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| **Bulletin No. 164**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1.     [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/164%20April%202011.htm#h1)2.     [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/164%20April%202011.htm#h2)3.     [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/164%20April%202011.htm#h3)4.     [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/164%20April%202011.htm#h4)5.     [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/164%20April%202011.htm#h5)6.     [Contributions](http://www.law.unimelb.edu.au/bulletins/164%20April%202011.htm#6)7.     [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)  |

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

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| **1.1 IOSCO report on commodities markets**On 15 April 2011, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published its Task Force on Commodity Futures Markets - Report to the Financial Stability Board. The Report sets out IOSCO's current work on the supervision of commodity derivative markets, market transparency, and the ongoing monitoring of developments in OTC financial oil markets.The Report was prepared in response to the G20's request in November 2010 for an update to be provided to the Financial Stability Board on IOSCO's workstreams in support of the G20's aim of improving the regulation and supervision of exchange-traded, OTC derivative and physical commodity markets. It also outlines IOSCO's future plans and possible additional new areas of focus.The following workstreams are currently being undertaken by the Task Force on Commodity Futures Markets:**(a) Supervision of commodity derivative markets: Review of the Tokyo Communiqué**This work is aimed at updating and reviewing the existing guidance on contract design and market surveillance for commodity contracts set out in the 1997 Tokyo Communiqué on Supervision of Commodity Futures Markets. The Tokyo Communiqué includes Guidance on Standards of Best Practice for the Design and/or Review of Commodity Contracts and Guidance on Components of Market Surveillance and Information Sharing.The Task Force is undertaking work to update the content of the Communiqué in light of market developments since 1997, which will include recommendations on market surveillance, information sharing, market transparency and the design of commodity futures contracts which are intended to ensure the overall orderly and efficient functioning of derivative markets where the underlying is a physical commodity. The intention of the Task Force is to finalise and submit a full set of recommendations in time for the G20's October 2011 Finance Ministers meeting.**(b) Price reporting agencies**The Task Force is engaging with representatives from the International Energy Forum (IEF), International Energy Agency (IEA), and the Organisation of Petroleum Exporting Countries (OPEC) to assess the impact of oil price reporting agencies on overall market functioning and on financial markets in particular, in line with previous recommendations made on the need for improved physical market transparency.The study is aimed at informing the G20 about the influence and impact that price reporting agencies have on price discovery for various types of crude oil and in particular how this feeds into financial markets, since many price reporting agency benchmarks are used in exchange settlement prices. Final conclusions are intended to be available to the G20's Finance Ministers at their October 2011 meeting.**(c) Regulation and transparency of the financial oil market**The main focus of the Task Force in monitoring OTC oil markets is to encourage ongoing work by the ISDA Commodities Steering Committee (COSC) towards the creation of a trade repository for commodity derivatives, initially focusing on financial oil transactions. These efforts have resulted in the issuance by ISDA of a request for proposals from potential service providers to set up a trade repository.ISDA's repository will provide a structure for market participants to report transaction information both to regulators and to market participants, with flexibility for regulatory data requests and changes in content and functionality, with the aim of improving oversight, understanding and transparency of OTC financial oil derivative markets. ISDA currently intends that its repository will begin operation in the first quarter of 2012.The report is available on the [IOSCO website](https://www.iosco.org/library/pubdocs/pdf/IOSCOPD352.pdf%22%20%5Ct%20%22_new).etailed Contents**1.2 US Senate Investigations Subcommittee report on the financial crisis** On 13 April 2011, the US Senate Permanent Subcommittee on Investigations released a 635 page report on the results of its inquiry into key causes of the financial crisis.  The report is titled 'Wall Street and The Financial Crisis: Anatomy of a Financial Collapse'. The report documents conflicts of interest, excessive risk-taking and failures of federal oversight that, according to the report, helped push the US into the deepest recession since the Great Depression.The report expands on evidence gathered at four Subcommittee hearings in April 2010, examining four aspects of the crisis through detailed case studies:  high-risk mortgage lending, using the case of Washington Mutual Bank, a US$300 billion thrift that became the largest bank failure in US history; regulatory inaction, focusing on the Office of Thrift Supervision's failed oversight of Washington Mutual; inflated credit ratings that misled investors, examining the actions of the US's two largest credit rating agencies, Moody's and Standard & Poor's; and the role played by investment banks, focusing primarily on Goldman Sachs, creating and selling structured finance products that resulted in billions of dollars of losses for investors, while the bank itself profited from betting against the mortgage market.The following is extracted from the summary of the report issued by the Committee:**High Risk Lending.** With an eye on short term profits, Washington Mutual (WaMu) launched a strategy of high-risk mortgage lending in early 2005, even as the bank's own top executives stated that the condition of the housing market "signifies a bubble" with risks that "will come back to haunt us". Executives forged ahead despite repeated warnings from inside and outside the bank that the risks were excessive, its lending standards and risk management systems were deficient, and many of its loans were tainted by fraud or prone to early default.  WaMu's chief credit officer complained at one point that "[a]ny attempts to enforce [a] more disciplined underwriting approach were continuously thwarted by an aggressive, and often times abusive group of Sales employees within the organization."  From 2003 to 2006, WaMu shifted its loan originations from low risk, fixed rate mortgages, which fell from 64% to 25% of its loan originations, to high risk loans, which jumped from 19% to 55% of its originations.  WaMu and its subprime lender, Long Beach Mortgage, securitized hundreds of billions of dollars in high risk, poor quality, sometimes fraudulent mortgages, at times without full disclosure to investors, weakening US financial markets.  New analysis shows how WaMu sold some of its high risk loans to Fannie Mae and Freddie Mac, and played one off the other to make more money. **Regulatory Failures.** The Office of Thrift Supervision (OTS), Washington Mutual's primary regulator, repeatedly failed to correct WaMu's unsafe and unsound lending practices, despite logging nearly 500 serious deficiencies at the bank over five years, from 2003 to 2008.  New information details the regulator's deference to bank management and how it used the bank's short term profits to excuse high risk activities.  Although WaMu recorded increasing problems from its high risk loans, including delinquencies that doubled year after year in its risky Option Adjustable Rate Mortgage (ARM) portfolio, OTS examiners failed to clamp down on WaMu's high risk lending.  OTS did not even consider bringing an enforcement action against the bank until it began losing substantial sums in 2008.  OTS also failed until 2008 to lower the bank's overall high rating or the rating awarded to WaMu's management, despite the bank's ongoing failure to correct serious deficiencies.  When the Federal Deposit Insurance Corporation (FDIC) advocated taking tougher action, OTS officials not only refused, but impeded FDIC oversight of the bank.  When the New York State Attorney General sued two appraisal firms for colluding with WaMu to inflate property values, OTS took nearly a year to conduct its own investigation and finally recommended taking action - a week after the bank had failed.  The OTS Director treated WaMu, which was its largest thrift and supplied 15% of the agency's budget, as a "constituent" and struck an apologetic tone when informing WaMu's CEO of its decision to take an enforcement action.  When diligent oversight conflicted with OTS officials' desire to protect their "constituent" and the agency's own turf, they ignored their oversight responsibilities.**Inflated Credit Ratings.** The Report concludes that the most immediate cause of the financial crisis was the July 2007 mass ratings downgrades by Moody's and Standard & Poor's that exposed the risky nature of mortgage-related investments that, just months before, the same firms had deemed to be as safe as Treasury bills.  The result was a collapse in the value of mortgage related securities that devastated investors.  Internal emails show that credit rating agency personnel knew their ratings would not "hold" and delayed imposing tougher ratings criteria to "massage the . numbers to preserve market share".  Even after they finally adjusted their risk models to reflect the higher risk mortgages being issued, the firms often failed to apply the revised models to existing securities, and helped investment banks rush risky investments to market before tougher rating criteria took effect.  They also continued to pull in lucrative fees of up to US$135,000 to rate a mortgage backed security and up to US$750,000 to rate a collateralized debt obligation (CDO) - fees that might have been lost if they angered issuers by providing lower ratings.  The mass rating downgrades they finally initiated were not an effort to come clean, but were necessitated by skyrocketing mortgage delinquencies and securities plummeting in value.  In the end, over 90% of the AAA ratings given to mortgage-backed securities in 2006 and 2007 were downgraded to junk status, including 75 out of 75 AAA-rated Long Beach securities issued in 2006.  When sound credit ratings conflicted with collecting profitable fees, credit rating agencies chose the fees. **Investment Banks and Structured Finance.** Investment banks reviewed by the Subcommittee assembled and sold billions of dollars in mortgage-related investments that flooded financial markets with high-risk assets.  They charged US$1 to US$8 million in fees to construct, underwrite, and market a mortgage-backed security, and US$5 to US$10 million per CDO.  New documents detail how Deutsche Bank helped assembled a US$1.1 billion CDO known as Gemstone 7, stood by as it was filled it with low-quality assets that its top CDO trader referred to as "crap" and "pigs", and rushed to sell it "before the market falls off a cliff."  Deutsche Bank lost US$4.5 billion when the mortgage market collapsed, but would have lost even more if it had not cut its losses by selling CDOs like Gemstone.  When Goldman Sachs realized the mortgage market was in decline, it took actions to profit from that decline at the expense of its clients.  New documents detail how, in 2007, Goldman's Structured Products Group twice amassed and profited from large net short positions in mortgage related securities.  At the same time the firm was betting against the mortgage market as a whole, Goldman assembled and aggressively marketed to its clients poor quality CDOs that it actively bet against by taking large short positions in those transactions.  New documents and information detail how Goldman recommended four CDOs, Hudson, Anderson, Timberwolf, and Abacus, to its clients without fully disclosing key information about those products, Goldman's own market views, or its adverse economic interests.  For example, in Hudson, Goldman told investors that its interests were "aligned" with theirs when, in fact, Goldman held 100% of the short side of the CDO and had adverse interests to the investors, and described Hudson's assets as "sourced from the Street," when in fact, Goldman had selected and priced the assets without any third party involvement.  New documents also reveal that, at one point in May 2007, Goldman Sachs unsuccessfully tried to execute a "short squeeze" in the mortgage market so that Goldman could scoop up short positions at artificially depressed prices and profit as the mortgage market declined.  **Recommendations.** The Report offers 19 recommendations to address the conflicts of interest and abuses exposed in the Report.  The recommendations advocate, for example, strong implementation of the new restrictions on proprietary trading and conflicts of interest; and action by the SEC to rank credit rating agencies according to the accuracy of their ratings.  Other recommendations seek to advance low risk mortgages, greater transparency in the marketplace, and more protective capital, liquidity, and loss reserves. **Recommendations on High Risk Lending****1. Ensure "Qualified Mortgages" Are Low Risk.** Federal regulators should use their regulatory authority to ensure that all mortgages deemed to be "qualified residential mortgages" have a low risk of delinquency or default.**2. Require Meaningful Risk Retention.** Federal regulators should issue a strong risk retention requirement by requiring the retention of not less than a 5% credit risk in each, or a representative sample of, an asset backed securitization's tranches, and by barring a hedging offset for a reasonable but limited period of time.**3. Safeguard Against High Risk Products.** Federal banking regulators should safeguard taxpayer dollars by requiring banks with high risk structured finance products, including complex products with little or no reliable performance data, to meet conservative loss reserve, liquidity, and capital requirements.**4. Require Greater Reserves for Negative Amortization Loans.** Federal banking regulators should use their regulatory authority to require banks issuing negatively amortizing loans that allow borrowers to defer payments of interest and principal, to maintain more conservative loss, liquidity, and capital reserves.**5. Safeguard Bank Investment Portfolios.** Federal banking regulators should identify high risk structured finance products and impose a reasonable limit on the amount of such high risk products that can be included in a bank's investment portfolio.**Recommendations on Regulatory Failures****1. Complete OTS Dismantling.** The Office of the Comptroller of the Currency (OCC) should complete the dismantling of the Office of Thrift Supervision (OTS), despite attempts by some OTS officials to preserve the agency's identity and influence within the OCC.**2. Strengthen Enforcement.** Federal banking regulators should conduct a review of their major financial institutions to identify those with ongoing, serious deficiencies, and review their enforcement approach to those institutions to eliminate any policy of deference to bank management, inflated CAMELS ratings, or use of short term profits to excuse high risk activities.**3. Strengthen CAMELS Ratings.** Federal banking regulators should undertake a comprehensive review of the CAMELS ratings system to produce ratings that signal whether an institution is expected to operate in a safe and sound manner over a specified period of time, asset quality ratings that reflect embedded risks rather than short term profits, management ratings that reflect any ongoing failure to correct identified deficiencies, and composite ratings that discourage systemic risks.**4. Evaluate Impacts of High Risk Lending.** The Financial Stability Oversight Council should undertake a study to identify high risk lending practices at financial institutions, and evaluate the nature and significance of the impacts that these practices may have on US financial systems as a whole.**Recommendations on Inflated Credit Ratings****1. Rank Credit Rating Agencies by Accuracy.** The SEC should use its regulatory authority to rank the Nationally Recognized Statistical Rating Organizations in terms of performance, in particular the accuracy of their ratings.**2. Help Investors Hold CRAs Accountable.** The SEC should use its regulatory authority to facilitate the ability of investors to hold credit rating agencies accountable in civil lawsuits for inflated credit ratings, when a credit rating agency knowingly or recklessly fails to conduct a reasonable investigation of the rated security.**3. Strengthen CRA Operations.** The SEC should use its inspection, examination, and regulatory authority to ensure credit rating agencies institute internal controls, credit rating methodologies, and employee conflict of interest safeguards that advance rating accuracy.**4. Ensure CRAs Recognize Risk.** The SEC should use its inspection, examination, and regulatory authority to ensure credit rating agencies assign higher risk to financial instruments whose performance cannot be reliably predicted due to their novelty or complexity, or that rely on assets from parties with a record for issuing poor quality assets.**5. Strengthen Disclosure.** The SEC should exercise its authority to ensure that the credit rating agencies complete the required new ratings forms by the end of the year and that the new forms provide comprehensible, consistent, and useful ratings information to investors, including by testing the proposed forms with actual investors.**6. Reduce Ratings Reliance.** Federal regulators should reduce the federal government's reliance on privately issued credit ratings.**Recommendations on Investment Bank Abuses****1. Review Structured Finance Transactions.** Federal regulators should review the RMBS, CDO, CDS, and ABX activities described in the report to identify any violations of law and to examine ways to strengthen existing regulatory prohibitions against abusive practices involving structured finance products.**2. Narrow Proprietary Trading Exceptions.** To ensure a meaningful ban on proprietary trading under section 619 of the Wall Street Reform and Consumer Protection Act 2010, any exceptions to that ban, such as for marketmaking or risk-mitigating hedging activities, should be strictly limited in the implementing regulations to activities that serve clients or reduce risk.**3. Design Strong Conflict of Interest Prohibitions.** Regulators implementing the conflict of interest prohibitions in sections 619 and 621 of the Wall Street Reform and Consumer Protection Act 2010 should consider the types of conflicts of interest in the Goldman Sachs case study, as identified in the report.**4. Study Bank Use of Structured Finance.** Regulators should consider the role of federally insured banks in designing, marketing, and investing in structured finance products with risks that cannot be reliably measured and naked credit default swaps or synthetic financial instruments. The report is available on the [Committee's website](http://levin.senate.gov/newsroom/supporting/2011/PSI_WallStreetCrisis_041311.pdf%22%20%5Ct%20%22_new).etailed Contents**1.3 IMF global financial stability report**On 13 April 2011, the International Monetary Fund (IMF) published the semi annual financial stability report. The topics dealt with in the report are:Chapter 1 - Key risks and challenges for sustaining financial stability:What are the key stability risks and challenges?:Living dangerously - the legacy of high debt burdens in advanced economiesBanking system - not enough has been doneSovereign funding challengesAlleviating pressures on households and firmsMacro and stability implications of capital inflows into emerging markersDurable financial stability.Chapter 2 - How to address the systemic part of liquidity risk:What is systemic liquidity risk?Will liquidity rules under Basel III lower systemic risk?Measures of systemic liquidity risk and potential macroprudential tools to mitigate itPolicy conclusions.Chapter 3 -  Housing finance and financial stability:Housing booms and bustsGlobal housing finance landscapeHousing finance and financial stabilityPolicy conclusions.The report is available on the [IMF website](http://www.imf.org/external/pubs/ft/gfsr/2011/01/index.htm?source=cmailer" \t "_new).etailed Contents**1.4 Financial Stability Board publishes background note on shadow banking** On 12 April 2011, the Financial Stability Board (FSB) published a note titled 'Shadow Banking: Scoping the Issues'. This note provides information on the work of the FSB to develop recommendations to strengthen the oversight and regulation of the shadow banking system. The "shadow banking system" can broadly be described as "credit intermediation involving entities and activities outside the regular banking system". Intermediating credit through non-bank channels can have advantages, for example by providing an alternative source of funding and liquidity. However, as the recent financial crisis has shown, the shadow banking system can also be a source of systemic risk both directly and through its interconnectedness with the regular banking system. It can also create opportunities for arbitrage that might undermine stricter bank regulation and lead to a build-up of additional leverage and risks in the system. Enhancing supervision and regulation of the shadow banking system in areas where systemic risk and regulatory arbitrage concerns are inadequately addressed is therefore important. The G20 Leaders at the November 2010 Summit asked the FSB to develop recommendations to strengthen the oversight and regulation of the shadow banking system. The FSB has since formed a task force to develop initial recommendations for discussion that would:clarify what is meant by "the shadow banking system";set out potential approaches for monitoring the shadow banking system; andexplore possible regulatory measures to address the systemic risk and regulatory arbitrage concerns posed by the shadow banking system.The note sets out the current thinking of the task force - in particular on the first item. It proposes that monitoring and policy responses should be guided by a two-stage approach: first by casting the net wide to cover all non-bank credit intermediation so as to identify potential areas where new risks might arise; and then second by narrowing the focus to those parts of the system where maturity/liquidity transformation, flawed credit risk transfer, and/or leverage create important systemic risks. The note is available on the [FSB website](http://www.financialstabilityboard.org/publications/r_110412a.pdf%22%20%5Ct%20%22_new).etailed Contents**1.5 Interim report of UK commission on banking**On 11 April 2011, the UK Independent Commission on Banking published its interim report. The report sets out the Commission's current and provisional views on possible reforms to improve stability and competition in UK banking following the financial crisis, and seeks responses to those views. It is stated in the report that making the banking system safer requires a combined approach that: makes banks better able to absorb losses;makes it easier and less costly to sort out banks that still get into trouble; andcurbs incentives for excessive risk taking.Achieving greater loss-absorbency requires, first, that banks hold more equity relative to their assets and, second, that creditors, not taxpayers, take losses if necessary. On equity capital, an important step is the 7% baseline ratio of equity to risk-weighted assets in the Basel III agreement. The international community is considering augmenting this for systemically important banks. In the Commission's view, the available evidence and analysis suggests that all such banks should hold equity of at least 10%, together with genuinely loss-absorbent debt. That would strike a better balance between increasing the cost of lending and reducing the frequency and/or impact of financial crises. On remedying the failure of debt to absorb losses in the crisis, contingent capital and debt capable of so-called 'bail-in' might be able to contribute to improved loss-absorbency in the future. Loss-absorbency and stability might also be improved by ranking the claims of ordinary depositors higher than those of other unsecured creditors.Greater loss-absorbing capacity has the further advantage that it may enable loss-sharing without requiring bankruptcy and thereby facilitate more orderly and efficient resolution of failing banks, limiting collateral damage. This may be of particular importance for wholesale and investment banking operations, which tend to be highly complex and span several countries with differing insolvency regimes. Disorderly failure of such banks is dangerous for the wider financial system, and international agreement on means of allowing them to fail more safely is essential. Turning to the structural aspect of reform, a focus of the Commission's work is the question of whether there should be a form of separation between UK retail banking and wholesale and investment banking. The Commission is considering forms of retail ring-fencing under which retail banking operations would be carried out by a separate subsidiary within a wider group. This would require universal banks to maintain minimum capital ratios and loss-absorbing debt for their UK retail banking operations, as well as for their businesses as a whole. Subject to that, the banks could transfer capital between their UK retail and other banking activities.Measures to increase competition in the banking sector are also considered in the report. The first concerns structural measures to improve competition. Second, competition among incumbent banks, and between them and challengers, is blunted by the actual and perceived difficulties for customers switching accounts, by poor conditions for consumer choice more generally, and by barriers to entry. The report suggests that it may be possible to introduce greatly improved means of switching at reasonable cost, in which case the industry should be required to do this within a short timescale, and that barriers to entry may be able to be reduced. Third, the Commission regards the Financial Conduct Authority proposed as part of the Government's reforms of the regulatory architecture as potentially a vital spur to competition in banking. The Authority will have regulatory tools not available to the general competition and consumer authorities and, in line with an earlier recommendation by the Commission, the Authority should have a clear primary duty to promote effective competition.The report is available on the [Commission's website](http://bankingcommission.independent.gov.uk/bankingcommission/%22%20%5Ct%20%22_new).etailed Contents**1.6 Treasurer rejects acquisition of Australian Securities Exchange by Singapore Exchange**On 8 April 2011, the Australian Treasurer announced that he has made an order under the [Foreign Acquisitions and Takeovers Act 1975](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6803" \t "Default) (the Act) prohibiting the acquisition of ASX Limited (ASX) by Singapore Exchange Limited (SGX). This is on the basis that the proposed acquisition is not in the national interest. The Treasurer's decision is based on advice received from the Foreign Investment Review Board (FIRB). Following is an extract from the Treasurer's announcement: 'It is in the national interest for Australia to maintain the ongoing strength and stability of our financial system, and ensure it is well placed to support the Australian economy into the future. It is important that we continue to build Australia's standing as a global financial services centre in Asia to take best advantage of the benefits of our superannuation savings system. I had strong concerns that the proposed acquisition would be contrary to these objectives.'I have been advised that many of the claimed benefits of this transaction are likely to be overstated. To diminish Australia's economic and regulatory sovereignty over the ASX could only be justified if there were very substantial benefits for our nation, such as greatly enhanced opportunities for Australian businesses and investors to access capital markets. Given the size and nature of the SGX - which is a smaller exchange with a smaller equities market than the ASX - the opportunities that were offered under the proposal were clearly not sufficient to justify this loss of sovereignty.'The ASX also operates infrastructure that is critically important for the orderly and stable operation of Australia's capital markets. Both the Reserve Bank of Australia (RBA) and the Australian Securities and Investments Commission (ASIC), carefully review the operations of the ASX on an ongoing basis and have been satisfied that it is meeting its obligations and remains a robust operation. However, FIRB's recommendation, which incorporated advice from ASIC, the RBA and the Australian Treasury, was that not having full regulatory sovereignty over the ASX-SGX holding company would present material risks and supervisory issues impacting on the effective regulation of the ASX's operations, particularly its clearing and settlement functions. Australia's financial regulators have advised me that reforms to strengthen our regulatory framework should be a condition of any foreign ownership of the ASX to remove these risks.'etailed Contents**1.7 Consultation on improved European corporate governance framework**On 5 April 2011, the European Commission launched a public consultation that addresses the ways in which corporate governance of European companies can be improved. The consultation covers a number of issues such as how to improve the diversity and functioning of the boards of directors and the monitoring and enforcement of existing national corporate governance codes, and how to enhance the engagement of shareholders. The consultation paper aims to launch a general debate on a number of issues such as:1. Board of directors: questions addressed refer to their effective functioning and ensuring they are composed of a mixed group of people, e.g. by enhancing gender diversity, a variety of professional backgrounds and skills as well as nationalities. The functioning of boards in terms of availability and time commitment of directors is also under scrutiny as well as risk management and directors' pay.2. How to enhance shareholders' involvement on corporate governance issues and encourage more of them to take an interest in sustainable returns and longer term performance, and also how to enhance the protection of minority shareholders. The paper also addresses whether there is a need for shareholder identification, i.e. for a mechanism to allow issuers to see who their shareholders are, and for an improved framework for shareholder cooperation.3. How to improve monitoring and enforcement of the existing national corporate governance codes in order to provide investors and the public with meaningful information. Companies which do not comply with national corporate governance codes have to explain why they deviate from them. Too often, this does not occur. The paper asks whether there should be more detailed rules and whether national monitoring bodies should have more say on companies' corporate governance statements.The consultation paper is available on the [European Commission website](http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf%22%20%5Ct%20%22_new).etailed Contents**1.8 SEC announces filing of limit up-limit down proposal to address extraordinary market volatility**On 5 April 2011, the US Securities and Exchange Commission (SEC) announced that national securities exchanges and the Financial Industry Regulatory Authority (FINRA) filed a proposal to establish a new "limit up-limit down" mechanism to address extraordinary market volatility in US equity markets.Under the proposal, trades in listed stocks would have to be executed within a range tied to recent prices for that security. If approved by the SEC, the new limit up-limit down mechanism would replace the existing single stock circuit breakers, which were approved on a pilot basis shortly after the market events of 6 May 2010.**(a) Limit up-limit down requirements**The proposed "Limit Up-Limit Down" mechanism would prevent trades in listed equity securities from occurring outside of a specified price band, which would be set at a percentage level above and below the average price of the security over the immediately preceding five-minute period. For stocks currently subject to the circuit breaker pilot, the percentage would be 5%, and for those not subject to the pilot, the percentage would be 10 percent.The percentage bands would be doubled during the opening and closing periods, and broader price bands would apply to stocks priced below US$1.00. To accommodate more fundamental price moves, there would be a five-minute trading pause - similar to the pause triggered by the current circuit breakers - if trading is unable to occur within the price band for more than 15 seconds.If approved, all trading centres, including exchanges, ATSs, and broker-dealers executing internally, would have to establish policies and procedures reasonably designed to prevent trades from occurring outside the applicable price bands, to honour any trading pause, and to otherwise comply with the procedures set forth in the plan. The exchanges and FINRA have requested that the SEC approve the plan as a one-year pilot program.**(b) Existing circuit breaker approach**Under the existing circuit breaker pilot, trading in a stock pauses across the US equity markets for a five-minute period if the stock experiences a 10% change in price over the preceding five minutes. The pause gives the markets the opportunity to attract new trading interest in an affected stock, establish a reasonable market price, and resume trading in a fair and orderly fashion.The circuit breaker pilot was initially approved by the SEC on 6 June 2010, and is currently set to expire on 11 August 2011 (or earlier if the limit up-limit down mechanism is implemented before then). The circuit breakers apply to securities in the S&P 500 Index and Russell 1000 Index as well as certain exchange-traded funds.While the circuit breakers have been effective in moderating potentially extraordinary volatility, they also have been triggered by erroneous trades. As a result, the SEC has encouraged the exchanges and FINRA to develop a more sophisticated mechanism that not only would prevent an erroneous trade from triggering a trading pause, but keep the erroneous trade from occurring in the first place.The proposal is available on the [SEC website](http://www.sec.gov/news/press/2011/2011-84-plan.pdf%22%20%5Ct%20%22_new).etailed Contents**1.9 SEC proposes rules requiring listing standards for compensation committees and compensation consultants**On 30 March 2011, the United States Securities and Exchange Commission (SEC) voted unanimously to propose rules directing the national securities exchanges to adopt certain listing standards related to the compensation committee of a company's board of directors as well as its compensation advisers, as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010. The SEC's proposal also would require new disclosures from companies concerning their use of compensation consultants and conflicts of interest. In particular, the proposal requires the "listing standards" to address the independence of the members on a compensation committee, the committee's authority to retain compensation advisers, and the committee's responsibility for the appointment, payment and work of any compensation adviser. Once an exchange's new listing standards are in effect, a listed company must meet these standards in order for its shares to continue trading on that exchange. **(a) Background**In 2010, Congress passed the Dodd-Frank Act that among other things sought to address issues regarding the compensation that companies pay their executives. Section 952 of the Act addresses the compensation committees formed by corporate boards as well as the compensation advisers that these committees retain. In particular, this provision requires the SEC to direct the exchanges to adopt certain "listing standards" relating to the independence of the members on a compensation committee, the committee's authority to retain compensation advisers, and the committee's responsibility for the appointment, compensation and work of any compensation adviser. Once an exchange's new listing standards are in effect, a listed company must meet these standards in order for its shares to continue trading on that exchange.In addition, the provision requires each company to disclose in its proxy material for an annual meeting of shareholders whether its board's compensation committee retained or obtained the advice of a compensation consultant. The provision also requires a company to disclose whether the work of the compensation consultant has raised any conflict of interest and, if so, the nature of the conflict and how the conflict is being addressed.**(b) Requirements of the proposed rules****(i) Independence of compensation committee members**Under the SEC's proposal, the exchanges would be required to adopt listing standards that require each member of a company's compensation committee to be a member of the board of directors and to be independent. In developing a definition of independence, the exchanges would be required to consider such factors as:The sources of compensation of a director, including any consulting, advisory or compensatory fee paid by the company to such member of the board of directors. Whether a member of the board of directors of a company is affiliated with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company.As with all listing standards, exchanges would need to seek the approval of the SEC before adopting them.**(ii) Authority and funding of the compensation committee**The proposed rules would require the exchanges to adopt listing standards providing that the compensation committee of a listed company:May, in its sole discretion, retain or obtain the advice of a compensation adviser. Is directly responsible for the appointment, payment and oversight of compensation advisers. Must be appropriately funded by the listed company.**(iii) Compensation adviser selection**The proposed rules also would require the exchanges to adopt listing standards providing that a compensation committee may select a compensation consultant, legal counsel or other adviser only after considering the following five independence factors:Whether the compensation consulting company employing the compensation adviser is providing any other services to the company. How much the compensation consulting company who employs the compensation adviser has received in fees from the company, as a percentage of that person's total revenue. What policies and procedures have been adopted by the compensation consulting company employing the compensation adviser to prevent conflicts of interest. Whether the compensation adviser has any business or personal relationship with a member of the compensation committee. Whether the compensation adviser owns any stock of the company.The exchanges themselves could impose additional considerations.**(iv) Exemptions**As directed by the statute, the proposed rules would require the exchanges to exempt the following five categories of companies from the compensation committee independence requirements:Controlled companies. Limited partnerships. Companies in bankruptcy proceedings. Open-end management investment companies registered under the Investment Company Act of 1940. Any foreign private issuer that discloses in its annual report the reasons that the foreign private issuer does not have an independent compensation committee.In addition, the proposed rules would authorise the exchanges to exempt a particular relationship from the independence requirements applicable to compensation committee members.The proposed rules also would authorise the exchanges to exempt any category of company from all of the requirements of the new compensation committee listing standards. The proposed rules would exempt controlled companies from all of the requirements of the new compensation committee listing standards.As with all listing standards, the exchanges would need to seek the approval of the SEC before adopting any exemptions.**(v) Compensation consultant conflicts of interest disclosure**Exchange Act registrants subject to the federal proxy rules are already required to disclose information about their use of compensation consultants, including specific information about fees paid to consultants that the SEC added in late 2009. The proposed rules would modify existing rules to require disclosure about whether:The compensation committee has retained or obtained the advice of a compensation consultant. The work of the compensation consultant has raised any conflict of interest and, if so, the nature of the conflict and how the conflict is being addressed.The proposed rules also would eliminate the current disclosure exception for services that are limited to consulting on broad-based plans and the provision of non-customised benchmark data, but would retain the fee disclosure requirements, including the exemptions from those requirements.The proposed rules are available on the [SEC website](http://www.sec.gov/rules/proposed/2011/33-9199.pdf%22%20%5Ct%20%22_new).etailed Contents**1.10 UK report on auditors and market concentration**On 30 March 2011, the UK House of Lords Economic Affairs Committee published its report titled 'Auditors: market concentration and their role'. The report examines:the dominance of the Big Four and its effects on competition and choice;  whether traditional, statutory audit still meets today's needs;the effect on audit of the adoption of International Financial Reporting Standards (IFRS); and how banks were audited before and during the financial crisis and what changes there should be, including in auditors' relationships with financial regulators. According to the report, the Big Four's domination of the large firm audit market in the UK is almost complete: in 2010 they audited 99 of the FTSE 100 largest listed companies, which change auditors every 48 years on average. In bank audit in the UK there is only a Big Three, since Ernst & Young are not active. The report identifies the risk that one of the Big Four might leave the audit market, leading to an even greater and wholly unacceptable degree of concentration unless preventive action is taken. In relation to auditors and the financial crisis, the report is critical of confidential dialogue between auditors and bank regulators falling away before the financial crisis so that there was no pooling of information or concerns which might have given warning or allowed some action to mitigate the worst effects.The Committee also heard evidence that audit standards had been lowered by the adoption of International Financial Reporting Standards (IFRS). These became mandatory for EU listed companies in 2005 and are intended to pave the way towards common accounting standards around the world including the US. The Committee heard that IFRS were more rules-based than previous national standards and leave less scope for the auditor to exercise prudent judgment and as necessary to override a box-ticking approach in order to reach a true and fair view of a given financial statement. The Committee makes three main recommendations:First, a detailed investigation of the large-firm audit market by the Office of Fair Trading, with a view to an inquiry by the Competition Commission so that all the interrelated issues surrounding concentration, competition and choice can be thoroughly examined in depth. Second, that prudence should be reasserted as the guiding principle of audit. Third, the new framework of banking supervision should provide for bank audits to contribute more to the transparency and stability of the financial system, in particular through two-way dialogue between auditors and supervisors about the financial health of banks.The report is available on the [Economic Affairs Committee website](http://www.publications.parliament.uk/pa/ld201011/ldselect/ldeconaf/119/11902.htm%22%20%5Ct%20%22_new).etailed Contents**1.11 Superannuation funds urged to provide greater disclosure to members**Superannuation fund boards are being urged to disclose more information to their members under a new governance framework launched on 29 March 2011 and jointly prepared by the Australian Institute of Superannuation Trustees (AIST) and Industry Funds Forum. The framework contains recommendations on board composition, risk management, education/training, member disclosure and trustee remuneration. Key recommendations contained in the Fund Governance Framework for not-for-profit superannuation funds include:Boards to disclose their remuneration policies and individual directors fees. Remuneration disclosed in bands of $50,000 for the top five executives of super funds.Boards to determine director terms based on individual director performance rather than an arbitrary measurement of time served.Boards to develop procedures to appraise board performance.Boards to "actively strive" to achieve a minimum of 40% of directors from each gender.Boards and sponsoring organisations to decide on the appropriateness of appointing trustee directors with other board responsibilities. Continued service of directors appointed to multiple boards to be regularly reviewed to ensure the appointment remains in the best interests of members and that any conflicts are managed appropriately.Boards to disclose policy for managing potential or actual related-party transactions and how those transactions are managed by the board.Board directors to undergo a minimum of 30 hours of training and professional activities each year. Further information is available on the [AIST website](http://www.aist.asn.au/%22%20%5Ct%20%22_new).etailed Contents**1.12 Proposed US rule for sponsors of asset backed securities to retain credit risk**On 29 March 2011, the United States Federal Reserve Board proposed a rule that would require sponsors of asset-backed securities (ABS) to retain at least 5% of the credit risk of the assets underlying the securities. The rule, which is proposed jointly with five other US federal agencies, would provide sponsors with various options for meeting the risk-retention requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010. In drafting the proposed rule, staff at the Federal Reserve Board and at the other agencies sought to ensure that the amount of credit risk retained is meaningful, while taking into account market practices and reducing the potential for the rule to negatively affect the availability and cost of credit to consumers and businesses. As required by the Dodd-Frank Act, the proposed rule includes a variety of exemptions from these requirements, including an exemption for US government-guaranteed ABS and for mortgage-backed securities that are collateralized exclusively by residential mortgages that qualify as "qualified residential mortgages" (QRMs). The proposal would establish a definition for QRMs - incorporating such criteria as borrower credit history, payment terms, down payment for purchased mortgages, and loan-to-value ratio - designed to ensure they are of very high credit quality. The proposed rule would also allow Fannie Mae and Freddie Mac to satisfy their risk-retention requirements as sponsors of mortgage-backed securities through their 100% guarantees of principal and interest for as long as they are in conservatorship or receivership with capital support from the US Government. The proposed rule is available on the [Federal Reserve website](http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20110329a1.pdf%22%20%5Ct%20%22_new).etailed Contents**1.13 Report on the credit ratings industry**On 28 March 2011, the Bank of England published a research report titled 'Whither the credit ratings industry'. The topics dealt with in the report are:The role of credit rating agencies in the financial system;Criticisms of credit rating agencies during the crisis;Reforming the credit ratings industry: recent initiatives;Options for reducing ratings reliance; andOptions for structural reform of the credit ratings industry.The report is available on the [Bank of England website](http://www.bankofengland.co.uk/publications/fsr/fs_paper09.pdf%22%20%5Ct%20%22_new).etailed Contents**1.14 UN guiding principles for business and human rights published** On 24 March 2011, the United Nations released a set of Guiding Principles for Business and Human Rights. The Guiding Principles seek to provide for the first time an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity. The UN Human Rights Council will consider formal endorsement of the text at its June 2011 session. The Guiding Principles are the product of six years of research and extensive consultations, led by the Secretary-General's Special Representative for Business and Human Rights, Harvard Professor John Ruggie, involving governments, companies, business associations, civil society, affected individuals and groups, investors and others around the world. The Guiding Principles outline how States and businesses should implement the UN 'Protect, Respect and Remedy' Framework in order to better manage business and human rights challenges. That Framework, which Professor Ruggie proposed in 2008, was unanimously welcomed by the Human Rights Council at the time, and has since enjoyed extensive uptake by international and national governmental organizations, businesses, NGOs and other stakeholders. The Guiding Principles highlight what steps States should take to foster business respect for human rights; provide a blueprint for companies to know and show that they respect human rights, and reduce the risk of causing or contributing to human rights harm; and constitute a set of benchmarks for stakeholders to assess business respect for human rights. The principles are organized under the UN Framework's three pillars: The state duty to protect human rights;The corporate responsibility to respect human rights; andThe need for greater access to remedies for victims of business-related abuse.The Guiding Principles are available on the [Special Representative for Business and Human Rights website](http://www.business-humanrights.org/SpecialRepPortal/Home%22%20%5Ct%20%22_new).etailed Contents**1.15 Proposed amendments to the UK Takeover Code** On 21 March 2011, the Code Committee of the UK Takeover Panel published a Consultation Paper titled 'Review of Certain Aspects of the Regulation of Takeover Bids: Proposed Amendments to the Takeover Code'. On 21 October 2010, the Code Committee of the Takeover Panel published a Statement (Statement 2010/22) setting out its response to a public consultation paper (PCP 2010/2), published on 1 June 2010, which had sought views on various suggestions for possible amendments to the Takeover Code. In Statement 2010/22, the Code Committee stated that it had concluded that:hostile offerors (i.e. offerors whose offers are not from the outset recommended by the board of the offeree company) have, in recent times, been able to obtain a tactical advantage over the offeree company to the detriment of the offeree company and its shareholders, and that it intended to bring forward proposals to amend the Code with a view to reducing this tactical advantage and redressing the balance in favour of the offeree company; and a number of changes should be proposed to the Code to improve the offer process and to take more account of the position of persons who are affected by takeovers in addition to offeree company shareholders. The Code Committee concluded that amendments to the Code should be proposed in order to:  increase the protection for offeree companies against protracted "virtual bid" periods by requiring potential offerors to clarify their position within a short period of time; strengthen the position of the offeree company by: - prohibiting deal protection measures and inducement fees other than in certain limited cases; and - clarifying that offeree company boards are not limited in the factors that they may take into account in giving their opinion and recommendation on an offer;  increase transparency and improve the quality of disclosure by: - requiring the disclosure of offer-related fees; and - requiring the disclosure of the same financial information in relation to an offeror and the financing of an offer irrespective of the nature of the offer; and  provide greater recognition of the interests of offeree company employees by: - improving the quality of disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees; and - improving the ability of employee representatives to make their views known. The Consultation Paper sets out the amendments to the Code proposed by the Code Committee in order to implement the conclusions described in Statement 2010/22. The Consultation Paper is available on the [Takeover Panel website](http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201101.pdf%22%20%5Ct%20%22_new).etailed Contents**1.16 FSB publishes review of risk disclosure practices in respect of exposures to structured credit products** On 18 March 2011, the Financial Stability Board (FSB) published a thematic peer review report of risk disclosure practices by financial institutions in FSB member jurisdictions in respect of exposures to structured credit products. The recent financial crisis highlighted the importance to market confidence of firms making clear disclosures of their exposures to risks. The FSB report reviews both financial institutions' public disclosures of these risk exposures as well as the actions undertaken by FSB member jurisdictions and the private sector participants to enhance disclosure practices. The review finds that FSB member jurisdictions have successfully prompted financial institutions to improve their disclosure of exposures to structured credit products. Most FSB members have also taken steps to implement enhanced Pillar 3 disclosures regarding securitisation and related exposures published by the Basel Committee on Banking Supervision in July 2009. More generally, standard setting bodies have improved their disclosure requirements for financial institutions in these areas in the wake of the financial crisis. Although firms' compliance with the FSF's recommended risk disclosures has generally been good, the quality of public risk disclosures varies across institutions and jurisdictions and there remains room for improvement. In particular there is room to improve disclosures on: (1) the descriptions of the use and objectives of special purpose entities (SPEs) used for securitisation; (2) off-balance sheet exposures of SPEs; (3) exposures both before and after hedging; and (4) the level of detail and granularity of the sensitivity analysis of securitisation exposures measured at fair value. The level of external audit assurance provided on risk disclosures typically varies depending on whether the disclosures are made in financial statements, Pillar 3 reports, or management analyses in financial reports or websites, and practice varies on how that level of assurance is disclosed. The FSB recommends that the International Auditing and Assurance Standards Board review whether further guidance is needed in this area. The FSB also recommends that banks improve their Pillar 3 disclosure practices, including by better aligning the publication of their Pillar 3 disclosures with the publication date of financial reports. They should also enable users to better compare these different types of disclosures. The report urges follow-through on the earlier FSF recommendation that the financial industry, investors, and auditors work together to provide risk disclosures that are most relevant as market conditions evolve, by developing principles and identifying leading disclosure practices. The report is available on the [FSB website](http://www.financialstabilityboard.org/publications/r_110318.pdf%22%20%5Ct%20%22_new).etailed Contents**1.17 Reform of New Zealand securities laws** On 17 March 2011, New Zealand Commerce Minister Simon Power announced Cabinet's decisions on the comprehensive review of securities laws. The next step in the process will be the release of an exposure draft of the new legislation later this year. Together with the establishment of the Financial Markets Authority (FMA), the new securities law regime will largely complete the major regulatory reform program in the financial sector. That reform includes the financial adviser regime, auditor regulation, the licensing of trustees and statutory supervisors, the prudential regulation of the non-bank deposit regime, finance company moratorium requirements, and the requirement for financial service providers to be registered and belong to a dispute resolution scheme. The key policy decisions by Cabinet include:**Regulated financial products**Moving to more principle-based classifications of regulated financial products (debt securities, equity securities, collective investment schemes, derivatives).Giving the FMA the ability to determine that a financial product comes within one of these categories and to move products between the categories.**Disclosure**Replacing the requirement for issuers to prepare a prospectus and investment statement with a requirement to prepare a single product disclosure statement tailored to retail investors.Tailoring the content of the product disclosure statement to specific financial products and making it heavily prescribed for standardised products. **Exemptions from the substantive requirements** Making the exemption for sophisticated investors principles-based with some clear, bright-line tests.Creating a new small-offers exemption, similar to that in Australia, to help small companies raise capital.Other exemptions will be carried over with clarifications to improve workability and certainty. If an exemption applies, issuers will still have general obligations under securities law, including not engaging in misleading or deceptive conduct.  **Collective investment schemes**Creating a single collective investment regime in which schemes will have to comply with a common set of substantive requirements to ensure an adequate level of investor protection. Such schemes will have an external supervisor responsible for custodianship of the scheme and supervising the manager.Requiring fund managers to be authorised by the FMA and subject to a fit-and-proper-person test. **The liability regime** Focusing securities law on civil remedies and compensating investors, with serious wrongdoing resulting in criminal liability.Making the most serious breaches of directors' duties result in criminal liability.Increasing the maximum period for the prohibition of a person from managing a company, from five years to ten years, and allowing the High Court to impose orders for an indefinite period. **Additional powers** Giving the FMA the power to issue 'no action' letters, and also a role in the promotion of financial literacy. **Regulation of exchanges** Cabinet will consider the appropriate regulatory framework for the regulation of securities markets in May this year, following further work by officials.**Miscellaneous** Agreement in principle to the establishment of a licensing regime for regulating financial intermediaries, including derivatives dealers and peer-to-peer lenders, and that workplace saving schemes be required to appoint an independent trustee.Replacing prescriptive rules around the contents of advertisements with a prohibition based on the requirement that an advertisement must not contain any material that is likely to deceive, mislead, or confuse.The Cabinet paper is available on the [Ministry of Economic Development website](http://www.med.govt.nz/templates/StandardSummary____43742.aspx%22%20%5Ct%20%22_new).etailed Contents**1.18 Report on protection, distribution and transfer of client assets** On 11 March 2011, the Technical Committee of the International Organization of Securities Commissions published a report titled 'Survey of Regimes for the Protection, Distribution and/or Transfer of Client Assets'. In an earlier report IOSCO stated that regulators should ensure that investors are adequately informed about the arrangements for protections afforded to client assets under their regimes.  On 15 September 2008, Lehman Brothers Holdings Inc (Lehman) declared bankruptcy. Simultaneously or shortly thereafter, certain Lehman subsidiaries also declared bankruptcy, including a number of investment firms. In the aftermath of such declarations, it became apparent that clients of the Lehman subsidiaries, as well as applicable regulators, had no means to easily ascertain the manner and extent to which different regimes, in foreign jurisdictions, protect client assets. Thus, the bankruptcies of Lehman and its subsidiaries demonstrated that the goal of investor awareness advocated in the earlier IOSCO report had not been achieved.  The latest IOSCO report aims to increase access to information concerning the protections that countries offer to client assets. Regulators considering cross-border financial activity need to understand the methods for, and scope of, protection afforded client assets in other jurisdictions, both to fulfil their own responsibilities and to achieve the effective cross-border coordination mechanisms called for in international efforts such as the recent recommendations made by the Financial Stability Board. Market participants, in considering where to do business, need similar information. Chapter 2 of the report describes differences in the treatment of client assets in various regimes, based on two issues: (1) distinctions between (i) securities for which a client has fully paid, and which are free from further pledges and encumbrances (fully-paid securities), and (ii) securities purchased, in part, with money a customer has borrowed from the investment firm (sometimes referred to as "margin securities"); and (2) distinctions between client assets securing debts of a client to the investment firm (e.g. securities purchased on margin) and client assets serving as a performance bond against the possibility of potential future debts of the client to the investment firm (e.g. initial margin for derivatives positions). Chapters 3 and 4 of the report broadly describe the protections that the regimes afford to client assets, both before and after the bankruptcy of an investment firm.  The report shows that each regime is unique in the methods by which it protects client assets, because such protections depend on the particulars of each jurisdiction's insolvency law and laws defining underlying property rights. The report also discusses the strengths and weaknesses of particular protections in facilitating efficient transfer or distribution of client assets. The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD351.pdf%22%20%5Ct%20%22_new).etailed Contents**1.19 Business leaders recommend changes to business reporting** Elemental changes to the current format of financial reporting need to be made to increase its relevance and stakeholder value and stem the increasing complexity that has plagued financial reporting in recent years, according to key business leaders from around the world. Developing a new form of reporting that integrates an organisation's social and environmental performance with its economic performance, in a simplified manner, would benefit all stakeholders, according to these business leaders. These and other recommendations are summarised in the report, 'Integrating the Business Reporting Supply Chain' published by the International Federation of Accountants (IFAC) on 9 March 2011. The report is available on the [IFAC website](http://web.ifac.org/publications/ifac-policy-position-papers-reports-and-comment-letters/reports-1%22%20%5Ct%20%22_new).etailed Contents**1.20 Paper on OTC derivatives**    The International Monetary Fund (IMF) has published a paper titled 'Making OTC Derivatives Safe: A Fresh Look'. Recent regulatory efforts, especially in the US and Europe, are aimed at reducing moral hazard so that the next financial crisis is not bailed out by tax payers. This paper looks at the possibility that central counterparties (CCPs) may be too-big-to-fail entities in the making. The present regulatory and reform efforts may not remove the systemic risk from OTC derivatives but rather shift them from banks to CCPs. Under the present regulatory overhaul, the OTC derivative market could become more fragmented. Furthermore, another taxpayer bailout cannot be ruled out. A reexamination of the two key issues of (i) the interoperability of CCPs, and (ii) the cost of moving to CCPs with access to central bank funding, indicates that the proposed changes may not provide the best solution. The paper suggests that a tax on derivative liabilities could make the OTC derivatives market safer, particularly in the transition to a stable clearing infrastructure. It also suggests reconsideration of a "public utility" model for the OTC market infrastructure.   The paper is available on the [IMF website](http://www.imf.org/external/pubs/ft/wp/2011/wp1166.pdf%22%20%5Ct%20%22_new).etailed Contents**1.21 Speech about the Takeovers Panel by the Parliamentary Secretary to the Treasurer** On 29 March 2011, the Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP, gave a speech at Melbourne Law School launching the recently published book 'The Takeovers Panel and Takeovers Regulation in Australia'. In his speech, the Parliamentary Secretary discusses the establishment and revitalisation of the Panel, the important role of the Takeovers Panel, and the Panel of the future. The speech is available on the [Parliamentary Secretary's website](http://parlsec.treasurer.gov.au/DisplayDocs.aspx?doc=speeches/2011/005.htm&pageID=005&min=djb&Year=&DocType=" \t "_new).etailed Contents |

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| **2. Recent ASIC Developments** |  | ext Section |

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| **2.1 New guidance on substantial holdings disclosure for securities lending**On 15 April 2011, ASIC released new regulatory guidance and relief aimed at achieving better disclosure by parties that are engaging in securities lending of substantial holdings in listed entities. The guidance is contained in Regulatory Guide 222 'Substantial holding disclosure: securities lending and prime broking' and the relief is contained in Class Order [CO 11/272].ASIC has also released Report 235 'Response to submissions on CP 107: Securities lending and substantial holding disclosure', which summarises consultations with industry leading to the new regulatory guidance.Under the new guidance, ASIC sets out its expectations as to how:parties involved in securities lending (including securities lenders and borrowers) will disclose substantial holdings in listed entities (interest of 5% or more); andprime brokers - who may have on-going borrowing agreements with their clients - will disclose substantial holdings.Further, ASIC has set out its expectations of the content of substantial holding notices that parties engaged in securities lending will have to provide, and relief that ASIC has granted in [CO 11/272] to simplify the content of those notices and better align timing of disclosures to changes in control over securities.Regulatory Guide 222 is available [here](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg222" \t "_new) and Class Order 11/272 is available [here](http://www.asic.gov.au/asic/asic.nsf/byheadline/2011%2BClass%2BOrders?openDocument" \l "co-11-272" \t "_new).etailed Contents**2.2 ASIC proposes improvements in quality of prospectuses**On 12 April 2011, ASIC announced that it is proposing an overhaul of prospectuses that would make them much easier for retail investors to use and would improve the quality of information on the proposed business model and the associated risks.ASIC's proposals are contained in two documents that have been released - Consultation Paper 155 'Prospectus disclosure: Improving disclosure for retail investors', and an accompanying draft regulatory guide.The consultation paper and draft regulatory guide cover prospectuses issued under section 710 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Generally, these are prospectuses for initial public offerings and for companies that propose to list. The guidance is also relevant to other types of prospectuses as well as some other documents.The below summarises the shortcomings that ASIC has identified in prospectuses, and the proposed response:**Shortcoming:** Front sections of a prospectus are often ineffective, include repetitive and/or multiple summaries, over-emphasise the benefits of the offer, and have a high ratio of marketing statements and photographs **Proposed solution:** Provide one balanced investment overview that helps retail investors make an informed investment decision by highlighting key information (see section C of CP 155). No photos in the overview other than the front cover.**Shortcoming:** Prospectuses are long and complex **Proposed solution:** Use practical communication tools (see tables 3 and 4 in the draft regulatory guide) to help make prospectuses 'clear, concise and effective' and reduce length where possible (including by incorporating certain information by reference).**Shortcoming:** Risk disclosure is too general and may resemble a 'shopping list'**Proposed solution:**Highlight the principal risks; listing every conceivable risk may not necessarily help investors to make informed decisions. Risk disclosure should be specific to the company - explain the risk with some indication of what is likely to happen if the risk occurs (see section D of CP 155).**Shortcoming:** Fragmented information on risks and associated returns requires investors to piece together the picture. Inadequate information on how the business will generate a return or meet defined short-term objectives.**Proposed solution:** Explain the company's business model i.e. how the company plans to make money and/or generate income or capital growth. If a company does not intend to generate a return for investors in the short term, explain the short term objectives and how they will be met. Explain the strategic risks to the business model (see section D of CP 155).**Shortcoming:** Absence of complete disclosure on directors and key managers who are leading or managing the company, and relevant benefits or interests they have.**Proposed solution:** Explain relevant expertise and skill. Include any criminal convictions, declarations under section 1317E of the Corporations Act, personal bankruptcies, disqualifications or disciplinary action within Australia or other jurisdictions that are less than 10 years old and that are relevant or material to the role to be undertaken and to the investment decision.  Explain if the person has been an officer of a company that went into a form of external administration because of insolvency during the time the person was an officer or 12-months afterwards. (see section D of CP 155).Consultation Paper 155 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \t "_new).etailed Contents**2.3 Further consultation paper on disclosure by infrastructure entities**On 8 April 2011, ASIC released a further consultation paper on proposed improvements in disclosure that will apply to infrastructure entities, with the aim of improving the quality of information available to retail investors. ASIC has also released a draft regulatory guide with the consultation paper.The consultation paper (CP) and draft regulatory guide (RG) - CP 154 'Infrastructure entities: improving disclosure to retail investors - further consultation' and draft RG 'Infrastructure entities: improving disclosure for retail investors' - follow consultation that began in April 2010 with CP 134. CP134 proposed benchmarks and additional disclosure that would apply to infrastructure entities. ASIC released CP 134 in response to the significant capital losses suffered by investors through investing in infrastructure entities. ASIC continues to believe that improved disclosure in this sector is warranted given that there is a significant amount of public investment in infrastructure anticipated over the next decade, which makes improving disclosure for infrastructure entities especially important.CP 154 seeks to clarify a small number of remaining issues from the earlier consultation, and sets out in detail ASIC's proposed benchmarks and disclosure principles, taking into account responses to the earlier consultation. In particular, ASIC has provided two options for the definition of an infrastructure entity, and asks respondents to provide feedback on them including their preferred option. The draft regulatory guide provides a benchmark approach to improved disclosure for this sector. This approach is consistent with other proposed regulatory guidance, for example, CP 147 'Hedge funds: Improving disclosure for retail investors' and CP 141 'Mortgage schemes: Strengthening the disclosure benchmarks'.Consultation paper 154 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \t "_new).etailed Contents**2.4 New training and assessment framework for financial advisers proposed**On 6 April 2011, ASIC released a consultation paper to seek views on a new training and assessment framework for financial advisers. Consultation Paper 153 'Licensing: Training and assessment framework for financial advisers' contains proposals relating to the assessment and professional development of financial advisers of Tier 1 products. It addresses issues identified in ASIC's review of the present training and assessment framework and seeks feedback on those proposals.ASIC proposes amending the assessment and professional development framework for financial advisers by requiring:all new and existing financial advisers who provide Tier 1 financial advice to pass a Financial Services Competency Certification exam to ensure they have the requisite competencies to perform their role. ('Entry Stage'); all new financial advisers following Entry Stage to be supervised by a supervisor (who has at least five years experience in the industry) for a minimum period of one year full time or equivalent; all financial advisers to undertake a Knowledge Update Review every three years on changes to laws, market issues and new products; and ongoing continuing professional development requirements. The consultation paper is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \t "_new).etailed Contents**2.5 Updated guidance for Australian financial services licence holders**On 1 April 2011, ASIC released updated versions of the following regulatory guides:Regulatory Guide 36 Licensing: Financial product advice and dealing (RG 36);Regulatory Guide 121 Doing financial services business in Australia (RG 121);Regulatory Guide 170 Prospective financial information (RG 170); andRegulatory Guide 175 Licensing: Financial product advisers - conduct and disclosure (RG 175). The new versions of the guides remove outdated information and incorporate references to regulations released in recent months, including those affecting issuers of standard margin lending facilities, simple managed investment schemes and certain superannuation products. The amendments do not represent substantive policy changes. The Regulatory Guides are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \t "_new).etailed Contents**2.6 New guidance aimed at enhancing the reliability and quality of expert reports**On 30 March 2011, ASIC released updated guidance that is aimed at enhancing the reliability and quality of expert reports that are commissioned to assist security holders and others make major decisions, including on takeover bids, schemes of arrangement and related party transactions. The guidance is contained in Regulatory Guide 111 'Content of expert reports' and Regulatory Guide 112 'Independence of experts'. Additional guidance is provided on how experts should assess whether a proposal is fair and reasonable. It requires experts to explain any material difference between their assessed value of a security and the recent market price of the security.ASIC requires that experts have a reasonable basis for forward-looking statements. There is clarification about the use of the discounted cash flow methodology, particularly when valuing a start up project where there is a long lead time until cash is generated. The expert must have a reasonable basis for the forward looking information and be explicit in disclosing the extent and nature of the adjustments made to allow for development stage risks. Regulatory Guides 111 and 112 are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \t "_new).etailed Contents**2.7 Updated guidance on responsible lending obligations**On 31 March 2011, ASIC published Regulatory Guide 209 'Credit licensing: Responsible lending conduct'. The updated regulatory guide provides further guidance and clarity for lenders on assessing borrowers' capacity to repay under the responsible lending requirements 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).The changes that ASIC has made include:clarifying that a conclusion of substantial hardship (where a borrower appears to have no obvious continued income stream for the full life of the credit contract) can often be rebutted with reasonable enquiries about the borrower's financial situation, requirements, and objectives; and providing further guidance on issues a lender should consider when assessing the relevance of income from a person - other than the borrower - in assessing the borrower's capacity to repay.  ASIC has also clarified that the use of sophisticated automated systems and tools for testing the reliability of information about income provided by an intending borrower may play a role in satisfying the requirements to take reasonable steps to verify such information, subject to some constraints.Regulatory Guide 209 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \t "_new).etailed Contents**2.8 New guidance aimed at improving disclosure and decision-making in related party transactions**On 30 March 2011, ASIC released new guidance that is aimed at bringing a substantial improvement in disclosure by public companies and registered managed investment schemes (MISs) about related party transactions. ASIC's guidance is in revised Regulatory Guide 76 'Related party transactions'. The [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) requires directors to seek shareholder approval unless a transaction is at arm's length or another exception applies. Prudent directors should be confident that a transaction is genuinely on arm's length terms when relying on this exception. In ASIC's view, it is insufficient for directors to rely on the exception if it is merely arguable that the transaction is on arm's length terms. In the guidance, ASIC sets out criteria for assessing whether a proposal is at arm's length.In summary, the guidance in RG 76 covers:**What decision is being made:** Whether to enter into a related party transaction **What ASIC guidance covers (RG 76):** Voting restrictions for directors at directors' meetings and when ASIC may give relief from these restrictions **Where to find it (RG 76):** Section B **What decision is being made:** Whether to seek member approval **What ASIC guidance covers (RG 76):** The 'arm's length' exception in Corporations Act 2001 section 210, including factors to consider when applying this exception **Where to find it (RG 76):** Section C**What decision is being made:** What to include in notices of meeting and explanatory statements (meeting materials) if member approval is sought **What ASIC guidance covers (RG 76):** The requirements of sections 218 and 219, the focus of ASIC's review of meeting materials and the exercise of ASIC's powers to shorten the 14-day review period or issue comments on the meeting materials **Where to find it (RG 76):** Section D**What decision is being made:** What votes to count at a members' meeting **What ASIC guidance covers (RG 76):** Voting exclusions for related parties at members' meetings and when ASIC may give relief from the relevant provisions **Where to find it (RG 76):** Section D**What decision is being made:** What to include about related party transactions in other disclosures **What ASIC guidance covers (RG 76):** The content of other disclosures to investors (in prospectuses, Product Disclosure Statements (PDSs) and takeover documents) **Where to find it (RG 76):** Section ERegulatory Guide 76 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \t "_new).etailed Contents**2.9 ASIC consults on minor modifications in converting ASX and SFE guidance** On 28 March 2011, ASIC released a consultation paper seeking industry feedback on its proposals to modify five ASX guidance notes and one SFE procedure, determination and practice note. These changes will help market participants comply with ASIC market integrity rules for the Australian Securities Exchange (ASX) and ASX 24 markets. This consultation paper begins ASIC's process of converting the substance of existing guidance into regulatory guides. ASIC will build on the guidance provided in Regulatory Guide 214 'Guidance on ASIC market integrity rules for ASX and ASX 24 markets' on the relevance of existing ASX and SFE guidance, and will propose additional clarification where necessary. Consultation Paper 152 'ASIC's conversion of ASX and SFE guidance: General operational obligations' does not propose changes to existing market integrity rules. Any future review of obligations under existing market integrity rules will be the subject of separate consultation. Specifically, CP 152 covers guidance in relation to: the good fame and character requirement (ASX GN 7 Management requirement - Good fame and character - Reliance on APRA requirements);the ongoing compliance and supervision responsibilities of responsible executives (ASX GN 27 Ongoing compliance and supervision - Responsibilities of responsible executives);insurance requirements of market participants (ASX GN 8 Insurance requirements);trading records (ASX GN 33 Trading records); andclients' segregated account obligations for ASX 24 market participants (SFE PDP 2.2.26 Clients' segregated account obligations).ASIC has recently consulted on specific market integrity rules for the Chi-X market (see Consultation Paper 148 'Proposed market integrity rules: Chi-X market'). When settling the conversion of existing ASX and SFE guidance ASIC will also have regard to the application of the proposed ASIC regulatory guides to markets other than ASX and ASX 24, for example, the proposed Chi-X market. Consultation Paper 152 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \t "_new).etailed Contents**2.10 Consultation paper relating to debentures and advertising** On 25 March 2011, ASIC released a consultation paper on proposals that would revise ASIC's policy on how debt securities can be described in offer documents and the preferred form of advertising for these instruments. The proposals are in response to submissions from industry participants expressing concerns about ASIC's decision in June 2010 to discontinue the no-action position in relation to certain non-compliance with the debenture naming restrictions.  Consultation Paper 151 'Debt securities: modifying the naming provisions and advertising requirements' sets out ASIC's proposals to:introduce class order relief to provide for a new class of debt security (in addition to the current classes of 'debenture', 'mortgage debenture' and 'unsecured note') called a 'note', providing certain conditions (including sufficiency of security) are met; and revise ASIC's advertising standards for offers of debt securities and interests in mortgage schemes, in particular the standards relating to risk of loss and comparing these types of securities with bank deposits.Consultation Paper 151 is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp151.pdf/%24file/cp151.pdf%22%20%5Ct%20%22_new).etailed Contents**2.11 Draft guide on use of non-conforming financial information**On 24 March 2011, ASIC released for consultation a draft regulatory guide on disclosing financial information prepared other than in accordance with accounting standards (non-conforming financial information). Entities are including financial information in public documents more and more, including annual reports, market announcements and transaction documents that do not conform to accounting standards. In particular, it has become increasingly common for entities to present alternative profit disclosures.Proposals include providing reconciliation to the statutory financial statements and being consistent in the modifications applied to the statutory financial information from year to year. Consultation Paper 150 'Disclosing financial information other than in accordance with accounting standards' provides tailored guidance on the use of non-conforming financial information in each of the following three types of documents:financial reports; documents accompanying a financial report (e.g. the directors' report), market announcements, presentations to investors and briefings to analysts; and transaction documents such as prospectuses.Consultation Paper 150 is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp150.pdf/%24file/cp150.pdf%22%20%5Ct%20%22_new).etailed Contents**2.12 ASIC begins shadow shopping research**On 21 March 2011, ASIC announced it will be examining the quality of financial advice via 'shadow shopping' research in 2011, with a focus on advice provided to people at retirement.The definition and gradations of 'quality' retirement financial advice will be established by ASIC in consultation with an expert reference group that includes both industry and consumer group representation. In addition, the retirement shadow shopping research aims to:improve ASIC's understanding of how consumers and investors view and experience the retirement financial advice process; provide general feedback to the financial advice industry, in particular identifying areas where conduct needs to be improved; and identify areas of suspected misconduct for further action; encourage continued professionalisation of retirement advisers; and encourage people to seek financial advice when planning for retirement. The shadow shopping will be conducted in consultation with the expert reference panel. A report on the shadow shopping will be issued when complete.etailed Contents |

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| **3.1 Treasurer rejects ASX-SGX merger proposal** As noted in Item 1.6 of this Bulletin, on 8 April 2011 the Federal Treasurer, the Honourable Wayne Swan, made a statement that he has rejected the proposed merger of ASX Limited (ASX) and Singapore Exchange Limited (SGX). In these circumstances the parties have agreed to terminate the Merger Implementation Agreement entered into on 25 October 2010. The ASX Board reiterates its ongoing belief in the need for ASX participation in regional and global exchange consolidation.  ASX will continue to evaluate strategic growth opportunities, including further dialogue with SGX on other forms of combination and cooperation. The ASX Board will now focus on finding a successor to Mr Robert Elstone for the role of Managing Director and CEO.  The Chairman announced at last year's AGM that the Board had resolved to embark on such a process following Mr Elstone's indication that he did not wish to further extend his contract beyond its current term, which ends on 11 July 2011 or, at the Board's discretion, 11 October 2011. ASX also continues to strengthen its preparedness to operate within the proposed domestic competitive environment, which will include the offering of new products and services to its customers and new market operators. ASX agrees that Australia's regulators should have appropriate powers to oversee and to act to intervene when systemic risk issues threaten institutions that are central to Australia's financial system.  ASX will fully engage with the government agencies undertaking any review. This is the [Market Announcement](http://www.asxgroup.com.au/media/PDFs/110408_ASX-SGX_Merger_treasurerrejection.pdf%22%20%5Ct%20%22_new).etailed Contents**3.2 ASX and Orient Capital launch ASX IR Intelligence** On 28 March 2011, ASX and Orient Capital announced the launch of an investor relations initiative called 'ASX IR Intelligence'.  Designed specifically for ASX-listed companies, ASX IR Intelligence is a suite of investor relations tools delivered through miraqle, Orient Capital's online investor relations platform.  The tools are designed to assist companies identify and communicate with investors, potential investors and the wider investment community.  The first tool available through ASX IR Intelligence is miraqle shares. Miraqle shares replaces ASX's Securities Activity Report (SAR) with an online, on-demand equity market intelligence product.  Drawing data directly from the ASX, miraqle shares gives companies the ability to view, analyse, compare and download market data on the trading activity of individual stocks, sectors and indices. ASX IR Intelligence allows ASX-listed companies to supplement their free access to miraqle shares by subscribing to additional miraqle modules that focus on identifying underlying shareholders (sharetrak) and managing and facilitating shareholder communications (sharecom). All ASX-listed companies will be given access to miraqle shares, with workshops scheduled in capital cities around Australia to assist companies familiarise themselves with the product. This is the [Media Release](http://www.asxgroup.com.au/media/PDFs/110328mrASXIRIntelFinal.pdf%22%20%5Ct%20%22_new).  Further information about ASX IR Intelligence can be found at: [www.asx.com.au/irintelligence](http://www.asx.com.au/irintelligence%22%20%5Ct%20%22_new).etailed Contents**3.3 ASX SME, mid-cap and micro-cap equity market review** ASX has commenced an SME, Mid-Cap and Micro-Cap Equity Market Review (the "Review") with the aim of better meeting the needs of issuers and investors outside the S&P/ASX200, and those based in Western Australia in particular. ASX believes there is scope for building on the successes of the current market structure for securities outside the S&P/ASX200, and is seeking public comment on how it can improve the market for these securities. ASX invites feedback on issues relevant to ASX's Review, including the following:Are there particular industry sectors that would benefit from segmentation, either in the form of different listing rules, trading functionality, different market models, or some other targeted ASX services?What could ASX do differently to better meet the needs of start-up or exploration companies, and intermediaries and investors in these companies? How can ASX best support and promote junior exploration companies?What could ASX do differently to better meet the needs of WA-based companies? Are there key features or characteristics of WA-based entities which could form the basis of market segmentation?What are the benefits of tailoring listing and trading requirements for different segments of the market within the single market structure?What are the benefits of introducing a new market(s) tailored to the needs of specific listed entities? What are the difficulties that this poses? This is the [consultation paper](http://www.asxgroup.com.au/media/PDFs/110328ASX_SME_Equity_Market.pdf%22%20%5Ct%20%22_new).  ASX invites submissions by Friday 20 May 2011.etailed Contents**3.4 ASX investor hours** ASX Investor Hours are free, lunch time seminars, presented by finance industry experts.  Investor Hour is delivered each month in mainland capitals around Australia.  A wide range of topics of interest to retail investors are covered. Audio recordings of the Melbourne and Sydney Investor Hours are among the most popular business podcasts on iTunes Australia. The Melbourne and Sydney presentations are now being filmed.  This means that you can watch the presenter deliver their talk and view their slides synchronised with the session. This is the [calendar of Investor Hours](http://www.asx.com.au/resources/investor-hour-seminars.htm%22%20%5Ct%20%22_new) and the [recordings of past Investor Hours](http://www.asx.com.au/resources/asx-podcasts-2011.htm%22%20%5Ct%20%22_new).etailed Contents**3.5 Reports** On 6 April 2011 ASX released:the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/110406_monthly_activity_report_march11.pdf%22%20%5Ct%20%22_new);the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2011/notice2011_060.pdf%22%20%5Ct%20%22_new); andthe [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/110406_monthly_compliance_march2011.pdf%22%20%5Ct%20%22_new)for March 2011.etailed Contents |

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| **4.1 BC Iron Limited - Declaration of unacceptable circumstances and orders**On 6 April 2011, the Takeovers Panel announced that it has made a declaration of unacceptable circumstances and final orders in relation to an application dated 21 March 2011 by BC Iron Limited (BCI) in relation to its affairs.On 20 January 2011, BCI entered into a scheme implementation agreement (SIA) with Regent Pacific Group Limited (Regent Pacific), which owns or controls 19.49% of BCI, and Regent Pacific's wholly owned subsidiary, Regent Pilbara Pty Ltd (Pilbara). Under the SIA, Pilbara would acquire by scheme of arrangement all the fully paid ordinary shares in BCI (except those already held) for $3.30 per share.Clause 15.1(d) of the SIA provides that Regent Pacific may terminate the SIA where the Regent Pacific Board publicly changes or withdraws its recommendation. This termination right was not disclosed.Clause 10.2 of the SIA provides that the Regent Pacific Board may change or withdraw its recommendation if the Regent Pacific Board has determined in good faith, having received a specific written opinion from Senior Counsel on the matter, that its fiduciary and statutory duties to Regent Pacific require it to do so. This right was not disclosed.On 15 March 2011, Regent Pacific announced that the Regent Pacific Board had decided to withdraw its recommendation of the necessary Regent Pacific shareholder resolutions in reliance on clause 10.2 of the SIA and that Regent Pacific was terminating the SIA under clause 15.1(d) with immediate effect.On 22 March 2011, BCI released a copy of the SIA on ASX.In the Panel's view, by reason of the non-disclosure of Regent Pacific's right to terminate based on clause 15.1(d) of the SIA and Regent Pacific's subsequent reliance on the right, the acquisition of control over voting shares in BCI has not taken place in an efficient, competitive and informed market.The Panel has made orders that Regent Pacific and Pilbara cannot rely on clause 15.1(d) of the SIA to terminate that agreement.The reasons for the decision are available on the [Takeovers Panel website](http://www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=RD" \t "_new).etailed Contents |

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| **5. Recent Corporate Law Decisions** |  | ext Section |

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| **5.1 Does a principal have a proprietary claim in relation to assets acquired by his agent in breach of fiduciary duty?** (By Betty Shao, Freehills)  Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership) [2011] EWCA Civ 347, England and Wales Court of Appeal, Lord Neuberger MR, Richards and Hughes LJJ, 29 March 2011 The full text of this judgment is available at:[http://www.bailii.org/ew/cases/EWCA/Civ/2011/347.html](http://www.bailii.org/ew/cases/EWCA/Civ/2011/347.html%22%20%5Ct%20%22_new) **(a) Summary** The case considered whether a principal or employer could assert a proprietary right to assets acquired by his agent or employee in breach of fiduciary duty. The England and Wales Court of Appeal held that a proprietary claim is not available except where the asset is "beneficially the property of the beneficiary" or the fiduciary acquired the asset "by taking advantage of an opportunity or right which was properly that of the beneficiary". The Court of Appeal also examined whether a beneficiary could trace monies distributed by a fiduciary to third parties in circumstances where monies had been mixed with the fiduciary's funds. It was held that the beneficiary could claim a proprietary interest and that the onus was on the fiduciary to distinguish their funds from those of the beneficiary.  **(b) Facts**  The Versailles Group consisted of Versailles Group PLC ('VGP') and its fully owned trading subsidiary Versailles Trade Finance Limited ('VTFL'). Ostensibly engaged in transaction based financing, the Versailles Group ran a "classic ponzi scheme" financed with bank loans and funds obtained from wealthy individuals known as "traders". Loans from the banks were secured by fixed and floating charges against the assets of VTFL. Money advanced by traders was collected by Trading Partners Ltd ('TPL'), a company directed and controlled by Mr Clough and Mr Cushnie (a significant shareholder of VGP). This money was held in trust by TPL for the purpose of "purchas[ing] goods of merchantable quality and goods which have been agreed for sale" and subsequently forwarded to VTFL pursuant to a management agreement. On 5 May 1999 the UK Department of Trade and Industry began an investigation into VGP's affairs under section 447 of the Companies Act 1985 (UK). Following the commencement of this investigation,  Mr Cushnie sold some shares he held in VGP and made distributions to the Versailles Group and the banks.  In January 2000, administrative receivers were appointed to VGP and VTFL.  The appellant, Sinclair Investments (UK) Limited ('Sinclair'), took an assignment of all the claims of TPL. Sinclair asserted two proprietary claims against multiple respondents including the Versailles Group, the administrative receivers and two of the banks which had provided loans. The claims were in relation to:  the proceeds from the sale of VGP shares since profits had been realised as a result of Mr Cushnie breaching his fiduciary duties as a director of TPL; andfunds forwarded to VTFL from TPL on the basis that VTFL owed TPL fiduciary duties.  **(c) High Court of Justice decision**  In relation to the first claim, Justice Lewinson held that the appellant was only entitled to a personal remedy against the respondents as Mr Cushnie's acquisition of VGP shares occurred before TPL was incorporated and accordingly, he did not owe trustee-like duties in relation to that property. However, he accepted that Sinclair was entitled to assert a proprietary interest in money held by VTFL to the extent that distributions were made after the banks had notice of the proprietary claim and made out of recoveries that could not be identified as having originated from sources other than the mixed fund.  The appellant appealed and the respondents brought a cross-appeal.   **(d) Court of Appeal decision**  The Court of Appeal dismissed the appeal and the cross-appeal.  **(i) Proprietary claim to the proceeds of sale of the VGP shares**  As the proprietary claim did not relate to funds in respect of which Mr Cushnie owed fiduciary duties, the Court of Appeal considered proceeds generated through the share sale as being analogous to a bribe and examined the issue of whether a principal beneficially owns a bribe received by his agent arising from a breach of fiduciary duty.  Master of the Rolls, Lord Neuberger (with whom Richards and Hughes LJJ agreed), rejected the appellant's argument that the Court of Appeal should follow the Privy Council decision in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 in which it was held that a principal has a proprietary right to a bribe received by an agent. Lord Neuberger criticised the decision on a number of grounds including the following: Lord Templeman's judgment assumes what it asserts as he states that a bribe paid to a "false fiduciary vests in.the person to who the duty is owed" before setting out to explain his reasoning; there is no basis for asserting that a bribe paid out to a fiduciary is an asset which the fiduciary was under a duty to take for the beneficiary, given the fundamental distinction between a fiduciary enriching himself by depriving a claimant of an asset and a fiduciary enriching himself by doing a wrong to the claimant; andthe judgment gave insufficient consideration to the potentially "unfair consequences" the decision would have on other creditors. Lord Neuberger further stated that the Court of Appeal was not bound to follow Privy Council decisions and that its own decision in *Lister & Co v Stubbs* (1890) LR 5 Ch D 1, in which an employer was denied a proprietary right to a secret commission received by an employee, was to be preferred.  **(ii)  TPL's proprietary claim to the monies held by VTFL**  The Court of Appeal accepted that TPL had a proprietary interest in the funds it entrusted to VTFL under the management agreement. It rejected the argument raised by the banks that monies owned by TPL and VTFL were "so inextricably mixed together" that it was impossible for TPL to mount a proprietary claim in respect of any of the money in its name. The Court of Appeal also placed the onus on the administrative receivers to show that the money in the mixed account did not belong to VTFL. etailed Contents**5.2 The court's role in ordering meetings under section 411 of the Corporations Act**  (By Jordan Wright, Blake Dawson) Re Foster's Group Limited (ACN 007 620 886) [2011] VSC 93, Supreme Court of Victoria, Ferguson J, 21 March 2011. The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2011/93.html](http://www.austlii.edu.au/au/cases/vic/VSC/2011/93.html%22%20%5Ct%20%22_new) **(a) Summary** This case concerned an application by Foster's Group Ltd (Foster's) under section 411 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act) for orders convening a meeting of its shareholders for the purpose of voting on a proposed scheme of arrangement.  The scheme proposed to demerge Foster's wine business, Treasury Wine Estates (Treasury), from its beer business, Foster's Australia Ltd (Foster's Australia).  A question of different treatment for potentially different classes of shareholders was of particular interest to the Court. **(b) Facts**  Foster's is proposing to implement a demerger of Treasury from the rest of its corporate group.  All shares in Treasury are owned by Foster's subsidiary company,  Foster's Australia.  The vehicle for the demerger was to be a reduction in share capital and a scheme of arrangement.   Under the proposed scheme, all eligible Foster's shareholders (including both fully paid and partly paid) would receive one share in Treasury for each three Foster's shares held.  Other than the scheme, the transaction was to be effected by a number of documents:an Implementation Deed (Deed) between Foster's and Treasury requiring both to take all steps necessary to implement the proposed scheme and capital reduction; a deed poll in favour of participating Foster's shareholders binding Treasury to perform its obligations under the Deed; anda Transfer Agreement requiring Foster's to pay a $1.25 billion capital reduction amount to Foster's Australia in exchange for the transfer of Treasury shares to eligible Foster's shareholders.  This amount would likely be forgiven by Foster's Australia. Ineligible shareholders (some overseas shareholders), and those eligible shareholders who elected to participate in the share sale facility rather than receive Treasury shares, would receive the proceeds of sale of the Treasury shares that they would otherwise have received. **(c) Decision**  **(i) Role of the Court**  The Court stressed that its role in such an application is supervisory: *Re Healthscope Limited* [2010] VSC 367; Re NRMA Ltd (2000) 33 ASCR 595; *Re CSR Limited* (2010) 183 FCR 358.  At a first hearing, the Court is to focus on the substantive and procedural requirements of section 411, and not make an assessment of fairness, unless it is clear that the scheme would not be approved at a second hearing. The substantive and procedural requirements that the Court must be satisfied of are:that the proposed scheme is an arrangement under s 411 of the Act;that the scheme booklet adequately explains the proposal and provides all material information to shareholders; that ASIC has had an opportunity to examine the scheme and make submissions to the Court; andthat arrangements for calling and conducting the meeting are satisfactory. Lastly, if the scheme company indicates that there may be an issue relating to member classes, the Court is to address that issue at the first hearing.  In this instance, both ASIC and Foster's raised a class issue. **(ii) Class treatment issue** Her Honour referred to the test for identifying a class that was formulated in *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573, and observed that the current test relates to a "community of interests" rather than identical treatment.  Her Honour approved of the statement by Santow J in *Re NRMA Ltd* (2000) 33 ASCR 595 at 617, where his Honour stated: "divergent commercial interests extrinsic to share membership are ordinarily not a factor which should differentiate classes." The potentially different classes of shareholders in the Foster's transaction were:ineligible overseas shareholders;partly paid shareholders; andfully paid shareholders. Her Honour noted that the ineligible overseas shareholders would receive different treatment under the scheme, as the Treasury shares they would have been entitled to would instead be sold.  Even though they would be treated differently, her Honour found that there was still a community of interest in deciding whether the demerger was in all the shareholders' best interests.  For this reason there was no separate class. The treatment of the partly paid shareholders was more complicated.  Partly paid shares constitute around 0.4% of Foster's share capital, and, at the time of the hearing, a substantial majority of those shares had an issue price higher than the Foster's share price.  The trust deed under which the partly paid shares were issued entitled those members to participate in schemes of arrangement on the same terms as any fully paid shareholders.  Foster's directors determined that the partly paid shareholders would be given this entitlement, and receive one Treasury share for every three Foster's shares held.  Because of this, it was possible that the partly paid shareholders would receive advantages not available to the fully paid shareholders. The possible advantages were:receiving the same number of Treasury shares without contributing the unpaid amount on their Foster's shares; andholding shares in Treasury that would rank equally with all other shares, and have the same entitlements. Her Honour found that these advantages were mitigated by the fact that the partly paid share call liability would remain the same after the demerger, even though Foster's asset base would be reduced, and there was the potential for Foster's share price to decrease.  In that event, the partly paid shares may end up more "out of the money".   Her Honour determined that the economic relativities between the partly and fully paid shareholders would not be altered by the proposed scheme, and for that reason there was only one class of shareholders. **(iii) Performance risk** Her Honour noted that as both Treasury and Fosters Australia were third parties to the proposed scheme, it was appropriate for the Court to consider the risk of non-performance of their respective obligations.  However, her Honour was satisfied that non-performance was unlikely as: Treasury was to be bound by the deed poll; and Foster's was required to take all steps to ensure that Foster's Australia, its wholly owned subsidiary, performed its obligations.   **(iv)  Conclusion**Ferguson J concluded that no issues arose from the matters considered above, and made orders for the meeting to be convened.etailed Contents**5.3 Can a document brought into existence for multiple and equal purposes within a corporate group satisfy the common law dominant purpose test for legal professional privilege?** (By Monali Pandey, Corrs Chambers Westgarth) Wingecarribee Shire Council v Lehman Brothers Australia Limited (in liq) (No 5) [2011] FCA 245, Yates J, 18 March 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2011/245.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/245.html%22%20%5Ct%20%22_new) **(a) Summary** Wingecarribee Shire Council, City of Swan and Parkes Shire Council ("the Applicants") contested a claim for legal professional privilege asserted by Lehman Brothers Australia Limited ("the Respondent") in relation to six documents that the Applicants sought from the Respondent pursuant to a Notice to Produce dated 22 February 2011. The documents the subject of the claim for privilege largely concerned emails either sent to or by the Respondent's internal legal counsel, Mr Shaun Ansell to Sarah Bower, Senior Legal Counsel, of Lehman Brothers Asia Holdings Limited. Five of the six documents were created for the purpose of giving advice to the Respondent as well as to the Respondent's related entities, the Lehman Brothers entities.  Yates J considered that as these documents were brought into existence for multiple and equal purposes where one of the purposes was foreign to the Respondent, namely for the provision of legal advice to the Lehman Brothers entities, legal professional privilege did not apply to these documents. In giving his reasons, Yates J stated that no lawyer-client relationship existed between Mr Ansell and the Lehman Brothers entities and no common interest privilege was in existence between the Respondent and the Lehman Brothers entities. With respect to the last document, Yates J considered that legal professional privilege attached to this document as it was created for the dominant purpose of providing the Respondent with legal advice. **(b) Facts**  From March 2007 until October 2008, Mr Ansell was employed as Vice President of the Legal and Compliance Division of the Respondent.  When Mr Ansell began working for the Respondent, the Respondent was Grange Securities Limited. Later on in 2007, "Lehman Brothers entities" (as defined by Mr Ansell's affidavit) acquired shares in the Respondent and the Respondent changed its name to Lehman Brothers Australia Limited. Mr Ansell's role whilst he was employed by the Respondent included:providing legal and compliance advice to the Respondent in relation to all aspects of its operations;managing the corporate and transactional legal aspects of the Respondent's business; andmanaging the compliance aspects of the Respondent's business. Mr Ansell reported to Mr Christopher Moore, General Counsel and Ms Bower, Senior Legal Counsel, both of Lehman Brothers Asia Holdings Limited. In September 2007, the Respondent conducted a review of the sale of financial products by its Fixed Income Division. This followed on from claims by the Respondent's customers regarding the sale of collateralised debt obligations ("CDOs"). At around that time, Ms Bower asked Mr Ansell to conduct an investigation of the division for the purpose of allowing the Respondent and other Lehman entities to seek legal advice in connection with the review. Mr Ansell stated that legal advice was sought by the Respondent and other Lehman entities in relation to the following issues:assessing the Respondent's legal position as regards claims made by the Respondent's clients in relation to transactions in CDOs and other financial products sold by the Respondent and also possible claims against the Respondent's professional indemnity insurer;assessing whether the Respondent had legal grounds to discontinue the employment of various employees for cause or take disciplinary action against those employees; andassessing whether there were grounds for any legal claims by Lehman entities as purchaser of the Respondent in relation to sales of financial products prior to the acquisition by Lehman entities of the Respondent in March 2007. Yates J noted that Mr Ansell's affidavit read in a way that each of these purposes were equal purposes. Mr Ansell did not highlight any of the purposes as a dominant purpose or ruling, prevailing or most influential purpose. Mr Ansell's affidavit also addressed each of the six documents in relation to the reasons why they were created. For documents one to five, the documents were stated by Mr Ansell to be created:in connection with the request for legal advice in order to assess the Respondent's position in relation to certain matters; andin connection with the request for legal advice in order to assess any legal claims available to the Lehman entities as purchasers of the Respondent for conduct that predated the acquisition by the Lehman entities of the Respondent in March 2007. For document six, the document was said to be created for the purpose of obtaining legal advice on the question of whether the Respondent had legal grounds to discontinue the employment of one of the Respondent's employees for cause. The Applicants submitted that:each of the documents were created for multiple equal purposes, which included the equal purpose of legal advice being sought and provided to the Lehman entities;legal advice to the Lehman entities did not include the Respondent and there was no basis for common or joint interest privilege, and advice being sought by the Lehman entities was for the sole benefit of the Lehman entities; andthe evidence did not establish any lawyer-client relationship between Mr Ansell and the Lehman entities or between Mr Ansell, the Respondent and the Lehman entities jointly. The Respondent submitted that Mr Ansell was providing independent legal advice and that the documents were created for the dominant purpose of providing legal advice sought from Mr Ansell's employer, being the Respondent. In determining whether legal professional privilege attached to the documents, Yates J applied the common law dominant purpose test set down in *Esso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia* [1999] HCA 67; (1999) 201 CLR 49. Yates J considered that the question he had to determine was whether, with respect to each document, the most that can be said of the communication is that the purposes for which it came into existence included a purpose of obtaining legal advice or assistance. In such a case, the privilege would not apply. **(c) Decision**  Yates J considered that legal professional privilege did not attach to documents one to five on the basis that, where there are multiple equal purposes for the creation of a document, it cannot be said that the dominant purpose of creating the document was to obtain legal advice for the Respondent. Yates J also considered that no lawyer-client relationship existed between Mr Ansell and the Lehman Brothers entities. With respect to document six, Yates J considered that this document related only to the legal position of the Respondent. Accordingly, this document was created for the dominant purpose of providing legal advice and privilege attached to the document.etailed Contents**5.4 Litigation funding as a financial product** (By Caroline Wong, Mallesons Stephen Jaques) International Litigation Partners Pte Ltd v Chameleon Mining NL [2011] NSWCA 50), New South Wales Court of Appeal, Giles JA, Hodgson JA and Young JA, 15 March 2011 The full text of this judgment is available at:  [http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=150634](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=150634" \t "_new) **(a) Summary** In this case, the New South Wales Court of Appeal held that a litigation funding agreement could fall within the definition of 'financial product' under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act") and therefore that litigation funding providers are obliged to hold an Australian financial services licence.  Failure to hold an Australian financial services licence may mean that the counterparties to litigation funding agreements can validly rescind those agreements under the Act. **(b) Facts**  International Litigation Partners Pte Ltd ("ILP") entered into an agreement with Chameleon Mining NL to fund litigation ("Agreement").  The Agreement contained a clause which provided that it could be terminated, subject to a fee being paid, if there was a change in control of Chameleon Mining NL ("Chameleon").  Cape Lambert Resources acquired control of Chameleon and purported to rescind the Agreement under section 925A of the Act.  That section effectively provides that, subject to a number of specified exceptions, a client may rescind an agreement for the provision of financial services where the person who agreed to provide those services does not hold an Australian financial services licence but is required to do so under the Act.   ILP contested the validity of Cape Lambert's rescission and claimed that it was entitled to the termination fee resulting from the change of control over Chameleon as well as the litigation funding fee. The central issues on appeal were whether or not the Agreement could be rescinded under section 925A of the Act and, if not, the amount which Chameleon must pay ILP.   **(c) Decision**  **(i) Litigation funding agreements as financial products** Under the Act, a financial product includes a facility which manages risk by managing the financial consequences of particular circumstances (see sections 763A and 763C of the Act).  The Court found that the Agreement's primary purpose is to manage the financial risk associated with the consequences of commencing proceedings.  Chameleon had entered into the Agreement in order to transfer the financial risk associated with the litigation (for example, adverse costs orders, or unsuccessful or partially unsuccessful proceedings) on to ILP.  The Agreement could therefore be characterised as a facility which manages the financial consequences of certain circumstances and fell within the general definition of a financial product under the Act. Under section 763E of the Act, the definition of financial product excludes facilities which satisfy the requirements of the definition but are incidental components of another facility that has a main purpose which is not a financial product purpose.  The majority found that the Agreement is not a financial product which is an incidental component of a facility which has purposes other than those of a financial product, since the Agreement had no main purpose of obtaining funding apart from the allocation of financial risk associated with the proceedings.  Hodgson JA dissented, finding that the management of financial risk was incidental to funding the litigation itself since the management of those risks was contingent on the litigation proceeding. A credit facility is also excluded from being a financial product under section 765A(h)(i).  The majority found that the Agreement is not a credit facility because it includes no loan or advance of money: rather, it is simply an agreement to pay costs in the future.  Hodgson JA dissented, arguing that the Agreement effectively constitutes a loan of the cost of the litigation, which has to be repaid in the event that the proceedings are sufficiently successful. The majority ultimately held that the Agreement fell within the definition of a 'financial product' and, since ILP did not hold an Australian financial services licence, the Agreement could be validly rescinded under section 925A of the Act. **(ii) Discussion of the meaning of 'derivative'** Under section 764A(1)(c) of the Act, a derivative is expressly included within the definition of financial product.  Giles, Hodgson and Young JJA therefore considered whether the Agreement could be classified as a 'derivative', and each took a different approach to the question.  Derivative is defined under section 761D of the Act as an arrangement under which a party must provide consideration of a particular kind to the other party and the value of that consideration is derived from the value of something else (for example, an exchange rate, index, asset, or commodity).   The majority held that the Agreement is not a derivative.  Young JA regarded the Agreement as creating an interest in the proceedings rather than depending on something else.  Since every permutation of the consideration payable depended upon the proceeding which was being funded as opposed to being derived from an unrelated 'something else', he considered that it fell outside of the definition of derivative.   Hodgson JA considered that the Agreement could fall within the general definition of derivative because the consideration paid under the Agreement (the Funding Fee) could be dependent on something else, such as the damages awarded in the proceedings or the legal costs payable.  However, contracts for the provision of services are expressly excluded from the definition of derivative.  He interpreted the phrase 'provision of services' as including contracts which involve procuring services from third parties, and therefore regarded the Agreement as falling within the exclusion.  Hodgson JA's approach may be contrasted with that of Young JA, who decided that the Agreement could not be for the provision of services, as the phrase was intended to refer to contracts whose value depends upon the time taken to provide the services and which therefore fell outside the scope of financial instruments which the legislature sought to regulate.   In the minority, Giles JA found that the Agreement is a derivative because its value is affected by something else: the legal costs or outcome of the litigation.  Further, he found that it could not be described as a contract for services as the contract is for the provision of money, not services. **(iii) Contractual interpretation: fees recoverable by ILP** The majority held that ILP's obligations and entitlements under the Agreement ceased once it had been terminated as a result of the change in control, and therefore that ILP was entitled to an early termination fee but not a fee for agreeing to fund the litigation.etailed Contents**5.5 Leave application for a statutory derivative proceeding** (By Claire Roberts, Blake Dawson) MG Corrosion Consultants Pty Ltd v Vinciguerra [2011] FCAFC 31, Full Federal Court, North, McKerracher and Jagot JJ, 10 March 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/31.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/31.html%22%20%5Ct%20%22_new)**(a) Summary**In MG Corrosion Consultants Pty Ltd v Vinciguerra ('Vinciguerra') the Full Federal Court considered in detail each element of section 237(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), which sets out when a court must grant an application for leave to bring a derivative proceeding. The Full Federal Court upheld a decision that the respondent (Mr Vinciguerra) be allowed to bring a derivative proceeding on behalf of the appellant MG Corrosion Consultants Pty Ltd (MGCC).  Mr Vinciguerra, a former MGCC director, claimed that excessive management fees were paid to Sola-Kleen, of which another MGCC director was the sole director.  The trial judge found that the requirements stipulated in section 237(2) of the Corporations Act were satisfied.  On appeal, the appellant challenged every element under that section except one as to form, alleging that it was not probable that MGCC would not have brought the action itself, that Mr Vinciguerra was not acting in good faith, that it was not in the best interests of MGCC that leave be granted, and that there was no serious question to be tried.  After a lengthy discussion of each of those criteria, the Full Court upheld the decision of first instance. **(b) Facts**The respondent, Albert Vinciguerra, sought leave under section 237 of the Corporations Act to commence a derivative proceeding on behalf of the appellant (MGCC).  Mr Vinciguerra was a director of the MGCC, as was the first respondent, Malcolm Stuart Gilmour.  Mr Gilmore was also the sole director of Sola-Kleen.  Tony Armenti (the second respondent) was MGCC's external accountant. Mr Vinciguerra alleged that payments made by MGCC to Sola-Kleen were grossly in excess of what they ought reasonably to have been.  Mr Vinciguerra was granted orders under section 247 of the Corporations Act permitting him to inspect MGCC's books.  He arranged for Mr Peter Gorey, an accountant, to go over those books, and Mr Gorey's findings supported Mr Vinciguerra's suspicions.  MGCC arranged for an independent accountant, Graham Ruthgen, to go over the books.  Mr Graham also found evidence of a shortfall, albeit of a much smaller amount.  After Mr Vinciguerra ceased to be a director of MGCC, after a period of four years (during which Mr Gilmour was the sole director), Trevor John Harradine joined MGCC as a director.  Mr Gilmour and Mr Harradine were the directors and only shareholders of another entity, but did not disclose this to the primary judge (who discovered this fact during the course of the trial, and attached weight to it).   Mr Vinciguerra was granted leave to bring a derivative proceeding in the first instance.  MGCC appealed on the basis that the payments were reasonable, and aspects of Mr Vinciguerra's conduct should have prevented leave from being granted. **(c) Decision**The Full Federal Court dismissed the appeal and in doing so considered each element in section 237(2), outlining when a court must grant an application.  **(i) Likelihood that MGCC would commence proceedings** North, McKerracher and Jagot JJ considered the time that had elapsed between MGCC ordering an independent financial investigation and the commencement of proceedings (a period of nearly two years) to be very relevant in their determination of whether MGCC was likely to bring proceedings.  The 'independence' of Mr Harradine (not a party to the proceedings) was also considered. Because of his personal interest in the matters being considered, his appointment could not bolster the claim that proceedings would be independently brought.  **(ii) In the best interests of the company that leave be granted** The Court held that it was not material that Mr Vinciguerra himself was in no position to decide the issues at hand.  It was reasonable for him to leave these affairs 'in the hands of' experienced solicitors and an experienced accountant.  The Court held that it did not necessarily follow that because a party proposed to wind up a company (as Mr Vinciguerra had), that person was necessarily acting in bad faith in bringing a statutory derivative action.  The Court also held that Mr Vinciguerra's decision not to accept an offer to sell his shares was reasonable, particularly as his complaint centred around accounting irregularities, and was not indicative of bad faith.  **(iii) In the best interests of MGCC** The Court rejected the suggestion that Mr Vinciguerra needed to show a reasonable likelihood of the action succeeding.  Aside from the requirement that more than a mere possibility of success existed, it was important that the granting of leave not be permitted to become a mini trial in itself.  The Court cited the decision in *Vigliaroni v Concrete Precast Systems Pty Ltd* [2009] VSC 253 to affirm that generally the 'pursuit of an action by or on behalf of a company against an officer for recovery of compensation for damage done to the company by the officer's breach of duty' will be in the best interests of the company.  MGCC also tried to claim that the rebuttable presumption that an action would not be in the best interests of a company if brought against a third party applied.  The Court dismissed this argument because a director is not a third party.  **(iv) Serious question to be tried** The Court acknowledged that statutory derivative actions place an onerous burden on a company and that leave should not be granted lightly.  The Court reiterated, however, that the purpose of leave is not to negate the need for a hearing.  As both the expert called by Mr Vinciguerra and the expert called by MGCC concurred that the management fees were inflated to some degree, there was a serious question to be tried. etailed Contents**5.6 Relief from forfeiture of commercial lease where forfeiture unconscionable**(By Andrew Nicholls, DLA Phillips Fox)Lindholm, in the matter of Munday Group Pty Ltd (Receivers and Managers Appointed)(In Liquidation) v Tsourlinis Distributors Pty Ltd  [2011] FCA 195, Federal Court of Australia, Finkelstein J, 9 March 2011The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2011/195.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/195.html%22%20%5Ct%20%22_new)**(a) Summary**The case concerned an application by the receivers of a company running a hotel premises under a commercial lease. The landlord sought to terminate the lease by issuing five notices under section 146 of the [Property Law Act 1958 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=534" \t "Default) alleging various breaches of the lease.  Each section 146 notice was followed by a notice of termination. The receivers disputed the landlord's right to terminate the lease and sought relief from forfeiture. Despite finding that some of the termination notices were valid, Finkelstein J decided to provide relief from forfeiture of the lease under the Court's equitable jurisdiction. He held that relief from forfeiture was justified where exercise of a landlord's power to terminate a lease was unconscionable. In this case, the landlord's motivations for seeking the termination, as well as the disproportionate benefit it would gain from terminating the lease, meant that any termination would be unconscionable.**(b) Facts** Upday Pty Ltd (Upday) was part of a larger group of companies that had entered into financial difficulties in 2009. National Australia Bank appointed receivers and administrators to a number of these group companies, including Upday. An agreement was struck to sell the shares in some of the group companies, including Upday, and the units in the unit trusts of which the relevant companies were trustees to a subsidiary of the Melbourne Racing Club (MRC), MRC Investments Pty Ltd (MRC Investments). There were a number of conditions precedent to the sale, including that each company execute a deed of company arrangement (DOCA), and that where required under the terms of relevant leases, the consent of the landlord be obtained to the change in control of the trustee company that would result from the transfer of shares.Upday operated the Golden Fleece Hotel under a lease from Tsourlinis Distributers Pty Ltd (Tsourlinis). Upon discovering that receivers and administrators had been appointed to Upday, Tsourlinis served a notice on Upday pursuant to section 146 of the Property Law Act 1958 (Vic) relying on the appointment of receivers and administrators as the ground for termination of the lease.  Four subsequent notices were served, each relying on alleged breaches of the lease, and each notice was followed by a notice of termination.  The receivers disputed Tsourlinis's right to terminate the lease, and sought relief from forfeiture.**(c) Decision****(i) Validity of the grounds of the notices**Finkelstein J considered the grounds on which each of the notices purporting to terminate the lease had been served. He concluded that the first and fourth notices were invalid, but the second, third and fifth notices provided valid grounds for termination of the lease.    **(ii) Relief from forfeiture**Citing a variety of authorities, Finkelstein J concluded that the Court's discretion in equity to provide relief from forfeiture is exercisable where it can be shown that it would be unconscionable for the landlord to terminate the lease. The onus is on the lessee to show that the lessor's exercise of a right to terminate the lease is unconscionable.In the case at hand, the receivers had shown that Tsourlinis would obtain a wholly disproportionate benefit from relying on the breaches as a basis for termination. Finkelstein J also concluded that any breaches by Upday of the lease had been remedied or would be remedied, and that where they could not be remedied, the loss suffered by the landlord could be made good by payment of damages. For these reasons, Finkelstein J held that Tsourlinis's reliance on its power to terminate the lease was unconscionable and granted relief from forfeiture of the lease.**(iii) Relief from a future breach of the lease**Finkelstein J noted that under the lease, landlord consent was required to any change in control of Upday. The lease also required that incoming directors provide personal guarantees in respect of the obligations of Upday under the lease.  Accordingly it was foreseeable that Tsourlinis would refuse to give its consent to the change in control.  Because of this, Finkelstein J made an order restraining Tsourlinis from exercising any rights it had under the lease in response to a transfer of the shares in Upday to MRC Investments or consequent on the appointment of new directors to Upday.  In making this order he noted that when considering whether to consent to a change in shareholding or directorship Tsourlinis was bound to act reasonably and in good faith.  It would not be in good faith (i.e. it would be unreasonable) to refuse consent to the change in control given the significant financial standing of MRC, and the fact MRC had undertaken to provide an irrevocable bank guarantee in support of the obligations of MRC Investments under the lease.   As, strictly, relief against forfeiture could not be granted because the breach (i.e. the transfer of shares without landlord consent to the change in control having been given) had not occurred, Finkelstein J made an order to restrain any future refusal of Tsourlinis to consent to a transfer of ownership on a 'quia timet' basis.**(iv) Application by deed administrators**The administrators of the DOCA sought an order under section 444F(4) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) that Tsourlinas be prohibited from taking possession of the premises following forfeiture of the lease.  Their reasoning was that in such a case the DOCA, which would maximise returns to the creditors, would be defeated.  Ultimately it was not necessary to consider whether an order should be made based on the deed administrators' application.  However, Finklestein J made a number of comments on the operation of the section, concluding that the workability of section 444F is a matter that should be addressed by Parliament.etailed Contents**5.7 Inspection of documents in equity**(By Adrian Ng, Clayton Utz)Silkman v Shakespeare Haney Securities Limited [2011] NSWSC 148, New South Wales Supreme Court, Hammerschlag J, 11 March 2011The full text of this judgement is available at: [http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=150692](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=150692" \t "_new)**(a) Summary**This case considered the extent to which the beneficiary of a managed investment scheme was entitled to access documents relating to that scheme.The plaintiff in this case was a member of the Shakespeare Haney Premium Income Fund (Scheme), a managed investment scheme that suffered financial difficulties during the global financial crisis.  The defendant was the responsible entity of the Scheme and, as such, the relationship between the defendant and plaintiff was one of a trustee and beneficiary.The plaintiff sought access to certain information from the defendant, including documents relating to the investments made by the defendant on behalf of the Scheme, accounting discrepancies in records relating to the Scheme and other commercial decisions made by the defendant in its capacity as the responsible entity of the Scheme.In refusing the plaintiff's application, Hammerschlag J held that the approach taken by the Privy Council in *Schmidt v Rosewood Trust* [2003] 2 AC 709 (Schmidt) should be followed.  Under the Schmidt approach, the fiduciary obligation of trustees to provide to beneficiaries information relating to trust property and its investments is tempered by the circumstances of the relationship between the parties (including the terms of any contract between them).Applying the Schmidt approach, Hammerschlag J held that the plaintiff was not entitled to access the documents she sought because she had failed to establish that the defendant had not complied with its disclosure obligations under the Constitution and the Act.**(b) Facts**The Scheme was a managed investment scheme registered under Chapter 5C of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act). The deed poll which established the Scheme (Constitution) provided for the appointment of a "Manager" who was responsible for holding the investment assets of the Scheme members on trust while the Scheme used those assets to make investments.  The Manager was the defendant in this case.During the GFC in early 2009, the defendant wrote to the plaintiff to inform her that withdrawals from the Scheme had been suspended. The plaintiff subsequently wrote to the defendant seeking disclosure and inspection of a broad range of documents relating to the Scheme, including information concerning all:applications, valuations, appraisals, estimates, loan agreement, mortgages and other securities offered or provided by the Scheme;variations and extensions of any contractual terms to debtors (some of which were one year in arrears);communications between the defendant and borrowers in relation to any actual or potential default by the borrower; andaccounts recording any advances made or payments received by or on behalf of the Scheme and any impairment or provisions for impairment which related to any of the mortgage investments or loans by the Scheme that were overdue or the terms of which had been extended between 2007 and 2010.The plaintiff sought this information so as to determine whether: (1) the Constitution had been breached by company officers via non-application of mandated valuation methodologies; (2) investment decisions had been reasonably made; and (3) the Scheme had adopted and complied with appropriate accounting policy, section 601HA of the Act and the Constitution.The defendant rejected the plaintiff's request for access to such information. The plaintiff applied to court for an order requiring the defendant to produce for inspection the information sought by the plaintiff.**(c) Decision**The plaintiff put her case relying exclusively on the line of authority commencing under *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918 (Londonderry) and most recently followed in *McDonald v Ellis* (2007) 72 NSWLR 605).  Under the Londonderry approach:a beneficiary's right to inspect "trust documents" held by a trustee is deemed to be an equitable proprietary interest of the beneficiary; andthe plaintiff is only required to establish that the defendant is her trustee and that the documents are "trust documents" in order to be entitled to access to those documents.Justice Hammerschlag refused the plaintiff's application, finding that the plaintiff (in her capacity as beneficiary under the Scheme) did not have the right to access the documents she sought on the basis that:the strict approach to trust document access adopted by the Privy Council under Schmidt should be followed rather than the Londonderry approach;under the Schmidt approach:(i) a beneficiary has no equitable proprietary interest in documents so as to give rise to a right of production and inspection; and(ii) a trustee nevertheless has a duty to disclose information to beneficiaries under a trust but the extent of this duty depends on the nature of the relationship of the party, including the terms between them (e.g. the Constitution); andthe plaintiff had failed to establish that;(i) the defendant had not complied with its disclosure obligations under the Constitution and the Act; or(ii) that the requested disclosure of documents would remedy any proposed deficient disclosure.In making his decision Hammerschlag J found that the Londonderry approach contained jurisprudential difficulties that the Schmidt approach did not have. As such, his Honour did not adopt the Londonderry approach in this case. In particular he noted that the Londonderry approach has difficulty:ascribing a workable and principled definition of the term "trust documents"; divining the nature of the beneficiary's so-called proprietary interest in such documents; explaining why a discretionary beneficiary who has no lesser interest in the due administration of the trust (but who has no proprietary interest in the assets) should, illogically, be denied disclosure; explaining why authorities which have taken the Londonderry approach have limited the beneficiary's right to disclosure by reference to the interests of third parties in maintaining confidentiality; and reconciling a beneficiary's entitlement to documents such as a settlor's statement of intention or a constituent trust deed with the fact that these instruments are themselves not assets or appurtenant to assets of the trust.  **(i) Intentions of the plaintiff** Justice Hammerschlag, in obiter, did note that the plaintiff's intentions were not improper and that, had the plaintiff established an entitlement to disclosure, her intentions to use the documents to seek an appropriate remedy would not have eroded that entitlement.**(ii) Other factors influencing orders**Justice Hammerschlag, also in obiter, noted that confidentiality of documents would not act as a bar to disclosure as orders can be framed to permit any persons who might want to keep information confidential to be heard. His Honour also noted that the effect of disclosure on third parties, such as other beneficiaries, would influence any order that he would be willing to make.etailed Contents**5.8 Agreement to fund investigations by a liquidator not a managed investment scheme** (By Chris Keefe, Clayton Utz) HP Mercantile Pty Limited v Tumut River Orchard Management Limited (In Liquidation) [2011] FCA 200, Federal Court of Australia, Emmett J, 10 March 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2011/200.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/200.html%22%20%5Ct%20%22_new)  **(a) Summary** This decision appears to indicate that the rights to "benefits" that a party may acquire by way of an agreement to fund a liquidator's investigations are not, generally speaking, of a kind capable of bringing such an agreement within the definition of a "managed investment scheme" contained in section 9 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act). **(b) Facts**  **(i) Investor Loan Agreements** Tumut River Orchard Management Limited (In Liquidation) (Tumut) promoted, managed and operated eight horticultural projects.  Many of the investors in the projects entered into Investor Loan Agreements with Tumut, pursuant to which Tumut lent the investor the amount required to invest in the relevant project.   **(ii) Purported assignments** Tumut purportedly assigned its right, title and interest in the debts due under the various Investor Loan Agreements (Debts) to one or other of the following entities:Core Finance Pty Limited (Core);Symsung Pty Limited (Symsung); orTreetop Projects Limited (Treetop). Subsequently, each of Core, Symsung and Treetop purportedly assigned its right, title and interest in the Debts to Merilbah Investments Pty Limited (Merilbah). Merilbah then purportedly assigned its right, title and interest in the Debts to the plaintiff, HP Mercantile Pty Limited (HP). HP subsequently commenced proceedings against a number of investors seeking to recover the Debts pursuant to the terms of the Investor Loan Agreements. In the various proceedings commenced by HP, investors sought to challenge the validity and efficacy of the purported assignments of the Debts. **(iii) The alleged scheme** Between January and February 2008, Mr Nicholas Crouch, a registered company liquidator, and Mr Tim Galic, a solicitor acting for a number of investors who were defendants in proceedings brought by HP, agreed that:Mr Crouch would be appointed liquidator of Tumut and Merilbah; andMr Galic would source funding for investors for whom he acted and provide such funding to Mr Crouch to investigate the affairs of Tumut and Merilbah, particularly with respect to the validity of the purported assignments of the Debts.  Mr Crouch was subsequently appointed liquidator of Tumut and joint liquidator of Merilbah (along with Mr Shabnam Amirbeaggi). On 23 May 2008, Mr Galic sent a circular to investors inviting them to join a group that would contribute funds to challenge HP's alleged title to the Debts.  It was proposed that, if HP commenced proceedings against an investor (who had joined the group) seeking to recover a debt pursuant to an Investor Loan Agreement, Mr Galic's firm would act for that investor and that the cost of doing so would be shared on a pro rata basis among members of the group. In August 2008, Mr Crouch and Mr Galic further agreed that, if Mr Crouch discovered sufficient evidence to challenge the various purported assignments of the Debts and any such challenge was successful, Mr Crouch would seek orders pursuant to section 564 of the Act to the effect that investors who funded Mr Crouch's investigations would:be rewarded with ownership of their respective debt claimed to be payable to HP pursuant to their respective Investor Loan Agreement; andreceive a premium on the distribution of any assets on the liquidation of Tumut and Merilbah.Between approximately May 2008 and April 2010, both Mr Crouch and Mr Galic sent numerous circulars to investors seeking funding.  Each circular provided an update on Mr Crouch's investigations to date and stated that Mr Crouch proposed to seek orders pursuant to section 564 of the Act on behalf of those investors who funded his investigations (provided the purported assignment of the Debts to HP were found to be invalid). Substantial payments were made by investors to Mr Crouch as a result these circulars. **(iv) The proceeding** HP sought, inter alia, the following orders:a declaration that the alleged scheme is a managed investment scheme; a declaration that the alleged scheme is an illegal scheme not registered under the Act;a declaration that the alleged scheme is being operated in contravention of section 601ED of the Act; andan order restraining the continued operation of the alleged scheme. On 19 November 2010, the Court ordered, by consent, that the question of whether the alleged scheme was operating as an unregistered managed investment scheme in contravention of the Act be determined separately from, and in advance of, other issues in the proceeding. **(c) Decision**  Relevantly, the definition of "managed investment scheme" contained in section 9 of the Act includes a scheme that consists of the following features:people contributing money or money's worth as consideration to acquire rights to benefits produced by the scheme;contributions that are pooled or used in a common enterprise to produce financial benefits or proprietary rights for the people who hold interests in the scheme; andmembers not having day-to-day control over the operation of the scheme. His Honour considered the definition of "managed investment scheme" contained in section 9 of the Act and found that the "proper approach" was to consider whether or not the necessary features were present in the alleged scheme. In finding that money had not been contributed as consideration to acquire rights to benefits produced by the alleged scheme, his Honour considered the benefits alleged by HP and found that the majority of the alleged "benefits" were correctly categorised as either:a consequence of the purpose of those contributions, regardless of whether or not any contribution was made to the alleged scheme;a right that existed irrespective of whether or not an investor contributed money to the alleged scheme; ora benefit that was not exclusive to investors who participated in the alleged scheme. With respect to benefits arising from Mr Crouch's promise to seek orders pursuant to section 564 of the Act, his Honour noted a "possible misapprehension as to the terms of section 564" of the Act by Mr Crouch.  His Honour went on to state that, if the assignment of the Debts to HP was invalid, the investors are debtors of Tumut or Merilbah and, accordingly, there could be no distribution of any assets on the liquidation of Tumut or Merilbah to investors who are not creditors of those companies.  In any event, his Honour stated that an obligation to make an application to the Court is not a benefit that would be produced by the alleged scheme, but rather, it is the price paid in exchange for the contribution of money to the scheme by an investor. With regard to whether or not the money contributed to the alleged scheme was pooled to produce financial benefits or proprietary rights for those that held an interest in the scheme, his Honour found that there was nothing to indicate that the money contributed by the investors would produce a benefit for those investors as a whole.   Indeed, the benefit that each investor who contributed money would acquire would be unchanged, regardless of the number of investors who contributed to the pool or the size of the pool.  In finding that no such pooling feature was present, his Honour described the alleged scheme as "a series of bilateral arrangements rather than an aggregation." Accordingly, the alleged scheme was found not to be a scheme which consisted of the necessary features to bring it within the definition of managed investment scheme contained in section 9 of the Act.etailed Contents**5.9 Responsible entity may refuse to register forms of transfers executed by power of attorney** (By Jiayue Li, DLA Phillips Fox) Re Perpetual Investment Management Limited as responsible entity for Perpetual's Monthly Income Fund and Perpetual's Wholesale Monthly Income Fund [2011] NSWSC 133, Supreme Court of New South Wales, White J, 9 March 2011 The full text of this judgment is available at:[http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=150631](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=150631" \t "_new) **(a) Summary** Direct Share Purchasing Corporation Pty Ltd (DSPC) made offers to unitholders in Perpetual's Monthly Income Fund ('MIF') and Perpetual's Wholesale Monthly Income Fund ('WMIF') to purchase their units at below market value.  The offers had been accepted by some unitholders ('Relevant Unitholders'). Perpetual Investment Management Limited ('Perpetual'), as the responsible entity of MIF and WMIF, sought judicial advice from the court pursuant to section 63 of the *Trustees Act 1925 (NSW)* ('Trustees Act') in relation to whether it was justified in not registering the forms of transfer of units in MIF and WMIF to DSPC, as well as other issues in relation to the administration of the trust. White J did not accept DSPC's contention that the court should not provide judicial advice in the circumstances.  White J advised that Perpetual was entitled to refuse to register the forms of transfer in specified circumstances, among other advice, and confirmed that Perpetual was entitled to be paid its costs and expenses out of fund assets. **(b) Facts**  Following a request from DSPC's solicitors, Perpetual provided the unitholder registers for MIF and WMIF to DSPC's solicitors.  DSPC then sent offers to unitholders of MIF and WMIF to purchase their units. DSPC sent Perpetual a copy of an offer which it said had been sent to unitholders of MIF and WMIF.  The offers sought to purchase the unitholders' units at below market value.  DSPC then provided Perpetual with documents apparently completed and signed by 56 unitholders in MIF and five unitholders in WMIF containing acceptances of the offers as well as documents appointing DSPC as their attorney to exercise all rights attaching to the units and to execute documents to effect a transfer of the units.   Perpetual wrote to unitholders warning them that the offer made by DSPC was below market value, and also wrote to the Relevant Unitholders asking them to confirm whether they wished to proceed with the transfer of their units to DPSC. Perpetual received replies from the majority of the Relevant Unitholders, most of whom stated that they did not wish to proceed with the transfer of their units to DSPC.  Perpetual then wrote to unitholders stating that it would refuse to register any form of transfer provided by DSPC until it had sought judicial advice. DSPC contended that the court should not provide the judicial advice on the following grounds:the court did not have power to give advice under section 63 of the Trustees Act, as the advice sought did not relate to the management or administration of the trust property or the interpretation of the trust instrument;as Perpetual had already refused to register the transfers, there was no issue for the court to give advice or direction upon;as DSPC might challenge Perpetual's refusal to register the transfer under section 1017F of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), the giving of judicial advice would prejudge those proceedings; andthe unitholders could not be treated as a group as they have individual interests and it should be left to the individual unitholder to pursue actions against DSPC.Additionally, DSPC contended that Perpetual was not justified in refusing to act upon the apparently valid powers of attorney to register the transfers when unitholders themselves had not sought to set aside the powers of attorney.  **(c) Decision**  White J held that it was appropriate for the court to give judicial advice in the current circumstances as the jurisdiction of section 63 was enlivened.  White J held that the jurisdiction of the Trustees Act should not be narrowly construed. Accordingly, White J advised that Perpetual would be justified in:refusing to register the forms of transfer of units in MIF and WMIF to DSPC in its current form as they did not comply with the Corporations Act,refusing to register any new compliant forms of transfer of units submitted by DSPC, except in the case of unitholders who have indicated that they wished the transfer to be registered, until ordered to do so by a court of competent jurisdiction.distributing income to such of the Relevant Unitholder or DSPC as is registered as the unitholder at the time when, according to the constitution of the MIF or the WMIF, a unitholder's distribution of income is to be determined;continuing to process withdrawal requests from Relevant Unitholders, as long as they were the registered unitholder, after receipt of transfer documentation executed by DSPC, until otherwise ordered by a court of competent jurisdiction; andpaying its costs and expenses incurred in connection with these proceedings out of the assets of the MIF and the WMIF on an indemnity basis. **(i) Court's jurisdiction to provide judicial advice to trustees** Perpetual was held to be trustee of each of MIF and WMIF.  White J held that the court had jurisdiction to provide the advice sought to Perpetual pursuant to the Trustees Act.   Following *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, White J held that if the transfers were registered Perpetual would be obliged to administer the trusts in favour of DSPC.  Therefore there was a clear connection between the advice sought by Perpetual as to whether to register the transfers and its administration of the trust property.  In addition, Perpetual had only conditionally refused to register the transfers and hence, there was still an issue for the court to provide judicial advice. White J further stated that the provision of judicial advice would not prejudge proceedings taken under section 1017F challenging Perpetual's refusal to register the transfers.  The issue to be considered pursuant to a section 1017F proceeding was not between DSPC and Perpetual, but between Perpetual and the unitholders who had accepted DSPC's offer and who had not indicated to Perpetual that they wished for the transfer to be registered.  The giving of judicial advice would not affect the resolution of the issues between DSPC and those unitholders. **(ii) Judicial advice provided by the court** White J held that DSPC had no statutory or contractual right to compel Perpetual to register the transfers.  DSPC merely had an equitable right to register the transfers if, but only if, the contracts it had entered into with the unitholders were enforceable.  In the circumstances in which DSPC had procured the acceptances of the unitholders, Perpetual would be justified in acting on the basis that there is no presumption that the contracts are binding, except where unitholders had expressly confirmed that they wished to proceed with the transfer of the units. White J held that Perpetual was not obliged to scrutinise the enforceability of apparently valid documents and Perpetual would not be subject to criticism had it registered the transfers.  However, his Honour held that it did not follow that it was up to individual unitholders to restrain DSPC from seeking registration of the transfers or to restrain Perpetual from registering the transfers. Therefore, White J advised that except in respect of transfers where the transferring unitholder confirmed to Perpetual that it wished Perpetual to register the transfer, Perpetual would be justified in not registering transfers of units until so ordered by a court of competent jurisdiction. His Honour further advised that, on the basis of information set out in the relevant fund's register of unitholders at the relevant date:Perpetual would be justified in distributing the income of the fund to the registered unitholder; andPerpetual would be justified in continuing to process withdrawal requests made by the registered unitholder.Perpetual was held to have acted properly in its application for judicial advice and was consequently entitled to be paid its costs and expenses in connection with the application out of the assets of both funds on an indemnity basis.etailed Contents**5.10 Freezing order under the Uniform Civil Procedure Rules 1999 (Qld)** (By John O'Grady and Lindsay Hogan, Corrs Chambers Westgarth) Fletcher v Fortress Credit Corporation (Australia) II Pty Limited [2011] QSC 30, Supreme Court of Queensland, McMurdo J, 8 March 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/qld/QSC/2011/30.html](http://www.austlii.edu.au/au/cases/qld/QSC/2011/30.html%22%20%5Ct%20%22_new) **(a) Summary** The liquidators of Octaviar Limited (Receivers and Managers Appointed)(In Liquidation) ('Octaviar') formally MFS Limited, sought interlocutory relief against the respondent, Fortress Credit Corporation (Australia) II Pty Limited ('Fortress'), to prevent it from dealing with assets up to an amount of $40 million, including funds held in escrow, until the determination of further proceedings before the court. Her Honour, McMurdo J, granted the orders pursuant to the [Uniform Civil Procedure Rules 1999 (Qld)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14486" \t "Default) ('UCPR'), but refused to require National Australia Bank ('NAB') to transfer funds held in escrow to another bank, even at the risk that NAB might use the funds to set-off existing liabilities owed to it by the respondent, as this would be inconsistent with Supreme Court of Queensland, Practice Direction No 1 of 2007 - Freezing Orders, 5 August 2007 ('Practice Direction'). Her Honour rejected a request to grant an order over the 'net unencumbered assets' of the respondent, as the respondent's assets and not the respondent's net position, marked the boundary of protection under the Practice Direction. Moreover, her Honour stated that the award of a Mareva order under 260D(3), was not dependent upon the risk of the respondent's financial position deteriorating due to the incurring of further liabilities. **(b) Background** In May 2007, Fortress provided a loan to Young Village Estates Pty Ltd ('YVE') under a facility agreement ('YVE facility agreement') guaranteed by Octaviar. In June 2007, Fortress lent $150 million to Octaviar Castle Pty Ltd ('Castle') - a wholly-owned subsidiary of Octaviar - under a facility agreement ('Castle facility agreement') secured by a fixed-and-floating charge over Octaviar's assets. In mid-February 2008, the Castle facility agreement was increased to $200 million. On 18 February 2008, a Deed of Amendment was executed by Fortress, Castle and Octaviar, which provided that $15 million of the additional $50 million loan would be payable by Castle to Fortress under a 'Funded Participation Agreement'. This agreement entitled Castle to participate in the recovery of the YVE debt, which in turn benefited Octaviar, as Castle effectively had no other creditors. Octaviar had repaid the Castle facility agreement on 29 February 2008, but did not obtain a discharge of the debt. In fact, on 22 January 2008, Octaviar and Fortress executed a deed which extended the coverage of the charge to the YVE facility agreement. The liquidators of Octaviar argued that:when combined, the Deed of Amendment of the Castle facility agreement, Funded Participation Agreement and payment of $15 million, were together an unfair preference transaction for the purposes of section 588FA(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default); andas Octaviar was insolvent, this was an insolvent transaction and therefore voidable under section 588FE of the Corporations Act 2001 (Cth). This $15 million claim will form the basis of further proceedings. In late December 2008, the then administrators of Octaviar Administration Pty Ltd paid $19,746,713 to Fortress from monies held on trust for the benefit of Octaviar. A further $304,331 was paid in February 2009. The monies received by Fortress were held in a separate account ('escrow funds'), first at Fortress' own initiative and then by order of the court, subject to separate legal proceedings. The liquidators of Octaviar claim that these payments were made under a voidable charge, as it was entered on 22 January 2008, which occurred during the six months ending on the relation back day. These payments are also the subject of further proceedings. **(c) Decision** Her Honour noted that a freezing order (Mareva order) could be granted under rule 260D of UCPR where the applicants had a 'good arguable case on an accrued or prospective cause of action that is justiciable'. In granting the order, her Honour held that the applicants had a 'relatively strong case' for the purposes of rule 260D, as:evidence showed that the scheme by which Octaviar paid $15 million to Fortress in order to have Castle become entitled to the YVE debt was a preferential payment, because Fortress received more that it would have than if the transaction were set aside; andthe transaction which secured Octaviar's liability for the YVE debt was voidable as an insolvent transaction. Her Honour granted a freezing order over the escrow funds because rule 260D(3) of UCPR was satisfied - there was a risk of the funds being removed from Australia or disposed of, dealt with or diminished in value. Her Honour referred to evidence which showed that Fortress would have remitted the funds to its US parent company, if it were not for an order of the court. Her Honour also found that the 'balance of convenience' test for the granting of interlocutory relief favoured the applicants, as there was scant evidence showing that Fortress would suffer loss or damage as a result of the order. Her Honour referred to evidence showing that Fortress was winding down its Australian operations and further noted that the order did not require Fortress to 'curtail' its business operations and would permit it to make further loans. Furthermore, any loss suffered by Fortress due to the order being awarded could be considered in a future award of damages. Her Honour refused a request requiring NAB to transfer the escrow funds to another bank. Her Honour found that while there was a risk of NAB using the funds to set-off existing liabilities owed to it by Fortress, such an order would be inconsistent with the Practice Direction. In fact, it expressly provided that an order did not prevent a bank from exercising a right of set-off. Her Honour noted that NAB was not a party to the application and that granting such an order would affect its security position. Her Honour rejected an application requiring Fortress to maintain $40 million of 'net unencumbered assets'. While an order to maintain $40 million of unencumbered assets including the escrow funds was granted, her Honour found that the term 'net unencumbered assets' was inconsistent with the Practice Direction. This direction only provided for the restraint of assets up to a stated 'unencumbered value', meaning a 'value free of mortgages, charges, liens or other encumbrances'; it did not mean the 'unencumbered value of all of the defendant's assets minus the total of all of the defendant's liabilities', as defined in the applicants' draft order. Her Honour noted that if the applicants' definition of 'net unencumbered assets' was adopted, the respondent's ability to incur liabilities would be affected. Her Honour stated that more generally, the granting of a Mareva order is not determined by the risk of a defendant's financial position deteriorating due to the incurring of further liabilities but is determined under rule 260D(3) of UCPR, where 'there is a danger that a prospective judgment would be unsatisfied' due to a dealing which encumbered the assets. Accordingly, her Honour held that 'it is not a function of the Court to elevate the plaintiff to the status of a secured creditor' and that a Mareva order is not 'designed to stop a person from sliding into insolvency'.etailed Contents**5.11 Piercing the corporate veil** (By Caroline Wong, Mallesons Stephen Jaques) Antonio Gramsci Shipping Corporation v Stepanovs [2011] EWHC 333, England and Wales High Court (Commercial Court), Burton J, 25 February 2011 The full text of this judgment is available at: [http://www.bailii.org/ew/cases/EWHC/Comm/2011/333.html](http://www.bailii.org/ew/cases/EWHC/Comm/2011/333.html%22%20%5Ct%20%22_new) **(a) Summary** *Antonio Gramsci Shipping Corporation v Stepanovs*, a judgment of the England and Wales High Court, concerned whether the corporate veil could be pierced to enable the claimants to bring and enforce proceedings against the defendant.  The defendant, together with four other businessmen, had established a number of offshore companies for the purpose of siphoning profits away from the claimant companies.   Justice Burton outlined the key principles applicable to piercing the corporate veil and held that the defendant could be held jointly and severally liable, together with the offshore companies, in relation to the scheme.  Importantly, Justice Burton held that proceedings could be brought to pierce the corporate veil notwithstanding that: it may not be necessary to do so in order to obtain an effective remedy;the defendant was not solely in control of the offshore defendant corporations; andproceedings had also been brought against the offshore companies. Justice Burton also heard submissions in relation to whether English or European law determined the identity of the parties to the relevant charterparty agreements and whether English courts had jurisdiction over the matter.  He held that the contract was governed by English law, and that English courts did have jurisdiction over the matter.   **(b) Facts** Thirty single ship companies, under the beneficial ownership of the Latvian Shipping Company, brought an action against the defendant in relation to his operation (together with four other beneficial owners) of five offshore companies (the 'Corporate Defendants').  The defendant used the Corporate Defendants in order to hire vessels from the Latvian Shipping group and then sub-charter them out to third parties at substantially higher rates than the head charters.  The scheme resulted in the claimants suffering a loss of an estimated $100 million, and the claimants brought an action against the Corporate Defendants.  The claimants also brought proceedings against the defendant, alleging that the Corporate Defendants were established solely as vehicles for that scheme, and that the corporate veil ought to be pierced so as to make the defendant jointly and severally liable for the Corporate Defendants breach of the charterparty agreements. **(c) Decision**  Justice Burton outlined the principles relating to piercing the corporate veil.  He identified fraudulent misuse of the company structure itself (as opposed to corporate dealing by the company) as the heart of the doctrine.  His Honour stated that, if there were a number of wrongdoers acting with a common purpose and in control of the company, each of the wrongdoers could be said to be in 'material control' and therefore that the corporate veil could be lifted so that proceedings could be brought against one or all of them.   His Honour rejected the submission that the court will only lift the corporate veil where it is necessary to do so in order to provide the claimant with an effective remedy for the wrong.  His Honour held that a claim to pierce the corporate veil was not demurrable at the outset because it had not been shown to be necessary: necessity did not need to be pleaded.  Although piercing the corporate veil is an exceptional course for the court to take, the claimants did not need to show that it was necessary in order for proceedings to be brought. In the course of his judgment, his Honour also rejected arguments that the claimants could not pursue the defendant for breach of contract, finding that there was 'no good reason of principle or jurisprudence why the victim cannot enforce the agreement against both the puppet company and the puppeteer who, all the time, was pulling the strings.'  Similarly, his Honour dismissed the arguments that the claimants had elected to pursue the Corporate Defendants' rather than the defendant, as he found that the claims were not in the alternative.etailed Contents**5.12 Assent by acquiescence at a members' meeting to remove the sole director** (By Steven Grant, Minter Ellison) Schofield v Schofield [2011] EWCA Civ 154, England and Wales Court of Appeal (Civil Division), Maurice Kay, Thomas, Ehterton LJJ, 25 February 2011. The full text of this judgment is available at:[http://www.bailii.org/ew/cases/EWCA/Civ/2011/154.html](http://www.bailii.org/ew/cases/EWCA/Civ/2011/154.html%22%20%5Ct%20%22_new) **(a) Summary** This decision of the England and Wales Court of Appeal is an appeal in proceedings brought by the appellant, Neil Schofield (Appellant), for a declaration that he is the sole director of Avenue Road Developments Limited (Company) and that his son, Lee Neil Schofield (Lee), had been removed as a director of the Company.  Lee, the Company and Nikolas Rimes, who was appointed by Lee to be the administrator of the Company, are defendants to the proceedings and respondents to the appeal.  The appeal is against the order of Recorder Chandler in the Norwich County Court dismissing the claim and ordering the Appellant to pay 8% of Lee's costs of the proceedings.  The appeal concerns whether Lee was properly removed as a director of the Company at a purported extraordinary general meeting. **(b) Facts** A meeting took place on 2 October 2009 at the offices of the Appellant's solicitors, Berry & Walton, attended by the Appellant, Lee and the Appellant's solicitor, Mr Berry (the Meeting).  The Appellant claims that the Meeting was an extraordinary meeting of members (EGM) of the Company, at which Lee was removed as the sole director of the Company and the Appellant was appointed the sole director.  The Appellant claims that the Meeting was effective to achieve that result because, although it was not called with the 14 days notice required by the Companies Act 2006 (UK) (Act), the Appellant representing Reggiesco Ltd (Reggiesco), the holder of 99.9% of the shares in the Company, and Lee, as the owner of the remaining share, agreed, or are to be regarded as having agreed, to treat the Meeting as valid and effective relying on the Duomatic principle, named after Re Duomatic Ltd [1969] 2 Ch 365.  The Duomatic principle as applied by English law provides that if it can be shown that all the shareholders at a general meeting assent to the same matter, that assent is as binding as a resolution in a general meeting.  Furthermore the Appellant submitted that the Duomatic principle provided that acquiescence by a shareholder with knowledge of the matter is as good as actual consent and silence by a shareholder at a meeting is as good as acquiescence and establishes consent. The relevant background facts are as follows:There were two shareholders in the Company namely Reggiesco, which was registered in Belize and held 999 shares, and Lee who held one share.  The Appellant was the sole director and 50% shareholder of Reggiesco.  Sara Garry (Ms Garry), who was formerly married to the Appellant, was the only other shareholder of Reggiesco and was also its company secretary.Prior to the Meeting Lee was the sole director of the Company.  On 3 September 2009 the Appellant served notice on Lee's sister, Victoria Schofield, as the Company's Secretary, requiring a meeting of the Company to appoint Greg Schofield as a director and to remove Lee as a director.  The Appellant was described in the notice as acting 'For and on behalf of Reggiesco'.  It was common ground that notice was intended to be a requisition pursuant to the Act.On 4 or 5 September 2009 Lee and his sister passed a resolution appointing Firefox Associates (UK) LLP (Firefox) to be the Company's Secretary in her place.On 9 September 2009 Firefox gave notice to the members, including Reggiesco, of the annual general meeting (AGM) of the Company to be held on 8 October 2009.  An amended notice of the AGM was sent on 20 September 2009.  One of the items notified as business to be considered at the AGM was Lee's removal as a director of the Company.On 22 September 2009 Berry & Walton sent Lee a letter stating that they were instructed by their clients, Reggiesco, in respect of Reggiesco's requisition of an EGM.  Among other things, the letter also stated that they were satisfied that the requisition was entirely valid and Lee ignored it at his peril as to a claim for breach of his duties as a director, and that it was the wish of Reggiesco that Lee should resign forthwith.  In his reply dated 24 September 2009 addressed to Mr Berry, Lee asked whether Mr Berry had taken instructions from only one of the two directors of Reggiesco (a reference to the Appellant), and whether Mr Berry could confirm that he also represented the other director of Reggiesco, and, if he could not so confirm, whether Mr Berry would not have a conflict of interest.On 28 September 2009 Berry & Walton replied, stating (amongst other things) that if Lee did not resign sooner, an EGM would be held at their offices on 2 October 2009; that he could attend in person or by proxy; and that the business would be to consider a motion to remove Lee from office as director and to elect a suitable replacement.  The Appellant claims that this was a notice calling a general meeting of the Company pursuant to the Act, the Company having failed to convene a meeting pursuant to the requisition.The Appellant's claim is that the EGM took place at the Meeting at Berry & Walton's offices on 2 October 2009 attended by himself, Lee and Mr Berry.  The Appellant submitted that he attended the Meeting as the fully authorised representative of Reggiesco, and everything he did at the Meeting was in that capacity.  He relied on the following events at the Meeting:  Lee proposed a motion that the Meeting be adjourned to 8 October 2009, when the Company's AGM was due to take place; Lee voted in favour of the motion but it was defeated by the Appellant's votes;  the Appellant proposed a motion that Lee be removed as a director; Lee voted against that motion, but it was passed by the Appellant's votes;  the Appellant proposed a motion that he be appointed a director of the Company;  Lee voted against that motion, but it was passed by the Appellant's votes.A form was filed at Companies House on 5 October 2009 of the appointment of the Appellant as a director.  Lee denied that it was filed by him or with his knowledge. Lee refused to acknowledge the validity of the motions and resolutions to remove him as a director of the Company and to appoint the Appellant as a director.  The AGM of the Company was purportedly held on 8 October 2009, which Lee attended as director of the Company.  Minutes of the AGM recorded that 'he felt that his power[s] were stripped from him' at the Meeting on 2 October 2009 'without following procedures'.  As to the appointment of the Appellant as a director, the minutes of the AGM recorded as follows:'Mr Neil David Schofield has appointed himself director on the 5th October but his appointment and his authority is in dispute as he is not an official of the company and has not proof to be a shareholder of Reggiesco Limited.  It was decided that Neil David Schofield will remain appointed director until all legal enquiries on his authority have been conducted and the dispute can be resolved.'Lee purported to appoint Mr Rimes as administrator of the Company on 13 January 2010 pursuant to paragraph 22 of Schedule B1 of the Insolvency Act 1986. The Appellant commenced the present proceedings on 17 December 2009 when the Claim Form and the Particulars of Claim were served.   The central findings of the Recorder's judgment were that: the Meeting took place without the requisite 14 days notice; the Meeting was an informal meeting to talk about the resolution to be proposed at the AGM on 8 October 2009 for Lee's removal as a director; Lee's conduct at the Meeting did not mean that he accepted that the Meeting had been properly convened; andbecause the Meeting was not properly convened, neither Lee's removal as a director, nor the appointment of the Appellant as a director, were valid and so the Appellant's claim failed.Permission to appeal was given on the basis that the Recorder should not have found that Lee's presence at the Meeting was other than acquiescence in short notice in accordance with the principles of section 312 of the Act (which governs the timing in which special notice must be provided for a resolution) or alternatively in the case of Re Duomatic Limited. **(c) Decision** Lord Justice Ehterton delivered the judgement of the court in which the appeal was dismissed, with whom Lord Justices Maurice Kay and Thomas agreed. Mr Berry submitted that, by attending the Meeting, putting forward a resolution for the adjournment of the Meeting, voting on that resolution and voting on the resolutions to remove him as a director and to appoint the Appellant as director, Lee was actively agreeing to the transaction of those items of the Company's business at the Meeting and hence its validity for that purpose, or, at the least, he acquiesced in the validity of the Meeting.  Mr Berry further submitted that, if Lee had wished to maintain an objection to the Meeting, he should simply not have attended or left, so that the Meeting did not achieve a quorum.  The Appellant also relied on the AGM minutes in which the Appellant's directorship was acknowledged on the basis that the acknowledgement was only consistent with Lee having accepted at the Meeting that the motions at the Meeting were validly and effectively proposed and voted upon.   Having reference to the cases referred to by Mr Berry in making his submissions, Lord Justice Etherton found that those cases were all apposite, but contrary to Mr Berry's submission, inevitably leading to the conclusion that the Duomatic principle had no application to the Meeting.  The authorities demonstrated that the Appellant must establish an agreement by Lee to treat the Meeting as valid and effective, notwithstanding the lack of the required period of notice.  Lee's agreement could be express or by implication, verbal or by conduct, given at the time or later, but nothing short of unqualified agreement, objectively established, will suffice.  In making this finding, Lord Justice Etherton had regard to the decision of *Rolfe v Rolfe* [2010] EWHC 244 (Ch) in which Justice Newey found that a shareholder's mere internal decision cannot of itself constitute assent under the Duomatic principle, rather there must be material from which an observer could discern or (as in the case of acquiescence) infer assent.  In this respect an objective test must be applied.  Applying these principles, Lord Justice Etherton found that objectively there was never an unqualified agreement by Lee as to the validity of the Meeting or the business which was purportedly transacted during the course of it.  In making this assessment, Lord Justice Etherton had regard to the following facts:Lee is a young man with no legal qualifications.Lee attended the Meeting against a background in which, so far as he was concerned, the Company's AGM had already been called for 8 October 2009 and one of the items on the agenda for the AGM was his removal as a director.  This led the Recorder to conclude that, so far as Lee was concerned, the Meeting was an informal meeting to talk about the resolution that was to be proposed at the AGM.Whether or not the preceding inference is correct, Lee attended the Meeting in the belief that neither the Appellant nor Berry & Walton were authorised to act for Reggiesco, and also having received advice from Firefox that inadequate notice had been given for an EGM to take place on 2 October 2009.  Lee was in possession of a copy of a letter dated 30 September from Firefox to Mr Berry, in which Firefox queried which company had called for an EGM on 2 October 2009, and, if it was Reggiesco, requesting sight of the board resolution calling for Lee's removal.  The letter also stated that Lee and Firefox enjoyed the support of Ms Garry, a director and shareholder of Reggiesco, and referred to the attached supporting letter from her dated 8 September 2009.  The letter further stated that the statutory notice for the EGM had not been given.Neither Ms Garry's letter of 8 September 2009 nor Firefox's letter of 30 September 2009 were mentioned by the Recorder in his judgment.  However, it was quite clear from a transcription of recording of the Meeting made by Lee (which was admitted as evidence for the appeal) that both letters were presented by Lee at the commencement of the Meeting, Lee specifically requested that their contents be addressed by the Appellant at the commencement of the Meeting and on the final request for any other business, and on each occasion the Appellant did indeed examine them.  At the Meeting Mr Berry asked Lee if he wished to propose the adjournment of the Meeting until 8 October 2009.  Lee proposed the adjournment and Mr Berry put the motion which was defeated by the Appellant's votes.   Mr Berry then put the proposal to remove Lee as a director, which was carried by the Appellant's votes.  The proposal was then put for the appointment of the Appellant as a director, which was carried by the Appellant's votes.  A proposal to appoint the Appellant as Chairman was carried by the Appellant's votes.  Mr Berry then said that he took it that the Appellant wanted to cancel the AGM called for 8 October 2009.  The Appellant agreed and so proposed, with the proposal again carried by the Appellant's votes.   Lord Justice Etherton found that the facts outlined above made clear that Lee was throughout maintaining his objection to any EGM on 2 October 2009 because he did not accept that the Appellant had authority to act on behalf of Reggiesco in the light of Ms Garry's letter, and for the other reasons given in Firefox's letter of 30 September including lack of notice.  Accordingly Lee's participation at the Meeting was conditional.  His position throughout the Meeting was that the Meeting had not been properly called, but, if and insofar as (contrary to his stated position) it was a valid meeting, he responded to the various proposals suggested by Mr Berry in the way that he did.  That was not an agreement by Lee, as shareholder, to treat the Meeting and the resolutions passed at the Meeting as valid and effective.  There was no objective agreement by him within the Duomatic principle.  Furthermore, that conclusion was not undermined by the AGM minutes which referred to the appointment of the Appellant as a director, or the lodgement of a form at Companies House noting the Appellant's appointment as director without the knowledge of Lee or anyone acting on his behalf or on behalf of the Company.etailed Contents**5.13 Granting of leave to bring derivative proceedings under section 237 of the Corporations Act**  (By Glen Wright, Freehills) Hannon v Doyle [2011] NSWSC 10, New South Wales Supreme Court, Justice Barrett, 3 February 2011 The full text of this judgment is available at: [http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=150097](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=150097" \t "_new) **(a) Summary** Mr David Hannon (Hannon) applied for leave to bring proceedings under section 237 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The Judge considered in detail whether there were serious questions to be tried under section 237(2)(d).The Judge held that claims that the companies in question had made loans to directors, "alienated" share options to directors' companies, provided excessive remuneration, diverted business to another company and engaged in oppressive conduct each satisfied the test in section 237(2)(d). **(b) Facts**  Hannon applied for leave to bring proceedings on behalf of Afro Pacific Holdings Pty Ltd (APH) and Afro Pacific Capital Ltd (APC), in which it owned 88% of the shares, under section 237 of the Corporations Act 2001. This section provides that the court must grant leave to member of a company (under section 236(2)(a)(i)) where it is satisfied that, inter alia:it is probable that the company will not bring the proceedings (section 237(2)(a));the applicant is acting in good faith (section 237(2)(b));it is in the best interests of the company that the applicant be granted leave (section 237(2)(c)); andthere is a serious question to be tried (section 237(2)(d)). As a member and former director of the companies, Hannon qualified under section 236(2)(a)(i) and (ii), leaving the court to assess whether he met the criteria of section 237. Relating to whether a serious question existed, Hannon argued the following:APC made unsecured loans to Doyle and Turner, some of which were interest free;APC's 15 million options in Transvaal Ferro Chrome Ltd (TFC) were "alienated" to two companies owned by two directors of ACP, Mr Doyle (Doyle) and Mr Turner (Turner) and the options were sold at below market value;APC provided Doyle and Turner excessive remuneration;APC lent money to Africa Pacific Capital Pty Ltd (Africa), a company established and owned by Doyle and Turner; Doyle and Turner caused Africa to supply services to companies when it was APC that had the existing client relationship on which the procurement of the services was based; Doyle and Turner transferred or diverted to Africa assets to which APC was entitled; andAPC never paid a dividend, even though there were profits out of which a dividend could prudentially have been paid, thus a claim under section 232 (oppressive conduct of affairs) arises. **(c) Decision**  The judge considered each issue separately as follows. In relation to the loans, it was not contested that they had been made. The Judge noted that each loan made to a director or director-related entity violates the "fundamental principle" in *Aberdeen Railway Co v Blaikie* (1854) 1 Macq HL 461 that "no [agent of a company] shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect ... So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into". The Judge held that sections 237(2)(c) and (d) were satisfied in relation to these claims. The Judge applied the same reasoning to the TFC options claim. In particular the Judge noted that it was of no consequence whether the options were sold at a price below market value, reiterating that "no question is allowed to be raised as to the fairness or unfairness" of such a contract. The Judge held that sections 237(2)(c) and (d) were satisfied in relation to these claims. Addressing the claim of overcompensation, the Judge noted that Doyle and Turner received "consulting fees" of $1,566,960 and $1,570,234 respectively in the financial year ended 29 February 2008, a sum far higher than could reasonably be expected for such fees in the circumstances. Again sections 237(2)(c) and (d) were taken to be satisfied. With regards the last set of substantive claims, relating to Africa, the Judge noted that:Africa deliberately adopted a letterhead designed to be deceptively similar to that of APC and made misrepresentations on its website which gave the impression that Africa and ACP were the same business;Africa informed it bankers that it was to receive income from a sale of shares when those shares belonged to APC, not Africa; andAfrica and ACP were operated as, and considered to be, one and the same. Thus the Judge concluded that there was a serious question to be tried. The Judge held that a serious question existed with regards to Hannon's claim of oppression regarding the non-payment of dividends. The Judge noted that absence of dividends itself is insufficient for a section 232 claim, but that the claim must be assessed in light of the whole circumstances. In the present case the lack of dividends "may properly be made part of the matrix" of a section 232 claim, along with the specific allegations of breach of duty. Finally, the Judge held that sections 237(2)(a) and (b) were met. The Judge concluded that Hannon honestly believes that a good cause of action exists, as shown by the evidence Hannon assembled and the effort to which he had gone to in pursuing the claims, coupled with the findings that serious questions exist and that the claims are in the best interests of the company.etailed Contents |

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