file/rep200.pdf" \t "_new) website.  CP 123 titled 'Debentures: Strengthening the disclosure benchmarks' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP123.pdf/$file/CP123.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h2)  **2.8 ASIC releases further updated guidance to assist credit licensees**  On 25 June 2010, the Australian Securities and Investments Commission (ASIC) released further updated versions of regulatory guides, which were first issued in December 2009 as part of ASIC's package of guidance to prospective credit licensees on the implementation of 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).  ASIC has updated and re-released the following regulatory guides:  Regulatory Guide 202 Credit registration and transition (RG 202)  Regulatory Guide 205 Credit licensing: General conduct obligations (RG 205)  Regulatory Guide 206 Credit licensing: Competence and training (RG 206)  Regulatory Guide 207 Credit licensing: Financial requirements (RG 207)  Regulatory Guide 208 How ASIC charges fees for credit relief applications (RG 208)  Regulatory Guide 209 Credit licensing: Responsible lending conduct (RG 209).  ASIC has also re-released Pro Forma 224 Australian credit licence conditions (PF 224), which updates information first released on 8 June of this year.  The changes made to the regulatory guides do not represent substantive changes to ASIC's current policies and approach to administering the new National Consumer Credit regime. Rather, the new versions incorporate references to regulations made in recent months.  Importantly, the guides refer to particular regulations affecting lenders with carried over (COI) instruments that is, a contract that was (a) made, and was in force immediately before 1 July 2010; and (b) subject to the old Credit Code (the Uniform Consumer Credit Code).   The updates follow on from the amended regulatory guides released on 8 June 2010, Regulatory Guide 203 Do I need a credit licence? (RG 203) and Regulatory Guide 204 Credit licensing: Applying for and varying a credit licence (RG 204).  The updated and re-released guides are available on the [ASIC](http://www.asic.gov.au/ASIC/asic.nsf/byHeadline/10-134AD%20ASIC%20releases%20further%20updated%20guidance%20to%20assist%20credit%20licensees?opendocument" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h2)  **2.9 ASIC starts reporting of short positions**  On 22 June 2010, the Australian Securities and Investments Commission (ASIC) started daily reporting of aggregated short positions.   Short sellers have been required to report short positions to ASIC following the introduction by the Federal Government of new reporting obligations to improve transparency of short sales in the Australian market. In these reports, short sellers disclose to ASIC the size of their overall short positions in specified listed financial products.   Starting on 22 June, ASIC is required to aggregate this information and report for each product the total of all short positions disclosed to ASIC for each 'reporting day'. ASIC publishes this information four reporting days after the date the position is held. The reports do not identify short sellers or their individual short positions.   Short position reporting provides a snapshot indication of the bearish sentiment towards a particular stock at any point in time. It also indicates the amount of overhang in the stock that will need to be covered at some point by short sellers purchasing shares.   For investors, this information may indicate the risk involved in trading the stock. This reporting, complemented by short selling transaction reporting and securities lending reporting (available from the Australian Securities Exchange), provides greater transparency on short selling activity in Australia.  The reporting regime follows the introduction by the Federal Government in December 2008 and December 2009 of new legislative requirements (under the [Corporations Amendment (Short Selling) Act 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=105282" \t "Default) and the Short Selling Regulations) to regulate short selling. These requirements include the imposition of specific short position reporting obligations in relation to covered short sales.   In April 2010, ASIC updated Regulatory Guide 196 Short selling, which outlines the legal position about what short sales are permitted, as well as specific reporting and disclosure obligations.  ASIC also released an information sheet, Information Sheet 98 Short position reporting, to help short sellers and systems developers prepare for the new short selling requirements.   Further information is available on the [ASIC](http://www.asic.gov.au/short-position-reports" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h2)  **2.10 ASIC and FINRA sign cooperation agreement**  On 22 June 2010, the Australian Securities and Investments Commission (ASIC) and the Financial Industry Regulatory Authority (FINRA) of the United States entered into a Memorandum of Understanding (MOU) to promote and support greater cooperation between the two regulators.  The MOU establishes a strong framework for mutual assistance and the exchange of information between ASIC and FINRA, to help ensure that high standards of market integrity and consumer protection are maintained in both jurisdictions. Among other things, the agreement will help the regulators to investigate possible instances of cross-border market abuse in a timely manner; exchange information on firms under common supervision of both regulators; and allow more robust collaboration on approaches to risk-based supervision of firms.  The memorandum is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/FINRA%20ASIC%20MOU_V8_11-June-2010.pdf/$file/FINRA%20ASIC%20MOU_V8_11-June-2010.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1 Transfer of supervisory functions to ASIC**   On 8 July 2010, the Australian Securities Exchange (ASX) announced that it had reached formal agreement with the Australian Securities and Investments Commission (ASIC) on the transfer of responsibility for the supervision of trading on ASX's licensed financial markets.   The transfer will take place on Sunday, 1 August 2010.  Upon the transfer:  ASIC will assume responsibility for the supervision of domestic licensed financial markets and for participants (including the relationship between participants and their clients) on those markets;  ASX will retain responsibility for ensuring participants admitted to its market comply with its operating rules; and  23 ASX staff will take up positions at ASIC in conjunction with the transfer of responsibility.  The new arrangements do not change the existing oversight of listed entities or the obligations on ASX's clearing and settlement facility operators.   The Australian Government announced the changes to the supervision of Australia's financial markets in August 2009 as the first step towards considering competition between market operators.    ASX is retaining a subsidiary company to fulfil the obligations of each of the licensed entities in the ASX Group to monitor and enforce compliance with the ASX operating rules after the transfer.  The name of this subsidiary will change to ASX Compliance, as the existing name - ASX Markets Supervision - will no longer properly describe the subsidiary's role within the ASX Group or ASX's ongoing obligations.    As a result of the transfer of supervision new Operating Rules ('Rules') are to be introduced for the ASX and ASX 24 (SFE) markets.  Matters currently covered by existing ASX Market Rules and SFE Operating Rules will be split between Market Integrity Rules to be supervised by ASIC and separate Operating Rules to be administered by ASX.   The new ASX and ASX 24 Operating Rules were formally lodged with ASIC on 29 June 2010.  They are subject to formal regulatory clearance which is expected to be given by 1 August 2010.  ASX is making the Rules available on the ASX website to enable participants to review the Rules in advance of the effective date.  A summary of the structure of the new Rules and the key changes is provided in the circular referred to below.   The transfer arrangements are available on the [ASX](http://www.asx.com.au/about/pdf/20100708_asx_asic_supervisory_transfer_arrangements.pdf" \t "_new) website.  The ASX circular regarding the restructured rule books are available on the [ASX](https://www.asxonline.com/intradoc-cgi/groups/participant_services/documents/communications/asx_027526.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h3)  **3.2 Reports**   On 7 July 2010, ASX released:  the ASX group monthly activity report;  the SFE monthly volume and open interest report; and  the ASXMS quarterly activity report for June 2010.  These reports are available on the [ASX](http://www.asx.com.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h3)  **3.3 ACH consultation paper: equity market margining**   On 30 June 2010, ASX released a consultation paper outlining proposed enhancements to ACH's central counterparty (CCP) risk management controls, specifically the introduction of routine daily margining of the equity cash market.   ASX recognises the evolution in best practice and regulatory expectations and is committed to measures that further strengthen the important CCP risk protections underpinning the Australian financial markets.  Moreover, it is ASX's view that it is both timely and appropriate to further enhance ACH's already robust risk controls.  To this end, ASX has conducted an extensive consultation process with market stakeholders on a range of potential ACH risk management enhancements.  Comprehensive responses were received in relation to ACH's consultation paper and a summary of feedback was published earlier this year.  ASX, in consultation with the RBA and ASIC, has since undertaken further analysis incorporating the feedback received.  The consultation paper outlines the proposed changes.   ASX is seeking further suggested refinements to the proposal by 13 August 2010 prior to finalising the operational design and implementation.  ASX looks forward to working with all stakeholders to optimise the outcome.  At this stage ASX is not able to confirm implementation timelines, but in order to assist longer term planning, is announcing that the implementation will not be earlier than Q4 2011.   The paper is available on the [ASX](http://www.asx.com.au/about/pdf/equity_market_margining.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h3)  **3.4 Changes to corporate governance principles and recommendations**   On 30 June 2010, the ASX Corporate Governance Council released the final changes to the Corporate Governance Principles and Recommendations about diversity, remuneration, trading policies and briefings.   Companies will be required to either adopt the new recommendations or explain in their annual report why they have not done so ("if not, why not?").  The ASX Corporate Governance Council believes this approach allows boards to develop policies and objectives appropriate for their individual circumstances, while also providing a mechanism for increased market transparency and accountability.   The changes to the Principles and Recommendations have been finalised following public consultation, which included reviewing submissions received from 23 entities in response to an exposure draft released in April 2010.    Further information is available on the [ASX](http://www.asx.com.au/about/pdf/20100630_changes_to_corporate_governance_principles.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h3)  **3.5 Corporate governance reporting remains high**   The latest review by ASX of reporting against the ASX Corporate Governance Council's Principles and Recommendations shows that listed entitles continue to have a high level of corporate governance reporting.   ASX's supervision subsidiary, ASX Markets Supervision, reviewed the annual reports of 1,648 listed entities with a 30 June 2009 (FY09) balance date.  This represented 75% of all listed entities at the time and was not limited to a specific entity size or market sector.   Overall reporting levels, being the aggregate of the levels of adoption of the Recommendations and the levels of "if not, why not" reporting, continue to be high:  Overall reporting was 93% for all 27 Recommendations;  Reporting was in excess of 90% for 18 out of the 19 practice-based Recommendations;  Reporting was in excess of 80% for 8 out of the 8 information-based Recommendations.  Because the revised Principles and Recommendations apply for the first time to companies with a year-end balance date of 30 June 2009, ASX has not made comparisons with the results of previous reviews measured against the original 2003 Principles and Recommendations.   Further information is available on the [ASX](http://www.asx.com.au/about/pdf/20100708_corporate_governance_reporting_fy09.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h3)  **3.6 Launch of ASX Net in September 2010**   On 29 June ASX announced that it will launch ASX Net, a fully managed, low latency, high capacity network solution for connectively to the Australian financial market, in September 2010.  ASX Net will support the transfer of multiple data feeds and allow clients to determine the products, services and liquidity they wish to access, including all ASX products and services, through a single connection point.  This will reduce costs and complexity for clients.   One of the key features of ASX Net is its incorporation of the latest technology.  To this end, Australian company PIPE Networks will provide low latency, high bandwidth dark fibre for ASX Net.  This will replace ASX's existing customer network, ASX NiPPA.   Further information is available on the [ASX](http://www.asx.com.au/about/pdf/20100629_launch_of_asx_net.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h3)  **3.7 VolumeMatch large order execution service**   ASX's new large order execution service, VolumeMatch, became available on 28 June.  VolumeMatch is an execution mechanism for large orders that reduces market impact and information leakage by allowing users to search for liquidity anonymously.  ASX worked with market participants over the last three years to develop the new service.   The features of VolumeMatch cater to the growing demand from fund managers for a large order execution service that protects against rising market impact costs due to information leakage and falling average trade sizes.  At the same time, VolumeMatch preserves the integrity of the main ASX market by executing trades at prices from the central limit order book (protecting price discovery), setting size thresholds (limiting liquidity fragmentation) and publishing trades in the normal course of sales (immediate post-trade transparency).   VolumeMatch is part of the range of new systems and order type functionality being introduced by ASX to better meet the needs of ASX's customers and to position ASX strongly in an increasingly competitive environment.   Further information is available on the [ASX](http://www.asx.com.au/about/pdf/20100625_volumematch_to_go_live_28_june_2010.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%237) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1 Successful challenge to examination summons relating to terminated voluntary administration**   (By Katie Tatoulis, DLA Phillips Fox)   Ariff v Fong [2010] NSWSC 696, New South Wales Supreme Court, Barrett J, 30 June 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/696.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/696.html" \t "_new)   **(a)  Summary**   The decision by Barrett J in the Supreme Court of New South Wales concerned two applications from Ms Yazni Ariff and Mr Ian Kim Seng Fong, which were heard together. Barrett J considered whether, pursuant to Part 5.9 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"), a summons issued by the court in 2006 to Ms Ariff for examination and an order to produce documents regarding the examinable affairs of a group of companies from the CarLovers Group ("CarLovers companies") remained valid subsequent to the termination of the voluntary administration of the CarLovers companies in November 2007 and the fact that the various deeds of company arrangement were no longer in force.   His Honour also considered whether the statutory provisions under which the examination summons was issued, namely Part 5.3A of the Act, were valid enactments of the Commonwealth Parliament.   **(b)  Facts**   Ms Ariff was an employee or consultant in the insolvency practice of Mr Stuart Ariff, and performed various functions concerning the CarLovers companies. These companies became subject to voluntary administration under Part 5.3A of the Act on 10 July 2003. On 12 May 2006, Mr Fong became an "eligible applicant" pursuant to section 9 of the Act, obtaining authorisation from ASIC for various CarLovers companies. Each of these companies had executed a deed of company arrangement on 5 December 2003, and Stuart Ariff became the administrator of the deeds which remained in operation until 1 November 2007.   In July 2006, following an application by Mr Fong acting as the "eligible applicant" in relation to the CarLovers companies, the court issued an examination summons to Ms Ariff which required her to attend court for examination about the examinable affairs of the CarLovers companies pursuant to section 596B of the Act.    On 17 July 2008, ASIC commenced proceedings against Stuart Ariff, and on 10 August 2008 the court found against Stuart Ariff.   In August 2008, Ms Ariff made an application for orders setting aside the examination summons. On 6 August 2008, Hammerschlag J held that "unless otherwise ordered by a Judge of this court, no examination of.[Ms Ariff] pursuant to the summonses for examination served on them, is to be conducted". There was no mention as to whether this decision would be stayed pending the decision regarding Stuart Ariff.   The first application was brought by Ms Ariff who sought two declarations: first, that the court does not have the power to order that she be examined pursuant to the summons for examination and to produce documents in response to the order for production as served on her. In the alternative she sought a declaration that the examination summons and order for production addressed to her were not a valid exercise of the court's powers.   The second application was brought by Mr Fong who sought two orders: first, that the court order that the examinations ordered in the 2006 proceedings now be conducted on such dates as fixed by the court pursuant to the Order of Hammerschlag J in 2008; and secondly, that the subpoenas and order for production issued were returnable on a date to be fixed by the court.   **(c)  Decision**  **(i)    Summons of examination**   Barrett J first considered whether the summons that was issued continued to be valid subsequent to the CarLovers Companies ceasing to be subject to any form of Chapter 5 administration or process when the deeds of company arrangement were terminated by order of the court on 1 November 2007.   Barrett J held that Mr Fong's capacity to make use of the examination facility in relation to Ms Ariff created by Pt 5.9 came to an end in November 2007. This occurred when the CarLovers companies ceased to be subject to any Chapter 5 administration process when the deed of company arrangement was terminated, and of the description in ASIC's letter of authority to Mr Fong as "eligible applicant". This was based on the decision of French J in *Highstroke Pty Ltd v Hayes Knight GTO Pty Ltd* [2007] FCA 13, which held that sections 596A and 596B of the Act have no application to a company which is not being dealt with pursuant to Chapter 5 of the Act.   Although the summons was validly issued in July 2006, the purpose it was intended to serve concerned the Chapter 5 administration process affecting the CarLovers companies when "eligible applicant" status was conferred on Mr Fong and that purpose now no longer existed. As ASIC chose to refer to the company as being "subject to deed of company arrangement", it extended to all of the CarLovers companies, and the authority was related to each company being subject to a deed of company arrangement. Hence Mr Fong's authority could only be properly exercised if he had a connection with the deed of company arrangement, or the Chapter 5 regime applicable to the CarLovers companies due to the deeds of company arrangement.   Barrett J held that Ms Ariff was entitled to relief ensuring that she should no longer be subject to examination pursuant to the extant examination summons under section 596B of the Act. However, his Honour was not satisfied that relief should take the form of a declaration as were the terms of Ms Ariff's application, but instead held that the summons should be discharged as "any future use of the summons would be for a purpose foreign to that which the summons was issued".   **(ii)  Order to produce documents**  Barrett J held it unnecessary to consider the orders for production made against Ms Ariff, as this was merely an adjunct to the examination process and so too should be discharged.  **(iii)  Validity of statutory provisions**  Although it was not necessary to decide, for the sake of completeness Barrett J considered whether section 596B of the Act, in empowering the court to order an examination about the examinable affairs of a company subject to deed of company arrangement, was constitutionally valid.  Ms Ariff contended that the power under Part 5.9 of the Act to summon a person for examination was not a judicial power, thus under the Constitution the court did not have power to issue it. This was on the basis that the conferral of the court's jurisdiction regarding particular species of "civil matter" arising under Part 5.9, pursuant to section 1337B of the Act, which entails the compulsory examination of a person about the affairs of a company that has executed a deed of company arrangement, was not authorised by Chapter III of the Constitution, as it does not allow the Commonwealth parliament to confer on any court a power that is not judicial power. His Honour noted that the examination which is non-judicial in its own right can only be judicial in nature if it is incidental to another proceeding or process, which in this case was administration under a deed of company arrangement.   Barrett J considered whether the power to examine under Part 5.9 of the Act is ancillary to section 447A or more generally Part 5.3A, which creates a general supervisory jurisdiction of the court.   In finding against Ms Ariff's alternate contention, Barrett J followed *Le Miere J in Re Sons of Gwalia Ltd; Ex parte Love* [2008] WASC 75, holding that that the general supervisory jurisdiction does exist in relation to a company subject to deed of company arrangement.  Barrett J held that the power of the court under Part 5.9 of the Act to order that a person be examined about the examinable affairs of a company subject to deed of company arrangement is a judicial power. This is because it is ancillary or incidental to the court's judicial function of exercising supervisory jurisdiction over the corporation subject to a deed of company arrangement, conferred by Part 5.3A as a whole, while the deed of company arrangement continues in force.  **(d)  Conclusion**  Barrett J made the following orders:  That the summons issued under section 596B upon the application of Mr Fong summoning Ms Ariff for examination be discharged.  That each order for the production of documents made against Ms Ariff on the application of Mr Fong be discharged.  That the application of Mr Fong (being the application for orders to the effect that examination of Ms Ariff pursuant to the said summons proceed and that documents be produced by her) be dismissed.  That Ms Ariff's costs of the applications of herself and Mr Fong determined by the Judge be paid by Mr Fong.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h4)  **4.2 Administrator's remuneration under section 449E of the Corporations Act**   (By Chris Taylor and Tim Lee, Corrs Chambers Westgarth)   Huxtable, in the matter of Timeshare Resort Club Ltd (in liq) [2010] FCA 673, Federal Court of Australia, Barker J, 25 June 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2010/673.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/673.html" \t "_new)   **(a) Summary**   The administrator for Timeshare Resort Club Limited (Timeshare), Mr Carl Huxtable, applied under section 449E(1)(c) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) to the court for a determination of the remuneration due to him as administrator. Section 449E(1)(c) allows the court to determine an administrator's remuneration where it has not been set by an agreement between the administrator and the committee of creditors or by a resolution of the company's creditors.   The court had to consider whether legal fees incurred as part of the administration and amounts for work performed prior to the date of Mr Huxtable's appointment as administrator, amounted to "remuneration" for the purposes of section 449E. Barker J ruled that neither item should be included in the court's assessment. The legal fees were excluded because they are classified as disbursements (which have a separate regime under Part 5.3A of the Act), and the amounts for work performed prior to appointment were excluded because section 449E only covers work that is undertaken during the administration.   **(b) Facts**   Mr Huxtable was appointed administrator of Timeshare on 14 February 2009. During the course of the administration he was assisted by other employees of Sumpart Pty Ltd (his employer) and two partners of summerslegal, the firm advising on the administration (the Partners). Mr Huxtable had involved the Partners as early as 10 February 2009, when he first met Timeshare's board of directors to discuss his appointment as administrator. The Partners and other summerslegal solicitors provided assistance from 10 February onwards. In the period between 10 February and 14 February, Mr Huxtable and the Partners spent a significant amount of time reviewing Timeshare's complex operations.   The administration ended on 9 April 2009 when the creditors resolved at the second creditors' meeting to place Timeshare in liquidation. The issue of Mr Huxtable's remuneration had not been settled by this date, despite two attempts by Mr Huxtable to have creditors pass a resolution approving a fixed amount for his fees. The second of these attempts was made at the 9 April meeting that marked the end of the administration. Mr Huxtable advised the creditors that if the resolution was rejected, he would apply to the Federal Court for an order for remuneration. In accordance with the [Federal Court (Corporation) Rules 2000 (Cth)](http://my.lawlex.com.au/default.asp?cid=19255&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) Mr Huxtable provided notices to the creditors and shareholders specifying the amount claimed. This figure included sums for both Mr Huxtable's fees as administrator and summerslegal's fees. Timeshare's liquidator then brought Mr Huxtable's claim before the court for a determination of the remuneration payable.   **(c) Decision**   **(i) Administrator's remuneration**   The court accepted Mr Huxtable's account of the work that he and other Sumpart employees performed in relation to the administration and found that Mr Huxtable was entitled to remuneration for the work performed while appointed as administrator between 14 February and 9 April 2009. The court made an order under section 449E that the quantum of this remuneration be assessed by a Federal Court registrar. However, the court made clear that this quantum would not include amounts for work performed prior to 14 February 2009 or for summerlegal's fees.   **(ii) summerslegal's fees**   The court excluded summerlegal's fees from the administrator's remuneration to be assessed by the registrar on the basis that legal fees are properly classified as disbursements rather than remuneration. In making this decision Barker J relied heavily on *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 (Venetian), *Re Korda* [2004] FCA 1682 (Korda) and the Code of Professional Practice of the Insolvency Practitioners of Australia (the Code).   Applying Venetian and Korda, Barker J held that a claim under section 449E can only recover amounts for the administrator's remuneration, and cannot be used to recover disbursements incurred during the administration. This distinction was drawn on the grounds that an administrator's right to claim for disbursements arises under section 443D(a), while the right to claim for remuneration arises under section 443D(b).   Barker J also cited Venetian and Korda in support of the proposition that legal fees are properly classified as disbursements rather than remuneration. In discussing this issue his Honour also referred to clause 12.9.1 of the Code, which categorises advice provided by 'independent lawyers' (as opposed to 'internal' legal advisors) as disbursements. His Honour noted the argument that summerlegal were not 'independent lawyers' because of their relationship with Sumpart Pty Ltd, but found that the court did not have to consider this question as the plaintiff had conceded in submissions that summerslegal was a separate and distinct business.   Having discussed these authorities, his Honour provided a summary of Mr Huxtable's position. With regards to his remuneration, the court would provide a binding assessment that Mr Huxtable could claim against Timeshare under section 443D, which gives the administrator the right to be indemnified out of the company's assets. The legal fees and any other disbursements could also be claimed under this indemnity, but unlike the remuneration these expense claims would be subject to the liquidator's assessment of whether or not they were properly incurred expenses.   **(iii) Work performed prior to 14 February**   Barker J ruled that Mr Huxley was not entitled to be remunerated under section 449E for work performed prior to his appointment as administrator because the section only covers work actually undertaken during the administration, summerslegal's pre-administration fees were also not recoverable for the same reason. In arriving at this decision his Honour relied on the case of *Skafcorp Ltd v Jarol Pty Ltd* (2002) 44 ACSR 138 (Skafcorp). Under Skafcorp an administrator can only claim remuneration for work performed prior to his or her appointment if there is an express or implied contract with the company in respect of such work. Alternatively, the administrator can make a claim for reasonable payment on a quantum meruit basis. However his Honour held that a claim for pre-appointment work cannot be considered in an application under section 449E and must be brought under separate proceedings.   **(iv) Section 447E**   Barker J then turned his attention to the order sought by Mr Huxtable to the effect that Part 5.3A of the Act operate as if Mr Huxtable were a person entitled to apply for an order under section 477E(1) of the Act. Section 447E allows ASIC, a creditor or a member of a company to request that the court make any order it thinks fit where the administrator has acted in a way that is prejudicial to the interests of the company's creditors or members. Mr Huxtable asked the court to exercise its power under section 447A of the Act to amend the operation of section 447E so that he as administrator would also have leave to apply. Section 447A gives the court the power to amend the operation of Part 5.3A of the Act in relation to a particular company. If leave was granted, Mr Huxtable then intended to apply under section 447E for an order that the court review the legal fees 'as a disbursement'. Mr Huxtable in effect was asking the court to rule on whether the legal fees were properly incurred expenses.   Barker J rejected this application, noting that even if leave were granted to apply under section 447E the administrator would still have to argue that his own conduct (including the incurring of the legal fees) was prejudicial to the interests of Timeshare's creditors and members. As this would contradict his own evidence, His Honour pointed out that Mr Huxtable was therefore asking the court to effectively ignore the requirement for prejudicial conduct under section 447E. His Honour found that section 447E did not comprehend such orders, and that in any event the court should not grant such orders.   **(v) Costs**   Barker J awarded Mr Huxtable costs on an indemnity basis for both the application and the assessment before the registrar, and ordered that the costs be paid out of the liquidation of the company. His Honour considered this order appropriate because the administrator's work had been reasonably performed and the creditors had failed to fix his remuneration despite being given reasonable opportunity to do so.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h4)  **4.3 Receivers' obligations in relation to preferred creditors**   (By Rachael Pliner, Freehills)   Mark Anthony Korda and David John Winterbottom as receivers and managers of Westpoint Corporation Pty Ltd (in liq) (receivers and managers appointed) v Silkchime Pty Ltd (receivers and managers appointed) atf Silkchime Unit Trust [2010] WASC 155, Supreme Court of Western Australia, Le Miere J, 25 June 2010  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/wa/WASC/2010/155.html](http://www.austlii.edu.au/au/cases/wa/WASC/2010/155.html" \t "_new)   **(a) Summary**   The case concerned an application for directions by receivers pursuant to section 424 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the "Act") in relation to the conduct of the receivership where the outstanding amounts owed to the lender by the chargors had been repaid (or were capable of being repaid). The court held that the receivers were not obliged to realise further assets by commencing reasonable causes of action, for the purposes of paying preferred creditors (i.e., former employees) pursuant to section 433 of the Act. However, the receivers had a discretion as to whether they would continue any proceedings currently on foot providing that such a discretion was exercised in good faith and having regard to the interests of the preferred creditors. The court held that the Receivers were not obliged to retire. They were entitled to continue to realise assets in order to establish a retention fund for expenses and losses incurred in relation to actual and threatened litigation brought by the chargors against them.    **(b) Facts**   On 28 September 2005, companies in the Westpoint group (the defendants) entered into various related agreements. The sixth defendant ("ING") entered into a loan agreement with Westpoint Corporation (and other borrowers) and advanced  approximately $45 million. A number of guarantees and fixed and floating charges were executed by the corporate guarantors and borrowers (referred to as the "Chargors") in favour of ING.   On 24 January 2006, ING appointed the plaintiffs as receivers and managers (the "Receivers") of the Chargors. The Receivers realised the Chargors' assets and caused the Chargors to repay amounts owing to ING, so that the total debt was capable of being repaid to ING. ING did not discharge the Chargors on the basis that there was a prospect that money or damages would become owing (whether actually or contingently) by the Chargors to ING. ING formed this view on the basis of the following two factors.   The first was the potential liability of the Receivers and ING as a result of actual and threatened litigation. The Chargors commenced proceedings against ING, the Receivers and others on 4 September 2009 in the Federal Court ("COR 223 of 2009") in relation to the conduct of the receivership (which included an argument that the Receivers should have retired in January 2008).    The second factor was ING's potential obligation to indemnify the Receivers against any losses caused by pursuing various causes of action in order to pay the priority creditors pursuant to section 433 of the Act. This concerned certain entitlements due to prior employees of Westpoint Corporation (the "Priority Creditors").   Most of the assets that had been realised by the Receivers were the fixed charge assets. ING and the Receivers intended to continue to realise the Chargors' remaining assets until the cash surplus reached a sufficient threshold. The remaining assets consisted of Westpoint's various causes of action which were required to be litigated or settled in order to realise further funds.   The Receivers applied under section 424 of the Act for directions in relation to the conduct of the receivership. The role of section 424 is to provide a procedure for a receiver to obtain some guidance from the court in conducting the receivership and to give protection to a receiver against a claim for breach of duty.    The court also made a number of declarations, sought by the Receivers under section 25(6) of the [Supreme Court Act 1935 (WA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=15947" \t "Default), in relation to the construction of the indemnities in the various loan documents.    **(c) Decision**   The court was not entitled in the present case to determine any of the issues raised in COR 223 of 2009. Accordingly, the court's directions were made subject to the findings in COR 223 of 2009.   **(i) Priority creditors and section 433 of the Act**   The Receivers sought directions as to whether they were required under section 433 of the Act to continue to realise floating charge assets, in this case by pursuing Westpoint's reasonable causes of action, in order to pay the Priority Creditors. The Priority Creditors' entitlements could not be satisfied out of the existing net realisations.    Under section 433 of the Act a receiver appointed under a floating charge must pay, out of the property coming into its hands, certain types of debts in priority to any claim for principal and interest due under the charge. The priority debts may include wages and other entitlements payable to former employees. This section does not apply to court appointed receiverships. It also only applies where as at the date of the receiver's appointment the company has not commenced to be wound up.    If a receiver fails to comply with its obligation (except for the application of assets in favour of prior ranking creditors) it may become personally liable for such repayment. It may remain liable even if it is removed and replaced.    The authorities establish that section 433 of the Act imposes a positive obligation on a receiver to pay preferential payments. However, the court noted that these authorities concerned cases where the receiver had converted floating charge assets into money or otherwise had in its hands money derived from the floating charge assets. None of the authorities had addressed the present question, that is whether section 433 of the Act requires the Receivers to realise floating charge assets so as to provide a fund from which the preferred payments may be made.    The court considered that the purpose of section 433 of the Act is to "prevent a floating chargee from scooping the pool by enforcing the security and leaving preferential creditors in the cold". The court held that the purpose of section 433 of the Act would not be promoted if it was interpreted so as to require a receiver (and the chargee indemnifying it against any loss) to risk its own funds for the benefit of the preferred creditors by prosecuting the causes of action. The court held that the Receivers were under no obligation to commence any causes of action for the purposes of the Priority Creditors.    However, the court held that different considerations applied to the two actions that had already been commenced by the Receivers. The court observed that the Receivers owe duties to the Priority Creditors analogous to the duties owed to the Chargors, which include the duty to exercise its powers in good faith and not to sacrifice the preferred creditors interests recklessly. The court held that the Receivers have a discretion whether to prosecute the actions currently on foot providing that such a discretion is exercised in good faith and having regard to the interest of the Priority Creditors.    **(ii) The Receivers right to maintain a retention fund and obligation to retire**   The Receivers sought directions that:  they are not obliged to retire in light of the threatened litigation and potential liability to pay the Priority Creditors (even though the amount borrowed was capable of being repaid to ING); and  they were entitled to realise assets of the Chargors to create a fund to satisfy future potential liabilities of the Chargors to ING.  The court observed that receivers have a common law right to retain a fund against the costs of defending litigation brought against them by a chargor. The court held that, subject to the findings or orders made in COR 223 of 2009, the Receivers are justified in realising the remaining assets of the Chargors to create a fund available to satisfy the future potential liabilities in relation to the litigation. The court also held that the Receivers were entitled to continue the receivership until they had established a sufficient fund.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h4)  **4.4 US Supreme Court effectively ends US securities litigation against Australian companies by Australian plaintiffs for conduct which occurred outside the United States**   (By Jonathon Redwood, Barrister)   Morrison v National Australia Bank, 561 US (2010), United States Supreme Court, Scalia J (joined by Roberts CJ, Kennedy, Thomas and Alito JJ), Breyer J concurring in part and concurring in judgment, Stevens J (joined by Ginsburg J) concurring in judgment only, 24 June 2010.   The full text of the judgment is available at [http://www.supremecourt.gov/opinions/09pdf/08-1191.pdf](http://www.supremecourt.gov/opinions/09pdf/08-1191.pdf" \t "_new)   **(a) Summary**   In a unanimous landmark decision the United States Supreme Court has effectively foreclosed US securities litigation against Australian companies by Australian plaintiffs for conduct which occurred in Australia. On 24 June 2010, in Morrison v National Australia Bank, the Supreme Court held that securities fraud class actions under section 10(b) of the US Securities Exchange Act of 1934 ("Exchange Act") do not cover claims of foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges.    It replaced decades of previous jurisprudence of lower appellate courts with a new bright-line rule: section 10(b) only applies to a transaction when the purchase or sale is made in the United States, or involves a security listed on a domestic exchange. It based this decision principally on the canon of statutory construction which presumes that Congress does not intend to apply a statute to conduct outside of the United States unless the text of the statute clearly indicates such an intention.    Whilst the decision establishes certainty in the application of US federal securities laws to foreign companies, it is likely to encourage class actions before Australian courts under Australian rules governing representative proceedings for breach of similar anti-fraud Australian securities laws now that such actions cannot be brought in the United States.    **(b) Background**   A distinctive feature of US securities regulation is that the potential for large securities law civil suits in the US is appreciably higher than in other jurisdictions. As a general matter, the heightened liability risk in the US is not so much a product of more investor friendly securities laws (or "law on the books" in the words of Professor John Coffee of Columbia University), but differences of legal culture, civil procedure and methods of enforcement of securities laws.    It is well known that the US is a litigious culture and this extends to securities laws. This litigious culture is fed by the widespread historical use of class actions as a form of private enforcement of securities laws and the generally more permissive and flexible laws providing for the use of such class actions, the costs system (ie, costs do not follow the event as in Australia), the availability of contingency fees, and the size and coordination of the securities litigation bar. Class actions in the US are also facilitated by the fraud on the market doctrine, which has hitherto not been embraced by Australian courts. Under this theory, plaintiffs are entitled to a rebuttable presumption that class members had relied on the integrity of the trading market in deciding to sell their shares and are not required to prove direct reliance in order to establish causation.   The principal legal source of civil liability for misleading statements conveyed to investors under US securities laws is Rule 10b-5 promulgated pursuant to section 10(b) of the Exchange Act. Section 10(b) provides:   "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange.[t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered,.any manipulative device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe."   Most relevantly, one limb of Rule 10b-5 promulgated by the SEC thereunder proscribes making any untrue statements of material fact or failing to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. Its legal contours are thus, speaking generally, analogous to section 52 of the [Trade Practices Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) for misleading and deceptive conduct and analogous provisions in sections 670, 728 and 1041 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).    Apart from the private enforcement through class actions, another distinctive feature of Rule 10b-5 had been its extraterritorial reach. A number of decisions prior to Morrison v NAB had established subject matter jurisdiction for Rule 10b-5 claims concerning non-US companies where it could be established that the conduct in the United States was more than merely preparatory and had some discernible effect in the US. Many had criticised the unpredictable and inconsistent application of the so called "conduct" and "effects" tests.   Distinguished US securities regulation academic, Professor John Coffee, has been highly critical of the extra-territorial operation of Rule 10b-5. He has cogently argued (Coffee, "The Law and the Market: The Impact of Enforcement" (2007)) that the availability of securities class actions should be restricted to U.S. nationals and foreign residents because allowing foreign non-resident investors to be included within a class not only forces US courts to serve as "policemen to the world", but also discourages foreign companies from cross-listing. The influential Committee on Capital Markets Regulation has also criticised the availability and proliferation of class actions against foreign issuers in respect of largely extra-territorial conduct. They contend it has had a corrosive impact on the competitiveness of US capital markets because the spectre of becoming embroiled in a US class action discourages foreign companies from raising capital in the US.    The litigation in Morrison v NAB should be considered against this background.   **(c) Facts and curial history**   In Morrison v NAB, Australian plaintiffs who purchased NAB ordinary shares on the ASX brought a securities fraud class action based on Rule 10b-5 against NAB in the United States District Court (Southern District of New York). To connect the alleged fraud to the US, and thus to provide a basis for the US court to exercise jurisdiction over their foreign-cubed claims, the Australian plaintiffs alleged that employees of HomeSide, NAB's US mortgage service provider subsidiary, knowingly created models that falsely inflated the value of its Mortgage Servicing Rights ("MSRs"). HomeSide employees then allegedly transmitted these inflated values to NAB executives in Australia, who allegedly participated in the fraud by including that information in NAB's ASX financial disclosures. When the inflated MSR values became apparent, NAB took large write-downs, allegedly causing a decline in NAB's share price.   Following the Second Circuit's "conduct" and "effect" tests, the District Court dismissed the Australian plaintiffs' claims for lack of subject matter jurisdiction, holding that because the claims concerned alleged public misstatements, the "heart" of the alleged fraud had occurred in Australia, where NAB executives determined the content of, and issued NAB's public disclosures. The underlying conduct by HomeSide employees, while part of the chain of events that ultimately caused the alleged losses, was insufficient to establish the right of the Australian plaintiffs to bring suit in the US. This conduct, at most, amounted to a link in the chain of a scheme that culminated at NAB's nerve centre of operations in Melbourne.   The Second Circuit affirmed the decision of the District Court and reaffirmed that a US court generally has jurisdiction to hear foreign-cubed claims only if activities in the US "were more than merely preparatory to a fraud and culpable acts or omissions occurring here directly caused losses to investors abroad". The court said this determination is not mechanical but contextual and fact-intensive, and ultimately "depends on what and how much was done in the United States and on what and how much was done abroad."   The Second Circuit emphasised that because the US securities laws focus on disclosures, a US court should not exercise jurisdiction where primary responsibility for the content of the disclosures and the issuance of the disclosures occurred abroad. Accordingly, the Second Circuit rejected the proposition that a US court can exercise jurisdiction over foreign-cubed claims solely because certain conduct contributing to the creation of the alleged misstatements occurred in the US. At the same time, the Second Circuit was not persuaded that the bringing of such claims would bring US securities laws into conflict with those of other jurisdictions, since the anti-fraud rules and enforcement objectives of other countries were broadly similar. A bright-line rule, therefore, precluding foreign-cubed claims was not warranted. Conscious, however, that it is not a world court charged with policing securities fraud globally, the Second Circuit concluded that its existing doctrinal framework, which focuses on the locus of the conduct said to comprise the heart of the alleged fraud, appropriately balanced the competing policy goals of avoiding conflict with foreign securities laws, on the one hand, and preventing the export of fraud from the United States on the other hand.   As applied to the facts of Morrison v NAB, the Second Circuit held that (1) because there were no allegations of any effect on US investors or US markets, (2)  none of the alleged misstatements were made from the US but from NAB's headquarters in Melbourne, which took primary responsibility for NAB's public filings and its communications with investors and the outside world, and (3) the lengthy chain of causation between Homeside's actions and the statements that reached investors, amounted to a conclusion that the total "mix of factors" meant that that US courts lacked subject matter jurisdiction.   In light of the significance of Second Circuit's decision and the uncertain state of the law, certiorari was granted by the Supreme Court.   The Australian Government and ASIC, along with other foreign governments concerned by the exterritorial reach of US securities laws, intervened before the Supreme Court as amicus curiae. The Australian Government submitted that it is "opposed to overly broad assertions of extraterritorial jurisdiction over aliens arising out of foreign disputes, because such litigation can interfere with national sovereignty and result in legal uncertainty and costs for actors involved in global trading and investment."    The Australian Government said the decision marked an opportunity for the court to place appropriate limits on foreign-cubed class actions in an increasingly globalised securities market where more nations have in place detailed regulatory systems.  It argued that broad assertion of jurisdiction to provide civil remedies in national courts for violations allegedly perpetrated by foreign issuers of securities against foreign investors in foreign places is inconsistent with international law and may interfere with, and the undermine the policy choices reflected by, the regimes that Australia and other nations have established to regulate companies and protect investors in their markets.  As noted above, the Australian class action process differs from the US model in significant ways.   In this respect it was emphasised that Australia's comprehensive system of securities regulation reflects the public choices made by successive Australian Governments. The differences that exist between Australian and US securities regulation generally reflect public policy choices about which sovereign governments may reasonably differ. Importantly, a class action could have been brought in Australia under the Corporations Act (by the then equivalent of sections 1041H and 1041E) by the appellants in relation to the type of conduct alleged in this particular case. Principles of comity dictated that the court should respect Australia's sovereign judgments on class action civil procedures, especially when litigation concerns Australian citizens suing an Australian corporation over conduct that occurred in Australia.   **(d) Decision**   In a unanimous opinion authored by Justice Scalia, the Supreme Court held that the Exchange Act's antifraud provisions concerning misstatements and omissions do not cover putative claims brought by foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges.  The court agreed with the criticisms of the Second Circuit's "conducts" and "effects" tests made by the Australian Government and other foreign governments.   As a threshold matter, the court held that whether foreign-cubed claims may proceed in a US court is not an issue of subject-matter jurisdiction, but rather a question of whether there is a cause of action for foreign-cubed claims under the Exchange Act.   The court answered this question negatively by application of the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." The court was critical of previous decisions of lower courts for failing to faithfully apply this basic canon of statutory construction.  The court concluded that there was no clear indication in the text of section 10(b) (upon which Rule 10b-5 is based) or other provisions of the Exchange Act that section 10(b) was intended to apply extraterritorially.    The court held that the text of the Exchange Act supported the following bright-line rule: section 10(b) applies to a transaction when the purchase or sale is made in the United States, or involves a security listed on a domestic exchange. The court said that the focus of the Exchange Act was not upon the place where the deception originated, but upon purchases and sales in the United States. The court's transaction test effectively eliminates foreign-cubed securities claims.   Because the appellant's claims did not involve securities listed on a US exchange and all aspects of their purchases occurred outside the United States, the court confirmed the Second Circuit's dismissal of their claims.   Extra-textual or policy considerations supported the court's textual conclusion. First, as noted above, the "fear that [the US] has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." Secondly, as urged by the Australian and other Governments, a concern that extraterritorial application of section 10(b) of the Exchange Act may result in conflict and incompatibility with the laws and regulatory regime of other nations on the same subject-matter in respect of the same conduct. The court acknowledged in this respect that "[t]he regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters."   Justice Stevens (joined by Justice Ginsburg) agreed with the result, but rejected the bright-line rule adopted by the majority. He would have followed the Second Circuit's conduct and effects test as consistent with the text, structure, history and purpose of the Exchange Act and Congress' invitation for judicial development of this area of the law. He criticised the majority's reasoning for withdrawing section 10(b)'s application from cases in which there is both substantial wrongful conduct that occurred in the US and substantial injurious effect on US markets and citizens.   **(e) Observations**   The clear effect of the decision is that investors who purchase shares of Australian companies which are listed on the ASX and not in the US will be unable to bring proceedings under the principal antifraud provision of US federal securities law.    Morrison v NAB was concerned with section 10(b) of the Exchange Act. Similar reasoning should apply to sections 11 and 12(2) of the US Securities Act of 1933 ("Securities Act") concerned with primary offerings through a public prospectus in the US, as is usually the case with large global equity offerings (eg, the sale of shares by Telstra in "T1" and "T2").    The court emphatically rejected an alternative test advanced by the Solicitor General (Elena Kagan, the nominee for the Supreme Court) that fraud would fall within section 10(b)'s compass where it involved significant conduct in the US that is material to the fraud's success. The court also declined to address an argument from the Solicitor General that a different test should apply to proceedings brought by the SEC.   Significantly however, the US House of Representatives and the Senate have recently (and subsequently to the Supreme Court's decision) approved the "Dodd-Frank Wall Street Reform and Consumer Protection Act," or "Dodd-Frank."  Section 929P of Dodd-Frank expands extraterritorial jurisdiction in actions brought by the US Department of Justice or the SEC, but not private parties, under the antifraud provisions of the Securities Act and the Exchange Act. In the case of the Securities Act and the Exchange Act, this includes "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors," as well as "conduct occurring outside the United States that has a foreseeable substantial effect within the United States." This is broadly similar to the test advocated by the Solicitor General.   With respect to private parties, Dodd Frank does not override Morrison v NAB but rather section 929Y of Dodd-Frank requires the SEC to study the extent to which private rights of action under the antifraud provisions of the Exchange Act should be extended to cover conduct within the US that constitutes a significant step in the furtherance of the violation, even if the securities transaction occurs outside the US and involves only non-US investors, and conduct occurring outside the US that has a foreseeable substantial effect within the US. Among other things, the study must analyse:  the scope of such a private right of action, including whether it should extend to all private actors or only institutional investors, or otherwise;  what implications such a private right of action would have on international comity;  the economic costs and benefits of extending a private right of action for transnational securities frauds; and whether a narrower extraterritorial standard should be adopted.  Somewhat paradoxically given the perceived concern with the conduct and effects test applied by the Second Circuit on the competitiveness of the US capital markets, Morrison v NAB is likely to deter Australian and other foreign companies from listing their ordinary shares on the NYSE or Nasdaq now that the touchstone for the extraterritorial operation of the Exchange Act is whether the security is listed on a US exchange.  At the same time, the fact of listing of American Depositary Receipts ("ADRs"), which represent the right to receive a specified number of ordinary shares, it would seem will not trigger the extraterritorial operation of the Exchange Act in respect of purchases of the underlying shares on the ASX, as was the case in Morrison v NAB.    More broadly, Morrison v NAB is likely to divert class action claims by Australian plaintiffs against Australian companies that otherwise might have been pursued in the US - because of the favourable legal environment for shareholder class actions in the US - to class actions pursued before Australian courts (or proceedings brought by ASIC on behalf of shareholders). This seems especially likely given the more favourable legal environment for class actions in Australia in recent years.    At a time when the US has significantly wound back on the availability of securities class actions, through a combination of a series of recent narrowing Supreme Court decisions and Congressional restrictions, in recognition of the damaging impact of class actions on the competitiveness of the US capital markets, the emergence of litigation funders (bolstered by the High Court's decision in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386), publicly-listed law firms and the liberalisation of the rules governing representative proceedings has seen Australia move in the opposite direction toward an environment more conducive to the bringing of large shareholder class actions.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h4)  **4.5 Existence of litigation funder weighs in favour of security for costs**   (By Michael Power, Mallesons Stephen Jaques)   Bufalo Corporation Pty Ltd (receiver and manager appointed) (in liq) v Lendlease Primelife Limited (No 3) [2010] VSC 263, Supreme Court of Victoria, Judd J, 21 June 2010   The full text of this judgment is available at:   [http://www.austlii.edu.au/au/cases/vic/VSC/2010/263.html](http://www.austlii.edu.au/au/cases/vic/VSC/2010/263.html" \t "_new)   **(a) Summary**   The Victorian Supreme Court ordered security for costs against a plaintiff who brought proceedings with the support of a litigation funder.     The submissions in this case show that in a security for costs application the existence of a litigation funder can be a two-edged sword.  On the one hand, the litigation funder can weigh against an order for security, if the court is satisfied that it will pay the plaintiff's costs.  On the other hand, the existence of a funder can weigh in favour of such an order, because it means an order for security for costs will not 'stultify' litigation, and because it is fair that the funder share the costs (not just the rewards) of the litigation.   In this case, Judd J followed a long line of recent cases which held that the existence of a litigation funder weighs in favour of an order for security for costs.  To the extent that this represents more liability for litigation funders, the decision may discourage litigation funders financing proceedings brought by an insolvent plaintiff.  However, the judgment suggests that in some cases a litigation funder may make an order for security less likely, not more.   **(b) Facts**   The plaintiff had undertaken property developments with the first defendant between 1997 and 1999.  The plaintiff defaulted on a loan advanced by the first defendant, and the first defendant appointed a receiver and manager.  The plaintiff commenced proceedings, alleging (amongst other things) that the first defendant had breached a joint venture agreement between them.   The present application was brought by the defendants.  They applied for an order under section 1335 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) that the plaintiff provide security for their costs of preparing for the trial.  Section 1335(1) provides that, "[w]here a corporation is a plaintiff in any action or other legal proceeding, the court having jurisdiction may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given."   This was not the first time that the defendants had applied for security for costs.  On 30 April 2009 Judd J ordered the plaintiff to provide security for costs, albeit only to a limited extent.  However, that earlier application and order were of limited scope only and did not affect the order sought in this application.   **(c) Decision**   The first limb of section 1335(1) - that the plaintiff would be unable to pay the costs of the defendants if successful - was not in dispute.  This marked a departure from the earlier application, where the plaintiff had argued that the litigation funder constituted an 'asset' which enabled it to meet its costs.  The plaintiff relied on an indemnity from the litigation funder for the plaintiff's costs.  This argument was rejected in the earlier application, and was not raised in this application.  However, Judd J hinted that it might be successful in other contexts.  His Honour suggested (at [65]) that it might be easier to characterise the funder as an 'asset' if the plaintiff provided more detailed evidence of the funder's financial position.  He further noted (at [56]) that although it could be "cumbersome and highly contentious" for a defendant to enforce an indemnity for costs against a litigation funder, such problems "could possibly be overcome if the funder undertook to the court to be subject to any order for costs the court might make or consented to be joined as a party for that purpose[.]"     In this application, however, the existence of the litigation funder was used to oppose an order for security for costs.  The plaintiff had argued that the court should therefore exercise its discretion to refuse or discount an order for security, because its claim was 'defensive' in nature; and its impecuniosity had been caused by the defendants' alleged actions.  In response, the defendants argued that the existence of the litigation funder 'neutralised' these considerations, and made it easier for the plaintiff to meet an order for security for costs.     They pointed in their submissions (as did Judd J in his judgment) to a number of cases in support of that conclusion:  Green (as liquidator of *Arimco Mining Pty Ltd) v CGU Insurance* [2008] NSWCA 148 ("Green"), in which Hodgson JA said, "a court should be readier to order security for costs where the non-party who stands to benefit from the proceedings is not a person interested in having rights vindicated, as would be a shareholder or creditor of a plaintiff corporation, but rather is a person whose interest is solely to make a commercial profit from funding the litigation."  *Quadrant Constructions Pty Ltd v Morgan Smith Barney Australia Pty Ltd* [2009] VSC 455, where Forrest J said of the risk of security for costs 'stultifying' litigation, "the presence of the litigation funder changes the dynamics of this equation" so as to "neutralize this issue."  *Saunders v Houghton and Jones* [2009] NZCA 610 where the court held that a litigation funder "substantially alters the balance between plaintiffs and defendants" giving rise to "the need for the funder to provide security for costs in most cases."  *Fiduciary Ltd v Morningstar Research Pty Ltd* [2004] NSWSC 664, in which Austin J said, "it is fair for the courts to proceed on a basis which reflects the proposition that those who seek to benefit from the litigation should bear the risks and burdens that the process entails."  *Chartspike Ptd Ltd v Chahoud* [2001] NSWSC 585, where Young CJ in Eq said that where "a company which is insolvent.[has].contracted to have the liquidation funded by a third party, in return for that third party receiving a share of the verdict.it is appropriate that the third party bear part of the risk."  His Honour accepted this line of authority, and held that "the interests of justice are best served in this case by requiring the plaintiff to provide reasonable security for the defendants' costs."     His Honour dismissed the plaintiff's arguments that the litigation funder had assumed a 'fair share' of the risks of the litigation, and that its important role in the administration of justice meant that it should not be penalised by orders for security.  Importantly, the extent of the risk assumed was not disclosed, and the relevant parts of the funding agreement were redacted.  In that sense, the judgment suggests that if litigation funders are willing to provide further details of the indemnities and funding agreements through which they assume the risk of litigation, or provide undertakings to the court to assume that risk, they may evade orders for security for costs in future cases.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h4)  **4.6 Where insider trading will be taken to "occur"**   (BY Garth Riddell, Freehills)   Commonwealth Director of Public Prosecutions v Fysh [2010] QSC 216, Supreme Court of Queensland, Wilson J, 21 June 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/qld/QSC/2010/216.html](http://www.austlii.edu.au/au/cases/qld/QSC/2010/216.html" \t "_new)   **(a) Summary**   Restraining orders had been made against Fysh under the [Proceeds of Crime Act 2002 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=65667" \t "Default) on the basis that there were reasonable grounds to suspect that Fysh had contravened the insider trading provisions of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) "at Brisbane in the State of Queensland and elsewhere". The relevant trades took place on the ASX in Sydney however the principal share registers of the companies whose shares were traded were located in Brisbane. In the context of determining whether the Supreme Court of Queensland had jurisdiction to make the restraining orders, the court expressed the view that the conduct constituting the alleged insider trading offences had not occurred in Queensland, even though the transfers were eventually recorded in the principal share registers of the relevant companies in Brisbane.   **(b) Facts**   Fysh was the Executive Vice President and Managing Director for BG Africa, Middle East and Asia. A development team within BG had identified the use of coal seam gas as a potential business opportunity and was investigating various assets and possible business partners in Australia. It was alleged that Fysh was in possession of this information when he made certain trades on the ASX.    The trades took place on the ASX in Sydney. On-market trades on the ASX are effected in accordance with the ASTC Settlement Rules and are recorded on an electronic sub-register known as the CHESS sub-register.    It was unclear where Fysh was located when he arranged for his broker to make the trades, however the broker was located in Melbourne.    **(c) Decision**  Under the ASTC Settlement Rules, the transfers took effect when the shares were electronically deducted from their source holdings. This is when Fysh acquired/disposed of equitable title to the shares.  The CHESS sub-registers of the relevant companies were maintained at Sydney. The CHESS sub-register forms part of the share register required to be kept by a company under sections 168 and 169 of the Corporations Act. Accordingly, Fysh acquired/disposed of legal title to the shares when the transfers were recorded on the CHESS sub-register of the relevant company in Sydney.  None of the conduct constituting the alleged insider trading offences occurred in Queensland for the purposes of the [Proceeds of Crime Act 2002 (Cth)](http://my.lawlex.com.au/default.asp?cid=65667&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default), even though the transfers were eventually recorded in the principal share registers of the relevant companies in Brisbane following the CHESS transfers.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h4)  **4.7 Court offers guidance in relation to the execution and enforcement of a deed of loan and guarantee**   (By Amruta Bapat, Blake Dawson)   Matouk v The Entrance Seabreeze Pty Ltd [2010] NSWSC 649, New South Wales Supreme Court, Ward J, 18 June 2010   The full text of this judgment is available at:   [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/649.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/649.html" \t "_new)   **(a) Summary**  The plaintiff, Mr Nicholas Matouk, sought enforcement of a guarantee given by Mr Ghattas George Beshara (among others) in relation to a loan made by Mr Matouk to The Entrance Seabreeze Pty Ltd (Seabreeze).  The initial loan agreement and guarantee purported to be a deed; however, it appeared not to have been read or signed by Mr Matouk.  The initial agreement was later affirmed by a validly executed Deed of Variation.    Ward J of the New South Wales Supreme Court held that the loan agreement was binding and could be validly relied on by Mr Matouk to recover the loan moneys and interest as well as an additional payment of $500,000 contemplated by the agreement.  It was held that, even if the initial agreement could not bind Mr Beshara as either a deed or a contract of guarantee, Mr Beshara's obligations were validly affirmed by the Deed of Variation.  Ward J held that it was not unconscionable for Mr Matouk to seek to enforce the guarantee.   The quantum of the exact amount owing to Mr Matouk was unclear from the evidence and referred for determination by an Associate Justice.   **(b) Facts**  Mr Matouk made a loan of $800,000 to Seabreeze to assist the company with a development project.  The loan was made on the basis that each of the three directors of Seabreeze would provide personal guarantees.  The funds were lent pursuant to a document titled a "Deed of Loan", dated 23 November 2005.  The judgment referred to this document as "the Deed", even though its validity as a deed was a matter of dispute between the parties.    The Deed referred to Mr Matouk as the lender, Seabreeze as the borrower and each of the three directors of Seabreeze collectively as the Guarantor.  The Deed provided that Seabreeze was to repay to Mr Matouk the principal amount of $800,000 plus interest, as well as an additional payment of $500,000.   The Deed was executed by Seabreeze and its three directors but appeared not to have been signed by Mr Matouk who, despite insisting that he had signed it, was unable to produce a copy of the Deed bearing his signature.  Mr Matouk asserted that he had not read the Deed in detail before signing it.   On 26 April 2007, the parties entered into a validly executed Deed of Variation affirming the terms of the initial Deed.  The Deed of Variation contained a provision requiring Mr Matouk to withdraw a caveat held over a property belonging to Seabreeze.  In consideration for Mr Matouk doing so, Seabreeze provided him with a mortgage over another property as security.   With the exception of some nominal payments, Seabreeze largely failed to repay the loan.  Mr Matouk sought to enforce the Deed against Seabreeze and the corresponding guarantees against its three directors.  Default judgment was entered against Seabreeze and two of the directors.  The New South Wales Supreme Court considered whether the guarantee could be enforced against the third director, Mr Beshara.   **(c) Decision**   Ward J held that the Deed was binding on Mr Beshara.  In any event, her Honour found that the Deed was validly affirmed and varied by the 2007 Deed of Variation.  Mr Beshara was therefore obliged to repay the principal amount of the loan plus interest as well as the additional sum of $500,000.     In reaching this decision, Ward J considered the following issues:  whether the Deed amounted to a valid contract, given that Mr Matouk had not read it closely and did not appear to have signed it;  whether the Deed was enforceable as a deed, given that it was unsealed and apparently not executed by Mr Matouk;  the scope of the guarantor's obligations as contained in the Deed;  whether the principle of higher remedy applied;  whether it was unfair or unconscionable to enforce the guarantee against Mr Beshara; and  the quantum of the underlying debt.  **(i) Was there a valid contract?**   Ward J held that the Deed constituted a valid contract.  Her Honour noted that upon signing an agreement, a person is generally bound by its terms even if he or she has not read and understood the agreement.  Thus, Mr Matouk would have been bound by the signed Deed despite his lack of understanding as to its terms.    However, the evidence indicated that Mr Matouk had not signed the Deed.  Ward J held that nevertheless, there was sufficient evidence to indicate the formation of a binding contract.  Her Honour referred to the fact that Mr Matouk provided the loan for the purposes of the development project, and that Mr Beshara's conduct in making nominal repayments was consistent with the existence of an agreement between the parties.  Mr Beshara had signed the Deed and had received independent legal advice prior to doing so.  These factors, in addition to the commercial relationship between the parties, indicated that a contract was formed, regardless of the fact that Mr Matouk had apparently not read or signed the document.  In any case, Ward J noted that the 2007 Deed of Variation validly affirmed the terms of the original Deed.    **(ii) Was the Deed enforceable as a deed?**   Ward J referred to section 38 of the [Conveyancing Act 1919 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3880" \t "Default), which provides that a deed that is unsigned by one party is not enforceable against that party.  This provision did not assist Mr Beshara because Mr Matouk was not attempting to deny being bound by the Deed.    Ward J held that the Deed was enforceable as a deed, given that it had been executed by Mr Beshara.  Her Honour found that a party who executes a deed in accordance with the required formalities becomes bound by the provisions contained in it, even if the other party does not execute the deed thereafter.     In any case, even if the Deed could not be enforced as a Deed, it was held to be enforceable as a contract.  The provision by Mr Beshara of the guarantee was supported by valid consideration.  On the evidence, Mr Beshara knew when signing the guarantee that Mr Matouk would not provide the loan to Seabreeze in the absence of personal guarantees from the three directors.  This amounted to "ample" consideration for the guarantee given by Mr Beshara.    **(iii) The scope of the guarantor's obligations**   Ward J held that the obligations of the guarantors under the Deed included repayment of the principal loan amount plus interest, as well as the additional amount of $500,000.    Mr Beshara argued that his obligations as guarantor did not extend to payment of the additional $500,000.  However, Ward J rejected this contention and noted that the guarantee was given in relation to the "performance" of Seabreeze under the Deed.  Seabreeze's obligations included payment of this additional sum, and Mr Beshara was thus found to be liable for this payment as well.    Mr Beshara submitted that a guarantor's liability to repay the principal was only triggered on receipt of a formal demand, and that it would be unfair for the guarantor to be liable for payment of accruing interest before a formal demand was made.  Both these arguments were soundly rejected by Ward J.  Her Honour noted that there were no provisions in the Deed requiring a demand as a condition precedent to the liability of a guarantor.    **(iv) A higher remedy?**   Mr Beshara argued that the mortgage granted by Seabreeze to Mr Matouk pursuant to the Deed of Variation was a "higher remedy" than the guarantees provided by Mr Beshara and his co-directors, and that this effectively merged the remedies available to Mr Matouk, such that he could no longer rely on the guarantees but rather solely on the mortgage.     Ward J rejected this argument, noting that Mr Matouk merely obtained security in different forms from different parties.  Thus, the mortgage over Seabreeze's property did not extinguish any rights that Mr Matouk had in relation to enforcement of the guarantees provided by Mr Beshara or his co-directors.    **(v) Unfairness / unconscionability of enforcing the guarantee**   Mr Beshara argued, on the basis of the [Contracts Review Act 1980 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=10771" \t "Default), that it would be unjust to enforce the guarantee against him. He submitted that he was unaware of the financial situation of his co-directors, and that they had acted fraudulently against him.      Ward J affirmed that in determining whether a contract is unjust, the court is to have regard to various factors, including:  material inequality in bargaining power;  whether the contract was the subject of prior negotiations;  whether the parties had the opportunity to negotiate for the alteration of the contractual terms; and  whether the contractual terms were reasonably difficult to comply with, or not reasonably necessary to protect the legitimate interests of a party to the contract.  Ward J did not accept Mr Beshara's contention, noting that the agreement between the parties was commercial in nature with no evidence of unconscionable conduct.  It was held that Mr Matouk was not implicated in any instances of fraud which may have arisen between Mr Beshara and his co-directors.  Her Honour observed that Mr Beshara obtained a clear benefit from the transaction, due to his role as one of the directors of Seabreeze.  The fact that Mr Beshara had obtained independent legal advice in relation to the guarantee, and signed a declaration to this effect, was also persuasive.     **(vi) Quantum of the debt owing**   The evidence provided in relation to the quantum of the debt owed to Mr Matouk was described by Ward J as "wildly contradictory".  This issue was therefore referred to an Associate Justice for determination.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h4)  **4.8 Securing the repayment of moneys owing under a loan agreement and the nature of a mortgagee's interest in a floating charge prior to crystallisation**  (By Jiayue Li, DLA Phillips Fox)   Geoff Sharpe Pty Limited v M&E Fitzgerald Holdings Pty Ltd [2010] QSC 225, Supreme Court of Queensland, Wilson J, 18 June 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/qld/QSC/2010/225.html](http://www.austlii.edu.au/au/cases/qld/QSC/2010/225.html" \t "_new)   **(a) Summary**   The plaintiff as lender, the first and third defendants as borrowers, and the second defendant as guarantor, entered into a loan agreement ('loan agreement'). A mortgage debenture was also executed to secure repayment of moneys owing under the loan agreement, with the plaintiff as mortgagee and the first defendant as mortgagor.   A further loan was obtained by the plaintiff, the first defendant and another party from BankWest to fund a joint venture which the plaintiff and first defendant were parties to ('BankWest loan'). There was an oral agreement between the plaintiff, the first defendant and the other borrowers that they were each responsible for the loan liabilities of the joint venture, apart from those attributable solely to the plaintiff.   The first defendant defaulted under the loan agreement and the mortgage debenture. The plaintiff sought to enforce its rights under the loan agreement and mortgage debenture to obtain repayment of moneys advanced to the first defendant.   **(b) Facts**   On 6 February 2006, the plaintiff as lender and the first and third defendants as borrowers, and the second defendant as guarantor, entered into the loan agreement.    On or around the same date, the plaintiff and the first defendant entered into a mortgage debenture. The charge under the mortgage debenture operated as a fixed and specific charge over any listed assets and as a floating charge over all other property and assets in the mortgaged premises to secure repayment of 'moneys hereby secured' as defined by reference to the loan agreement. There were no assets listed in the relevant scheme to the mortgage debenture.   In May 2006, the managing director of the plaintiff had discussions with parties including the first defendant to enter into the BankWest loan to acquire gaming machines under a joint venture agreement. At a meeting on or about 10 July 2007, the plaintiff, the first defendant and the other borrowers under the BankWest loan orally agreed that the joint venture was at an end and that the borrowers were each responsible for the loan liabilities of the joint venture, except for those attributable solely to the plaintiff.   From 6 February 2006, the plaintiff made advances under the loan agreement to the first defendant. The plaintiff also made advances to the first defendant to allow it to meet its interest repayments under the BankWest loan. Additionally, the plaintiff repaid the entire outstanding balance on the BankWest loan.   The plaintiff claimed that these amounts were all moneys owing under the loan agreement and the amount was secured by the mortgage debenture and sought to recover an amount of $3,927,705.17 from the first defendant.   After these proceedings were commenced, the first defendant was placed in voluntary administration. The plaintiff was given leave to proceed by Wilson J pursuant to section 440D of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).   **(c) Decision**   Wilson J held that:  the $3,927,705.17 claimed by the plaintiff were moneys due and owing pursuant to the loan agreement;  the $3,927,705.17 claimed by the plaintiff were 'moneys hereby secured' within the meaning of the loan agreement and the mortgage debenture; and  under the mortgage debenture, the first defendant granted to the plaintiff a floating charge over all its assets and undertaking, including the Main Beach land, to secure repayment of moneys owing pursuant to the loan agreement.  **(i) Moneys due and owing pursuant to the loan agreement**   After reviewing the terms of the loan agreement which provided for further advances to be made to the borrowers at the lender's discretion, Wilson J held that all the amounts advanced by the plaintiff to the first defendant or on behalf of the first defendant in repayment of the BankWest loan were moneys due and owing pursuant to the loan agreement.   **(ii) Meaning of 'moneys hereby secured' by the mortgage debenture**   Wilson J further held that the amount claimed by the plaintiff constituted 'moneys hereby secured' under the mortgage debenture.   'Moneys hereby secured' was defined in schedule 3 of the mortgage debenture as the first advance of $560,000 provided by the plaintiff to the first defendant and 'the obligations of the Mortgagor under a certain Loan Agreement made between the Mortgagee of the First Part and the parties named in Schedule 4 of the Second Part'. This in turn referred to the loan agreement entered into on or around 6 February 2006.   The loan agreement contained a wide definition of 'moneys hereby secured'. The phrase was defined in the loan agreement to include 'all moneys already advanced or paid or now or hereafter advanced or paid by the Lender to for or for the use or accommodation of or on behalf of the Borrower either alone or jointly with any other person or otherwise owing or payable now or hereafter by the Borrower either alone or jointly with any other person to the Lender on any account or for any reason or in any manner whatsoever', followed without limitation by a number of specific examples.   Wilson J held that all the amounts advanced by the plaintiff as lender to the first defendant, as well as the amounts provided by the plaintiff in relation to the BankWest loan, constituted 'moneys hereby secured' under the mortgage debenture.   **(iii) Mortgagee's interest in floating charge over all of the first defendant's assets and undertaking**   The third issue for Wilson J to consider was whether the mortgagee's security extended to a floating charge over all of the first defendant's assets and undertaking, including the Main Beach land to secure repayment of moneys owing under the loan agreement.   Pursuant to the mortgage debenture, the charge operated as a fixed charge over any assets listed in schedule 7 of the mortgage debenture and a floating charge over all other property and assets in the mortgaged premises. No assets were listed in schedule 7 of the mortgage debenture.   Wilson J reviewed the authorities which considered the nature of a floating charge prior to crystallisation. The authorities stated that a mortgagee has an immediate and continuing equitable charge over the mortgagor's assets subject to the right of the mortgagor company to dispose of or deal with the assets free of or released from the charge to the extent this may be properly implied from the common intention of the parties.    Therefore, despite there being no crystallisation event in relation to the floating charge, the plaintiff mortgagee had an interest in the property and assets of the first defendant as to secure the repayment of moneys owing under the loan agreement.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h4)  **4.9 Approval of a scheme of arrangement under section 411(4)(b) of the Corporations Act**   (By Rose Lee, Clayton Utz)   Rusina Mining NL, in the matter of Rusina Mining (No 2) [2010] FCA 609, Federal Court of Australia, Barker J, 16 June 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2010/609.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/609.html" \t "_new)   **(a) Summary**   This judgment provides the court's reasons for approving a scheme of arrangement between Rusina Mining and its members under section 411 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  The court was satisfied that all procedural matters in respect of the scheme of arrangement had been complied with and that the scheme was fair and reasonable to Rusina Mining's members.  The court also considered the scope of section 411(17) and was satisfied that the Scheme had not been proposed for the purpose of avoiding Chapter 6 of the Corporations Act.     **(b) Facts**   European Nickel PLC sought to merge with Rusina Mining NL ("Rusina Mining") through the implementation of a scheme of arrangement between Rusina Mining and its shareholders ("Shareholders") under section 411 of the Corporations Act 2001 (Cth) ("Act") ("Scheme").     Rusina Mining applied to the court seeking orders convening a meeting of Shareholders to consider the approval of the Scheme ("First Court Hearing") and those orders were obtained on 30 April 2010.  Pursuant to those orders, a meeting was convened on 2 June 2010 where the resolution to enter into the Scheme was passed by the requisite majority in the number of Shareholders present and votes cast.  Rusina Mining then applied to the court for approval of the Scheme under section 411(4)(b).     **(c) Decision**   Justice Barker outlined the criteria for approval of a scheme of arrangement under the Act.  A scheme would be approved if the court was satisfied that all procedural matters had been complied with and that the scheme was fair and reasonable to the members in a general sense.  He noted that the court's role was supervisory in nature.   **(i) Procedural matters**   Justice Barker was satisfied that the meeting of Shareholders to approve the Scheme was convened and held in accordance with orders made on 30 April 2010 and as required by the Federal Court (Corporations) Rules 2000 (Cth), the Act and the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default).  These requirements included providing a notice of the meeting and scheme booklet to Shareholders, serving on ASIC a copy of the court orders made on 30 April 2010 and advertising the meeting in the newspaper.   **(ii) Matters of fairness**   Justice Barker summarised what the court must consider in determining matters of fairness in relation to schemes.  The court must ascertain that:  all the conditions required by the statute have been complied with;  the proposed scheme is made in good faith; and  the proposed scheme is at least so far as fair and reasonable as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve it.   In concluding that the Scheme was fair, Barker J noted that there was a high participation rate and a very large majority at the meeting of Shareholders which approved the Scheme.  Justice Barker reasoned that the strong shareholder support absolved any concerns about break fees raised at the First Court Hearing.  He noted that ASIC would not have registered the scheme booklet pursuant to section 412(6) of the Act if ASIC had any concern that it contained a false or misleading material particular.  Justice Barker also noted that a number of conditions precedent in place at the time of the First Court Hearing were now satisfied.   **(iii) The requirements of section 411(17)**   Justice Barker then considered the requirements of section 411(17) which provides that the court must not approve a scheme of arrangement unless:  it is satisfied that the scheme has not been proposed for the purpose of avoiding the operation of Chapter 6 of the Act; or  ASIC has provided a statement that it does not object to the scheme of arrangement, but the court need not approve a scheme of arrangement merely because ASIC has produced its statement of no objection.  Justice Barker noted that in the present case, Rusina Mining had acknowledged that its objectives could have been achieved through Chapter 6 but it was also a case where ASIC had produced a no objection statement.  Justice Barker agreed with Robson J in Re Coles Group Ltd (No 2) [2007] VSC 523 who stated that the existence of ASIC's no objection statement tends to establish that the existence of the purpose of avoidance is not of particular significance in relation to the court's exercise of discretion under section 411(4)(b).      Justice Barker held that the specific intention of avoiding a specific provision of Chapter 6 of the Act cannot be inferred from the general intention to prefer the procedure under Part 5.1 of the Act where Part 5.1 delivers a legal outcome that cannot be achieved under Chapter 6 (in the present case, 100% ownership determined in one procedure) or a legitimate commercial outcome, such as the timely and cost effective implementation of a merger.  He noted that the distinction is that the intention is not to avoid Chapter 6 but to prefer Part 5.1 generally.   In the present case, Rusina Mining had given Shareholders a similar disclosure that would have been afforded them had the merger been implemented by takeover under Chapter 6 and therefore the Shareholders were not disadvantaged.   **(iv) Orders**   For the above reasons, the court made orders approving the Scheme pursuant to section 411(4)(b) of the Act.  Other supplementary orders were made relating to procedural matters including an exemption from compliance with section 411(11) of the Act and the abridgment of the notice period in orders made on 30 April 2010.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h4)  **4.10 Reflective loss**   (By Stephen Magee)   Groeneveld Australia Pty Ltd v  Nolten  [2010] VSC 249, Supreme Court of Victoria, Ferguson J, 9 June 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2010/249.html](http://www.austlii.edu.au/au/cases/vic/VSC/2010/249.html" \t "_new)   **(a) Summary**   A statement of claim could not include a shareholder's claim for damages allegedly suffered by the shareholder's company.   **(b) Facts**   This decision concerned two procedural matters:  an application to join a New Zealand company as a plaintiff in proceedings in the Supreme Court of Victoria; and  a statement of claim in the Victorian proceedings.  It appears that Mr Nolten was a director of GA Pty Ltd. Mr Nolten was also the sole director of GNZ Pty Ltd, a wholly-owned subsidiary of GA.   GNZ entered into a lease. GA's statement of claim in the Victorian proceedings alleged that the lease had caused loss to GNZ and that, by allowing GNZ to enter the lease, Mr Nolten had breached his duty to GA. It sought a declaration that he had breached his duty to GA and an award of damages equal to the loss that its wholly-owned subsidiary GNZ had allegedly suffered.   An Associate Judge refused the joinder application and stayed that part of the statement of claim dealing with the alleged breach of Mr Nolten's directorial duties. GA sought leave to appeal.   **(c) Decision**   **(i) Joinder**   It appears that the New Zealand company was involved in litigation in New Zealand with one of the parties to proceedings in the Supreme Court of Victoria (which are not described in the judgment). The court heard and dismissed an appeal against the Associate Judge's refusal to join the New Zealand company to the Victorian proceedings.    **(ii) Statement of claim**   The court refused leave to appeal against the Associate Judge's stay of that part of the statement of claim dealing with the alleged breach of Mr Nolten's directorial duties. The court pointed out that GA's claim for damages was negated by the principle of reflective loss. This says that a shareholder (GA) cannot claim damages that are entirely reflective of a loss suffered by his company (GNZ).    GA argued that, even if it couldn't claim damages, it could still maintain the application for a declaration that Mr Nolten had breached his duty to GA. Even this small crumb of comfort was denied by the court. It said that, without the possibility of damages, the declaration would be a waste of time.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h4)  **4.11 Company meeting the costs of a derivative action**  (By Toby Collis and Mark Cessario, Corrs Chambers Westgarth)   Wood v Links Golf Tasmania Pty Ltd [2010] FCA 570, Federal Court of Australia, Finklestein J, 8 June 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2010/570.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/570.html" \t "_new)   **(a) Summary**   The applicants sought an order under section 242 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for costs from the respondent, Links Golf Tasmania Pty Ltd (LGT),  in pursuit of a derivative action in the name of LGT against Mr Sattler, a director of LGT, and his company.   After considering general practice in relation to the issue and Parliamentary intention behind the discretion afforded to the court under section 242, Finklestein J granted the order for costs.    **(b) Facts**   On 19 March 2010, leave was granted pursuant to section 237 of the Corporations Act 2001 (Cth) to Mr Wood and Mr Hetrel, former officers of LGT, to commence an action under Part 2F.1A, Corporations Act 2001 (Cth) (whereby certain persons may bring an action in the name of a company) in the name of LGT.   The proceedings were against Mr Sattler, a director of LGT, and his company, RG Sattler Nominees Pty Ltd.    LGT operates a links golf course in Tasmania. It intended to establish other golf courses. In the action, LGT contended that in breach of his duties, Mr Sattler misappropriated an opportunity to establish a new golf course on land adjoining LGT's existing course by procuring his company to take up the opportunity.   As part of the leave application under section 237, the applicants sought an order under section 242 that LGT cover the costs of the action against Sattler and his company.  Section 242 provides a broad discretion to the court to make orders it considers appropriate for costs of proceedings brought with leave granted under section 237.   LGT consented to the order. However, Sattler, as a majority shareholder, and another shareholder opposed the application.  In opposing the application, they relied on the following propositions:  more should be known about the merits of the action than is currently known;  an independent board of LGT had initially made a decision not to bring the claim against Sattler and his company;  if the action fails, LGT will suffer an adverse costs order;  if the action succeeds, Sattler or his company will pay the costs;  the costs may be run up unnecessarily;  LGT has limited resources;  Messrs Wood and Hetrel are not impecunious and could themselves fund the action; and  the action is really about a dispute between, on the one hand, Messrs Wood and Hetrel and, on the other, Sattler and LGT and the action is but a vehicle to resolve that dispute.  **(c) Decision**   The general approach to costs incurred in a derivative action is that those pursuing the action should bear the costs of the company: *Sub Rosa Holdings Pty Ltd v Salsa Sudada Productions Pty Ltd* [2006] NSWSC 916; *Roach v Winnote Pty Ltd* [2006] NSWSC 231.   However, Finklestein J did not follow this approach because:  the discretion conferred by section 242 is unconfined;  Parliamentary intention behind section 242, as evidenced in its Explanatory Memorandum, envisages that in appropriate circumstances a company should bear the costs of the proceedings; and  the purpose behind Part 2F.1A (and the common law action preceding it) is to increase the likelihood that someone brings a claim which the company ought to have commenced. In those circumstances, there is no good reason why the company should not bear the costs. This is in line with the position stated by Marks J in *Farrow v Registrar of Building Societies* [1991] 2 VR 589, which was followed prior to the enactment of Part 2F.1A.  His Honour noted that:  his approach will not result in a costs order in all cases, and referred to *Fiduciary Limited v Morningstar Research Pty Ltd* [2005] NSWSC 442; and  if a costs order is made, and at any later time it turns out the claim is unmeritorious, the costs order can be recalled.  Finkelstein J was not persuaded by the contention that the costs will be unreasonably run up, and noted that this can be controlled by the court.  Nor was he persuaded that, on the facts, LGT was short of funds.    His Honour therefore ordered that LGT meet the fair and reasonable costs of running the action on the basis that, prima facie, this was a matter which was, from LGT's perspective, worthwhile pursuing.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h4)  **4.12 New responsible entity takes rights, obligations and liabilities of an old responsible entity, even those expressed to be held in a "personal capacity"**   (By Jason Hewitt, Blake Dawson)   Huntley Management Limited v Timbercorp Securities Limited [2010] FCA 576, Federal Court of Australia, Rares J, 8 June 2010   The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2010/576.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/576.html" \t "_new)   **(a) Summary**   Timbercorp sought to argue that particular rights, obligations and liabilities that it had as the responsible entity of three managed investment schemes did not pass to Huntley, the new responsible entity.  Timbercorp argued that those rights, obligations and liabilities it held "in its personal capacity" should not pass despite the "statutory novation" sections 601FS and 601FT.  Justice Rares of the Federal Court rejected this argument and held that all rights, obligations and liabilities held in relation to the scheme passed to Huntley (except those expressly excluded by the Act).   **(b) Facts**   The members of three managed investment schemes removed Timbercorp Securities Limited (in liq) as responsible entity and appointed Huntley Management Limited through extraordinary resolutions.  Food and Beverage Australia Limited replaced Huntley as the responsible entity for the 2007 project and joined the action (but was dealt with in another proceeding).   Documents relating to the 2005 project were taken to be representative of all the schemes.  The constitution of the 2005 project provided that Timbercorp was the responsible entity and had to ensure, in relation to each scheme, that:  "any instrument that confers the right, for the purpose of the scheme, to use the land on which any primary production will occur in the operation of the scheme, is lodged for registration under State or Territory land titles law, in the name of.    (d) the licensee, either:           (i) as trustee for the members; or           (ii) beneficially in the course of and in accordance with its duties as responsible entity."   The constitution provided that Timbercorp was to issue a PDS to invite investors to participate in the scheme, under which each investor was to engage Timbercorp to cultivate, maintain and harvest mangoes on land leased from Mango Land Pty Ltd and carry out associated functions.  In the PDS, Timbercorp stated that it had "ultimate responsibility to [investors] for the operation and management for the Project. [Timbercorp] at all times. will be responsible to [investors] for the actions of all its agents and subcontractors."   Timbercorp, "in its personal capacity", leased a property from Mango Land.  The lease stated that it did not form part of the 2005 project's "scheme property" as defined in the Act.  The leased land was the land to be licensed to investors.   Each investor became party to three agreements under the constitution:  a licence agreement, between Mango Land, Timbercorp  and each investor, for a portion of the land;  a management agreement; and  a sub-licence and marketing deed relating to the particular mango breed and its marketing (and associated functions).  Timbercorp entered into each agreement (either in respect of the entire agreement, or in respect of particular obligations) "in its personal capacity".  Each agreement was expressed to be subject to the terms and conditions of the scheme constitution.  The PDS did not state that Timbercorp had entered into the agreements "in its personal capacity".   **(c) Decision**   Sections 601FS and 601FT of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) provide that the rights, obligations and liabilities (in relation to a scheme) of a former responsible entity become the rights, obligations and liabilities of any new responsible entity.  Rights, obligations and liabilities exclude those relating to fees to be paid prior to change, expenses incurred prior to change, the responsible entity's membership of a scheme, and those for which the former responsible entity could not have been indemnified out of the scheme property had it remained as responsible entity.   Justice Rares took the view that the sections provide a statutory novation designed to facilitate a change and ensure that any change does not disrupt the scheme.  The new responsible entity should be able to "step into the shoes" of the old.  The words "rights, obligations and liabilities" should be given a broad construction to facilitate an immediate and seamless change.   His Honour rejected the argument that rights, obligations and liabilities "in relation to the scheme" should be confined to documents concerning the scheme.  His Honour took the view that the expression "in relation to" is of wide and general import and should not be read down without some compelling reason to do so.  A purposive and broad construction of the expression "in relation to the scheme" must be adopted to provide for a full and effective transfer of control between responsible entities.  He noted an implicit limitation to those rights, obligations and liabilities capable of having an ongoing operation after the change.     Timbercorp contended that each agreement clearly disclosed which terms it agreed to only in its personal capacity and which it agreed to as responsible entity for the time being.  It argued that the various references to it entering into agreements "in its personal capacity" should be construed in their ordinary and natural meaning and, as such, the sections have no effect on those contractual provisions.  Any rights, obligations and liabilities it held in a personal capacity should be purchased from it by Huntley.   Justice Rares stated that the capacity in which each party contracts must be determined objectively, no specification by a party being determinative.  The court must consider what a reasonable person in the position of the parties would have understood having regard to the surrounding circumstances known to the parties, and the purpose and object of the transaction.   Timbercorp further argued that whilst the PDS did not make reference to its "personal capacity", it had no contractual force.  His Honour stated that the PDS was, at the least, a relevant part of the factual matrix.   Justice Rares considered that the background of the schemes was significant, and thus considered it necessary to identify the scheme itself.  He took the view that the essential feature of a managed investment scheme is that persons contribute money or money's worth to a "program or plan of action" constituted by the scheme and this property be pooled to produce benefits for those who made contributions.  His Honour pointed out that under the Act a responsible entity "has a prime function of applying through contributions to the acquisition of property and its subsequent use with the purpose of achieving that result".  The "substance and effect of the documents, construed in their context, is the critical determinant of the true nature of the parties' relationship and the rights, obligations and liabilities" created.  Given that the schemes related to the growing of mangoes on the land, the leases and licence agreements were essential to the scheme.   Further, Timbercorp had to protect investor interests and comply with Australian financial services licence requirements by lodging for registration, in its name beneficially, the leases of the land indicating that the lease was held as scheme property by whomever was the responsible entity.   His Honour also considered:  the scheme's dependence on the mango lot licences;  the correspondence between entitlements paid to Timbercorp and lease payments;  the tying of investors to Timbercorp, even if Timbercorp had been removed as responsible entity, that would occur if the leases were not novated; and  the fact that the PDS did not contemplate a situation in which Timbercorp would retain the benefit of the lease should it be replaced as a responsible entity.  His Honour concluded that "all the rights, obligations and liabilities of Timbercorp whether expressed to be those in its personal capacity or otherwise under the three investor agreements, leases and the constitution were those 'of the former responsible entity in relation to the scheme', within the meaning of section 601FS(1) other than for those rights, obligations and liabilities that it retains by force of sections 601FS(2) and 601FT(2)."  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h4)  **4.13 Limits on the ability of a valid power of attorney to bind a company**   (By Alex Bowen, Mallesons Stephen Jaques)   J Wright Enterprises Pty Ltd (in liq) v Port Ballidu Pty Ltd [2010] QSC 213, Supreme Court of Queensland, White J, 17 May 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/qld/QSC/2010/213.html](http://www.austlii.edu.au/au/cases/qld/QSC/2010/213.html" \t "_new)   **(a) Summary**   A mortgage over property owned by the defendant company was executed in such dubious circumstances that it could not be considered to bind the company, despite the fact that the director who executed it purported to act under a power of attorney which, while not entirely regular, was still valid.   However, a mortgage was registered on the title, and while this involved a fraud by the defendant's solicitor, this could not be attributed to the plaintiff. The debt the subject of the ineffective loan agreement was in fact secured by the mortgage.   **(b) Facts**   The plaintiff lent money on the basis of a mortgage purportedly executed by the defendant company. The property subject to the mortgage was the defendant company's sole asset and the defendant did not carry on any business other than leasing the property to Seatem Travel, a company which owned an interest in the defendant and which was associated with the director of the defendant who benefited from the loan, Mr O'Rourke. The defendant had previously used equity in the property to provide working capital to Seatem.   The loan was to Mr O'Rourke and his wife and the defendant. The mortgage documents were executed by Mr O'Rourke, who was a shareholder and one of three directors of the defendant. The other two shares were held by Seatem and the other two directors were executives of Seatem.   Mr O'Rourke ran the Seatem business in Australia on a day to day basis, and had well-defined authority to enter into contracts and manage the business. He was systematically overseen by the London-based executives of Seatem who were also directors of the defendant.   The mortgage was executed and registered on the title in ambiguous circumstances. The issue was whether the various documents actually bound the company.    **(c) Decision**   **(i) The power of attorney**   Mr O'Rourke had a valid power of attorney from the defendant company. The power was granted in an irregular way (by Mr O'Rourke and another director who was not yet appointed, but who was acting as a director), but it was entered in the company's seal register. The other directors who were appointed subsequently when Seatem acquired an interest in the defendant were not aware of the power of attorney.   However, the power of attorney was not produced by Mr O'Rourke until various other attempts to demonstrate his authority to the plaintiff had failed. Mr O'Rourke had provided the plaintiff with an old company resolution purportedly giving him power to act but clearly not extending in its scope to this transaction; and then he had produced an email from one of the overseas directors (who were said to be uncontactable) which allegedly authorised the loan. It was only after these had failed to satisfy the lender that Mr O'Rourke was asked about a power of attorney and he apparently remembered that there was one. It was nine years old and unregistered - this should have conveyed the understanding that it had not been used for this sort of transaction. In fact the other directors of the defendant were unaware of it.   The plaintiff was aware from an early stage of the apparent urgency of completing the loan and Mr O'Rourke's need to pay money owing to someone in Singapore. All of these circumstances should have alerted the plaintiff and its advisors to the fact that a great deal of caution was required. In the context in which it was produced, the power of attorney was not sufficient for the plaintiff to rely on Mr O'Rourke's authority to bind the defendant company.   In addition, the loan and mortgage were not executed "as attorney" for the company as required by the [Property Law Act 1974](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12558" \t "Default) and the [Powers of Attorney Act 1998](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=13432" \t "Default). The power of attorney was only registered after the execution of the documents. The mortgage was altered after signing by the defendant's solicitor to make it conform with the requirements for registration and it was registered.   **(ii) Waiver or acquiescence**   Subsequent to the granting of the alleged mortgage, Mr O'Rourke was involved in a refinancing of the defendant's and Seatem's other loans. As a result of this some money was repaid to the plaintiff. Mr O'Rourke executed this refinance without informing the other directors but the defendant company honoured the new arrangement and made repayments.   This was argued to indicate a recognition of Mr O'Rourke's capacity to execute mortgages and loans on behalf of the defendant. This was not accepted by the court. The refinancing was not authorised by the defendant and the defendant had taken the benefit of it, but this did not indicate acceptance of the loan to the plaintiff or the creation of a general authority in Mr O'Rourke.   **(iii) Fraud and creation of a charge on the property**   It was alleged by the defendant that the alteration of the mortgage instrument by the defendant's solicitor to make it appear that it had been correctly executed under a power of attorney was fraud sufficient to avert indefeasibility of title.   There was technically a fraud but it could not be sheeted home to the plaintiff. Therefore the mortgage which was registered was valid on the title and was effective by virtue of the indefeasibility of the register.   **(iv) What was secured by the mortgage?**   While the mortgage was successfully registered, there was still a question as to what, if anything, it secured. The mortgage instrument was broadly drafted and included in its scope of secured money any money advanced by the plaintiff to the defendant. It referred to the loan agreement but not to the amount of the loan.   This was enough for the mortgage to be effective in securing the amount subject to the loan. This seems to mean (although this was not decided) that while the outstanding amount can be recovered against the security of the property, the loan agreement cannot be enforced personally against the defendant.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/155%20July%202010.htm%23h4)  **4.14 Members of listed property trust apply for compensation from directors of responsible entity**  (By Jacqueline Christie and Anastacia Totoeva, Clayton Utz)  Mercedes Holdings Pty Limited v Water (No 2) [2010] FCA 472, Federal Court of Australia, Perram J, 14 May 2010    The full text of this judgment is available at:   [http://www.austlii.edu.au/au/cases/cth/FCA/2010/472.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/472.html" \t "_new)    **(a) Summary**   This decision establishes that section 1325(2) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) is available as a remedy to members of registered managed investment schemes in relation to breaches by directors of responsible entities of the duties imposed upon them by section 601FC.    The decision also considers:  the requisite degree of an auditor's "awareness" for the purposes of section 601HG(4) of the Corporations Act; and  whether unit holders of a registered managed investment scheme (being beneficiaries under a trust) have the ability to bring a claim in negligence against the auditors.  **(b) Facts**   The proceedings concern the affairs of a listed property trust formerly known as MFS Premium Income Fund (the Fund). The plaintiffs, who were unit holders of the Fund between 1 January 2007 and 15 October 2008, brought the representative proceedings on their own behalf and on behalf of other persons who were unit holders in the Fund.    The plaintiffs alleged that:  the responsible entity for the Fund (RE) entered into a series of 19 related party transactions;  the RE breached numerous duties by entering into these 19 transactions;  the officers of the RE also breached duties by allowing the RE to enter into the transactions;  the Fund's auditors failed to carry out an audit that they were required by law to effect; and  the Fund's auditors failed to report to ASIC various breaches of the Corporations Act 2001 by the RE and its directors which they should have known about, or did know about.  The plaintiffs further alleged that as a result of these breaches of duty the Fund entered into the 19 transactions and, as a consequence, the assets of the Fund were depleted, greatly diminishing the value of the plaintiffs' units in the Fund.  In these proceedings the plaintiffs sought leave to file a further amended application and an amended statement of claim. The final form of the proposed pleadings spanned some 571 pages. Perram J refused the application to amend and stated that the proposed pleading was "prolix, repetitious, and frequently obscure". However, in considering the procedural issues raised by these proceedings, Perram J made a number of important observations on substantive law issues. These are discussed below.    **(c) Decision**   **(i) Whether Fund members may recover compensation under section 1325(2) of the Corporations Act**   The Fund members alleged that the directors of the RE had breached section 601FD(1) in Chapter 5C of the Corporations Act. Chapter 5C does not provide machinery by which compensation may be awarded to a person who suffers loss or damage by reason of a director's breach of one of the duties imposed by section 601FD. So the Fund members applied for compensation under section 1325(2) (in Part 9.5), which provides:  "The court may, on the application of a person who has suffered, or is likely to suffer, loss or damage because conduct of another person that was engaged in contravention of Chapter 5C...make such orders as the court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention...if the court considers that the order or orders concerned will compensate the person who made the application..."   This was the first case where there was recourse to section 1325(2) in the context of a breach of section 601FD(1).    The sixth, seventh and ninth defendants (directors of the RE) presented a number of arguments as to why it was not open to the Fund members to rely on section 1325(2). However, ultimately Perram J held that these arguments must be rejected.    First, argued the directors, Part 9.4B of the Corporations Act, entitled "Civil Consequences of Contravening Civil Penalty Provisions", is an exhaustive code setting out the only ways in which compensation may be recovered for a breach of a civil penalty provision.    Their logic was as follows:  section 601FD(1) sets out the duties of RE directors;  section 601FD(3) states that a person who contravenes section 601FD(1) also contravenes section 601FD(3); and  subsection 601FD(3) is a civil penalty provision.  Under section 1317J, only ASIC or the corporation or RE for the registered scheme may apply for a compensation order for breach of a civil penalty provision. The directors argued, therefore, that the plaintiffs lacked standing to claim compensation for an alleged breach of section 601FD.   Perram J noted this point but highlighted that the plaintiffs were not in fact alleging a contravention of section 601FD(3). They were alleging only a contravention of section 601FD(1). The fact that a breach of section 601FD(1) is also a breach of section 601FD(3) did not require the plaintiffs to include an alleged breach of section 601FD(3) in their pleadings. "The exhaustive nature of Part 9.4B, even if established, is irrelevant."    Second, argued the directors, section 601MA is the sole civil remedy conferred by the Corporations Act on fund members for a contravention of Chapter 5C. Section 601MA(1) provides that: "A member of a registered scheme who suffers loss or damage because of conduct of the scheme's responsible entity that contravenes a provision of this Chapter may recover the amount of the loss or damage by action against the responsible entity whether or not the responsible entity has been convicted of an offence, or has a civil penalty order made against it..."   It was submitted that section 1325(2) was to be seen as a general provision which yielded to the more specific provisions of section 601MA. The directors' argument was that there is a negative implication from section 601MA which requires section 1325(2) to be construed as not extending to provide a remedy in the case of contraventions of Chapter 5C.    Perram J rejected this argument for two reasons. First, that implication would be directly inconsistent with the express words used in section 1325(2) which provides for a remedy for a Contravention of Chapter 5C. Second, the suggested negative implication is inconsistent with section 601MA(3) which states that "this section does not affect any liability that a person has under other provisions of this Act..."   **(ii) Whether auditors' "awareness" under section 601HG(4) must be actual or constructive**   In these proceedings the plaintiffs contended that the auditors "read or ought to have read" certain documents and, as a result were "aware" (within the meaning of section 601HG(4)(a)(i))  that the fund had entered into a number of related party transactions which required member approval and the auditors knew that such approval had not been obtained. Despite this, it was alleged, the auditors did not notify ASIC of the circumstances of which they had become aware, circumstances which may have amounted to a contravention of the Corporations Act.    The auditors argued that the word "awareness" in section 601HG(4)(a)(i) requires actual knowledge and therefore, the plaintiffs' pleading that the auditors "ought to have read" certain documents could not provide an adequate basis for an allegation of awareness within the meaning of the section. Perram J agreed on this point stating that there is no doubt that "aware" in that provision connotes a state of actual knowledge. However, he also conceded that a state of constructive knowledge may be sufficient in a case concerning section 601HG(4)(a)(i). For example, if the auditors were actually aware of matters of such a kind that their subsequent non-reading of certain documents could be seen as a deliberate course of conduct intended to avoid finding out more, then they may be in breach of the provision (in this case, the plaintiffs did not make that kind of allegation).      **(iii) Can a claim in negligence be brought by the beneficiaries of a trust against the auditors if the trustee refuses to sue?**   In addition to claiming compensation from the auditors for breaches of Chapter 5C of the Corporations Act 2001, the plaintiffs brought a claim in negligence against the auditors. The auditors argued that there was no duty of care owed by the auditors directly to unit holders and, even if there was, the standing to bring such a claim rested with the responsible entity as trustee.   The auditors' alternative submission was that there was a more general principle in corporations law which barred claims for "reflective loss". The principle applies where parallel rights are vested both in a corporation and in its shareholders against a third party. In such circumstances shareholders have not been permitted to recover loss arising from a fall in value of their shares because the corporation has a right to recover identical damages for harm done to it.    Perram J rejected both of these arguments, and held that these principles had no application. It was highlighted that the plaintiffs were not seeking to assert the rights of the trustee against the auditors; rather, they were seeking to assert their own common law rights (in circumstances which precisely overlapped with common law rights possessed by the trustee).  It was also held that the principle of reflective loss had no application to a suit by a trust beneficiary: reflective loss was a rule of company law and derived from the doctrine of maintenance of capital - a doctrine which had no application to the law of trusts.  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