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| SAI Global Corporate Law Bulletin No. 172**>** |  |

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| **Bulletin No. 172**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, The University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Piper](http://www.dlapiper.com/Australia/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1.     [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/172-December-2011.html#h1)2.     [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/172-December-2011.html#h2)3.     [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/172-December-2011.html#h3)4.     [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/172-December-2011.html#h4)5.     [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/172-December-2011.html#h5)6.     [Contributions](http://www.law.unimelb.edu.au/bulletins/172-December-2011.html#7)7.     [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)  |

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

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| **1.1****FRC reports high level of implementation of key corporate governance provisions** On 14 December 2011, the UK Financial Reporting Council (FRC) published its first analysis of how the two codes under its supervision - the UK Corporate Governance Code for listed companies and the UK Stewardship Code for investors - are being implemented.The report, titled 'Developments in Corporate Governance 2011: The impact and implementation of the UK Corporate Governance and Stewardship Codes', reveals a high level of take up of the new provisions announced last year. For example, 80 per cent of FTSE 350 boards have put all their directors up for annual re-election.Over 230 asset managers, asset owners and service providers signed up to the Stewardship Code in its first year, including most of the major investors in UK equities. The report highlights evidence that the quality of engagement between investors and company boards is improving in certain areas, for example in discussions around corporate risk. The FRC will make limited changes to both Codes during 2012, designed to promote further behavioural changes and to strengthen the dialogue between companies and their investors.A copy of the report is available on the [FRC website](http://www.frc.org.uk/publications/pub2672.html%22%20%5Ct%20%22_new). etailed Contents**1.2****Government releases proposals paper on reform to insolvency practitioners' regulatory framework** On 14 December 2011, the Parliamentary Secretary to the Treasurer and Attorney-General jointly released a proposals paper, 'A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia'. It follows the June 2011 release by the Government of an Options Paper, titled 'A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia'.  The Options Paper examined reforms with a view to addressing possible misconduct in the insolvency profession and improving the value for money for recipients of insolvency services. The matters dealt with in the Proposals Paper include: standards of entry into the insolvency professionregistration of insolvency practitioners remuneration framework for insolvency practitionerscommunication and monitoringfunds handling and record keepinginsurance requirements for insolvency practitionersdiscipline and deregistration of insolvency practitionersremoval and replacement of insolvency practitionersregulator powersspecific issues for small business. The Proposals Paper is available on the [Treasury website](http://www.treasury.gov.au/documents/2264/PDF/Proposals_Paper_insolvency.pdf%22%20%5Ct%20%22_new). etailed Contents**1.3** **Government releases discussion paper on the development of the retail corporate bond market** On 13 December 2011, the Deputy Prime Minister and Treasurer released a discussion paper regarding proposals aimed at developing the Australian retail corporate bond market by streamlining disclosure and liability requirements under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).   The paper invites discussion on the proposition that the retail corporate bond disclosure and liability regime should facilitate a sustainable corporate bond market by: reducing the regulatory burden on/barriers to issuance facing potential issuers while maintaining appropriate investor protection; ensuring that investors are made aware of the key features and risks associated with buying a particular bond from a particular company (noting that bonds will be made available to both existing and new investors in the company), while reducing the complexity of prospectuses and making them easier for investors to understand; and ensuring that there is an appropriate liability regime in place which balances investor protection against ensuring that directors are not unduly burdened. The Discussion Paper is available on the [Treasury website](http://www.treasury.gov.au/documents/2266/PDF/Retail_Corporate%20Bonds_DP.pdf%22%20%5Ct%20%22_new). etailed Contents**1.4** **Treasury releases consultation paper on unfair terms in insurance contracts** On 12 December 2011, Treasury released a draft regulation impact statement on unfair terms in insurance contracts for public consultation. The Treasury seeks feedback on potential options for ensuring that consumers who purchase insurance have an equivalent level of protection as that which currently applies to other financial products and financial services.   The Productivity Commission, in its 2008 'Review of Australia's Consumer Policy Framework', recommended that a new generic, national consumer law should apply in all sectors of the economy. It further recommended that this generic law include national unfair contract terms (UCT) laws. The UCT laws were implemented as laws of the Commonwealth and of Victoria and New South Wales on 1 July 2010 and now extend to all other States and Territories. The UCT laws are expressed to apply to all sectors of the economy, and to all businesses operating in those sectors in Australia which use standard form contracts in their dealings with consumers. The UCT laws apply to most financial products and financial services through the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default). However, UCT laws do not currently apply to insurance contracts. The Consultation Paper is also available on the [Treasury website](http://www.treasury.gov.au/documents/2256/PDF/2256ExposureDraft.pdf%22%20%5Ct%20%22_new).   etailed Contents**1.5****BIS Quarterly Review discusses global market repercussions of euro area sovereign debt crisis** On 12 December 2011, the Bank for International Settlements (BIS) released its 'BIS Quarterly Review' for December 2011.  It shows how concerns about sovereign risk in the euro area affected financial markets across the globe. The December issue also provides highlights from the latest BIS data on international banking and financial activity. Articles in the review include: 1.      FX trading strategies such as carry or momentum trades exhibit substantial downside risks to investors.  One bad month can be sufficient to wipe out one to two years of excess returns.2.     The Chinese policy of boosting the international role of the renminbi could undermine the effectiveness of capital controls while improving the allocation of capital.3.     Policy frameworks need to take into account the liquidity cycle - liquidity and credit booms and their associated contributions to systemic risk as well as liquidity shortages or disruptions in the provision of credit.4.     The US Federal Reserve and the Bank of England asset purchase programs lowered government bond yields significantly.5.     Large derivatives dealers have used some hard-to-value credit derivatives to transfer credit risk to non-bank financial institutions that could be considered shadow banks.   The BIS Quarterly Review is available on the [BIS website](http://www.bis.org/publ/qtrpdf/r_qt1112.pdf%22%20%5Ct%20%22_new).   etailed Contents**1.6****APRA releases consultation package on review of capital standards for insurers** On 9 December 2011, the Australian Prudential Regulation Authority (APRA) released a response paper and 14 draft prudential standards in a third round of consultation on its review of capital standards for general and life insurers.  The aims of the review include improving the risk-sensitivity of the capital standards and achieving better alignment of these standards across APRA-regulated industries. APRA commenced its review in 2010, and its consultation has included release of discussion and response papers, technical papers and two quantitative impact studies (QIS) to evaluate the impact of the proposals on insurers. The response paper summarises the main issues raised in submissions on APRA's March 2011 response paper and arising from APRA's assessment of the second QIS results.  APRA has revised its proposals in some areas to address issues raised in submissions and has provided further clarification on other aspects of its proposals. The draft prudential standards also provide further details on APRA's proposals. The response paper outlines the proposed eligibility requirements for components of the capital base for insurers, and the proposed limits for the components of the capital base. These eligibility requirements and limits have been aligned with the relevant proposed Basel III requirements for authorised deposit-taking institutions (ADIs) where appropriate. APRA has long adopted a policy of aligning its requirements for the composition of capital base for ADIs and general insurers, and it is now extending this alignment to life insurers. APRA will undertake further consultation on revised draft prudential standards, prudential practice guides and draft reporting forms during 2012. The complete set of final prudential standards, reporting forms and instructions are expected to be released by October 2012. APRA intends that the revised prudential standards take effect from 1 January 2013, with the first reporting under the revised framework to commence from the first reporting period in 2013. APRA will consider requests from insurers for transitional arrangements on a case-by-case basis in the second half of 2012.   The response paper and accompanying draft prudential standards are available on [APRA's website](http://www.apra.gov.au/GI/Pages/General-and-Life-Insurance-Capital-Review-Consultation-on-Draft-Prudential-Standards.aspx%22%20%5Ct%20%22_new). APRA's media release is available [here](http://www.apra.gov.au/MediaReleases/Pages/11_28.aspx%22%20%5Ct%20%22_new).  etailed Contents**1.7****Treasury releases consultation paper on governance arrangements for the not-for-profit sector** On 8 December 2011, the Treasury released a consultation paper on current governance arrangements for the not-for-profit (NFP) sector. The Government is consulting on what the core organisational governance principles applying to registered NFPs should be.  The outcomes of the governance review will help form the governance requirements for registered entities in the Australian Charities and Not-for-profits Commission legislation, starting from 1 July 2012. The Consultation Paper is also available on the [Treasury website](http://www.treasury.gov.au/documents/2252/PDF/CP_NFP_Governance_Arrangements.pdf%22%20%5Ct%20%22_new). etailed Contents**1.8****FSA sets out its expectations of non-executive directors in managing risks to retail customers** On 7 December 2011, the UK Financial Services Authority (FSA) issued a consultation on guidance for non-executive directors (NEDs).  Its aim is to assist NEDs understand their role in ensuring customers are treated fairly within their firms.   The FSA expects NEDs to play a pivotal part within the firm's governance by ensuring that the firm is meeting its responsibilities to retail customers.  The guidance proposes that amongst the issues that NEDs should consider are: taking a strategic view to treatment of their customers;being confident that the firm is identifying, monitoring and mitigating risk to its customers; having the right mix of skills on the Board and the right information to be able to constructively challenge the executive; and supporting a culture within the firm that takes into account fair treatment of customers. Together with the guidance for NEDs, the FSA has also set out for firms an outline of how it will assess how firms are managing these risks. The full text of FSA's guidance consultation is available on the [FSA website](http://www.fsa.gov.uk/pubs/guidance/gc11_30.pdf%22%20%5Ct%20%22_new). The FSA's media release is available [here](http://www.fsa.gov.uk/pages/Library/Communication/PR/2011/106.shtml%22%20%5Ct%20%22_new).etailed Contents**1.9****UK Government publishes consultation paper containing a draft of the Financial Services Act 2010 (Executives Remuneration Report) Regulations 2011** On 6 December 2011, the UK Government published a consultation paper containing a draft of the Financial Services Act 2010 (Executives' Remuneration Report) Regulations 2011.    The purpose of the Regulations is to require certain large banks to disclose the remuneration received by their eight highest paid senior executive officers.   The disclosures will not include executives on the main board of a UK bank, as their remuneration agreements must already be disclosed. According to the Government, improving transparency for senior executives who manage risk will help provide shareholders with more tools to hold senior management to account. Although banks will not be required to publish the name or title of the recipient, disclosure must include the pay of each individual, split up into fixed, variable, deferred variable, long term incentive scheme vestings, pension accruals, joining benefits and severance benefits. These proposals will apply to banks with assets in excess of £50 billion. The first disclosures will be due in 2012, covering the 2011 year.   The consultation paper is available on the [UK Treasury website](http://www.hm-treasury.gov.uk/consult_merlin_remuneration_disclosure.htm%22%20%5Ct%20%22_new).   etailed Contents**1.10****CAMAC to review the annual general meeting** On 6 December 2011, Parliamentary Secretary to the Treasurer announced that he had asked the [Corporations and Markets Advisory Committee](http://www.camac.gov.au/%22%20%5Ct%20%22_new) (CAMAC) to consider, inter alia, the future of the annual general meeting (AGM).   The review follows a report published in 2008 by the [Parliamentary Joint Committee on Corporations and Financial Services](http://www.aph.gov.au/senate/committee/corporations_ctte/index.htm%22%20%5Ct%20%22_new), titled  ['Better Shareholders - Better Company: Shareholder engagement and participation in Australia'](http://www.aph.gov.au/senate/committee/corporations_ctte/sharehold/report/report.pdf%22%20%5Ct%20%22_new), in which the role of the AGM was considered.  The Joint Committee took the view that the AGM remained a useful engagement forum for retail investors.   CAMAC has been asked to examine the future of the AGM, with particular regard to the impact of technological innovations and globalisation on the methods of information distribution and the way in which shareholders interact with companies. The terms of reference for the inquiry are:The future of the AGM in Australia, including how documents and meeting forms should change to meet the needs of shareholders in the future;The risks and opportunities presented by advancements in technology, in the context of maintaining the ongoing relevance and efficacy of the AGM; and The challenges posed to the structure of the AGM by globalisation, including potential increases in international share-ownership and dual-listing.The terms of reference and letter of referral are available on the [CAMAC website](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFReference/%24file/AGM.pdf%22%20%5Ct%20%22_new). etailed Contents**1.11****Basel Committee releases consultation paper on banks' internal audit function** On 2 December 2011, the Basel Committee on Banking Supervision released a consultative paper titled 'The internal audit function in banks'. The objective of the proposed guidance, which revises the Committee's 2001 document '[Internal audit in banks and the supervisor's relationship with auditors](http://www.bis.org/publ/bcbs84.htm%22%20%5Ct%20%22_new)', is to help supervisors assess the effectiveness of a bank's internal audit function. The guidance reflects developments in supervisory and banking practices and incorporates lessons drawn from the financial crisis. The proposed guidance is built around a set of principles that seek to promote a strong internal audit function within banks. The principles cover supervisory expectations related to the internal audit function as well as the supervisory assessment of that function. The principles also review the relationship between a supervisory authority and a bank's internal audit function. The Committee is now in the process of developing supervisory guidance on external audit. This guidance will build on existing Basel Committee guidance on this topic, including '[The relationship between bank supervisors and external auditors](http://www.bis.org/publ/bcbs87.htm%22%20%5Ct%20%22_new)' (2002) and '[External audit quality and banking supervision](http://www.bis.org/publ/bcbs146.htm%22%20%5Ct%20%22_new)' (2008). The Committee expects to publish a consultative version of its external audit guidance in 2012. The consultation paper is available on the [BIS website](http://www.bis.org/publ/bcbs210.htm%22%20%5Ct%20%22_new). etailed Contents**1.12****ANZ Survey of Adult Financial Literacy in Australia** On 1 December 2011, the ANZ Survey of Adult Financial Literacy in Australia 2011, which is the fourth such survey in a series that began in 2003, was published. The results from the survey have helped policymakers and advocates track trends in people's understanding of personal financial matters. Key findings from the 2011 Survey include:Groups with lower financial literacy include people under 25 years, people with no formal post-secondary education; people with relatively low levels of income and assets; those working in lower blue collar occupations; and females.Factors that help to 'explain' differing levels of financial literacy include age, financial knowledge and numeracy, financial attitudes, household income, education and occupation. Changes over time are apparent, including changes in financial attitudes and behaviour and investing since the GFC, and changes to awareness of consumers' rights and responsibilities. Some implications of the findings include: Identification of groups in the community who may benefit from efforts to lift their levels of financial literacy;Financial literacy is complex: Individuals and groups may perform well on some components of financial literacy but not others, and people's financial attitudes affect their level of financial literacy; and Effective financial literacy program design needs to find a way to both engage people and help to overcome the stress some people associate with dealing with money and build confidence in managing money. The Executive Summary of the results from the 2011 ANZ Survey is available on the [ANZ website](http://www.anz.com/resources/3/d/3dbcd380493e8b9395e5d7fc8cff90cd/2011-Adult-Financial-Literacy-Summary.pdf.pdf?CACHEID=3dbcd380493e8b9395e5d7fc8cff90cd" \t "_new).   etailed Contents**1.13****European Commission's audit market reform proposals** On 30 November 2011, the European Commission published wide-ranging proposals for the reform of the audit market.  If these become law they will make dramatic changes to the legal framework governing the audit and the organisational structure of the largest firms.  Under the proposals, the role of the auditors would be clarified and more stringent rules for the audit sector aimed in particular at strengthening the independence of auditors as well as greater diversity into the current highly-concentrated audit market would be introduced.   According to the European Commission, the 2008 financial crisis highlighted considerable shortcomings in the European audit system.  Audits of some large financial institutions just before, during and since the crisis resulted in 'clean' audit reports despite the serious intrinsic weaknesses in the financial health of the institutions concerned.  Recent inspection reports by national supervisors have also criticised the quality of audits.    With regard to public interest entities, the Commission is proposing, amongst other things, mandatory audit firm rotation after six years (9 years if two audit firms are used) and a ban on the auditor providing certain non-audit services.  Mandatory tendering of the audit is also proposed and contract clauses requiring a company to be audited by one of the 'Big Four' will be prohibited. The Commission also wants structural changes within the largest firms so that there is a complete separation between auditing and non-auditing activities.  A greater role is proposed for the audit committee, which the Commission says should consist of non-executive directors (NEDs), with at least one NED having experience and knowledge of auditing and another experience and knowledge in accounting and/or auditing.  A greater role for the [European Securities and Markets Authority](http://www.esma.europa.eu/%22%20%5Ct%20%22_new) is proposed with regard to coordination between regulators in Member States but also with regard to the publication of guidance on various matters identified in the Regulation including, for example, the content of the handover file to be provided by the outgoing auditor to the incoming auditor. The Commission's 'Reform of the audit market' proposals are available on the [European Commission website](http://ec.europa.eu/internal_market/auditing/reform/index_en.htm%22%20%5Ct%20%22_new).   etailed Contents**1.14****Treasury releases discussion paper on the test for the payment of dividends** On 28 November 2011, Treasury released a discussion paper relating to the test for payment of dividends in the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), parent entity reporting requirements and the conditions for changing the financial year of a company. The dividends test was amended in June 2010 to replace the profits-based test with a net assets test. Stakeholders have raised concerns about various aspects of the new dividends test. The discussion paper provides options for dealing with stakeholder concerns. The other changes canvassed in the paper would allow a parent entity to prepare it own financial statements where such statements are required or considered desirable and correct a technical error in the conditions for changing the financial year of a company. The Discussion Paper is available on the [Treasury website](http://www.treasury.gov.au/documents/2246/PDF/corp_act.pdf%22%20%5Ct%20%22_new).   etailed Contents**1.15****Corporate Governance Council's final recommendations to Monetary Authority of Singapore on proposed revisions to the Code of Corporate Governance** On 22 November 2011, the Corporate Governance Council ("Council") announced that it had submitted its recommendations on proposed revisions to the Code of Corporate Governance ("Code") to the Monetary Authority of Singapore (MAS) for consideration.   The recommendations deal with matters including: director independenceboard composition director trainingmultiple directorshipsalternate directors remuneration practices and disclosurerisk management. Full details of the recommendations of the Corporate Governance Council are available on the [MAS website](http://www.mas.gov.sg/news_room/press_releases/2011/Final_Recommendations_on_the_Proposed_Revisions_to_the_Code_of_CG.html%22%20%5Ct%20%22_new). etailed Contents**1.16****FTSE 350 Corporate Governance Review 2011** On 25 November 2011, the Grant Thornton UK Governance Institute published the 2011 edition of its annual corporate governance review.  The review is based upon the annual reports of 298 FTSE 350 companies with year ends between May 2010 and April 2011 (excluding investment companies).   The review notes, inter alia:  Half of all FTSE 350 companies complied with the Combined Code, with another 10% doing so for part of the year.Seven FTSE 350 businesses have been in full compliance with the Combined Code throughout the ten years of the review. Less than one in ten directors are women, with half of all Mid 250 boards exclusively male. 72% don't disclose their gender policy. 70% of FTSE 350 companies have introduced annual re-election of directors in anticipation of the new UK Corporate Governance Code. One in four companies held externally facilitated board evaluations, with 17% more planning a review in the coming year. More than half of chairmen's statements do not discuss governance and only 10% offer real insight into their governance culture. Only five companies changed their external auditor and the average tenure of auditor is 34 years. Just 25% of companies give real insight into how they monitor and maintain effective oversight of their internal control systems. 27% of companies already outline their business model, as required in the new UK Corporate Governance Code. The review is available on the [Grant Thornton website](http://www.grant-thornton.co.uk/pdf/Corporate_Governance_Review_2011.pdf%22%20%5Ct%20%22_new).   etailed Contents**1.17****Second edition of 'Women in the Boardroom'** On 24 November 2011, Deloitte published the second edition of its report 'Women in the Boardroom - A Global Perspective'.  The report provides a summary of measures that have been taken (or which are being taken) with regard to the gender diversity of boards in 17 countries around the globe, including Australia, Belgium, Canada, China, France, Germany, Hong Kong, India, Italy, Malaysia, the Netherlands, New Zealand, Norway, Singapore, Spain, the United Kingdom and the United States of America. The updated edition of the report comes after numerous governmental developments have evolved in several countries since the January 2011 publishing of the first edition. The new research highlights a variety of approaches to support diversity on boards, including requiring more disclosure, setting targets, and implementing quotas. According to the study, strong variations exist among countries regarding the most efficient way to achieve higher levels of diversity. The report is available on the [Deloitte website](http://www.corpgov.deloitte.com/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/USEng/Documents/Nominating-Corporate%20Governance%20Committee/Board%20Composition%20and%20Recruitment/Women%20in%20the%20Boardroom_Deloitte_111511.pdf%22%20%5Ct%20%22_new). etailed Contents**1.18****UK High Pay Commission publishes final report** On 22 November 2011, the High Pay Commission (UK) released its final report, titled 'Cheques with Balances: why tackling high pay is in the national interest'.  The High Pay Commission is an independent inquiry into high pay and boardroom pay across the public and private sectors in the UK.   The report makes various recommendations including the simplification of remuneration structures, greater disclosure and employee representation on remuneration committees.  The Commission considered whether the current shareholder advisory vote regarding the remuneration report should be binding but decided instead to propose that shareholders' advisory votes should relate to remuneration arrangements for the three years following the vote.   With regard to remuneration consultants, the Commission recommends that companies disclose the nature and extent of all services provided in order to address perceived conflicts of interest. The Commission also recommended that all non-executive positions should be publicly advertised.   The report is available on the [High Pay Commission website](http://highpaycommission.co.uk/wp-content/uploads/2011/11/HPC_final_report_WEB.pdf%22%20%5Ct%20%22_new).   etailed Contents**1.19****Report on board risk governance and disclosure practices** On 17 November 2011, Deloitte released its most recent report on risk governance and oversight practices at the board level, titled '[Risk Intelligent Proxy Disclosures - 2011: Have Risk-Oversight Practices Improved?](http://www.deloitte.com/view/en_US/us/Services/additional-services/governance-risk-management/40a7fb1b4c612310VgnVCM3000001c56f00aRCRD.htm%22%20%5Ct%20%22_new)' Since 28 February 2010, companies with securities registered by the US Securities and Exchange Committee (SEC) have been required to disclose the role of their board in risk oversight.  To see how proficient companies have become in their risk oversight practices, Deloitte undertook a study of risk disclosures of the S&P 500 in 2010 as detailed in their proxy statements.  That analysis examined 398 companies out of the S&P 500 and focused on 20 considerations, including whether or not the full board was responsible for risk and whether or not the disclosures noted the significance of tone at the top. The analysis was repeated this year on a more targeted basis.  While the focus was again on risk governance and oversight practices at the board level, the study was limited to the S&P 200 and focused on 12 of the 20 considerations included in the 2010 analysis.  Ultimately, there were 154 companies that can be compared over the two years, and their practices illustrate a steady and encouraging evolution in risk disclosure.  The report also recommends ways CFOs can continue to improve risk disclosures.  The report is available on the [Deloitte website](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/IMOs/Governance%20and%20Risk%20Management/us_grm_RIProxy2011_083111.pdf%22%20%5Ct%20%22_new). etailed Contents**1.20****New book by members of the Centre for Corporate Law and Securities Regulation** A new book has been published by members of the Centre for Corporate Law and Securities Regulation titled 'Law, Corporate Governance and Partnerships at Work - A Study of Australian Regulatory Style and Business Practice'.  The authors are Richard Mitchell, Anthony O'Donnell, Shelley Marshall, Ian Ramsay and Meredith Jones.   The book examines how businesses manage their labour systems, and particularly how they manage the complex interaction of various factors which give rise to instances of 'partnership' style relations between capital and labour within businesses. In pursuing this task, the book draws upon a new and extensive set of empirical data constructed by the authors, which examines the activities of business corporations in Australia, their outlooks and relationships with stakeholders, and relates these to two new and evolving theoretical frameworks based in political economy and law.   In his review, Sanford M Jacoby of the University of California, USA, describes the book as "an incisive analysis of the diverse ways that corporations mediate the impact on workers of recent changes in market competition. It is grounded in empirical reality via case studies of corporate governance in Australian companies and surveys of their directors.  Theorists who emphasize national institutions, including legal systems, cannot explain why some companies treat their employees as assets and others as commodities. That's why this book is so important."   Simon Deakin, of the University of Cambridge, UK, states that the book "makes a fundamental contribution to the understanding of the role of the legal system in shaping corporate governance and workplace relations.  It combines a wide-ranging theoretical inquiry with closely-focused empirical work which reveals the dynamics at play in this area of contemporary capitalism, as highlighted by the Australian case."   Further details are available on the [publisher's website](http://www.ashgate.com/isbn/9781409421061%22%20%5Ct%20%22_new). etailed Contents |

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

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| **2.1** **Exemptions for rural financial counselling and money management service providers from license requirements** On 15 December 2011, ASIC announced that rural financial counselling and money management service providers will be exempt from licensing requirements under the [National Consumer Credit Protection Act 2009 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "_default) following ASIC's decision to grant conditional relief [[CO 11/926]](http://www.asic.gov.au/asic/asic.nsf/byheadline/2011%2BClass%2BOrders?openDocument" \l "co11-926" \t "_new). Money management service providers who give financial advice about basic deposit products in the course of providing a money management service have also been granted limited relief [[CO 11/927]](http://www.asic.gov.au/asic/asic.nsf/byheadline/2011%2BClass%2BOrders?openDocument" \l "co11-927" \t "_new) from licensing requirements under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Rural financial counselling services are available to primary producers and rural small businesses in financial difficulty and are funded in whole, or in part, by the Commonwealth Government through the Department of Agriculture, Fisheries and Forestry or, in Queensland, through the Department of Employment, Economic Development and Innovation. Money management services are provided predominantly to improve the financial knowledge and skills of consumers, principally Indigenous consumers in regional and remote Australia. These service providers are funded in whole, or in part, by the Commonwealth through the Department of Families, Housing, Community Services and Indigenous Affairs. ASIC's exemptions are subject to important conditions, namely that: the regulated service is provided to the consumer as part of a rural financial counselling or money management service; no fees or charges are payable by the consumer for any aspect of the rural financial counselling service or money management service; the service providers do not engage in any credit activity or financial services business beyond the scope of these exemptions, and take all reasonable steps to ensure that none of their employees do so; and the service provider ensures its representatives have undertaken appropriate training to ensure that they have adequate skills, knowledge and experience to satisfactorily provide the services. These exemptions are given to rural financial counselling and money management service providers that deliver services within the parameters set by the relevant Government funding and supervisory arrangements. These exemptions are designed to support the continuing provision of these services within a consistent regulatory framework without imposing a disproportionate regulatory burden on service providers that would otherwise make their services unviable. etailed Contents**2.2** **Plans for FoFA reforms** On 13 December 2011, ASIC released its plans for publishing regulatory guidance on the impact of the Future of Financial Advice (FoFA) reforms on financial advisers and other industry participants. The proposed commencement date of the FoFA reforms is 1 July 2012. This depends on the timing of the passage of the Corporations Amendment (Future of Financial Advice) Bill 2011 and the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (FoFA Bills) through the Australian Parliament. Assuming the FoFA Bills are passed before 1 July 2012, ASIC aims to release regulatory guidance before 1 July 2012 on: The best interests duty: guidance will set out ASIC's expectations for meeting the best interests duty. Scaled advice: ASIC issued Consultation Paper 164 'Additional guidance about how to scale advice' ([CP 164](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp164" \t "_new)) in July 2011. The final guidance will aim to increase access to advice by facilitating the provision of scaled advice where appropriate. This guidance will take into account the best interests duty and will discuss a range of topics, including how the fact finding can be either limited or expanded, depending on the complexity of the advice being provided. Conflicted remuneration: guidance will assist industry to understand the practical operation of the ban on conflicted remuneration and how ASIC will administer it. ASIC powers: ASIC will re-issue Regulatory Guide 98 'Licensing; Administrative action against financial services providers' ([RG 98](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg98" \t "_new)) to reflect ASIC's expanded powers to cancel or suspend an AFS licence and ban representatives. ASIC is also considering developing regulatory guidance on FoFA's anti-avoidance provisions. Finally, ASIC will amend existing regulatory guidance and ASIC relief to reflect the FoFA reforms where necessary. These consequential amendments to existing regulatory guidance may not all occur before 1 July 2012. ASIC will consult directly with stakeholders in the coming months as well as seeking industry feedback through its usual formal consultation process. ASIC will also adopt a facilitative compliance approach for the first 12 months of the implementation of the FoFA reforms, until 1 July 2013. That is, provided industry participants are making reasonable efforts to comply with the FoFA reforms, ASIC will adopt a measured approach where inadvertent breaches result from a misunderstanding of requirements or systems issues. However, where ASIC finds deliberate and systemic breaches it will take stronger regulatory action.   etailed Contents**2.3** **Extension of transitional period for compliance with breach reporting conditions in group purchasing bodies class order** On 13 December  2011, ASIC issued Class Order [[CO 11/1287](http://www.asic.gov.au/asic/asic.nsf/byheadline/2011%2BClass%2BOrders?openDocument" \l "co11-1287" \t "_new)] 'Extension of period for compliance with breach reporting conditions in CO 08/1'. [CO 11/1287] extends the transitional period for compliance with the breach reporting condition in Class Order [[CO 08/1](http://www.asic.gov.au/asic/asic.nsf/byheadline/2008%2B%2BClass%2BOrders?openDocument" \l "co08-1" \t "_new)] 'Group purchasing bodies' until 30 June 2012. Group purchasing bodies arrange or hold cover under risk management products for others but do not issue risk management products or provide any financial product advice other than general information about the product. Group purchasing bodies include sporting and other not-for-profit organisations which arrange insurance for third parties (e.g. players or volunteers). This extension will enable the Government to consider whether the issues raised by Group purchasing bodies are better addressed by amendments to the Corporations Regulations, and if so to consult with stakeholders in the development of the regulations. [CO 08/1] gives conditional relief from the Australian financial services licensing regime and Chapter 5C of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for certain group purchasing bodies which arrange or hold risk management products for the benefit of third parties on a non-commercial basis. Regulatory Guide 195 'Group purchasing bodies for insurance and risk products' ([RG 195](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg195" \t "_new)) explains ASIC's policy underlying the conditional relief granted in [CO 08/1]. The breach reporting condition in [C0 08/1] provides that group purchasing bodies relying on the relief must notify ASIC in writing of matters that give the body reason to believe that it has failed, in a material respect, to comply with any of the other conditions in the relief. [CO 11/1287] extends the transitional period for compliance with the breach reporting condition in [CO 08/1] until 30 June 2012. The transitional period for compliance with the breach reporting conditions was otherwise due to expire on 31 December 2011. etailed Contents**2.4** **Information sheet on credit rating agency reporting obligations** On 13 December 2011, ASIC released an information sheet that specifies new reporting requirements for credit rating agencies (CRAs). From early 2012, all CRAs operating in Australia must lodge an annual compliance report with ASIC. These reports will assist ASIC in monitoring compliance with AFS licence conditions, including the mandatory obligation on CRAs to comply with the International Organization of Securities Commissions' Code of Conduct Fundamentals for Credit Rating Agencies (IOSCO Code). Information Sheet 147 'Credit rating agencies: Lodging a compliance report with ASIC' ([INFO 147](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/info147.pdf/%24file/info147.pdf%22%20%5Ct%20%22_new)) specifies the form and content of the annual compliance report. ASIC may request further information from CRAs as part of its ongoing risk-based surveillance. Three CRAs must submit their first compliance report by 31 January 2012. The remaining three AFS licensed CRAs are required to submit their first report by 31 April 2012. etailed Contents**2.5** **Guide on using non-IFRS financial information** On 9 December 2011, ASIC released a regulatory guide on disclosing non-IFRS (International Financial Reporting Standards) financial information. The purpose of Regulatory Guide 230 'Disclosing non-IFRS financial information' ([RG 230](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg230" \t "_new)) is to:   promote more meaningful communication of non-IFRS financial information to investors and other users of financial reports; assist directors in ensuring that the information is not misleading; and provide greater certainty in the market as to ASIC's views on disclosure of the information. Non-IFRS financial information, including non-IFRS profit measures, can be useful to investors and other users of financial information. Non-IFRS financial information is financial information that is presented other than in accordance with all relevant accounting standards. Australian accounting standards are consistent with the IFRS. The information can be presented in documents such as directors' reports, market announcements, investor briefings and transaction documents, provided it is not misleading. While the presentation of the information in financial reports is subject to particular legislative and accounting standards restrictions, there is more flexibility to present the information in documents attached to financial reports and other documents. Guidance to assist directors and preparers of financial information in reducing this risk includes:   giving equal or greater prominence to IFRS financial information; explaining the non-IFRS information and reconciling it to the IFRS financial information; calculating the information consistently from period to period; and not using information to remove 'bad news'.   The guidance in RG 230 is consistent with guidance in the US and Europe.  ASIC issued Consultation Paper 150 'Disclosing financial information other than in accordance with accounting standards' ([CP 150](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp150" \t "_new)) in March 2011. ASIC received 33 written responses to CP150. Enhancements include more guidance and examples.ASIC Website: Printed 18/12/2011     etailed Contents**2.6****Second phase of review of financial advice industry practice**   On 7 December 2011, ASIC announced that it would be contacting 30 Australian financial services (AFS) licensees as part of the second phase of its review of financial advice industry practice. The review is part of ASIC's proactive risk-based approach to surveillance in the financial advice industry. The risk-based program sits alongside ASIC's reactive surveillance work, which comes from complaints or breach reports. The review will take the form of a questionnaire that will include specific questions on areas such as licensee business models, training of representatives, and product and strategic advice. ASIC will use the information from the review to examine financial advice compliance systems and to inform its analysis of the risks facing gatekeepers in the financial advice industry. In Phase Two, ASIC will ask the 30 next largest AFS licensees to complete a questionnaire that will cover:licensee business model; training of representatives; monitoring and supervision of representatives; product and strategic advice; and complaints handling and compensation arrangements. The questionnaire will include specific questions on the areas listed above and three data schedules that cover consumer and product information, licensee remuneration and experience of representatives. Licensees have three months from the year end to respond to ASIC's questionnaire, which will be sent to licensees during December.  All information gathered will be confidential. ASIC intends to meet with all licensees in 2012 to discuss responses and, if necessary, to clarify information gaps.  Individual feedback will be provided to licensees involved and ASIC will issue a public report at the review's conclusion. At the Phase Two completion, ASIC will have been in contact with the 50 largest licensees providing financial advice to retail clients in Australia.  A public report will be issued by ASIC at the conclusion of the review. Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/11-284MR%2BASIC%2Bbegins%2Bsecond%2Bphase%2Bof%2Breview%2Bof%2Bfinancial%2Badvice%2Bindustry%2Bpractice?openDocument" \t "_new).   etailed Contents**2.7****Guidance on superannuation forecasts**  On 7 December 2011, ASIC released a regulatory guide and class order relief to assist superannuation fund trustees in providing their members with retirement estimates. A retirement estimate is a simple, broad estimate of how much superannuation a member might receive when they retire.  Retirement estimates are designed to help members think about how much money they will need when they retire, so they can start planning how to achieve this. Superannuation fund trustees providing retirement estimates (which may be personal advice) have been granted class order relief in 'Relief for providers of retirement estimates' ([CO 11/1227](http://www.asic.gov.au/asic/asic.nsf/byheadline/2011%2BClass%2BOrders?openDocument" \l "co11-1227" \t "_new)) from the licensing, conduct and disclosure requirements for general and personal advice in the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). ASIC's guidance in Regulatory Guide 229 'Superannuation forecasts' ([RG 229](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg229" \t "_new)) and class order relief aims to help members engage more with their superannuation and retirement planning. These initiatives, together with tools such as ASIC's [retirement planner](http://www.moneysmart.gov.au/tools-and-resources/calculators-and-tools/retirement-planner%22%20%5Ct%20%22_new) on the MoneySmart website and receiving professional advice from licensed financial advisers, are designed to help people better understand their options and get the most out of their retirement income. Retirement estimates and superannuation calculators play a complementary role in forecasting superannuation balances. In light of this, RG 229 also explains how ASIC's general relief for providers of financial product calculators in Class Order [[CO 05/1122](http://www.asic.gov.au/asic/asic.nsf/byheadline/2005%2Bclass%2Borders?openDocument" \l "co05-1122" \t "_new)] 'Relief for providers of generic calculators' applies to superannuation calculators. To rely on ASIC's relief a superannuation fund trustee must ensure that a retirement estimate: is given at the same time as the member's periodic statement and is included in, or accompanies, the statement; specifies the member's estimated retirement benefit, which is calculated taking into account all of the required variables, and using the default assumptions. These have been set based on the advice of the Australian Government Actuary; and sets out the mandatory content explaining how the retirement estimate has been calculated and the purpose of the retirement estimate. Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/11-282AD%2BASIC%2Breleases%2Bguidance%2Bon%2Bsuperannuation%2Bforecasts?openDocument" \t "_new).   etailed Contents**2.8** **Consultation on review of EDR schemes handling of complaints** On 2 December 2011, ASIC released a consultation paper to commence its review of external dispute resolution (EDR) jurisdiction over consumer complaints in cases where members have commenced legal proceedings to recover debts from consumers.   Consultation Paper 172, titled 'Review: EDR jurisdiction over complaints when members commence debt recovery proceedings', seeks feedback on whether ASIC should refine its policy settings in Regulatory Guide 139, 'Approval and oversight of external dispute resolution schemes' ([RG 139](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg139" \t "_new)).  The review also fulfils a commitment ASIC undertook when it approved the Financial Ombudsman Service Limited's (FOS) Terms of Reference in December 2009 to review the existing requirements in RG 139. The policy settings under review, as outlined in RG 139.77-RG 139.79, require both EDR schemes - FOS and the Credit Ombudsman Service Limited (COSL) - to handle complaints under their Terms of Reference or Rules where members have commenced debt recovery legal proceedings. This must cover proceedings that are in their early stages, but need not cover those that have progressed beyond the complainant lodging a defence or defence and counterclaim. This jurisdiction is primarily intended to assist complainants in hardship, especially those who may have taken out credit or margin lending products.  However, it also applies where providers of other financial products have commenced debt recovery legal proceedings (ie insurance, investments and payment systems-related products). Consultation Paper 172 is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp172-published-2-December-2011.pdf/%24file/cp172-published-2-December-2011.pdf%22%20%5Ct%20%22_new).   etailed Contents**2.9****Updated guidance for issuers of disclosure documents** On 30 November 2011, ASIC released its updated guidance for issuers of disclosure documents and product disclosure statements (PDSs). ASIC Regulatory Guides 55, 65 and 97 have been reviewed to include references to regulations released in recent months, including those affecting issuers of standard margin lending facilities, simple managed investment schemes and certain superannuation products.    AASIC's amendments include a number of technical updates and do not represent substantive policy changes:RG 55 is for issuers of financial products and others who prepare disclosure documents or product disclosure statements (PDSs). RG 55 provides guidance on how ASIC will administer the requirement under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for an issuer to obtain consent before citing a person in a disclosure document or PDS. The update also includes reference to the shorter PDS regime affecting issuers of standard margin lending facilities, simple managed investment schemes and certain superannuation products. RG 65 is for product issuers. It sets out ASIC's guidelines on how product issuers can meet their obligations under section 1013DA of the Corporations Act to disclose in PDSs how labour standards or environmental, social or ethical considerations are taken into account in selecting, retaining or realising an investment.RG 97 is also for product issuers of most superannuation and managed investment products issued to retail clients. It provides guidance on how to disclose fees and costs in PDSs and periodic statements. Further information is available on the a target="\_new" href="http://www.asic.gov.au/asic/asic.nsf/byheadline/11-274AD+ASIC+releases+updated+guidance+for+issuers+of+disclosure+documents+or+product+disclosure+statements?openDocument"> ASIC website, including the following updated guides: [Regulatory Guide 55](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RG55-Published-30-November-2011.pdf/%24file/RG55-Published-30-November-2011.pdf%22%20%5Ct%20%22_new):  'Statements in disclosure documents and PDSs: Consent to quote' [Regulatory Guide 65](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg65-published-30-November-2011.pdf/%24file/rg65-published-30-November-2011.pdf%22%20%5Ct%20%22_new):  'Section 1013DA disclosure guidelines' [Regulatory Guide 97](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg97-published-30-November-2011.pdf/%24file/rg97-published-30-November-2011.pdf%22%20%5Ct%20%22_new):  'Disclosing fees and costs in PDSs and periodic statements'. etailed Contents**2.10****Release of ASX Assessment Report** On 23 November 2011, ASIC released its annual assessment report of the ASX Group (ASX) licensees. Under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"), the licensee of a financial market is required to supervise and operate their market in accordance with Part 7.2 of the Act, and ASIC is required to conduct an assessment of those obligations.  ASIC must do an assessment at least once per year in relation to each licensee. The reporting period commences from 1 July 2009 and covers a number of events that have occurred recently, including ASX's technological incidents up to August 2011. The assessment was used to broadly understand the operational changes that ASX has made as a result of the transfer of market supervision to ASIC on 1 August 2010. The report sets out a number of areas for attention that ASX has agreed to address, working closely with ASIC.  In some cases, ASX has already initiated steps to meet the agreed actions. While important, these issues did not cause ASIC to qualify the conclusion that ASX adequately met its obligations during the reporting period. The agreed actions from the report deal with: Technology - ASIC had concerns with the deployment of ASX's technological resources during the period of review. The agreed actions are designed to better ensure that the release and management of ASX technology projects are done in a way that limits undue disruption to market users. They focus on ASX's engagement with ASIC and market participants about major and minor technical changes, improvements to ASX communications with industry and its approach to determining participant readiness. Compliance with operating rules - ASIC reviewed ASX's ongoing obligations to monitor and enforce compliance with its operating rules. The agreed actions relate to improvements in ASX's approach to discussing and recording continuous disclosure matters with issuers and its processes around futures contract monitoring. Performance indicators - ASIC reviewed current performance measures and agreed with ASX that a new set of measures needs to be developed that take account of ASX's changed role in the frontline supervision of trading. The reporting period commences on 1 July 2009 to align ASIC's assessment and ASX's self-assessment periods.  Previously the ASX reporting period was for the financial year and the ASIC assessment period covered calendar years. While the report focuses on ASX's deployment of technological resources, it does not cover the ASX market outage on 27 October 2011.  ASIC completed its review before the market outage.  It will be included in the next assessment along with a more detailed review of how the changes ASX has made as a result of the transfer of market supervision are now operating in practice. The next assessment is currently underway. The full text of the ASX Assessment Report is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep265-published-23-November-2011.pdf/%24file/rep265-published-23-November-2011.pdf%22%20%5Ct%20%22_new). etailed Contents**2.11****ASIC seeks consistency in micro lenders' responsible lending practices**   On 22 November 2011, ASIC announced that its review of the practices of pay day and other short-term small amount lenders has found that while the majority are aware of and taking steps to comply with their responsible lending obligations, further improvements need to be made. TThe findings of the review, which involved 19 micro lenders and looked at 168 loans between 1 July and 31 December 2010, are set out in ASIC's Report 264 'Review of micro lenders responsible lending conduct and disclosure obligations'. ASIC's review found that while lenders have introduced new procedures to meet the responsible lending requirements, they are failing to do so consistently on all loans. Problems included instances of lenders not recording the actual purpose of the loan, undertaking very limited verification of a consumer's financial circumstances, and not taking steps to clarify conflicting information in loan applications. Examples included files where: the expenses listed in the application appeared to be understated relative to very basic living costs; the consumer's stated expenses, together with the required repayments on the loan, exceeded the consumer's stated income; or the bank statement provided with the application showed the consumer's account was overdrawn by the end of each pay cycle. The [National Consumer Credit Protection Act 2009 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "_default) commenced in July 2010, imposing responsible lending obligations on credit providers to: make reasonable inquiries into a consumer's credit requirements and objectives; make reasonable inquiries into a consumer's financial situation; take reasonable steps to verify a consumer's financial situation; and only provide loans where they have done an assessment and determined that the consumer will be able to meet their obligations under the loan without substantial hardship. The holder of an Australian credit licence must keep a record of all material that forms the basis of an assessment of whether a credit contract will be unsuitable for a consumer. The material must be in a form that will enable the credit licensee to give the consumer a written copy of the assessment if requested. There are significant civil and criminal penalties that apply to these responsible lending obligations. In February 2010, ASIC issued Regulatory Guide 209 'Credit licensing: Responsible lending conduct' ([RG 209](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg209" \t "_new)), which set out its expectations concerning responsible lending obligations. On 17 November 2011, ASIC reported on its review of mortgage brokers' providing credit assistance for home loans ([Report 262](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep262-published-17-November-2011.pdf/%24file/rep262-published-17-November-2011.pdf%22%20%5Ct%20%22_new)).  ASIC intends to consider the findings from these reviews and liaise with relevant stakeholders to determine what further guidance, if any, may be required in RG 209. The National Consumer Credit regime has also required micro lenders to meet the requirements to become licensed, including having experienced responsible managers, developing a compliance plan, providing adequate staff training, introducing internal dispute resolution processes, and joining an External Dispute Resolution scheme. ASIC's Report 264 'Review of micro lenders responsible lending conduct and disclosure obligations' is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep264-published-22-November-2011.pdf/%24file/rep264-published-22-November-2011.pdf%22%20%5Ct%20%22_new).etailed Contents**2.12****Overview of corporate insolvencies** On 22 November 2011, ASIC published an annual overview of corporate insolvencies based on statutory reports lodged by external administrators for the 2010-2011 financial year. Under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), external administrators must lodge statutory reports for corporate insolvencies as soon as practicable where they identify possible misconduct by company officers, and/or where unsecured creditors are likely to receive less than 50 cents in the dollar on their debts. The statistics are based on external administrators' estimates and opinions at the time they are lodged and are, therefore, not an actual account of the outcomes of external administrations.  Nevertheless, the statistics provide a broad picture of corporate insolvencies in Australia for 2010-2011.   REP 263 is ASIC's third report since external administrators' reports could be lodged electronically.  The total number of electronic reports lodged directly by external administrators stands at 97% in 2010-11. The report complements data published by ASIC each month on the number and type of corporate insolvency appointments.   Report 263 'Insolvency Statistics: External administrators' reports 1 July 2010 - 30 June 2011' includes comprehensive information about the profile of companies placed into external administration, including industry types, employee numbers, the causes of company failure, the estimated number and value of a company's unsecured creditor debts and estimated dividends to unsecured creditors. In addition, the report details the frequency with which external administrators report misconduct by company officers, the types of alleged misconduct most frequently reported (both criminal and civil breaches) and information about the number of cases that might warrant further enquiry by ASIC. REP 263 notes that, as a result of ASIC's risk assessment, ASIC asked external administrators to prepare supplementary reports in 558 (9.8%) of the 5,670 reports for 2010-11 where company officer misconduct was alleged. Generally, ASIC can determine whether to commence a formal investigation on the basis of a supplementary report. In both 2009-10 and 2010-11, after assessment, ASIC referred 33 per cent of these cases for investigation or surveillance. The risk assessment approach to external administrators' reports and supplementary reports is consistent with ASIC's broader approach to assessing which matters to pursue for further regulatory action, which includes consideration of: evidence; level of harm or loss; and cost versus regulatory benefit. ASIC's Report 263 'Insolvency Statistics: External administrators' reports 1 July 2010 - 30 June 2011' is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep263-published-22-November-2011.pdf/%24file/Rep263-published-22-November-2011.pdf%22%20%5Ct%20%22_new).   A summary of key findings and data included in the report is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/11-263MR%2BASIC%2Breport%2Bprovides%2Boverview%2Bof%2Bcorporate%2Binsolvencies?openDocument" \t "_new). Access to the report's statistical data, including industry-specific data for the five largest industry classifications and seven years' of data comparison from 2004 to 2011, is also available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Insolvencies%2C%2Bteminations%2B%26%2Bnew%2Breg%2Bstats%2Bportal%2Bpage?openDocument" \t "_new). etailed Contents |

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| **3. Recent ASX Developments** |  | ext Section |

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| **3.1****ASX to centralise listings resources** On 2 December 2011, ASX announced that it will be transferring the listings adviser functions of its Adelaide and Brisbane offices to Sydney from 31 March 2012.   The bulk of ASX's communications with its listed entities are electronic - telephone, email and internet - and many listings functions are already centralised in Sydney, including the publication of company announcements and the coordination of listing applications and rule waivers.   The media release is available on the [ASXGroup.com.au website](http://www.asxgroup.com.au/media/PDFs/111202mrASX_to_Centralise_Listings_Resources_Media_Release_Final.pdf%22%20%5Ct%20%22_new). etailed Contents**3.2****ASIC Market Assessment Report of ASX** In November 2011, ASIC released its Market Assessment Report for ASX Group, indicating that ASX has complied with its statutory obligations for the ninth consecutive year since the introduction of annual assessments.  The assessment concludes that ASX has: adequate arrangements to monitor and enforce its operating rules; adequate arrangements to manage conflicts between its commercial interests and the need to ensure fair, orderly and transparent markets, and fair and effective clearing and settlement facilities; and sufficient financial, technological and human resources to properly operate its facilities.  ASIC's annual assessment report covers the activities of all six ASX group licensees for the period 1 July 2009 to 30 June 2010, as well as some specific market events that occurred more recently.  The report contains nine areas of 'agreed actions' between ASX and ASIC to further enhance ASX's arrangements.  ASX will progress each of the nine areas and has initiated action on many of them as part of its normal program of operational improvement.  ASIC's assessment follows the Reserve Bank of Australia's (RBA) annual assessment of ASX's licensed clearing and settlement facilities, published on 7 October 2011.  RBA found that all four clearing and settlement facilities operated by ASX complied with the relevant Financial Stability Standards and did all other things necessary to reduce systemic risk in the 2010-11 financial year.   The ASX media release is available on the [ASXGroup.com.au website](http://www.asxgroup.com.au/media/PDFs/ASXResponsetoASICAssessmentFinal.pdf%22%20%5Ct%20%22_new).  Further details of the ASIC report are outlined in Item 2.10 of this Bulletin. etailed Contents**3.3****Content sharing agreement with the United States Options Industry Council**   On 18 November 2011, ASX announced that it has entered into a content sharing agreement with the United States Options Industry Council (OIC), the premier body in the US created to educate investors and financial advisers about the benefits and risks of exchange-traded equity options.   The agreement makes the OIC's world-class research available to a local audience.  ASX will provide OIC institutional equity options white papers on the ASX website alongside its own Australian-focused research material.   The benefits of the content sharing agreement are already evident, with ASX replicating the OIC's quant study on the collar strategy over the NASDAQ 100 index for an examination of the same trading strategy over the S&P/ASX 200 index using XJO options.   Coinciding with the agreement, ASX is hosting the OIC's Managing Director, Phil Gocke, in Australia in February 2012.  Mr Gocke will deliver a series of seminars for institutional investors in Melbourne and Sydney, showcasing recent OIC institutional research and providing an overview of the US market and trends in new product development.   The information can be found at the Exchange Traded Options page on [ASX.com.au](http://www.asx.com.au/professionals/exchange-traded-options-institutional-investors.htm%22%20%5Ct%20%22_new).  The media release is available on the [ASXGroup.com.au website](http://www.asxgroup.com.au/media/PDFs/ASXResponsetoASICAssessmentFinal.pdf%22%20%5Ct%20%22_new). etailed Contents**3.4****ASX and ASX 24 Operating Rules amendments - Anomalous Order Threshold and Cancellation Operating Rules and Procedures**   On 28 November 2011, amendments were made to the trade cancellation policies for the ASX and ASX 24 markets as per the consultation paper released on 6 October 2010 (the ASX Trade Cancellation Consultation Paper).  A Circular was issued on 5 October 2011 to notify Participants of the:   impact on ASX's proposed rules from the ASIC Market Integrity Rules (Competition in Exchange Markets); and aspects of market feedback to the ASX Trade Cancellation Consultation Paper that can be incorporated into the ASX and ASX 24 Operating Rules.  /li> The Circular is available on [ASXOnline.com.au](https://www.asxonline.com/intradoc-cgi/groups/participant_services/documents/communications/asx_031700.pdf%22%20%5Ct%20%22_new). etailed Contents**3.5****Reports**   OOn 6 December 2011, ASX released:   the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASXGroupMonthlyActivityReport-Nov11.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_260.pdf%22%20%5Ct%20%22_new); and the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASXComplianceMonthlyActivityReport-Nov11.pdf%22%20%5Ct%20%22_new)for November 2011. etailed Contents |

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| **4.1****Consultation paper on rewrite of Guidance Note 18 on takeover documents** On 7 December 2011, the Takeovers Panel released a Consultation Paper seeking public comment on a draft rewrite of GN 18 on Takeover documents. The draft rewrite includes additional guidance in relation to target's statements, expert's reports, premia and intention statements. Over the last three years, the Panel has been simplifying its procedures and documentation, commencing with a rewrite of Guidance Notes 2, 4 and 5 (see [TP08/97](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=media_releases/2008/097.htm&pageID=&Year=2008" \t "_new)). GN 18 is the last rewrite of this project. The Panel seeks comments from practitioners, market participants and investors who may be affected by the guidance, particularly in respect of the additional guidance and whether market practices have changed since the last issue of GN 18. The Consultation Paper is available on the [Takeover Panel's website](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=consultation/039.htm&pageID=&Year=" \t "_new). etailed Contents |

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| **5.1****Centro creditors' schemes of arrangement approved including provision for payments to equity holders**   (By Michael Compton and Cherissa Zhou, Freehills)   In the matter of Centro Properties Limited and CPT Manager Limited in its capacity as responsible entity of Centro Property Trust [2011] NSWSC 1465, Supreme Court of New South Wales, Barrett J, 1 December 2011   The full text of this judgment is available at: [http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=155915](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=155915" \t "_new)   **(a) Summary** Justice Barrett in the Supreme Court of New South Wales approved four creditors' schemes of arrangement between Centro Properties Limited ("CPL") and CPT Manager Limited, in its capacity as responsible entity for Centro Property Trust ("CPTRE"), and certain classes of their creditors.   His Honour did not accept objections raised by contingent creditors that payments to equity holders under the schemes were either unlawful or improper, a breach of trust, inconsistent with public policy or a breach of directors' duties to creditors in the circumstances of impending insolvency, where such payments were necessary to give effect to a legitimate compromise that benefited the trust estate as a whole.   **(b) Facts**    CPL and CPTRE (together known as "CNP") have stapled securities on issue which consist of a share in CPL and a unit in Centro Properties Trust ("the Trust"), the responsible entity of which is CPTRE. CPL and CPTRE are jointly and severally liable for the debts incurred in their operations.   CPL and CPTRE sought orders under section 411(4)(b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act") approving schemes of arrangements between themselves, their "senior lenders", who were owed some $3.2 billion, and "hybrid lenders", who were owed some $1.1 billion. Debts held by the senior and hybrid lenders were secured liabilities, and CNP's assets were not sufficient to meet those secured liabilities, let alone the debts of other creditors.   CNP's other creditors included holders of CNP convertible bonds, unsecured creditors and contingent creditors, including PricewaterhouseCoopers ("PwC") and others who are parties to class action proceedings brought against CNP for alleged statutory misconduct regarding the content of financial statements.     The schemes between CPL and CPTRE and the senior lenders provided for the extinguishment of senior lenders' debt and release of their security in exchange for stapled securities in a new Centro entity resulting from an aggregation of the assets of the wider Centro group.  Under the senior lenders' schemes, senior lenders agreed to make available a total of $170 million, being part of the proceeds from the sale of CNP's portfolio of US retail property assets that would otherwise have been due to them in accordance with their facility documents, to be held in escrow for other stakeholders.  $70 million was to be preserved for unsecured creditors, and the remaining $100 million was to be made available to hybrid lenders, convertible bond holders, contingent creditors, and equity holders.  This amount was known as the "Junior Stakeholder Amount", and would only be released from escrow to CPTRE to be allocated to those stakeholders if all of the following approvals (that were necessary to implement the schemes and broader aggregation) were obtained: aapproval of the hybrid lenders of the hybrid lenders' schemes, which provided for release of their debt and security in exchange for a payment of each hybrid lender's proportionate share of $20 million;approval of CNP convertible bond holders of amendments to the terms of the bonds which would allow the bonds, which had a face value of $440 million, to be redeemed for a payment of $21,074,918; andapproval of CNP equity holders under ASX Listing Rule 11.2 of the transfer of assets into the new Centro entity to be created through the aggregation of assets in the wider Centro group, for which CNP equity holders would receive a payment of $48,925,082. The remaining $10 million of the Junior Stakeholder Amount would be preserved as the sole asset of CNP for the purposes of meeting claims of contingent creditors. On 22 November 2011, the schemes of arrangement were placed before duly convened meetings of senior and hybrid lenders, and approved by those creditors, with either no or "negligible" dissent.  Meetings of other stakeholders were also held on 22 November 2011 and passed the other necessary approval resolutions described above.  PwC sought to be joined as a party to the proceedings at the hearing to approve the schemes and raised a number of objections to the schemes being approved by the court.   **(c) Decision**   **(i) Threshold matters to approval of the schemes** Barrett J conducted a review of the authorities relating to the approval of schemes of arrangement and concluded that the court may take into account the position and objections of parties who are not bound by the schemes, including interested bystanders such as contingent creditors.  His Honour further held that, when considering whether the court was to approve a scheme, it was no part of the court's function to consider other potential schemes that might have been devised by the company, but rather to compare the position of creditors or members if the scheme takes effect to their position if no scheme were to take effect.   **(ii) Objections raised by PwC** PwC's objections to the scheme centred on the assertion that the $48,925,082 to be paid to CNP equity holders should be preserved for CNP creditors and that CNP equity holders should receive nothing.  In their submissions, PwC also raised some objections to payments to other creditors, however the court's analysis focussed on their objection to the payment to CNP equity holders.   PwC's three specific contentions in relation to this payment were that the payment: firstly, was an application of "scheme property" amounting to a breach of trust and therefore a contravention of the Corporations Act; secondly, was contrary to public policy because it was inconsistent with the policy underpinning the capital reduction provisions of the Corporations Act and the statutory order of priority in the event of winding up of a company; and thirdly, constituted conduct by the directors for a purpose that was impermissible as it failed to take account of the interests of creditors, which should be predominant in circumstances of impending insolvency.It was common ground between the parties that the Junior Stakeholder Amount was "scheme property" of the Trust up to the point at which it was released from escrow, and Barrett J accepted PwC's submissions that the Junior Stakeholder Amount would continue to be "scheme property" after being released from escrow. Otherwise, his Honour rejected all of PwC's objections.   Under the Trust's constitution, unitholders had a right to distributions of the capital of the Trust. PwC, in their first contention, argued that 'capital' must be non-existent where trust liabilities exceed trust assets, and that any transfer of any part of the trust property in this context would be a breach of trust.  Barrett J accepted CNP's submissions that the distribution of the Junior Stakeholder Amount was not a simple capital distribution but rather the product of a legitimate compromise with senior lenders who had made available the Junior Stakeholder Amount subject to contractual conditions as to how and when the amount would be applied, which included the payment to CNP equity holders as an inducement to vote in favour of the resolution required to approve the transfer of assets to the new Centro entity.  Barrett J held that, in this context, the payment to equity holders was an essential part of that compromise which, as a whole, would benefit the trust estate and those interested in it by freeing it from otherwise crippling debt, and that, on a proper construction of the broad powers of the trustee to deal with assets of the Trust contained in the Trust's constitution, the payment to equity holders would not amount to a breach of trust by CPTRE.   In relation to PwC's second objection, Barrett J held that companies and trusts are fundamentally different, and that there has never been any principle applicable to trusts that is similar to the rules regarding capital maintenance and distributions to members of a company.  His Honour further held that the order of priorities upon winding up in relation to companies do not apply to trusts, since there is no statutory process for the winding up of a trust akin to the process that applies to the winding up of a company.  On this point, his Honour concluded that the winding up of a trust is mainly to be fixed by the trust's constitution, and the CPTRE constitution did not provide for any order of priority other than satisfaction of the trustee's right of indemnity and payment of its costs, followed by the distribution of any balance to unit holders.   PwC's third contention was that, since the payment to CNP equity holders was required to induce equity holders to vote in favour of a resolution under ASX Listing Rule 11.2, directors were in breach of their duties to creditors (which they owed by virtue of the circumstances of impending insolvency) by failing to avoid the situation where equity holder approval was required for the aggregation to proceed, including failing to seek a waiver of ASX Listing Rule 11.2, or de-listing of CNP.  Barrett J held that neither CNP nor its directors had any duty to seek a waiver or de-listing, as it is expected that listed entities will comply the ASX Listing Rules, which are not only contractual obligations but are enforceable under the Corporations Act, rather than be expected to seek to extricate themselves from compliance.   Barrett J finally considered whether there was any other inherent unfairness to PwC or other class action litigants under the proposed schemes, and concluded that, since secured liabilities far exceeded the assets of the trust, the $10 million provided for contingent creditors under the senior lenders' scheme left contingent creditors in a better position to that in which they would find themselves if the schemes were not implemented, and that as such there was no unfairness to PwC inherent in the schemes.   Having rejected all of the objections raised by PwC and there being no other reasons for the court to withhold its approval, Barrett J held that the schemes should be approved. etailed Contents**5.2****US court rejects securities fraud settlement between the SEC and Citigroup** US Securities and Exchange Commission v Citigroup Global Markets, United States District Court for the Southern District of New York, 11 Civ 7387, Rakoff, USDJ, 28 November 2011 This full text of this judgment is available at:[http://www.nysd.uscourts.gov/cases/show.php?db=special&id=138](http://www.nysd.uscourts.gov/cases/show.php?db=special&id=138" \t "_new) **(a) Summary** The United States Securities and Exchange Commission ("SEC") proposed that the court approve a settlement relating to litigation in which the SEC had accused Citigroup Global Markets Inc ("Citigroup") of engaging in a major securities fraud. The terms of the settlement proposed payments by Citigroup of US$285 million in compensation, interest and penalties but without any admission of wrongdoing by Citigroup.  The court refused to approve the settlement on the basis that it was not fair, reasonable, adequate, or in the public interest. **(b) Facts** The SEC filed a lawsuit accusing Citigroup of a substantial securities fraud. According to the SEC's Complaint, after Citigroup realised in 2007 that the market for mortgage backed securities was beginning to weaken, Citigroup created a billion-dollar Fund that allowed it to dump some dubious assets on misinformed investors. This was accomplished by Citigroup misrepresenting that the Fund's assets were attractive investments rigorously selected by an independent investment adviser, whereas in fact Citigroup had arranged to include in the portfolio a substantial percentage of negative projected assets and had then taken a short position in those very assets it had helped select.  Having structured the Fund as a vehicle for unloading dubious assets on unwitting investors, Citigroup realised net profits of around US$160 million, whereas the investors lost more than US$700 million.  The SEC presented to the court a proposed settlement ("Consent Judgment") that recited that Citigroup consented to the entry of the Consent Judgment "[w]ithout admitting or denying the allegations of the complaint ....". The Consent Judgment:permanently restrained and enjoined Citigroup and its agents, employees, etc, from future violations of sections l7(a)(2) and (3) of the Securities Act; required Citigroup to disgorge to the SEC Citigroup's US$160 million in profits, plus US$30 million in interest thereon, and to pay to the SEC a civil penalty in the amount of US$95 million; and required Citigroup to undertake for a period of three years, subject to enforcement by the court, certain internal measures designed to prevent recurrences of the securities fraud.**(c) Decision** The court refused to approve the Consent Judgment as it had "not been provided with any proven or admitted facts upon which to exercise even a modest degree of independent judgment".  The standard of review adopted by the court was "whether the proposed Consent Judgment ... is fair, reasonable, adequate, and in the public interest".  AAccording to the court: "Here, the SEC's long-standing policy - hallowed by history, but not by reason - of allowing defendants to enter into Consent Judgments without admitting or denying the underlying allegations, deprives the Court of even the most minimal assurance that the substantial injunctive relief it is being asked to impose has any basis in fact ... a consent judgment that does not involve any admissions and that results in only very modest penalties is just as frequently viewed, particularly in the business community, as a cost of doing business imposed by having to maintain a working relationship with a regulatory agency, rather than as any indication of where the real truth lies. This, indeed, is Citigroup's position in this very case".  The court further stated: "Of course, the policy of accepting settlements without any admissions serves various narrow interests of the parties.  In this case, for example, Citigroup was able, without admitting anything, to negotiate a settlement that (a) charges it only with negligence, (b) results in a very modest penalty, (c) imposes the kind of injunctive relief that Citigroup (a recidivist) knew that the SEC had not sought to enforce against any financial institution for at least the last 10 years, and (d) imposes relatively inexpensive prophylactic measures for the next three years.  In exchange, Citigroup not only settles what it states was a broad-ranging four-year investigation by the SEC of Citigroup's mortgage-backed securities offerings, but also avoids any investors' relying in any respect on the SEC Consent Judgment in seeking return of their losses. If the allegations of the Complaint are true, this is a very good deal for Citigroup; and, even if they are untrue, it is a mild and modest cost of doing business. It is harder to discern from the limited information before the Court what the SEC is getting from this settlement other than a quick headline.  By the SEC's own account, Citigroup is a recidivist, and yet, in terms of deterrence, the $95 million civil penalty that the Consent Judgment proposes is pocket change to any entity as large as Citigroup. While the SEC claims that it is devoted, not just to the protection of investors but also to helping them recover their losses, the proposed Consent Judgment, in the form submitted to the Court, does not commit the SEC to returning any of the total of $285 million obtained from Citigroup to the defrauded investors but only suggests that the SEC 'may' do so.  In any event, this still leaves the defrauded investors substantially short-changed." br>  The court concluded that the proposed Consent Judgment was not reasonable, fair, adequate, or in the public interest. "It is not reasonable, because how can it ever be reasonable to impose substantial relief on the basis of mere allegations? It is not fair, because, despite Citigroup's nominal consent, the potential for abuse in imposing penalties on the basis of facts that are neither proven nor acknowledged is patent.  It is not adequate, because, in the absence of any facts, the Court lacks a framework for determining adequacy.  And, most obviously, the proposed Consent Judgment does not serve the public interest, because it asks the Court to employ its power and assert its authority when it does not know the facts." The Wall Street Journal, in an article published on 29 November 2011, quotes the SEC Director of Enforcement as stating that the judgment "ignores decades of established practice throughout federal agencies and decisions of federal courts".  The Journal refers to the comments of some lawyers that the judgment could "open the door to greater liability for Wall Street firms, increased legal costs for both companies and federal agencies, and drawn-out resolutions to securities fraud cases".etailed Contents**5.3****Breach of directors' duties in procuring entry into facility agreement not in best interests of corporation but benefitting group** (By Jason Hewitt, Blake Dawson) Mernda Developments Pty Ltd (in liq) v Alamanda Property Investments No 2 Pty Ltd (formerly known as Dollarforce Financial Services Pty Ltd (in liq)) [2011] VSCA 392, Supreme Court of Victoria, Court of Appeal,  Warren CJ, Mandie JA and Judd AJA, 30 November 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSCA/2011/392.html](http://www.austlii.edu.au/au/cases/vic/VSCA/2011/392.html%22%20%5Ct%20%22_new) **(a) Summary** Mernda Developments Pty Ltd (in liq) ("Mernda") entered into a facility agreement with Alamanda Property Investments No 2 Pty Ltd (in liq) ("Alamanda").  Under the facility agreement, Alamanda advanced funds to Mernda and 24 other borrowers, all of which were owned by Dale Howard Robertson and Clestus Weerappah.  Mr Weerappah was a shadow director of Mernda and the other borrowers. The borrowers were incorporated each with the purpose of owning, developing and selling property developments.  The borrowers were separately incorporated to quarantine the risk of each project. Mr Weerappah was held to have breached his duty to act in the best interests of Mernda under section 181(1)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") as, among other things, the facility agreement required Mernda to repay the debts of the other borrowers without giving Mernda any entitlement to draw down further advances.  In particular, the facility agreement required Mernda to repay all proceeds under any property sale to the debt of itself and other borrowers and required Mernda to pay (on a joint and several basis) the total amount outstanding under the facility agreement on a specified repayment date. **(b) Facts**    **(i) Overview** On 15 May 2003, the first appellant Mernda entered into a facility agreement with the first respondent Alamanda.  Mernda was one of 25 borrowers under the facility agreement, with Alamanda as lender.  The facility agreement was supported by charges, including a charge over Mernda's assets.  Mernda's borrowing was $1,030,516.  The total borrowing of all the borrowers was $11,171,641. Each borrower was owned by Dale Howard Robertson and Clestus Weerappah and the objective was to develop a number of properties for eventual sale.  While Mr Robertson was appointed as director of each of the companies, the court at first instance and on appeal accepted that Mr Robertson acted under the direction of Mr Weerappah, and accordingly Mr Weerappah was a shadow director of each of the borrowers.   The property developments were split across multiple entities to avoid "cross-collateralisation"; that is, to quarantine the risks to each entity. Mernda entered into a contract of sale to purchase land at a price of $8,500,000 plus GST.  This was to be paid by: a deposit of $1 million by 14 October 2002, an instalment of $850,000 by 1 September 2003 and the balance by 1 September 2004. On 31 October 2003, Mernda contracted to sell the land to Summit Investment Group Pty Ltd for $15,500,000 plus GST.  On payment of the balance of this purchase price, the net amount due to Mernda (after certain expenses) was $9,574,289.46.  On 19 December 2003, Mernda paid this amount to Russell Kennedy (as solicitors for Alamanda) (as required by the facility agreement, see below).  Mernda was left without any assets and unable to pay its debts (including a claim by the Commonwealth for GST in the sum of $1,550,165.26). **(ii) Facility agreement** A number of key terms of the facility agreement were considered relevant. First, the facility agreement provided that certain advances were made to each borrower, with further advances being available at Alamanda's discretion up to $15 million (including the initial advances).   Second, the facility agreement provided that each borrower was responsible jointly and severally for the whole of the principal outstanding (and other amounts payable).   Third, the facility agreement required borrowers to apply any proceeds of any property sale (minus certain expenses) towards payment of the principal as a whole. Finally, the facility agreement required repayment of the whole of the principal on or before 31 December 2003. **(c) Decision**   **(i) First instance decision and appeal** At first instance, the trial judge held (among other things) that Mr Weerappah had not breached his duties under sections 181 and 182 of the Act.   On appeal, Mernda and its liquidator argued the trial judge erred and ought to have held that Mr Weerappah had breached his duties under section 181(1)(a) of the Act and that the facility agreement is void. In particular, the appellants contended the trial judge erred in proceeding on the basis that Mernda was part of a group and holding that the mutual support, cross-collateralisation and the limited opportunity to draw down further advances (until the total borrowings reached $15 million) under the facility agreement were substantial advantages which a prudent director could sensibly secure for Mernda by procuring it to enter into the facility agreement and charge. SSection 181(1)(a) of the Act provides that a "director or other officer of a corporation must exercise their powers and discharge their duties . in good faith and in the best interests of the corporation". **(ii) Appeal decision** On appeal, their Honours held that the facility agreement and the relationship between the parties to the facility agreement contradicted the trial judge's findings.  Their Honours held that Mr Weerappah breached his duty to Mernda based on a number of reasons. First, their Honours held that (contrary to the trial judge's view) the facility agreement did not entitle Mernda to draw down further advances under the facility agreement.  Such advances were subject to the discretion of Alamanda. Second, the repayment date of 31 December 2003 required each borrower to repay its own indebtedness, and meet the obligations of any borrower unable to do so.  This provision would have required Mernda to make the repayment prior to completing its purchase of land. Third, and critically, the facility agreement required repayment of any proceeds of a sale of land.  This required Mernda to pay the whole of any proceeds to repay not only its own indebtedness, but that of the other borrowers. Their Honours held that, at the time which Mr Weerappah procured Mernda to enter into the facility agreement, "it was difficult to conceive of a basis on which an intelligent and honest person, in the position of Mr Weerappah. could, in the whole of the existing circumstances, have reasonably believed that it was for the benefit of Mernda to incur a liability for the debts of other borrowers, payable on 31 December 2003, coupled with an obligation to disgorge all proceeds on disposal of its asset in circumstances where it was not entitled to any further advances."  Their Honours held that, on the basis of Mr Weerappah's breach, the agreement and charge were voidable.  However, their Honours refused to grant a proprietary remedy for a number of reasons, including that the court was not informed of the likely impact of any remedy on creditors and other third parties.  However, their Honours ordered that Alamanda repay $7,724,289.46 being the amount paid by Mernda to Alamanda minus the initial borrowing of Mernda. Under section 1317H of the Act, their Honours also ordered Mr Weerappah to pay $7,724,289.46 to Mernda as compensation for damage suffered by Mernda as a result of Mr Weerappah's contravention of section 181(1)(a). As Alamanda was in liquidation, their Honours ordered that, under section 500(2) of the Act, the appellants require further leave to enforce the orders above.etailed Contents**5.4****Company's legitimate interest in defending proceedings** (By William Thomas, Mallesons Stephen Jaques) In the matter of CMI Limited [2011] QSC 346, Supreme Court of Queensland, McMurdo J, 23 November 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/qld/QSC/2011/346.html](http://www.austlii.edu.au/au/cases/qld/QSC/2011/346.html%22%20%5Ct%20%22_new) **(a) Summary** In interlocutory proceedings, Trojan Equity Ltd ("Trojan"), a shareholder of CMI Limited ("CMI"), sought an injunction restraining CMI from defending oppression proceedings brought against it.  The Court considered whether directors involved in the proceedings had actual or ostensible authority to act and considered the impact of the directors' possible conduct on the proceedings. In refusing to grant the injunction, the Court found that: although the director of CMI tasked with providing instructions to the company's solicitors lacked the authority to do so, the defect was curable and did not justify the injunction being granted; andCMI had a legitimate interest in contesting the allegations.**(b) Facts** The application relates to proceedings brought by the applicant, Trojan, against the first respondent, CMI, for oppression under sections 232, 233 and 461 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).  Sections 232-233 of the Act provide for relief where a company conducts its affairs in a manner which is contrary to the interests of the company as a whole and which is oppressive, unfairly prejudicial and discriminatory to its members.  Section 461 provides in part that a company may be wound up where its affairs have been conducted in the same manner.  Trojan is a minority shareholder in CMI.  The trial of the proceedings is to commence on 19 March 2012. Trojan brought this application to obtain an injunction restraining CMI from defending the proceedings.  It sought the injunction on two grounds.  First, that Mr Ryan (the director of CMI tasked with providing instructions to CMI's solicitors) had not been duly authorised to do so by the Board.  Second, that CMI's active participation in the proceedings was not necessary or expedient in the interests of the company as a whole, but was instead for the improper purpose of assisting the other respondents, who included the directors of CMI.  **(c) Decision** **(i) Lack of authority did not justify an injunction** McMurdo J held that Mr Ryan had not been duly authorised by the board to provide instructions to CMI's solicitors.  This meant that CMI's case was being conducted without instructions. His Honour considered two resolutions passed by the Board of CMI in relation to Mr Ryan.  The first resolution purported to appoint him as "executive chairman", a position which was not recognised in the Constitution of CMI.  The second resolution purported to appoint him as managing director.  Pursuant to the second resolution, Mr Ryan was granted authority to "provide instructions to External Service Providers".  However, his Honour held that this was not effective to grant Mr Ryan authority to make decisions on CMI's behalf in response to the proceedings.  This was because providing instructions in response to legal proceedings was not part of Mr Ryan's agreed duties as managing director.  The authorities granted to Mr Ryan needed to be considered within the context of his agreed duties. His Honour also held that even if Mr Ryan had been given authority to provide instructions to CMI's lawyers in relation to the proceedings, it did not follow that he had been given authority to decide in all respects what CMI's response to the claim should be. Ultimately, Mr Ryan's lack of authority was not held to justify the injunction being granted since the defect was curable.  His Honour instructed CMI to provide an affidavit from one of its solicitors explaining what had been done to remedy the defect. **(ii) CMI has a legitimate interest in defending proceedings** McMurdo J also held that Trojan had failed to demonstrate that it was not "necessary" or "expedient" for CMI to defend the proceedings.  His Honour found that CMI's interest in defending the proceedings was legitimate and that CMI could suffer substantial detriment if it was precluded from doing so. **(iii) Not a dispute between certain shareholders** TTrojan argued that CMI's interest in defending the proceedings was not legitimate because it was a dispute between certain shareholders, and therefore not in the best interests of the company as a whole.  This argument was based on the proposition stated by *Byrne J in Re D G Brims & Sons* (1995) 16 ACSR 559 that company funds should not be used by a shareholder majority to defend against proceedings instituted by a shareholder minority where the essential dispute is between the parties themselves, since this use of funds would be for an improper purpose. McMurdo J cited Austin J's recent review of authorities in *Power v Ekstein* [2010] NSWSC 137 ("Power").  In that case, it was held that "the test of whether the company's participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole".  It was further held that a company which has actively participated in proceedings or has incurred costs bears the onus of proving that those costs were necessary or expedient. However, McMurdo J distinguished the present proceedings from those where all members of a company are on one side or the other of the record.  His Honour noted that in this case, the vast majority of both ordinary and preference shareholders were not parties to the proceedings.  Those shareholders would be affected by the outcome of the proceedings to the extent that relief was claimed against the company.  Therefore, CMI's participation would serve a legitimate purpose as distinct from merely assisting one side against the other. **(iv) CMI had a legitimate interest in contesting allegations** Trojan further argued that CMI should only be allowed to be heard on the appropriate form of relief if Trojan was successful in making out its claim, as opposed to contesting the allegations made against CMI.  However, McMurdo J held that it was in the company's interests to contest allegations which would be made in the proceedings.  One of these allegations concerned the proper construction of certain provisions in CMI's constitution.  Others concerned CMI's status as a publicly listed company, such as those relating to its financial position, conduct at company meetings, use of company resources, decision-making by the directors and compliance with the Corporations Act.  Since these allegations may have affected the market for CMI's shares, it clearly had an interest in contesting them. Trojan further argued that CMI had pleaded to allegations which were only relevant to relief sought against the other respondents.  For example, it had pleaded in response to Trojan's allegation that the decision of the directors of CMI to abandon a share buy-back was made in bad faith, contrary to section 181(1) of the Corporations Act.  However, McMurdo J held that since those allegations concerned the governance of CMI, they could impact on the confidence of CMI's investors.  This finding was reinforced by the decision of Austin J in Power (above), that it was legitimate for a company to defend a claim which challenged the validity of its actions. **(v) Possibility of impropriety by CMI's directors** Finally, McMurdo J considered whether CMI's defence would be adversely affected by the separate interests of its directors, if they acted improperly.  His Honour held that there was a real risk that this was so.  In particular, there was a real risk that impropriety by the directors could affect the way CMI's response to Trojan's claim was formulated, given that the directors (including Mr Ryan) were also parties to the proceedings.  Further, if the directors were ultimately found to have acted improperly, there was no guarantee that CMI would be able to fully recover its costs.  Even though the directors had the benefit of an insurance policy in that circumstance, it was unlikely to fully cover a potential costs order made against them. However, his Honour considered that this possibility was outweighed by the detriment which CMI could suffer if it was prevented from participating in the proceedings.  CMI had a legitimate interest in defending the proceedings.  The possibility of impropriety affecting CMI was reduced by the fact that it and the directors were represented by separate solicitors and counsel.etailed Contents**5.5****Appointment of receiver of property of managed investment schemes being wound up** (By Sarah Horan, DLA Piper) Equititrust Ltd v The Members of the Equititrust Income Fund and the Equititrust Priority Class Income Fund [2011] QSC 353, Supreme Court of Queensland, Applegarth J, 23 November 2011 The full text of this judgment is available at: [http://www.sclqld.org.au/qjudgment/2011/QSC/353](http://www.sclqld.org.au/qjudgment/2011/QSC/353%22%20%5Ct%20%22_new) **(a) Summary** In this case, Applegarth J considered various applications made under Part 5C.9 and section 1101B of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") in respect of the winding up of two managed investment schemes.   Applegarth J held that the schemes should be wound up and ordered the appointment of a person to take responsibility for ensuring that each scheme would be wound up.  His Honour also ordered that the "responsible person" would act as a receiver to the property of each scheme. **(b) Facts**    Equititust Ltd ("the Company") was the responsible entity of three managed investment schemes, including the Equititrust Income Fund and Equititrust Priority Class Income Fund ("the funds").  Two of the schemes were registered, and the third was not required to be registered. On 12 October 2011, the board of the Company unanimously resolved that, for various reasons, the purpose for which each of the funds was established could not be accomplished.  The board further resolved that the Company, as the responsible entity, should take steps to wind up both the funds, within the meaning of section 601NC(1) of the Act and in accordance with the funds' constitutions. At 3.00pm on 21 November 2011, two insurance policies covering the Company's officers were due to expire (and were unlikely to be renewed).  The members of the board intended to resign prior to this time and could, therefore, not proceed with the winding up of the funds. By originating application filed on 15 November 2011, the Company sought orders that: the funds be wound up pursuant to section 601ND of the Act;the Company be replaced as responsible entity of the funds by a temporary responsible entity, with that entity to wind up the funds, pursuant to section 601FN of the Act; anda committee be appointed to take responsibility for ensuring that the funds be wound up in accordance with their constitutions pursuant to section 601NF of the Act.Soon after the commencement of the hearing on 21 November 2011, ASIC made an oral application under section 1101B of the Act for an order appointing a receiver of the property of each fund.  In support of its application, ASIC submitted that the Company had contravened both the Act and one condition of its Australian financial services licence, and that upon expiry of its insurance coverage, would have contravened another condition. **(c) Decision**   **(i) Application under section 601FN for the appointment of a temporary responsibly entity** Applegarth J found that there was a jurisdictional impediment to the making of an order under section 601FN for the appointment of a temporary responsible entity.  Section 601FN entitles ASIC or a member of the registered scheme to apply to the Court for the appointment of a temporary responsible entity (pursuant to section 601FP) if the scheme "does not have a responsible entity that meets the requirements of section 601FA".  At the time of the Company's application, it met the requirements of section 601FA.  Accordingly, the Court's powers under section 601FN were not invoked. **(ii) Application under section 601ND to wind up the funds** With respect to the application under section 601ND, Applegarth J determined that the winding up of both funds would be in the best interests of the members of the funds and his Honour made orders to this effect. Section 601ND(1)(a) authorises the Court to order that the responsible entity of a registered scheme wind up the scheme if the Court thinks it is "just and equitable to make the order".  With reference to various authorities, his Honour observed that a registered scheme may be wound up on this basis if the administration and original arrangement have broken down, or if it is in the public interest to do so.  In this case, Applegarth J considered it was just and equitable to make an order that the funds be wound up on the basis that, among other matters:the administration of the funds had broken down and the funds' purpose could not be accomplished;repayments to investors had been frozen since October 2008 and the funds had ceased making monthly interest payments to members on 1 April 2011;disharmony and disputes between members of the board of the Company and its sole shareholder had destabilised the administration of the funds, as a result of which it was extremely unlikely the funds could resume trading;the members of the board were due to resign prior to 3pm on 21 November, whereupon the proper administration of the funds would be jeopardised; andthe appointment of an independent person to take responsibility for ensuring that each fund be wound up in accordance with its constitution appeared to be in the best interests of the members of the funds.**(iii) Appointment of person to take responsibility for the winding up of the funds under section 601NF** Section 601NF(1) empowers the Court to appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with both its constitution and any orders made by the Court under section 601NF(2). In the present context, in light of the jurisdictional impediment to the appointment of a temporary responsible entity and the pending resignation of the board, Applegarth J considered it was necessary to appoint Mr David Whyte, an experienced insolvency practitioner, to take responsibility for ensuring that each fund would be wound up pursuant to section 601NF(1). **(iv) Appointment of a receiver pursuant to section 601NF and section 1101B** In addition to appointing Mr Whyte to take responsibility for ensuring each fund be wound up in accordance with its constitution, Applegarth J also appointed Mr Whyte as a receiver and made orders to this effect pursuant to both section 601NF(2) and section 1101B.  His Honour noted that whilst the necessity of making orders under both sections of the Act had been questioned during argument, he had elected to make such orders given both parties supporting the appointment of a receiver favoured such a course. UUnder section 601NF(2), the Court may make orders about how a registered scheme is to be wound up if the Court thinks it necessary to do so.  After extensive consideration of the nature and scope of section 601NF(2), which "leaves the detail of the winding up of a registered scheme in the hands of the Court" (*Mier v FN Management Pty Ltd* [2006] 1 QD R 229), his Honour concluded that the Court was empowered by section 601NF(2) to make an order that Mr Whyte act as receiver of the property of each fund.   Applegarth J made similar orders under section 1101B in response to ASIC's application for the appointment of a receiver.  In respect of section 1101B, his Honour observed that the Company's contravention of both the Act and the conditions of its Australian financial services licence justified the appointment of a receiver.  Applegarth J further reasoned that placing the property of the fund under the control of Mr Whyte as a receiver was ultimately likely to facilitate its realisation and the winding up of each fund for the benefit of its members. etailed Contents**5.6****Remuneration of liquidators and the Universal Distributing principle** (By John O'Grady and Alexa Kostenko, Corrs Chambers Westgarth) McCluskey v Wieselmann, in the matter of Westmeats (Export) Pty Ltd (Receivers and Managers Appointed) (in liq) [2011] FCA 1340, Federal Court of Australia, Dodds-Streetson J, 23 November 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2011/1340.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/1340.html%22%20%5Ct%20%22_new) **(a) Summary** In 2008, several companies in the Westmeats corporate group ("the Westmeats Group"), including Westmeats (Export) Pty Ltd ("Export") and Martman Nominees Pty Ltd ("Martman'), became insolvent. In December 2008, Gess Rambaldi and David Vasudevan ("the Liquidators") were appointed as liquidators of Export. The Liquidators applied for payment on an indemnity basis of their costs, fees and expenses in acting as stakeholders for Export. The Liquidators sought to recover the amount claimed from a fee escrow of $300,000 which was set aside by consent order on 20 May 2011 for the purpose of paying the Liquidators' fees and expenses ("the Fee Escrow"). Martman disputed the Liquidators claims to payment from the Fee Escrow on the basis that some of the Liquidators' expenses were not directly related to or necessarily incurred in their role as stakeholder or in the care, preservation or realisation of Export's property. The Court held that the Liquidators were entitled in principle to payment from the Fee Escrow of a reasonable amount for their work, costs and expenses which were reasonably done or reasonably incurred. The Court referred the matter to the Registrar for determining the reasonableness of each item claimed and for the fixing of quantum.  **(b) Facts**    In 2008, several members of the Westmeats Group, including Export and Martman, defaulted in payments owed to Westpac under an Interlocking Guarantee and Indemnity.  In August 2008, Peter McCluskey and James Stewart ("the Receivers") were appointed by Westpac as receivers and managers of Export and as controllers of Martman and other companies in the Westmeats Group. In December 2008, Gess Rambaldi and David Vasudevan ("the Liquidators") were appointed as liquidators of Export. By June 2009, the Westmeats Group had discharged its liability to Westpac by realising several of its properties. At this time, the Receivers held a surplus of $1,285,000 in relation to Export ("the Surplus") and were unable to terminate their appointments due to a dispute over subrogation claims to the Surplus.  On application by the Receivers, Finkelstein J held on 12 October 2010 that the Liquidators be appointed stakeholders of the surplus. Accordingly, the Receivers transferred the surplus to the Liquidators. In March 2011, Martman filed a cross-claim against several Westmeats Group companies.  Following mediation, the court issued consent orders providing, among other things, that $300,000 be set aside for payment of the Liquidators' fees and expenses. TThe Liquidators made this application to recover from the Fee Escrow the following costs, fees and expenses incurred in acting as stakeholder for Export:$75,111.85 for pre-litigation work and legal costs in relation to the subrogation claim, which involved corresponding, negotiating, conferencing and tendering proposals on the determination and quantification of subrogated claims, between 22 May 2009 and 11 October 2010 ("Category 1")$15.132.70 for work and legal costs pursuant to an arrangement with the Receivers under which the Liquidators undertook to recover Export's debts and realise Export's remaining properties between 22 May 2009 to 11 October 2010 ("Category 2")$98,165.25 for disbursements and legal costs from 9 June 2009 to 30 March 2011 ("Categories 3, 4 and 5")$53,587.60 for the Liquidators' work and expenses as stakeholders in these proceeding between 12 October 2010 to 1 May 2011 ("Category 6")$13,004.20 for the cost of maintaining and administering Export's properties ("Category 7")$1,815 for the Receivers' claim in relation to interpleader orders ("Category 8")$17,663.80 for legal fees incurred between 31 March 2011 and 31 August 2011 ("Category 9").Martman conceded that the Liquidators were entitled to payment from the Fee Escrow of the amounts claimed under Category 7 and Category 8. However, Martman disputed the Liquidators' entitlement to the amounts claimed under Categories 1 and 2.  Counsel for Martman contended that these amounts did not fall within the principle set out in *Re Universal Distributing Co Ltd (in liq)* [1933] HCA 2 ("Universal Distributing"), which gives liquidators priority claims only to those amounts directly related to or necessarily incurred in their role as stakeholder or in the care, preservation or realisation of property.  Martman submitted that the amounts claimed under Category 1 and 2 were related to the Liquidators' general administration duties and could not be claimed from the Fee Escrow.  In the alternative, Martman submitted that the Liquidators' evidence did not establish that the amounts were incurred in accordance with the Universal Distributing principle and did not establish the reasonableness of the Liquidators work, the expenses they incurred, or the quantum claimed.  Counsel for the Liquidators submitted that the Liquidators had a priority claim to the Fee Escrow for the amounts claimed in accordance with Lowe J's finding in *McPherson Thom & Co v Coombie Pastoral Co Pty Ltd* [1929] VLR 295 ("McPherson").  In McPherson, Lowe J held that an applicant on an interpleader summons is prima facie entitled, as far as the funds admit, to complete indemnity for his costs provided that that applicant is not guilty of conduct that increased the costs. In its written submissions, Martman disputed the Liquidators' claim to costs and expenses that the Liquidators incurred before their appointment as stakeholder. However, in oral argument Counsel for Martman conceded that the Liquidators were entitled to remuneration for their work as stakeholder before their formal appointment.  **(c) Decision**   The Court found that the Liquidators bore the onus of establishing entitlement to the amount claimed from the Fee Escrow. In particular, to succeed the Liquidators needed to establish that each individual item of work and expense fell within the Universal Distributing principle, was reasonably undertaken or incurred, and was reasonable in quantum. With respect to Categories 1 and 2, the Court held that the Liquidators were entitled in principle to recover their costs, remuneration and expenses under the Fee Escrow for the following reasons: First, the Court held that the Liquidators' work was work within their role as stakeholder.  Since the Receivers were acting as stakeholders of the Surplus once the debt to Westpac was discharged and the Receivers assented to the Liquidators' role in resolving the competing subrogation claims, the Liquidators had performed the work as de facto delegates of the Receivers. Their work under Categories 1 and 2 was thus directly incurred in the care, preservation or realisation of property and, in accordance with the principles in McPherson and Universal Distributing, the Liquidators could claim in priority to other creditors. Second, in accordance with *Kennet v Charlton* [2007] NSWSC 190, the Liquidators could recover the costs of dealings and negotiations prior to issuing the application and could recover the costs of the application itself on an indemnity basis. The Liquidators were not required to demonstrate that their efforts had increased the fund in order to recover from the Fee Escrow. Third, the Liquidators' evidence was sufficient to establish that the Liquidators had performed the work and incurred the expenses for the purposes they claimed. With respect to the Liquidators' claims under Categories 3, 4, 5 and 6, the Court held that for the same reasons as discussed in relation to Categories 1 and 2 the Liquidators were entitled to payment from the Fee Escrow for their fees and expenses. In relation to Category 9, the Court found that the legal fees were incurred, among other things, to establish through the current application the Liquidators' entitlement to payment from the Fee Escrow. This purpose was integrally connected with their role as stakeholders and therefore the Liquidators were in principle entitled to recover the amounts claimed under Category 9 from the Fee Escrow. The Court further held that each item of work done, each expense incurred, and the quantum claimed under every category needed to be reasonable. The Court referred the question of reasonableness and quantum to a Registrar for determination.etailed Contents**5.7****Applications by liquidator for general extension of time and pooling orders**  (By Lincoln Verass, DLA Piper) In the matter of Australian Hotel Acquisition (in liquidation) and Other Companies; In the matter of David John Frank Lombe in his capacity as Liquidator of Australian Hotel Acquisition Pty Ltd (receivers & managers) (in liquidation) and Other Companies [2011] NSWSC 1374, Supreme Court of New South Wales, Windeyer J, 17 November 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWSC/2011/1374.html?stem=0&synonyms=0&query="Australian%20Hotel%20Acquisition](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWSC/2011/1374.html?stem=0&synonyms=0&query=%22Australian%20Hotel%20Acquisition" \t "_new)" **(a) Summary** The liquidator had delayed in winding up the Australian arm of a diverse corporate group.  This was because certain funds had not been released to the group.  The liquidator sought an order under section 588FF(3) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") for the court to grant a general extension of time within which applications under section 588FF(1) may be brought. The court held that the requirements of section 588FF(3) were not satisfied in this context and so dismissed the extension proceedings.  The liquidator also sought pooling orders under section 579E. The relevant group had two separate chains of wholly owned Australian subsidiary companies.  Evidence showed there to be very limited operational and financial connection between the two. However, both operated hotels of a similar nature.  Acting Justice Windeyer held that the requirements of section 579E(1)(b) were not made out and so the pooling order could not be made.  **(b) Facts**    The key facts in this matter were as follows:Seven related companies, broadly involved in the hotel business, became insolvent in mid 2008. The primary assets of the Australian arms of the group were the 'Courtyard by Marriot' hotels in North Ryde and Parramatta, NSW, and Surfers Paradise, Queensland.The Commonwealth Bank appointed receivers to realise an unpaid debt.  The receivers sold the North Ryde hotel and the Surfers Paradise hotel and surplus funds remained after the relevant debt was satisfied.  The liquidators (subsequently, a sole liquidator) had received the surplus funds from the Surfers Paradise hotel.  Funds from the North Ryde hotel were separately held, pending current creditors' proceedings.  The liquidator subsequently sold the Parramatta hotel.The liquidator gave evidence that their work thus far had been complicated by the presence of the receivers and difficulties surrounding recovering assets from New Zealand registered companies.The liquidator brought a claim under section 538FF(3) of the Act for an order extending the time within which applications under section 588FF(1) (which relates to voidable transactions) may be brought.  The liquidator argued that a general time extension was necessary because investigations into insolvent trading had not yet been undertaken. The liquidator also sought a pooling order pursuant to section 579E(1) of the Act in respect of the same companies together with orders as to the payment of expenses and remuneration of the administrators and liquidators of certain of the companies (which were trustee of certain unit trusts). It was argued that section 579E(1)(b)(iv) applied. The subsection requires that "one or more companies in the group own particular [property](http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s261.html%22%20%5Cl%20%22property%22%20%5Ct%20%22_new) that is or was used, or for use, by any or all of the companies in the group in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group." The companies were part of a single joint venture.  The joint venture entity, Real Estate Assets Ltd ("REAL"), was incorporated in New Zealand.  Evidence indicated the intention of directors was to simplify the corporate structure of the group and have the Australian hotel holdings controlled by a single Australian entity. This entity would ultimately be wholly owned by REAL.  Despite the intention of directors, at the time of the insolvency the North Ryde Hotel was held by a separate entity from the other Australian hotels.  It was argued that two separate arms of the joint venture were conducting the Australian operations of the joint venture. **(c) Decision**   Acting Justice Windeyer considered the authorities regarding the effect of section 588FF.  His Honour confirmed that where time extension orders are sought on general grounds, that is, where no particular reason is forwarded as to why the extension is necessary other than to complete a sufficiently diligent winding up process, the liquidator must provide a satisfactory explanation of the reasons for the delay.  This is because such orders are "not usual" and "out of the ordinary". Acting Justice Windeyer observed that the task of the liquidator was not particularly complicated, as proper accounts had been kept and the liquidator was from a particularly large and well-resourced accounting firm.  Accordingly, his Honour confirmed that a lack of funds was the only reason which could potentially take these liquidations out of the ordinary.  However, due to the particular facts of this matter, Acting Justice Windeyer confirmed that it was not fair and just in all the circumstances to grant an extension of time, and so dismissed the extension proceedings. With respect to the pooling application, Acting Justice Windeyer relied upon the construction of section 579E(1)(b)(iv) proposed by *Barrett J in Allen v Feather Products Pty Ltd* (2008) 72 NSWLR 597.  Barrett J held that the words "carried on jointly" require some sharing of particular property between various related companies for a "common purpose".  Acting Justice Windeyer declined to make the pooling order for two reasons:First, the relevant section requires "one or more companies in the group own particular [property](http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s261.html%22%20%5Cl%20%22property%22%20%5Ct%20%22_new)...".  His Honour interpreted this wording to impose a temporal element to the analysis.  That is, the property owned at the time of the application must be used for a common purpose.  The only property held by companies in the group were proceeds of the sale of assets brought about through receivership and liquidation.  Such surplus funds were not "particular property" within the requirements of section 579E(1)(b)(iv).  In addition, those requirements were not satisfied due to the manner in which certain assets had been used.Second, Acting Justice Windeyer considered whether the relevant property was used by the seven companies of the group in connection with a business, scheme or undertaking carried on jointly by the companies in the group, and confirmed that even if his Honour may have fallen into error in the above analysis, the Australian aspects of the joint venture could not be separated and considered as a separate business or undertaking. This was due to the inclusion of the North Ryde companies, as their business was not part of an undertaking carried on jointly with the other relevant companies to produce a particular outcome. Those businesses were held to be separate businesses, and accordingly his Honour declined to make the pooling order sought.etailed Contents**5.8****A procedurally defective appeal against a rejection of a proof of debt in a creditors' trust may be cured** (By Alissa Crittenden, Clayton Utz) In the matter of Bevillesta Pty Limited [2011] NSWSC 1378, Supreme Court of New South Wales, Barrett J, 16 November 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1378.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1378.html%22%20%5Ct%20%22_new) **(a)  Summary** Mrs Rahme ("applicant") filed an interlocutory process in proceedings relating to Bevillesta Pty Limited ("Bevillesta") pursuant to the [Supreme Court (Corporations) Rules 1999 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=19658" \t "_default) ("Corporations Rules"), by which she sought to appeal against the rejection of two proofs of debt she had submitted.  The interlocutory process was filed in the same proceedings which had been brought by the then voluntary administrators of Bevillesta.  In those proceedings, orders and directions had been made by Bergin J concerning the procedures by which the then voluntary administrators were permitted to propose to creditors a deed of company arrangement ("DOCA") which would provide for the establishment of a creditors' trust deed. Top Ryde Funding Pty Ltd ("Funder"), the funder under the creditors' trust deed which had been executed following the orders and directions of Bergin J, argued that the applicant's interlocutory process disclosed no reasonable cause of action or was an abuse of process on the basis that it had been improperly filed pursuant to the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act").  The Funder contended that the avenue of appeal provided under the creditors' trust deed was not derived from the Act and hence an appeal by way interlocutory process under the Corporations Rules was impermissible. The Court found that, although there was force to the Funder's contentions, the defect in the applicant's application was properly characterised as an irregularity as to form which could be cured under sections 63 and 64 of the [Civil Procedure Act 2005 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=85461" \t "_default) ("CPA"). **(b) Facts** On 10 June 2011, the New South Wales Supreme Court decided an application brought by Messrs Green and Krejci, the then voluntary administrators of Bevillesta.  The voluntary administrators sought directions and orders concerning the procedures by which they might put before the creditors of Bevillesta a proposal for the adoption of a DOCA which, upon execution, would provide for the replacement of that structure with a creditors' trust.  After obtaining the relevant orders and directions, the voluntary administrators put the proposal for a DOCA and trust deed to the creditors of Bevillesta which was approved.  On 8 July 2011, the DOCA was executed which annexed a form of trust deed to be executed.  Under the DOCA and upon execution of the trust deed, Bevillesta was to be released from all claims of creditors and those creditors were to become beneficiaries under the trust deed.  The trust deed was also executed on 8 July 2011, the parties to which were Messrs Green and Krejci as trustees, Bevillesta and the Funder.  Upon execution of the trust deed:the claims of persons who were creditors of Bevillesta in respect of matters predating 16 February 2011 were, by force of the DOCA, released and barred;the persons with such claims became entitled to seek to come in as beneficiaries of the trust fund constituted by the trust deed, which trust fund was made up principally of money provided by the Funder; andthe DOCA terminated, leaving the former creditors of Bevillesta with such rights as accrued to them by virtue of the trust deed.The trust deed provided that an "Admitted Beneficiary" was a "Trust Beneficiary whose Trust Claim had been accepted fully, partially or contingently".  The trust deed provided the procedures for establishing matters to determine whether a person was an "Admitted Beneficiary" and, if so, in what quantum.  The procedures were closely analogous and drew heavily on the Act with respect to proofs of debt in a winding up of a company.   The applicant submitted two proofs of debt which were rejected in full.  The trust deed provided that a "Trust Beneficiary" (which included a person who had or claimed to have a trust claim, thereby including the applicant) had 21 days from being notified of a decision in respect of a proof of debt to file an appeal or other application in relation to the decision.  The applicant was notified of the rejection of her two proofs of debt by letter dated 15 September 2011.  On 6 October 2011, the applicant filed the interlocutory process.  The Funder filed an interlocutory process by which it claimed that:the proceedings in which the applicant had commenced her appeal had been exhausted following the orders and directions made by Bergin J on the application of the then voluntary administrators.  Those proceedings were not available to the applicant to bring an appeal against the rejection of her proofs of debt;an interlocutory process under Corporations Rules was an impermissible vehicle for advancing an appeal under the trust deed.  This was because such an application could only be used if it was required or permitted by the Act.  An appeal under the trust deed did not fit that description; andit was a fundamental misconception that the clause of the trust deed which allowed an appeal granted jurisdiction to the Supreme Court.  Rather, the most it could do was adopt the relevant provisions and regulations of the Corporations Act and Regulations and, insofar as those clauses purported to confer jurisdiction on the Court, they were inoperative.The Funder submitted that the interlocutory process was a nullity, that she should have filed a statement of claim or summons and that her failing to do so was a fatal defect.  Given the expiry of the 21 day period of appeal, it was now too late for the applicant to bring an appeal properly. **(c) Decision** The Court accepted the Funder's argument that the applicant's interlocutory process was defective as a means of appealing against the rejection of her two proofs of debt.  However, the Court did not accept that the interlocutory process was a nullity.  Rather, given that the orders that the applicant sought in the interlocutory process were intelligible and the relief claimed was of sufficient clarity, the interlocutory process was properly characterised as an irregularity pursuant to section 63 of the CPA.  Despite the interlocutory process having been improperly and inappropriately filed in the proceedings originally commenced by the then voluntary administrators, the interlocutory process itself embodied or initiated proceedings in its own right.  Under section 64 of the CPA, by which the Court may order at any stage that a document in the proceedings be amended, it was open to the Court to order that the applicant's interlocutory process be amended.  In circumstances where:the applicant's claims and the basis for those claims were clear; andthe deficiencies identified by the Funder were remediable by amendments;the case was not one in which no reasonable cause of action was disclosed nor was it an abuse of process.  As such, it was appropriate and in accordance with the dictates of justice to make an order pursuant to section 64 of the CPA for the pleadings to be amended.  The Funder's interlocutory process was dismissed accordingly.etailed Contents**5.9****D&O policy held to be information relating to an asset of the borrower** (By Jack Anstey, Blake Dawson) BOS International (Australia) Ltd v Babcock & Brown International Pty Ltd [2011] NSWSC 1382, Supreme Court of New South Wales, Rein J, 11 November 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1382.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1382.html%22%20%5Ct%20%22_new) **(a) Summary** The Supreme Court of New South Wales ordered Babcock & Brown International Pty Ltd ("Babcock") to produce copies of its directors and officers' insurance policies to BOSI International (Australia) Ltd ("BOSI"). The court found that the bundle of rights held under the D&O Policies were an asset of the insured and accordingly, copies of the D&O Policies were information relating to that asset. **(b) Facts**    BOSI managed a syndicate of financiers that lent $3 billion to Babcock.  Babcock undertook to insure its business and assets under the agreement governing the loan ("Agreement").  Clause 10.1(l) of the Agreement required Babcock to provide BOSI with any information that BOSI requested relating to "the assets, operations, accounting methods or financial position" of Babcock. Babcock held directors and officers' liability insurance policies ("Policies"). The Policies included a confidentiality provision which prevented Babcock from disclosing the existence or nature of the Policies.  BOSI subsequently requested copies of the Policies pursuant to clause 10.1(l) of the Agreement in order to assess Babcock's financial position.  BOSI claimed that it was entitled to the Policies under clause 10.1(l) because:a claim by Babcock against its directors and officers is a chose in action; andas a result, BOSI's request for a copy of the Policies was a request for information relating to a Babcock asset.Babcock argued that it was not required to provide copies of the Policies because: upon proper construction of the Agreement, BOSI's contingent rights under the Policies were not an asset until liability under the Policies was determined; andclause 10.1(l) of the Agreement had to be construed by reference to the confidentiality provision, as to require Babcock to disclose in direct breach of the Policies would amount to a commercial nonsense. **(c) Decision**   The bundle of rights obtained by Babcock under the Policies was held to be a chose in action. This constituted an asset, despite being contingent in nature.  Additionally, Rein J reasoned that a potential claim made against Babcock's directors and officers was a chose in action and an asset of Babcock for the purpose of clause 10.1(l).  It was also held that a potential claim would fall within the ambit of clause 10.1(l) because, given the liability was covered by Babcock's Policies, it would affect the financial position of Babcock. Additionally, Rein J came to the conclusion that BOSI did not have to establish that a claim against Babcock's directors and officers existed as a precondition to BOSI's right to inspect the Policies. Ordinary principles of construction led Rein J to hold that the Policies were information relating to the contingent asset. As the asset was a bundle of rights, production of the Policies was held to be the best way of producing information about the asset, as opposed to producing the asset itself.  The confidentiality clause was found to not be part of the factual matrix relevant to the construction of clause 10.1(l).  This was because the common inclusion of confidentiality clauses in directors and officers liability insurance policies was not sufficiently notorious.  Babcock was ordered to produce the documents.etailed Contents**5.10****Sufficiency of information provided in notice of meeting** (By Steven Rice and Cherissa Zhou, Freehills) Stratford Sun Limited v OM Holdings Limited; In the Matter of OM Holdings Limited (No 5) [2011] FCA 1275, Federal Court of Australia, Foster J, 10 November 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2011/1275.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/1275.html%22%20%5Ct%20%22_new)   **(a) Summary** Foster J dismissed the claims of Stratford Sun Limited ("Stratford Sun") that the Notice of Meeting circulated by OM Holdings Limited ("OMH") provided insufficient information to shareholders regarding a proposed share offer in breach of the ASX Listing Rules and the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Specifically, his Honour held that:it is sufficient for the purposes of ASX Listing Rule 7.3.4 that the Notice states the selection of allottees will be left to the discretion of the directors;a breakdown of the intended use of proceeds from the share issue is not required by ASX Listing Rule 7.3.6;the voting exclusion statement provided by OMH was not ambiguous for the purposes of ASX Listing Rule 7.3.8; andthe failure to disclose general risks and disadvantages which are obvious to shareholders did not render the notice misleading or deceptive.**(b) Facts** ASX Listing Rule 7.1 requires the approval of equity holders for the issue of equity securities of a listed body, where that issue would constitute at least 15% of the securities on issue of that body throughout the preceding 12 months.  ASX Listing Rule 7.3 contains various requirements for the meeting materials.  ASX Listing Rule 7.3.4 requires that the meeting materials for that approval state the names of the allottees of the securities to be issued (if known) or the basis upon which allottees will be selected.  ASX Listing Rule 7.3.6 requires the meeting materials to disclose "[t]he intended use of the funds raised".  ASX Listing Rule 7.3 requires a "voting exclusion statement". OMH wished to pursue a dual listing on the Hong Kong Stock Exchange ("HKSE") through a global offering of shares.  The proposed issue of up to 345,000,000 OMH shares required approval by holders of ordinary shares under ASX Listing Rule 7.1. Notice requirements under Listing Rule 7.3 were thus engaged. Stratford Sun, who held approximately 11.4% of OMH's shares, challenged the validity of certain resolutions passed at the relevant Annual General Meeting of OMH.  This challenge was on the basis that the Notice of Meeting and Explanatory Statement (together the "meeting materials") provided insufficient information to shareholders.  Stratford Sun claimed that OMH consequently breached ASX Listing Rules 7.3.4, 7.3.6, and 7.3.8 and/or 14.11 and Corporations Act 2001 (Cth) sections 793C, 1101B(1)(d) and/or 1041H(1). **(c) Decision** **(i) Allottees** In terms of ASX Listing Rule 7.3.4, Foster J held that, where the names of proposed allottees were not known at the time the meeting materials were circulated, it was sufficient to state that the future selection of allottees will be left to the discretion of the directors in consultation with the Joint Global Co-ordinators of the issue.  Foster J held there was no breach of ASX Listing Rule 7.3.4. **(ii) Intended use of net proceeds** His Honour held that nothing in the language of ASX Listing Rule 7.3.6 required OMH to provide a breakdown of the intended use of funds raised.  Foster J also rejected Stratford Sun's submission that failure to specify amounts or percentages constituted misleading and deceptive conduct under section 1041H(1) of the Corporations Act 2001 (Cth), particularly considering that the final amount raised could vary by up to $98 million and no firm and final decisions had been made as to the use of the proceeds.  Foster J held there was no breach of ASX Listing Rule 7.3.6. **(iii) Voting exclusion statement** ASX Listing Rule 7.3.8 requires the meeting materials to contain a voting exclusion statement in the form prescribed in Listing Rule 14.11.  Foster J found that the voting exclusion statement in the Notice of Meeting had faithfully followed the language used in Listing Rule 14.11.  His Honour held that the statement that OMH will disregard votes cast by "any person who may participate in the proposed issue and any person who might obtain a benefit" was not ambiguous, and therefore not misleading and deceptive, even though the identity of potential allottees and of persons who might obtain a benefit were not identified.  Foster J held there was no breach of ASX Listing Rules 7.3.8 or 14.11. **(iv) Risks and disadvantages of the proposed issue** Foster J took the view that general risks which would be obvious to any shareholder who had the skills and information of the hypothetical shareholder called upon to consider the relevant resolution need not be spelt out in the meeting materials. These risks or disadvantages include the impact on the proposal of potential involvement by a strategic investor; the impact of trading volatility and liquidity; and the impacts of dual listing on the HKSE. The failure to disclose these risks and disadvantages did not render the meeting materials misleading or deceptive.etailed Contents**5.11****Fully paid and partly paid shareholders are the same class for the purposes of a scheme meeting** (By Sashi Balaraman and Jenna Friedman, Mallesons Stephen Jaques) Re Foster's Group Limited (No 2) [2011] VSC 547, Supreme Court of Victoria, Ferguson J, 26 October 2011 (Revised on 4 November 2011)  The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/vic/VSC/2011/547.html](http://www.austlii.edu.au/au/cases/vic/VSC/2011/547.html%22%20%5Ct%20%22_new) **(a) Summary**Foster's sought orders under section 411(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for the convening of a meeting of its shareholders for the purpose of voting on a proposed scheme of arrangement.SABMiller plc ("SABMiller") proposed to acquire all of the shares in Foster's through its indirect wholly owned Australian subsidiary, SABMiller Beverage Investments (SBI) via a scheme of arrangement between Foster's and its shareholders. As part of the arrangement, Foster's also proposed an equal capital reduction ("Capital Return").  Relevantly, Foster's share capital is comprised of fully paid shares, partly paid shares and performance rights.In deciding to convene a meeting in relation to the scheme, the Court considered whether there was a sufficient "community of interest" between shareholders such that they should be treated as a single class.  In this instance, the Court held that all shareholders - partly paid and fully paid (including those who hold performance rights and those who do not) - can be treated as a single class.  This case confirms that a court will only find separate classes where the facts show it would be impossible for a particular group to consult together with a view to their common interest. **(b) Facts**Foster's and SABMiller entered into a scheme implementation deed, under which Foster's agreed to propose and implement the scheme and the Capital Return, assisted by SABMiller ("Transaction"). Fully paid shareholders would receive $5.40 for each share ($5.10 cash per share from SBI and 30 cents cash per share from Foster's under the Capital Return).  In relation to Foster's partly paid shareholders, the Capital Return of 30 cents per share would be applied to reduce the issue price of each Foster's partly paid share and they would receive amounts in the range of $1.36 per share to $2.17 per share depending on the unpaid amount of the issue price of the share. In addition, some of the performance rights (which are held by executives) would vest, with the shares provided to them being entitled to participate in the Transaction on the same basis as other ordinary shares.  There was also provision for an additional cash payment to these executives. Foster's proposed a single members' scheme with one class of shareholders comprised of partly paid shareholders and fully paid shareholders.  There was no scheme for performance rights. The Transaction also provided for adjustments if a favourable class ruling was not received from the ATO that the Capital Return was a dividend for Australian income tax purposes.  If the ruling was not obtained (or only obtained in part), there would be an adjustment to the consideration so that, in effect, shareholders would be paid the same total amount ($5.40 per share for fully paid shareholders and between $1.36 and $2.17 per share for partly paid shareholders). Foster's partly paid shares were, at the time of the decision, "out of the money" meaning their issue price exceeded Foster's share price and/or the consideration payable either under the scheme or the Transaction.**(i) Issues arising**  The main issue that arose for Ferguson J's consideration was whether the various categories of shareholders (partly paid, fully paid and fully paid who held performance rights) constituted separate "classes" for the purposes of the scheme of arrangement and should vote separately.There were differences between the partly paid shareholders, holders of performance rights and the fully paid shareholders.  The key issue was whether those differences led to the conclusion that there was not a sufficient "community of interest" between those persons such that they should be separate classes for voting at the scheme meeting.**(c) Decision** **(i) Key statements of the law**FFerguson J reiterated the long-standing test for identifying a class for the purposes of a scheme of arrangement laid down by Lord Justice Bowen in *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 at 583 (referred to with approval by Stone J in *Re Wattyl Ltd* [2010] FCA 854) requiring the term "class" to be confined to "those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest".  Ferguson J noted that, more recently, the test has been enunciated as requiring a "community of interest".  Her Honour also referred with approval to Santow J's comment in *Re NRMA Ltd* (2000) 156 FLR 349 that "[d]ivergent commercial interests extrinsic to share membership are ordinarily not a factor which should differentiate classes" (at 371).**(ii) Submissions and application of the law**Foster's submitted that there was a sufficient community of interest on the basis that:all shareholders would receive a price reflecting the value of their shares;the terms of the partly paid shares permit holders to participate in reconstructions, amalgamations, mergers and schemes of arrangement on the same basis as fully paid ordinary shareholders after appropriate adjustments had been made due to the unpaid proportion of the issue price of the partly paid shares;the valuation process undertaken by the Foster's board and the methodology adopted in respect of the partly paid shares was consistent with the terms governing the Foster's partly paid shares and took into account the value relativities of holders of Foster's fully paid shares and partly paid shares;fully paid shareholders were not receiving less per share by reason of the amounts being paid to the Foster's partly paid shareholders under the scheme; andthe availability of extra payments to performance right holders did not mean that their rights were so different that they could not consult together with other shareholders.The court accepted these arguments. The fact that each shareholder would receive an amount that may differ from others or that the scheme may be more commercially advantageous to certain shareholders does not in itself necessitate a separate class where the relativities between shareholders have been preserved. Accordingly, the Court held that there was only one class of scheme shareholders.etailed Contents**5.12****Leave to commence derivative action denied where no serious question to be tried in relation to alleged breaches of directors' duties** (By Katrina Sleiman and Grant Mason, Corrs Chambers Westgarth)  In the matter of Gladstone Pacific Nickel Limited [2011] NSWSC 1235, Supreme Court of New South Wales, Ball J, 4 November 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1235.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1235.html%22%20%5Ct%20%22_new)   **(a)  Summary** An application was brought by Robash Pty Ltd (plaintiff) for leave from the Court to bring proceedings in the name of a company, Gladstone Pacific Nickel Pty Ltd (defendant) of which the plaintiff was a member.  The basis of the application was an allegation that a former director of the defendant, Mr Clive Palmer, had breached the fiduciary duties he owed to the defendant, under sections 180-182 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and at common law.  The plaintiff claimed that those breaches had occurred because Mr Palmer had taken financial advantage, for himself and three companies owned and controlled by him ("Palmer companies"), of an opportunity which properly belonged to the defendant. In doing so, it was claimed that Mr Palmer had preferred his own interests where they conflicted with the interests of the defendant.  In circumstances where the directors of the defendant had declined to bring proceedings against Mr Palmer and the Palmer companies, the plaintiff sought leave from the court to bring proceedings pursuant to sections 236 and 237 of the Corporations Act. **(b)  Facts**    In late 2007, the defendant attempted to obtain funding for a nickel refinery project at Gladstone in Queensland. The defendant approached Mr Palmer and China Metallurgical Group Corporation ("MCC") in order to obtain funding for the construction of the nickel refinery.  In December 2007, Mr Palmer acquired approximately 50 per cent of the defendant's shares in order to provide capital for the acquisition.  On 8 December 2007, Mr Palmer was appointed to the board of the defendant.  MCC also agreed to exclusively negotiate with the defendant with a view to constructing the nickel refinery.  In November 2008, BHP Billiton Ltd ("BHPB") decided to sell all of its shares in two of its subsidiaries, QNI Metals Pty Ltd and QNI Resources Pty Ltd ("QNI entities"). The two QNI entities together owned the entity which controlled the Yabulu Nickel Refinery. This opportunity was attractive to the defendant as the Yabulu refinery had greater capabilities than the refinery which the defendant had proposed to construct.  The defendant entered in negotiations with BHPB for the Yabulu refinery.  Mr Palmer had also been approached, in his personal capacity, to see if he was interested in purchasing the QNI entities.  Mr Palmer informed a director of the defendant that he might be interested in the Yabulu refinery for himself but that he would not interfere with any bid by the defendant.  Mr Palmer offered to provide some support but declined to provide the entire finances because he "only own[ed] part of the company". The negotiations between the defendant and BHPB concluded when the defendant was unable to gain sufficient finance for the acquisition.  BHPB informed the defendant, on 26 May 2009, that its most recent offer was unacceptable and, on 28 May 2009, terminated the defendant's access to an electronic data room used for due diligence.  BHPB contacted Mr Palmer and informed him that they were still interested in receiving an offer from one of his fully owned subsidiaries.  On 2 June 2009, the board of the defendant resolved that they would seek confirmation that BHPB would no longer negotiate with them and if not, attempt to pursue a management agreement in relation to the project with Mr Palmer's subsidiaries.  Later that day BHPB confirmed that it would not negotiate with the defendant.  Mr Palmer continued to pursue a separate deal with BHPB and at some time in June 2009 resigned from the board of the defendant before making a successful acquisition of the QNI entities on 3 July 2009.  **(c)  Decision**   Section 236 of the Corporations Act allows a member to bring proceedings on behalf of a company if they are granted leave under section 237.  The dispute focussed on the requirement that there be a serious question to be tried (section 237(2)(d)) and the requirement that it be in the best interests of the company that the applicant be granted the leave sought (section 237(2)(c)). TThe Court needed to determine if there was a serious question whether Mr Palmer had breached his fiduciary duties.  Normally, Ball J said, a "fiduciary is liable to account for profit or benefit if it was obtained (1) in circumstances where there was a conflict... or (2) by reason of the fiduciary taking advantage of opportunity or knowledge which he derived in consequence of his... fiduciary position" (referring to Mason J in *Hospital Products v United States Surgical Corporation* [1984] HCA 18). However, Ball J noted that there are circumstances where a fiduciary may take advantage of an opportunity that was available to the principal without breaching the duties owed.  For example there will be no breach:where the fiduciary gains the fully informed consent of the principal;where the principal has abandoned its interest in the opportunity and therefore placed it outside the scope of the fiduciary duties owed (*Queensland Mines v Hudson* (1978) 18 ALR 1); or where there is no possible conflict between personal interest and fiduciary duty and it is plainly in the interests of the person to whom the fiduciary duty is owed that the fiduciary obtain rights or benefits (*Chan v Zacharia* (1984) 154 CLR 178). This is because "the liability of the fiduciary should not be transformed into a vehicle of unjust enrichment of the plaintiff" (*Colbeam Palmer Ltd v Stock Affiliates Ltd* [1968] HCA 50). Ball J adopted the approach of Lord Upjohn in *Queensland Mines Ltd v Hudson* where his Lordship said "In order to assess whether or not there is a real sensible possibility of conflict one must adopt the position of a reasonable person looking at the relevant facts and circumstances of the particular case".  His Honour found that in circumstances where:/p> Mr Palmer had originally been approached to consider the acquisition before he became a director of the defendant;Mr Palmer did not commence negotiating with BHPB personally until after BHPB informed the defendant that they would no longer be considered as a purchaser; the defendant was not reasonably in a position to come up with funds sufficient to purchase the QNI entities; and the defendant encouraged Mr Palmer to pursue the purchase in his own right so that they might be compensated for some of their costs, there was not a serious question to be tried that Mr Palmer breached his duties. In considering what is in the best interests of the company, Ball J stated that it is necessary to consider the prospects of success of the action, the likely costs and likely recovery if the action is successful and likely consequences if it is not.  One relevant matter in considering these issues is the nature of any indemnity the applicant has offered to the company if the action is brought and the likelihood that the company will recover under that indemnity.  It is also necessary to consider the resources the company will be required to devote to the action and the resources it has available, together with the effect that the action may have on other aspects of its business.  Finally, it is necessary to consider whether some other remedy is available to the applicant so as to make the proposed action unnecessary from its point of view. Ball J considered that it would not be in the best interests of the defendant for the proceedings to be brought because:the indemnity offered by the plaintiff was unlikely to cover the entire costs of the litigation; litigation against its major shareholder would hinder the defendant's ability to raise funds and carry out its normal business; andgiven that the defendant had been able to wait to see the outcome of the purchase, it was not clear that the defendant would recover a large amount of money from any litigation commenced. Ball J refused leave for the proceedings to be brought and dismissed the application. etailed Contents**5.13****A company can be reinstated and wound up simultaneously** (By Richard Baird, Clayton Utz) ACN 078 272 867 Pty Ltd (in liq) (formerly Advance Finances Pty Ltd) v Deputy Commissioner of Taxation [2011] HCA 46, High Court of Australia, Heydon J, 2 November 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/HCA/2011/46.html](http://www.austlii.edu.au/au/cases/cth/HCA/2011/46.html%22%20%5Ct%20%22_new)**(a)  Summary** These proceedings concerned the issue of whether the Court has power to make orders reinstating the registration of a company and, simultaneously upon reinstatement, winding up the company in insolvency. The plaintiffs submitted that a winding up order could not be made until after the company had been reinstated. Heydon J disagreed. **(b)  Facts**    These two proceedings were brought in the original jurisdiction of the High Court of Australia under subsection 75(v) of the Constitution. The plaintiffs in the first proceeding were two companies formerly known as Advance Finances Pty Limited ("Advance") and Civic Finance Pty Ltd ("Civic") respectively.  The plaintiff in the second proceeding was Gary Binetter, who was a former director of Advance and Civic.  The defendants to each proceeding were the Deputy Commissioner of Taxation and the Federal Court of Australia. The plaintiffs sought constitutional writ relief in respect of orders made by a single judge of the Federal Court, Jagot J, winding up Advance and Civic in insolvency under section 459A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act").  Section 459A provides that the Court may order that an insolvent company be wound up in insolvency on an application made under section 459P of the Corporations Act. The application to wind up Advance and Civic under section 459A was made by the Deputy Commissioner of Taxation under section 459P.  Subsection 459P(2) provides that a person who is a creditor of a company only because of a contingent or prospective debt may only bring an application to wind up the company in insolvency with the leave of the Court.  Subsection 459P(3) provides that the Court may give leave if satisfied that there is a prima facie case that the company is insolvent, but not otherwise.  Jagot J had found that the Deputy Commissioner was a contingent creditor of Advance and Civic, by reason of having issued amended notices of assessment to those companies, and that there was a prima facie case that those companies were insolvent. Jagot J had also made orders reinstating Advance and Civic under section 601AH of the Corporations Act; however, those orders were not challenged in the High Court. Subsection 601AH(2) provides that the Court may make an order that ASIC reinstate the registration of a company if an application is made to the Court by a person aggrieved by the deregistration and the Court is satisfied that it is just that the company's registration be reinstated.  Jagot J had found that the Deputy Commissioner was a person aggrieved by the deregistration of Advance and Civic and that it was just that those companies be reinstated.  Those companies had been deregistered five days after the Australian Taxation Office had given notice of its intention to audit a number of entities associated with Mr Binetter and his father. **(c) Decision**   The plaintiffs' position was that orders under section 459A winding up Advance and Civic in insolvency could not be made until after the companies had been reinstated. The plaintiffs argued that Jagot J only had jurisdiction to wind up Advance and Civic if they were in existence at the time the winding up order was made.  As those companies were not in existence at the relevant time (because they had been deregistered but had not yet been re-registered), they could not be the subject of a valid order under section 459P. The plaintiffs drew support for their argument from the definition of "company" in section 9 of the Corporations Act, meaning a company "registered under this Act". Heydon J noted that the definition of "company" as meaning a company "registered under this Act" only applies "unless the contrary intention appears". His Honour found that a contrary intention appears in section 601AH because all of the references to companies in that provision apply to companies which have been deregistered.  He observed that nothing in either section 459A or section 601AH prevents an order under section 459A being made to take effect from the time when the company is reinstated pursuant to an order made under subsection 601AH(2) The plaintiffs also relied on the repeal of subsection 574(1)(b) of the Corporations Law in 1998 in support of their contention that the Court has no power to wind up a company whose registration had been cancelled.  That subsection had provided that "nothing in this subsection affects the power of the Court to wind up a company the registration of which has been cancelled".  Heydon J reviewed the extrinsic material which accompanied the repeal of subsection 574(1)(b) and found no suggestion that Parliament had intended to remove the Court's power to order that a company's registration be reinstated at some future date and, upon reinstatement, that the company be wound up in insolvency. His Honour also rejected a submission that subsection 601AH(5) of the Corporations Act precluded the Court from bringing Advance and Civic back into existence and simultaneously placing them into liquidation, being a form of existence different to the form in which they had last existed.  His Honour observed that subsection 601AH(5) states that, if a company is reinstated, it is taken to have continued in existence as if it had not been deregistered.  It does not state that a company can only come back into existence in the same form as it was on deregistration. Finally, the plaintiffs submitted that the winding up orders under section 459A should not have been made unless Advance and Civic had been given an opportunity to be heard.  Heydon J gave three reasons for rejecting that contention.  First, his Honour noted that the companies did not exist at the time of the hearing, notwithstanding the deemed continuance of their existence provided by subsection 601AH(5).  Second, he found that there was no unfairness as a matter of substance because Mr Binetter had participated fully in the hearing before Jagot J in support of the companies' possible interests.  Third, he found that the grant of the relief sought in the circumstances would be futile. Accordingly, in the result, Heydon J dismissed each proceeding.etailed Contents**5.14****Balancing the interests of owners and lessors with secured creditors during an administration**  (By Steven Grant, Minter Ellison) In the matter of Colorado Group Ltd (administrators appointed) (receivers and managers appointed) [2011] VSC 552, Supreme Court of Victoria, Gardiner AsJ, 28 October 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2011/552.html](http://www.austlii.edu.au/au/cases/vic/VSC/2011/552.html%22%20%5Ct%20%22_new) **(a)  Summary** These proceedings provide useful guidance as to the balancing exercise involved in weighing up the interests of owners and lessors of property whose proprietary rights are substantially qualified by the operation of section 440C of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") during the administration of a company, and the object of endeavouring to preserve the business of a company in administration as a going concern.  Section 440C provides that during the administration of a company, the owner or lessor of property that is used or occupied by, or is in the possession of, the company cannot take possession of the property or otherwise recover it, except: (a) with the administrator's written consent; or (b) with the leave of the Court. **(b) Facts**   On 30 March 2011, the defendant, Colorado group Limited ("Colorado") together with nine associated companies was placed in administration pursuant to Part 5.3A of the Act.  On 13 April 2011, receivers and managers were appointed to six operating "active" companies in the group, including Colorado.  Ventana Pty Ltd ("Ventana") was a member of the Westfield Group and is the owner and landlord of the shopping centre known as Westfield Southland.  On 10 June 2011, Ventana made application by originating process for leave of the Court pursuant to section 440C of the Act to enforce its right to possession of a property which it had leased to Colorado at Shop 2219 at Westfield Southland. PT Limited ("PT") was also a member of the Westfield Group and is the owner and landlord of a shopping centre known as Westfield Carousel in Cannington, Western Australia.   On 27 June 2011, PT made a separate application by originating process for leave pursuant to section 440C of the Act to enforce its right to take possession of Shop 1025 at Westfield Carousel Shopping Centre.  Ventana and PT contended that there were five reasons why the Court in the exercise of its discretion should grant them leave to regain possession of the respective premises:A second creditors' meeting was some time off and by operation of section 440C the moratorium prevented the plaintiffs from exercising their proprietary rights.  The plaintiffs argued that their proprietary rights should not be so affected, particularly in circumstances where there was evidence of significant financial loss occasioned by Colorado's continued occupation of the premises. Second, both leases had expired and Colorado cannot offer any potential purchaser a lease of either premises as part of any proposal.  Colorado, through its receivers and administrators, had no right to remain in possession of the property once the statutory moratorium imposed by section 440C concluded.  Therefore, there was no advantage in continuing to trade from the stores.  If the group as a whole was restructured and entered into a deed of company arrangement, the plaintiffs would not be bound by the deed unless they consented to it and the two stores subject to these applications would not form any part of the business and undertaking of Colorado.  The only means by which Colorado could remain in occupation would be, if having executed a deed of company arrangement, its deed administrator successfully applied to prevent the plaintiffs from regaining possession of the premises by obtaining an order under section 444F(4).  The plaintiffs argued that preventing the plaintiffs from exercising their right of possession for such a lengthy period of time was inconsistent with Part 5.3A as it unjustly imposed tenants on them which they did not want. Third, the plaintiffs argued that they suffered ongoing financial loss because of the refusal to deliver up possession of the premises.  For example, at the Southland site, the new lessee, Blue Illusion, had to be offered a temporary site and as a result of this Ventana was losing $17,000 rent per month.  In addition, Ventana had to contribute costs of approximately $50,000 towards the fit out and conversion of the temporary site for use by Blue Illusion. Fourth, the plaintiffs argued that the grant of leave by the Court would not affect the likelihood of a successful sale or restructure of Colorado.  The plaintiffs argued that the assertion that the closure of the two stores which would result from the grant of the leave in this case would jeopardise the sale of the business or a restructure of it, was not developed beyond assertion and was not made out by the evidence. Fifth, the plaintiffs argued that there had been no delay in bringing the present applications.  Ventana sought to reach a commercial agreement to resolve the matter which would have enabled Colorado to continue trading at Southland, including offers of relocation and contribution to relocation costs but that offer was declined.  It was said that it was unreasonable for the receivers to reject that offer in circumstances where the lease had expired.The receivers' and administrators' submissions opposed the applications for leave.  In their submissions, the receivers contended that the stores that remained after the closures of 139 stores in June formed the "foundation stone" of the group.  The receivers further asserted that they wished to preserve the businesses and maintain control of the store network in order to implement a proposed sale or restructure and that they were concerned that the grant of leave in respect of these two stores would reduce the likelihood of a successful sale or restructure because key revenue generating stores would have to be closed.  The administrators argued that the continuation of the business as a going concern, with the prospect of a sale or restructure, was beneficial to unsecured creditors, including the employees who retained their employment, and trade creditors who continue to receive income from supplying goods.  The administrators further contended that if the remaining stores closed, employees would be made redundant and trade suppliers would lose Colorado as a customer.  The receivers and the administrators submitted that if Ventana and Westfield and other landlords moved to repossess their properties, then the entire sale process or restructure is likely to be frustrated.   Furthermore, the grant of leave to even one or two landlords may lead to other landlords making similar applications which was particularly significant given that there are approximately 36% of the Colorado Group's leases which would expire by the end of 2011.  The receivers and the administrators further submitted that the fact that the lease of the Southland premises expired on 2 April 2011 was irrelevant, as the moratorium created by section 440C applies even though there is no lease.  **(c) Decision**  Gardiner AsJ noted that consideration of the applications for leave under section 440C required a balancing exercise involving the weighing up of the interests of the plaintiffs whose proprietary rights in respect of the premises are substantially qualified by the operation of the section and the object of endeavouring to preserve the business of Colorado as a going concern.   The restraints imposed by section 440C work to enable the receivers to enhance the return to the secured creditors.  However, the unsecured creditors would not benefit from those restraints, save that in the case of the two stores the subject of these proceedings, nine employees will continue to be retained and suppliers to the two stores will benefit by the continuance of trade.  In this respect it was conceded by the receivers and the administrators that the unsecured creditors would not receive a dividend as there would be no surplus after the secured creditors have been paid. Taking this into account, Gardiner AsJ found that the plaintiffs should be granted leave to take possession of the respective premises.  In making this decision, Gardiner AsJ did not consider that the grant of leave would materially impact the administration or that it had been established that the viability of the business as a going concern or a restructure of the companies would be affected by the grant of leave.  Furthermore, Gardiner AsJ considered the "flood gates" argument put forward by the receivers and the administrators as having little merit as these were the only applications for leave at the date of the hearing of this matter, despite the fact that the administration has been in progress for over six months, and each application by any owner or lessor of property would be determined on its own merits.etailed Contents |

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