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We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 131 242. | |  | |      |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%231) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1** **CAMAC releases discussion paper on the AGM and shareholder engagement**  On 14 September 2012, the Corporations and Markets Advisory Committee (CAMAC) released a discussion paper titled 'The AGM and shareholder engagement'.  This paper responds to a request from the Government for advice on the role of the annual general meeting. CAMAC considers this issue in the broader context of shareholder engagement and how the conduct of the AGM may be assisted by technological developments and opportunities.  Key matters raised in the discussion paper include:  **(a)   Shareholder engagement**   * Whether there should be more formalised guidance on how the members of a company's board engage with shareholders. * Whether the equivalent of the UK Stewardship Code should be introduced into Australia. This Code sets out principles and guidance on how various institutional shareholders should discharge their position as significant equity owners. * Whether the manner in which institutional shareholders utilise the services of proxy advisers requires enhanced guidance or regulation. * Whether the right of 100 members to call an extraordinary general meeting of shareholders should be abolished.   **(b)   Annual reports**   * Whether annual reports contain unnecessary 'clutter'. * Whether annual reports should more clearly distinguish between a high level strategic report (which identifies the strategy and future direction of the company as well as the challenges facing it) and other supporting information. * What technological developments might be employed to assist shareholders to glean useful information from the annual report.   **(c)    Conducting the AGM**   * Whether there is unnecessary timing or other barriers to shareholders placing matters on the AGM agenda or having supporting statements circulated. * Whether shareholders should have greater scope for passing non-binding resolutions. * Whether a chair should have the power to impose any time, or other, limits on individual shareholders speaking at the AGM. * Whether the circulation of pre-completed proxy forms should be permitted. * Whether third parties should be able to collect and send to the company completed proxy forms. * Whether there a problem with 'lost' or 'miscounted' votes. * Whether the renting of shares should be regulated. * Who should be entitled to information about proxy and direct voting trends before the AGM. * Whether there should be legislative backing for online voting during the AGM. * Whether voting by show of hands should be abolished in some or all instances. * What procedure might best ensure the independent verification of votes cast at an AGM. * Whether any steps are necessary to promote greater consistency in the disclosure to the market of voting results. * How often directors should be obliged to stand for re-election. * Whether there should be further legislative controls over the voting procedure for electing directors.   **(d)   Future of the AGM**   * Whether the functions of the AGM should be changed in some manner for some or all public companies. * Whether the obligation to hold an AGM should be abolished. * Whether 'online-only' or 'virtual' AGMs should be permitted.   Submissions on any matter in the discussion paper are invited by Friday 21 December 2012.  The discussion paper is available on the [CAMAC website](http://www.camac.gov.au/camac/camac.nsf/0/0B9CE078B4189EACCA256B6C007F9FCE?opendocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.2** **Government releases paper on APRA's resolution powers**  On 12 September 2012, the Government released for public public consultation a paper titled 'Strengthening APRA's Crisis Management Powers', which seeks comments on a range of options to enhance Australia's financial sector, particularly prudential regulation.  The options canvassed in the paper aim to:   * strengthen the Australian Prudential Regulation Authority's (APRA's) crisis management powers in relation to authorised deposit-taking institutions (ADIs), superannuation entities and general and life insurers, including:  ·   the ability to appoint statutory managers to a failing institution;  ·   extending APRA's capacity in relation to foreign entities;  ·   providing APRA with the ability to direct failing institutions in relation to disclosure requirements;  ·   ensuring the Financial Claims Scheme operates more smoothly to provide greater certainty; and  ·   providing APRA with directions power in superannuation to take pre-emptive action to address prudential concerns including the removal of an individual trustee, director or officer. * simplify APRA's regulatory powers across the various Acts it administers in the banking, insurance, and superannuation sectors, given that many firms operate across sectors; and * make a series of minor and technical amendments to enhance the effectiveness of legislation administered by APRA.   The options canvassed in the consultation paper bring the regulatory framework more closely into line with the G20-endorsed new international standard for crisis management arrangements: the Financial Stability Board (FSB) Key Attributes of Effective Resolution Regimes.  The closing date for submissions is 14 December 2012.  The consultation paper is available on the [Treasury website](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/APRA" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.3** **APRA and RBA release joint paper on macroprudential analysis and policy in the Australian financial stability framework**   On 11 September 2012, the Australian Prudential Regulation Authority (APRA) and the Reserve Bank of Australia (RBA) released a joint paper titled 'Macroprudential Analysis and Policy in the Australian Financial Stability Framework'.   Australia's financial stability policy framework involves clear mandates for financial stability distributed across several agencies, with the Council of Financial Regulators (CFR) playing a central coordinating role. The prudential elements of that framework rest with APRA, with analytical support from the RBA. The paper - originally prepared as background for the IMF FSAP team in early 2012 - sets out the tools and practices of these two agencies that are designed to support financial stability from a system-wide perspective. The Australian authorities view macroprudential policy as subsumed within the broader and more comprehensive financial stability policy framework.  In broad terms, APRA has responsibility for the setting of prudential standards and instruments and for supervision of institutions. The instruments available to the RBA in pursuing its financial stability objective include the use of its role as liquidity provider to the financial system and its regulatory powers in respect of the payments system, including oversight of clearing and settlement systems. The RBA also recognizes that the setting of macroeconomic policies needs to be fully informed by financial stability developments, and financial stability assessments are regularly incorporated into the RBA reporting and decision-making processes (normally half-yearly).  The paper is available on the [APRA website](http://www.apra.gov.au/AboutAPRA/Publications/Documents/2012-09-map-aus-fsf.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.4** **Latest European data on board diversity**   On 7 September 2012, Egon Zehinder International released the 2012 edition of its European Board Diversity Analysis Report. The report notes that women represent one third of new board members at Europe's largest companies.   **(a) Accelerating trend in overall representation of women on European boards**    The share of all board seats held by women has risen by 28% in the past two years to 15.6% (from 12.2% in 2010). This is equivalent to almost half of the total progress from the baseline set in Egon Zehnder's first analysis in 2004, when only 8.0% of board seats were held by women.   There has been a rapid increase in the numbers of European companies with at least one woman on the board, rising to 86% by 2012: a 9% increase since 2010 (79%); and a 41% increase since 2004 when only 61% of all boards included a woman. If this trend continues at the current rate, women will be represented on the boards of all of Europe's largest companies within the next two to four years and account for 25% of all board roles within the next five years.   The overall figures mask significant regional disparity. In five Scandinavian countries there is at least one female director on every board, and the UK is close with 95% of leading companies now having at least one woman. However Greece, Italy and the Netherlands still lag behind, with almost a third of boards still wholly male, rising to half in Portugal and Luxembourg.   **(b) No progress in executive and Chair roles for women**   The Egon Zehnder analysis flags concern that women are particularly under-represented in executive roles, which are often a stepping stone to non-executive board positions. Only one in twenty executive board positions (as opposed to one in six of all board positions) are today held by a woman - and there has been no progress since 2010.   The analysis indicates that despite women's increasing representation on boards as a whole, the top board leadership roles remain out of reach. Just seven of 415 Chair roles across the companies surveyed were held by a woman, again with no progress since 2010. A key reason for the scarcity of women Chairs is that few women have sufficiently long and broad board experience. The analysis shows that women board members are on average almost five years younger than their male counterparts.   **(c) Rise in non-national board members**   The analysis shows that boards are simultaneously becoming more international, with a steep increase in non-national board members since 2010. In 2012, 31.5% of Europe's top companies' board members were non-nationals, against 27.8% in 2010. International appointments in the largest companies in Europe accounted for 33% of all appointments in the past 12 months (compared with 37% of women appointments).   The full report, including an interactive chart with European and country-specific data, is available on the [Egon Zehnder website](http://www.egonzehnder.com/global/clientservice/diversityandinclusion/thoughtleadership/publication/id/17500785" \t "_new).   **(d) Latest UK data on gender diversity**   On 4 September 2012, UK's Professional Boards Forum released updated figures regarding the gender diversity of FTSE100 and FTSE250 company boards.    The report notes that 44% of FTSE100 board appointments since 1 March 2012 have been women. 17.3% of FTSE100 directors are women (the figure for FTSE250 companies is lower at 11.3%). It is also reported that eight FTSE100 companies have no female directors.   The full report is available on the [Professional Boards Forum website](http://www.boardsforum.co.uk/boardwatch.html" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.5** **EC consultation on benchmarks and market indices following LIBOR manipulation**  On 5 September 2012, following the recent manipulation of LIBOR, the European Commission launched a consultation inviting stakeholders to comment on possible new rules for the production and use of indices serving as benchmarks in financial and other contracts.  The consultation is wide-ranging: it covers all benchmarks, not just interest rate benchmarks such as LIBOR but also commodities and real estate price indices for example and it seeks to identify possible shortcomings at every stage in the production and use of benchmarks.  The consultation paper comprises 5 chapters covering:   * the scope, process and nature of indices and benchmarks * governance and transparency in the use of actual transaction data * the purpose and use of benchmarks * the provision of benchmarks by private or public bodies, and * the impact of potential regulation, including transition, continuity and international uses issues.   Further information is available on the [EU website](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/939&format=HTML&aged=0&language=en&guiLanguage=en" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.6** **FSA releases guidance for consultation on risks to financial services customers from sales staff incentives**    On 5 September 2012, the UK's Financial Services Authority announced that it had begun work to address the risks of mis-selling arising from the incentives received by sales staff working in retail financial services. This work will be continued by the new Financial Conduct Authority.    In a review of 22 authorised firms (including banks, building societies, insurance companies and investment firms), the FSA found that most firms did not have effective systems and controls in place to manage adequately the risks of mis-selling arising from sales staff incentives. In 20 of the 22 firms reviewed, the FSA found that the incentives schemes were structured in ways that increased the risk of mis-selling.    In order to assist firms to identify and manage the risks arising from their incentive schemes, guidance has been published by the FSA for consultation. Where the potential for mis-selling from particular incentives cannot be mitigated, the guidance makes clear that those incentives should not be provided to staff.   The Guidance Consultation is available on the [FSA website](http://www.fsa.gov.uk/static/pubs/guidance/gc12-11.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.7** **BIS working paper on computer trading in financial markets**   On 31 August 2012, the UK's Department for Business Innovation & Skills (BIS) released new research evaluating the economic costs and benefits of EU legislative proposals on computer trading in financial markets.   In November 2010, BIS launched a project to consider the future of computer trading in financial markets. As part of this project, BIS has released a working paper, titled 'Economic impact assessments on MiFID II policy measures related to computer trading in financial markets'.    The paper presents interim findings on the future of computer trading in financial markets. It focuses on the costs, risks and benefits of six possible regulatory measures which are currently being considered within the European Union's Markets in Financial Instruments Directive 2 (MiFID II).  The policy measures assessed in the research include:   * circuit breakers; * tick sizes; * market-maker obligations; * minimum order-to-execution ratios; * minimum resting times and notification of algorithms.   Computer-based financial trading has grown substantially in recent years. It now accounts for around 70% of equity trading in the US, and 30% in Europe.   Such trading has attracted controversy and has been implicated by some, as a contributory factor in the so-called 6 May 2010 'Flash Crash' in which one trillion dollars temporarily evaporated from US markets.   The working paper is available on the [BIS website](http://www.bis.gov.uk/assets/foresight/docs/computer-trading/12-1088-economic-impact-mifid-2-measures-computer-trading" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.8** **NZ FMA's first year - oversight of market conduct report**   On 30 August 2012, New Zealand's Financial Markets Authority (FMA) published its first report on the key issues and themes to emerge from market oversight activities in the first 12 months since it was established. Details are contained in FMA's inaugural 'Inquiries, Investigations and Enforcement Report', which is being published ahead of its Annual Report.  FMA also revealed it received over 4000 complaints and enquires about the financial markets during the 2011- 2012 financial year. The majority of those complaints related to people or entities providing financial advice, the new financial advisers' regime, securities issuers and failed finance companies.  The report also highlights FMA's engagement with and oversight of the market on a wide range of matters including:   * Failed finance company investigations and litigation * Asset preservation orders * Perimeter surveillance * Financial advisers * Offer of securities without prospectus * Unsolicited offers * Secondary markets issues * Third party claims.   The Report is available on the [FMA website](http://www.fma.govt.nz/media/1025995/inquiries_investigations_and_enforcement_report_2012.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.9** **SEC releases financial literacy study**  On 30 August 2012, the US Securities and Exchange Commission released a staff study with findings on what investors want to know about financial professionals and investment products and services, and when and how investors want to receive such information.  Mandated by the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, the study draws on numerous sources, including online survey research, focus group research, public comments to the SEC, and a Library of Congress review of studies of financial literacy among US retail investors.  The study identifies investor perceptions and preferences regarding a variety of investment disclosures. The study shows that investors prefer to receive investment disclosures before investing, rather than after, as occurs with many investment products purchased today. The study identifies information that investors find useful and relevant in helping them make informed investment decisions. This includes information about fees, investment objectives, performance, strategy, and risks of an investment product, as well as the professional background, disciplinary history, and conflicts of interest of a financial professional. Investors also favour investment disclosures presented in a visual format, using bullets, charts, and graphs.  The study is available on the [SEC website](http://www.sec.gov/news/press/2012/2012-172.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.10** **CFTC issues final rules establishing swap requirements**  On 27 August 2012, the US Commodity Futures Trading Commission (CFTC) approved final rules to improve the risk management procedures of swap dealers and major swap participants.  The Dodd-Frank Wall Street Reform and Consumer Protection Act directed the Commission to adopt rules on the timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps, as well as the reconciliation and compression of swap portfolios. These rules fulfil this congressional direction.  Proper documentation of swaps is critical to reducing risk in the bilaterally-traded swaps market and has been the focus of significant domestic and international attention in recent years. Confirmation, portfolio reconciliation, and portfolio compression have been recognized as essential post-trade processing mechanisms for reducing risk and improving operational efficiency. These rules will also help highlight risk management concerns for swap dealer and major swap participant senior management and regulators at an earlier stage.  Further information is available on the [CFTC website](http://www.cftc.gov/PressRoom/PressReleases/pr6336-12" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.11** **Financial Services Council releases super governance standard for consultation**  On 27 August 2012, the Financial Services Council released for consultation its draft standard for governance of superannuation funds.  The draft Standard builds on APRA's prudential standards. The five key requirements of the standard are:   * majority of independent directors; * independent chairperson; * preventing multiple, competing directorships; * disclosure of an environmental and social governance risk management policy; and * proxy voting record disclosure.   None of the above proposals are required under APRA's proposed prudential standards for superannuation.  The requirement to disclose remuneration proposed by the FSC in March has been superseded by the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012, which will mandate the disclosure of remuneration paid to superannuation trustees and management.  The FSC is consulting with members and stakeholders such as the ASX Corporate Governance Council on the Standard.  The draft standard is available on the [FSC website](http://www.fsc.org.au/downloads/uploaded/23%20%2008%2012%20%20%20DRAFT%20FSC%20Superannuation%20Governance%20Standard_6e42.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.12** **IOSCO consults on the technological challenges to market surveillance**   On 22 August 2012, the International Organization of Securities Commissions (IOSCO) released a Consultation Report titled 'Technological Challenges to Effective Market Surveillance: Issues and Regulatory Tools'. The Report seeks public comments on a series of proposed high-level recommendations aimed at helping market authorities improve market surveillance.   This Consultation Report is based upon the results of an IOSCO survey, as well as presentations made to the Organization by operators of Trading Venues, Market Authorities and industry representatives. It sets forth a number of questions for consultation and outlines proposed recommendations to assist Market Authorities in addressing the challenges posed by the latest technological developments to effective market surveillance, particularly with respect to:   * improving surveillance capabilities on a cross-market and cross-asset basis; and * making more useful to Market Authorities the data collected for surveillance purposes.   Securities markets have experienced a dynamic transformation in recent years. Rapid technological advances and regulatory developments have produced fundamental changes in the structure of securities markets, the types of market participants, the trading strategies employed, the increase in the speed of trading and the array of products traded.    Trading of securities has become more dispersed among exchanges and various other trading venues. The markets have become even more competitive, with exchanges and other trading venues aggressively competing for order flow by offering innovative order types, new data products and other services, and through fees charged or rebates provided by the markets.   Risks posed to markets by illegal or otherwise inappropriate conduct can be substantially increased by automation, as market participants have the ability to trade numerous products and enormous volume in fractions of a second. In addition, the speed at which trading occurs impacts the ability to monitor effectively markets in the traditional sense. Moreover, because trading has become more dispersed across multiple trading centers, it has become more difficult to monitor and trace orders and transactions.   These developments pose challenges to regulators in conducting market analysis and surveillance, and in reconstructing important trading events. Current surveillance techniques, including the collection, storage and accessibility of data may be insufficient to capture in a timely manner all of the information necessary to monitor efficiently and effectively trading activity that occurs in the current highly automated and dispersed markets. The absence in many jurisdictions and within geographical zones of certain market surveillance tools (eg an audit trail system) seems to be one of the more significant problems facing the markets in light of these technological developments.   The Consultation Report examines current regulatory market surveillance and audit trail capabilities of securities markets and considers the feasibility of both existing and additional regulatory tools to deal with the challenges arising for market surveillance in contemporary markets.    The Report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD389.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.13** **FSA proposes to ban the promotion of UCIS and similar products to ordinary retail investors**   On 22 August 2012, the UK Financial Services Authority (FSA) released a consultation paper in which it sets out proposals to restrict the selling of unregulated collective investment schemes (UCIS) and similar products to the vast majority of ordinary retail investors in the UK.   The proposed rules mean that, in the retail market, promotions will generally be restricted to sophisticated investors and high net worth individuals for whom the products are more likely to be suitable.  Currently, UCIS can be promoted to ordinary retail investors if an adviser first assesses the product's suitability. In effect, the proposal would prevent firms from marketing UCIS to ordinary retail customers, even in the context of financial advice.  The consultation paper follows on from extensive work undertaken by the FSA, which found that only one in every four advised sales of UCIS to retail customers were suitable, taking into account the customer's needs and requirements. The FSA found that many promotions breach the restrictions and only a minority of advice is suitable.  Certain other products can carry similar risks to UCIS but are not currently subject to the same marketing restrictions and can be widely promoted in the retail market. In this consultation, the FSA proposes to introduce new rules for them to create a level playing field and improve standards of consumer protection.  The FSA is acting because of the high levels of unsuitable advice it has uncovered and the potential for customer detriment.  Examples include:   * pensioners being advised to invest all of their wealth in a single, illiquid UCIS with a view to generating income; and * a customer advised to borrow money to invest in UCIS and service the debt with withdrawals from that investment.   A number of non-mainstream pooled investments have failed completely in recent years, leading to total investment loss for customers.   The Consultation Paper is available on the [FSA website](http://www.fsa.gov.uk/static/pubs/cp/cp12-19.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.14** **Parliamentary Committee report on oversight of ASIC**    On 21 August 2012, the Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) released its report on the statutory oversight of ASIC.    The report follows the PJCCFS inquiry into various areas of ASIC's activities and determines whether ASIC is fulfilling its statutory responsibilities, with reference to section 1 of the Australian Securities and Investments Commission Act 2001 (Cth).    Matters considered by the PJCCFS in the report include:   * ASIC's 'ongoing regulatory response to the collapse of Trio Capital'; * growth of Australia's superannuation industry; * complaints handling by ASIC; * advertising standards; and * ASIC's resources.   The Report is available on the [Parliamentary Joint Committee website](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=corporations_ctte/asic/asic_2012_2_Aug/index.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.15** **SEC issues first whistleblower program award**   On 21 August 2012, the US Securities and Exchange Commission (SEC) announced its first 'whistleblower' payout from a new SEC program to reward people who provide evidence of securities fraud.  A whistleblower who helped the SEC stop a multi-million dollar fraud will receive nearly US$50,000.   The award represents 30 percent of the amount collected in an SEC enforcement action against the perpetrators of the scheme, the maximum percentage payout allowed by the whistleblower law.  The award recipient, who does not wish to be identified, provided documents and other significant information that allowed the SEC's investigation to move at an accelerated pace and prevent the fraud from ensnaring additional victims. The whistleblower's assistance led to a court ordering more than US$1 million in sanctions, of which approximately US$150,000 has been collected thus far. The court is considering whether to issue a final judgment against other defendants in the matter. Any increase in the sanctions ordered and collected will increase payments to the whistleblower.  The SEC did not approve a claim from a second individual seeking an award in this matter because the information provided did not lead to or significantly contribute to the SEC's enforcement action, as required for an award.  The 2010 Dodd-Frank Act authorized the whistleblower program to reward individuals who offer high-quality original information that leads to an SEC enforcement action in which more than US$1 million in sanctions is ordered. Awards can range from 10 percent to 30 percent of the money collected. The Dodd-Frank Act included enhanced anti-retaliation employment protections for whistleblowers and provisions to protect their identity. The law specifies that the SEC cannot disclose any information, including information the whistleblower provided to the SEC, which could reasonably be expected to directly or indirectly reveal a whistleblower's identity.  Further information is available on the [SEC website](http://www.sec.gov/news/press/2012/2012-162.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.16** **NZ Takeovers Panel recommends changes to the Takeovers Code**  On 20 August 2012, the New Zealand Takeovers Panel announced its recommended changes to the Takeovers Code. The purpose of the amendments is to improve the efficiency of the Code and improve disclosures to shareholders of Code companies.  Amongst the recommendations is one designed to improve the quality of disclosure regarding the intentions of the offeror company in respect of the target company: the Panel recommends that clause 14(1) of Schedule 1 of the Code should be amended to require the offeror company to disclose its intentions regarding material changes to the target company's business activities, assets and capital structure (including dividend policy).   The Panel's recommendations are available on the [NZ Takeovers Panel website](http://www.takeovers.govt.nz/publications/takeover-amendments-2012/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.17** **UK Treasury Committee publishes preliminary findings on LIBOR**    On 18 August 2012, the UK Treasury Select Committee published its report into LIBOR following its inquiry into the Final Notice issued by the Financial Services Authority with respect to Barclays on 27 June 2012.   The Committee has called for action in a number of areas, including: higher fines for firms that fail to co-operate with regulators, the need to examine gaps in the criminal law, and a much stronger governance framework at the Bank of England.  The Preliminary findings are available on the [UK Parliament's website](http://www.publications.parliament.uk/pa/cm201213/cmselect/cmtreasy/481/48102.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.18** **Basel Committee consults on managing risks associated with the settlement of foreign exchange transactions**   On 17 August 2012, the Basel Committee on Banking Supervision issued for consultation 'Supervisory guidance for managing risks associated with the settlement of foreign exchange transactions'.   The proposals update the Committee's 'Supervisory guidance for managing settlement risk in foreign exchange transactions'. Since publication of that guidance in 2000, the foreign exchange market has made significant strides in reducing the risks associated with the settlement of FX transactions. However, substantial FX settlement-related risks remain, not least because of the rapid growth in FX trading.  The proposed new guidance aims to ensure that such risks are effectively managed. It provides more comprehensive and detailed direction on governance arrangements and the management of principal risk, replacement cost risk and all other FX settlement-related risks. In addition, the guidance promotes the use of payment-versus-payment arrangements, where practicable, to reduce principal risk.  The guidance is organised into seven 'guidelines' that address governance, principal risk, replacement cost risk, liquidity risk, operational risk, legal risk and capital for FX transactions.  The consultative paper is available on the [BIS website](http://www.bis.org/publ/bcbs229.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.19** **Assessing the possible sources of systemic risk from hedge funds**   In August 2012, the UK's Financial Services Authority (FSA) released its report titled 'Assessing the possible sources of systemic risk from hedge funds'. The report sets out the results of the FSA's latest Hedge Fund Survey (HFS) conducted in March 2012 and the Hedge Fund as Counterparty Survey (HFACS) conducted in April 2012.   The key findings of the March 2012 HFS and April 2012 HFACS include:   * Aggregate assets under management increased in the survey period, predominantly due to positive returns, but also helped by generally positive net subscriptions. Aggregate assets below their high-water mark (HWM) have remained stable and low. * The footprint of surveyed hedge funds is modest in most markets when measured by the value of their exposures and by turnover. Possible exceptions are the convertible bond, interest rate derivative and commodity derivative markets. The HFS only provides a partial view of global hedge fund exposures and so, globally, hedge funds will have a bigger footprint. * Leverage remains largely unchanged and modest for most funds. Fixed-income arbitrage strategies report the highest leverage, both in terms of gross exposures relative to Net Asset Value (NAV) and total borrowings relative to NAV. Most cash (or on-balance sheet) leverage comes from repo borrowing, which is continually rolled; however, borrowing from this source has declined in aggregate in the latest survey. Understanding the source of hedge fund borrowings is important in assessing systemic risk through 'market' and 'credit' channels. The latest survey results suggest that unencumbered cash as a multiple of total borrowing has declined in aggregate. * In aggregate, surveyed hedge funds report that they are able to liquidate their assets in a shorter timeframe than the period after which their liabilities would fall due. Almost all funds state that they can suspend investor redemptions and/or create side pockets, and over half report that their investors have side letters. Nonetheless, there is still a risk of a sudden withdrawal of funding during stressed market periods (such as a withdrawal of repo financing), resulting in forced asset sales. * Counterparty exposures of surveyed hedge funds remain fairly concentrated among five banks. From the banks' perspective, they have tightened financing terms for hedge funds post-crisis, increasing their resilience to hedge fund defaults. * Measures of portfolio concentration, including qualifying funds' top ten positions as a percentage of gross market value (GMV) and the number of open positions, has remained largely unchanged for most surveyed funds.   The report is available on the [FSA website](http://www.fsa.gov.uk/static/pubs/other/hedge-fund-report-aug2012.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.20** **Recent studies on mergers and acquisitions in Australia**   Two Australian law firms have recently published studies of the state of mergers and acquisitions in Australia.  **(a) 'The Real Deal 2012 Half-Year Update'**  According to Clayton Utz's report, the energy and resources sector and foreign bidders continue to dominate public M&A activity, which is down almost 30% this half compared to the same period in 2011. Only 22 deals with a transaction value over $50 million were announced in the first six months of this year, compared to 31 deals in the first half of 2011.  Clayton Utz state that private equity had been active in the public M&A arena, with a number of private equity 'bear hug' approaches to boards in 2012. Although these approaches had resulted in only one formally announced deal to date, Clayton Utz expect that target boards would show a greater willingness to engage with private equity in the second half of the year.  Foreign bidders also continue to dominate public M&A activity, accounting for 73% of all deals in the first half of 2012 compared with 64 in 2011. Chinese bidders have overtaken the US as the most active in the Australian market, with Canadian bidders also increasingly prominent. The energy and resources sector accounted for almost half the foreign deals this year, although foreign bidders have also been active in the capital goods, biotechnology and real estate sectors.  2012 has also been marked by increased regulatory focus on fundamental takeover law principles, including the creep rule (under which shareholders can increase their shareholdings above 19% by 3% every 6 months), continuous disclosure obligations, the proper response of boards to bear hug approaches, and truth in takeovers. Responses to takeover approaches appears to be on ASIC's hit-list of takeover reforms it has said it will be discussing with Treasury.  'The Real Deal' is based on an in-depth analysis by Clayton Utz's M&A team of all Australian public company deals valued at over $50 million. It provides insight and analysis into public M&A deal structures, tactics adopted by targets and acquirers, and developments shaping the future of the Australian M&A market.  The report is available on the [Clayton Utz website](http://www.claytonutz.com/docs/THE_REAL_DEAL_Half_Year_Update_July%202012.pdf" \t "_new).   **(b) 'Public Mergers & Acquisitions Report'**   The fourth annual 'Freehills Public Mergers & Acquisitions Report' draws on 5 years of statistics and analysis, to provide insight into how market conditions have evolved over the past 5 years and the future outlook for local M&A.   According to the report, it has been a period of relative stability in Australia's M&A market over the last financial year despite global turbulence, with a notable decline in deal volume being offset by strong deal value. However, despite improved success rates hitting a 4 year high of 81%, the lack of competition is concerning for shareholders.    According to Freehills, despite activity returning to almost pre-GFC levels in FY2011, there were only 83 deals announced in the last financial year, which is the lowest number recorded since the FY 2009 GFC. Yet while deal volume remained low, overall deal value remained fairly strong. The value of deals announced in FY2012 was A$63 billion, which was a decrease of only A$16 billion in funds committed by bidders. Overall success rates for deals increased to 81% for general market transactions and 90% for transactions exceeding A$1 billion.  Additional findings of the Report include:   * Chinese bidders are becoming far more adept at successfully executing Australian public M&A, with success rates for Chinese bidders reaching 83% in FY2012 (as opposed to 57% last year). * A number of relatively high-profile transactions were the subject of significant delays (and in some cases brought to an unhappy end) due to lengthy deliberations by offshore regulatory bodies in relation to necessary conditions. * M&A activity in the energy and resource sector continues to be a strong component of overall Australian activity - but there are now heartening signs for the broader economy that Australia is no longer as dependent on energy and resources as it was in the GFC. * Ongoing consolidation in the coal sector has accounted for 10% of the number of total deals in FY2012 and a total of $20 billion of overall deal value. * In cash deals, 49% were either partly or fully funded by debt, a surprising finding given the levels of uncertainty regarding the availability of debt. * Private equity activity stepped up for the fourth year running, with a dramatic increase in certain sectors including industrials, utilities and materials, a trend that is expected to continue.   Contact information in relation to the report is available on the [Freehills website](http://www.freehills.com.au/8415.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.21** **US Business Roundtable releases updated Principles for Corporate Governance**   The Business Roundtable (BRT), an association of chief executive officers from US companies, released a 2012 revised edition of its 'Principles of Corporate Governance'. These were last updated in 2010.  BRT's principles include updates in five key areas:  **(a) Independent leadership**  BRT endorses the appointment of a lead director where a board combines the positions of CEO and chairman or has a chairman who is not independent. BRT also recommends that the board evaluate its leadership structure annually.  **(b) Whistleblower provisions and compliance oversight**  BRT recommends that companies establish procedures for handling reports of all types of misconduct, including violations of law and the company's code of conduct. Company audit committees should meet at least annually with the person who has day-to-day responsibility for a company's compliance program.  **(c) Risk oversight**  BRT highlights the important role of board of directors in risk oversight, emphasizing the link between strategy and risk and the need for a risk oversight structure that enables a board to understand the company's major risks, how they relate to the company's strategy, and what the company is doing to manage these risks.  **(d) Shareholder communication and engagement**  BRT emphasizes the importance of communication with shareholders and considering the views of shareholders. BRT also notes that, although companies should consider shareholder views, the board has a duty to act in the best interests of the company and all its shareholders.  **(e) Political activities**  BRT recommends that, at companies engaged in political activities, the board of directors should have oversight responsibility and consider whether to adopt a policy on disclosure of these activities.  The updated principles are available on the [BRT website](http://businessroundtable.org/studies-and-reports/business-roundtable-principles-of-corporate-governance-2012/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1)  **1.22** **Update on Centre for Corporate Law and Securities Regulation publications and research**    In August 2012, the Centre for Corporate Law and Securities Regulation (CCLSR) at the University of Melbourne published an update of its latest publications, research and seminars.   The update is available on the [CCLSR website](http://cclsr.law.unimelb.edu.au/files/CCLSR_publications_research2011-2012.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1** **Review of risk management in the funds management sector**   On 10 September 2012, ASIC released the findings of its review into the 'Adequacy of risk management systems of responsible entities' (Report 298).   ASIC has emphasised the importance of responsible entities in the funds management sector maintaining adequate risk management systems. ASIC has also indicated its intention to develop good practice guidance on risk management systems for responsible entities in 2013.  In the responsible entities reviewed, ASIC found that the sophistication of risk management systems varied greatly. While they generally had adequate risk management systems adapted to the nature, scale and complexity of their financial services businesses, ASIC observed that improvements could be made, especially for those responsible entities that are not part of an Australian Prudential Regulation Authority (APRA) regulated group.   ASIC's review also identified new challenges and risks in the growing managed funds sector, as it consolidates and integrates. In addition, ASIC found that smaller responsible entities tend to face:   * key person risk where the loss of one or two people, either temporarily or permanently, may produce a major impact on the operations of the responsible entity and the performance of its funds; and * the risk of overreliance on external compliance and risk management consultants without necessarily having the skills and resources to independently assess the quality of their services.   ASIC expects to consult on developing good practice guidance on risk management systems for responsible entities and may consider proposals such as:   * regular reviews of risk management systems and, in any event, reviews of these systems when market shocks occur; * forward looking analysis of resource adequacy; * succession planning and independent monitoring to address key person risk and the risk of overreliance on external compliance and risk management consultants; and * quantitative or actuarial analysis for stress testing risks on an 'if not, why not?' basis.   Report 298 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep298" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h2)  **2.2** **Annual overview of corporate insolvencies 2011-2012**   On 7 September 2012, ASIC released its annual overview of corporate insolvencies based on statutory reports lodged by external administrators for the 2011-2012 financial year.  'Insolvency statistics: External administrators' reports 1 July 2011-30 June 2012' (Report 297) provides insight into the 10,074 reports received over the last year and is part of ASIC's commitment to providing the public with more information about the nature of corporate insolvencies in Australia.  **(a) Profile of insolvent companies**  The report includes comprehensive information about the profile of companies placed into external administration including:   * industry types * employee numbers * causes of company failure * estimated number and value of a company's unsecured creditor debts, and * estimated dividends to unsecured creditors.   The report indicates that small to medium size corporate insolvencies continued to dominate reports by external administrators to ASIC. Of note, 85% had assets of $100,000 or less, 78.5% had less than 20 employees and 42% had liabilities of $250,000 (or less).  ASIC states that 98% of creditors in this group received between 0-11 cents in the dollar, reflecting the asset/liability profile of small to medium size corporate insolvencies.  **(b) Reported misconduct**  The report also details how often 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 ASIC's enquiry.  In assessing which matters to pursue further, ASIC considers, among other things:   * the nature of the possible misconduct reported * amount of the liabilities * deficiency suffered * availability of evidence, and * the advice of the external administrator that the reported possible misconduct warrants further investigation.   ASIC also asked external administrators to prepare 738 supplementary reports where company officer misconduct had been alleged. This accounted for 10.2% of the 7,253 reports that were lodged (and alleged misconduct) in the 2011-12 financial year.   Supplementary reports are typically detailed, free-format reports, which set out the results of the external administrator's inquiries and the evidence to support any alleged offences. Generally, ASIC can determine whether to commence a formal investigation on the basis of a supplementary report. In both 2010-11 and 2011-12, after assessment, ASIC referred 33% and 29% of these cases respectively 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. This includes consideration of:   * evidence * level of harm or loss, and * cost versus regulatory benefit.   The report complements data published by ASIC each month on the [number and type of corporate insolvency appointments](http://www.asic.gov.au/asic/asic.nsf/byheadline/Insolvencies,+teminations+&+new+reg+stats+portal+page?openDocument" \t "_new).  Report 297 is ASIC's second annual report and fourth report since external administrators' reports could be lodged electronically. It is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep297" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h2)  **2.3** **Hybrids warning: Don't be dazzled, be wary of the risks**  On 27 August 2012, ASIC reiterated its advice to consumers to be aware of the risks and complexities of hybrid securities following a number of offers to have hit the market recently.  While not commenting on individual offers, ASIC warned consumers to be wary of these complex products, which can be issued as subordinated notes or convertible preference shares. ASIC noted there have been some cases where hybrids had not been paid back when investors expected because the company had a choice about when to redeem those investments.  Other risks include:   * Some hybrids have investment terms lasting several decades if they are not redeemed earlier. For example, with a 60-year term, a 40 year-old investing today would need to live to 100 to see their investment mature. * The price of hybrids can drop below what you originally paid, making it hard to get out of your investment at the price you want. * Despite the advertised high interest rates, some companies will stop paying interest if their financial position deteriorates. * Hybrids are generally subordinated.   Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-207MR+ASIC%27S+hybrids+warning:+don%27t+be+dazzled,+be+wary+of+the+risks?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h2)  **2.4** **Corporate insolvencies: June quarter 2012**   On 20 August 2012, ASIC released its latest official insolvency data.   **(a) Quarterly result**  There has been a small decrease in insolvency appointments from the previous quarter although the overall number of external administrations (EXADs) appointments remained relatively high. ASIC also notes the quarterly total was down compared to the same quarter in 2010-11(2,656).  By appointment type, director-initiated creditor voluntary liquidations increased from the previous quarter (up 16.8%), offset by falls in Court liquidations (down 31.9%) and receiverships (down 6.7%). ASIC states this was consistent with reports of fewer wind up applications filed by the Australian Taxation Office (ATO) in the last part of the financial year; a driver of activity in earlier quarters.  **(b) Annual statistics**  Data for the 2011-12 year show an increase in EXAD appointments of 9.4% compared to the 2010-11 financial year. As a proportion of the total number of registered companies, the annual increase in EXAD appointments from 2010-11 to 2011-12 was 4.8%.  **(c) Five-year comparison**  The five year trend analysis shows a significant growth in creditor voluntary liquidations, partially offset by a reduction in voluntary administrations.  Voluntary administrations and receivership appointments sit within a range of between 300 to 400 appointments per quarter since September 2009.   Further detailed information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-201MR+Corporate+insolvencies:+June+quarter+2012?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h2) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1** **Reports**   On 5 September 2012 ASX released:   * the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Group_Monthly_Activity_Report_-_August_2012.pdf" \t "_new); * the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2012/notice2012_209.pdf" \t "_new); and * the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Compliance_Monthly_Activity_Report_August_2012.pdf" \t "_new)   for August 2012.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h3)  **3.2** **Submission to the ASIC consultation paper CP 181 - Retail Trading in Commonwealth Government Securities**   On 31 August 2012, ASX provided a submission to the ASIC consultation paper CP181: 'Retail Trading in Commonwealth Government Securities'.    ASX strongly supports ASIC's proposals and has developed an operational and legal framework based on the use of depository interests to facilitate trading in CGS. The ASX submission raises some operational issues in relation to implementing this initiative.   The ASX submission can be found on [ASXGroup.com.au](http://www.asxgroup.com.au/media/CP181_retail_trading_commonwealth_government_securities.PDF" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h3)  **3.3** **Consultation paper - ASX 3 and 10 Year Treasury Bond Futures Quarterly Roll**   On 20 August 2012, ASX released a consultation paper 'ASX 3 and 10 Year Treasury Bond Futures Quarterly Roll'. The consultation paper examines potential changes to the market structure of the 3 and 10 Year Treasury Bond Futures roll and examines the likely impact of market behaviour for industry review, consideration, discussion and feedback.   The Consultation Paper is available on [ASXGroup.com.au](http://www.asxgroup.com.au/media/ASX_3_and_10_Year_Treasury_Bond_Futures_Quarterly_Roll.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h3)  **3.4** **ASX Limited Annual Report**   On 16 August 2012, ASX released its full-year result for the year ending 30 June 2012. ASX Managing Director and CEO, Elmer Funke Kupper, said:   'After a strong start to the year, market conditions weakened as the year progressed. In the first half, 2.8% revenue growth translated into 2.9% earnings growth. In the second half, revenue fell by 5.1% and underlying earnings declined by 8.6%, as both retail and institutional investors reduced their risk appetite and activity levels. This was particularly evident in the businesses that service Australia's equity markets, including Listings, Cash Markets and Information Services. The decline in these businesses was largely offset by revenue gains in Derivatives, Technical Services and Austraclear. This shows the benefits of having a well-diversified revenue profile.   'ASX has a strong balance sheet that allows the company to continue to invest in technology and new products and services. The final dividend of 85.1 cents per share and the full-year dividend of 177.9 cents per share reflect a 90% payout ratio of underlying profit after tax, consistent with previous results.'   On ASXGroup.com.au you can find:   * [Media Release](http://www.asxgroup.com.au/media/PDFs/ASX_Full-Year_Media_release.pdf" \t "_new); * [ASX Limited Annual Report 2012](http://www.asxgroup.com.au/media/PDFs/ASX_Full-Year_Annual_Report.pdf" \t "_new); * transcript of the [Media Briefing](http://www.asxgroup.com.au/media/PDFs/ASX_FY_QA_Media_-_FINAL.pdf" \t "_new); * transcript of the [Analyst Briefing](http://www.asxgroup.com.au/media/PDFs/ASX_FY_Q__A_Analysts_FINAL.pdf" \t "_new);   along with the Final Dividend Announcement and Appendix 4E Preliminary Final Report.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h3)  **3.5** **Submissions re consultation paper - Modernising the timetable for rights issues**   The period for submissions to ASX's consultation paper '[Modernising the timetable for rights issues: facilitating efficient and timely rights issues](http://www.asxgroup.com.au/media/consultation_paper_rights_issue_timetable_3Jul12.pdf" \t "_new)' closed on 14 August 2012.    Of the nineteen submissions received, six were provided on a confidential basis. Links to the thirteen public submissions, along with the original consultation paper, can be found on the [Public Consultations page](http://www.asxgroup.com.au/public-consultations.htm" \t "_new) on ASXGroup.com.au.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h3)  **3.6** **Submission to the Council of Financial Regulator's consultation paper - Competition in the clearing and settlement of the Australian cash equity market**   On 10 August 2012, ASX provided a submission to the Council of Financial Regulator's consultation paper 'Competition in the clearing and settlement of the Australian cash equity market'.    ASX submitted that a rigorous cost-benefit analysis is needed before a move away from the existing market structure in Australia (a single clearing house and settlement facility) is considered. ASX welcomes competition where this provides a clear net benefit to the profitability and stability of Australia's financial markets and improves Australia's global competitive position.   The ASX submission is available on [ASXGroup.com.au](http://www.asxgroup.com.au/media/Competition_in_the_clearing_and_settlement_of_the_Australian_cash_equity_market.PDF" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h3) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1** **Altius Mining Ltd**   On 31 August 2012, the Takeovers Panel announced that, upon further disclosure and changes to the rights issue being made, it had declined to make a declaration of unacceptable circumstances in response to an application dated 14 August 2012 from Alexander King. The application concerned a 1-for-1 fully underwritten pro-rata non-renounceable rights issue to raise approximately $5.19 million, announced by Altius on 2 August 2012.  The underwriter, Foxfire Capital Pty Ltd, is controlled by Mr John Zee (a director of Altius). Neither Foxfire nor Mr Zee currently hold any shares in Altius.  The applicant submitted (among other things) that:   * disclosure regarding the rights issue was deficient; * Altius and Foxfire had adopted no meaningful steps to mitigate the effect of the rights issue on control of Altius; and * the control effect of the rights issue was unfairly dependent on the way in which Foxfire exercised its discretion to allocate (or not allocate) the shortfall.   The Panel considered that the initial structure did not minimise the potential control effects of the rights issue. Altius, in accordance with the request of the Panel, announced the following changes which satisfied the Panel's concerns:   * the rights issue is fully sub-underwritten; * the underwriter and sub-underwriters will not be allocated any shares until all applications by existing shareholders under the shortfall facility are filled; * each shareholder applying for shares under the shortfall facility will be allocated their pro rata share of the shortfall having regard to their shareholdings at the record date and the allocation process will be repeated in rounds until either all of the shortfall has been allocated or all shortfall applications have been satisfied in full; * no shareholder will be allocated shares under the shortfall facility that would result in the relevant interest of that shareholder and its associates exceeding 20% of the issued share capital of Altius; * any unallocated shares remaining after all shortfall facility applications are filled will be allocated by the underwriter to the sub-underwriters; and * the closing date of the rights issue was extended to 5pm (Melbourne time) on Friday, 7 September 2012.   Altius has also made further disclosure to shareholders regarding the need for and proposed use of funds to be raised under the rights issue offer and the current financial position of Altius.  On the basis of the above, the Panel decided not to make a declaration of unacceptable circumstances.  The reasons for the decision are available on the [Takeovers Panel website.](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=media_releases/2012/069.htm&doctype=" \t "_new)  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h4)  **4.2** **Minemakers Ltd 02R**    On 30 August 2012, the Takeovers Panel announced that it had declined to make a declaration of unacceptable circumstances in response to an application dated 14 August 2012 from UCL Resources Limited, seeking a review of the initial Panel's decision in Minemakers 02. Minemakers is currently the subject of an off-market takeover bid from UCL, announced on 18 May 2012.  UCL submitted that (among other things) reports provided by BDO Corporate Finance (WA) Pty Ltd and Optiro Pty Ltd and included in Minemakers target statement:   * contained a number of matters that were misleading and which go beyond matters on which experts might disagree; and * reached conclusions which no reasonable expert could have reasonably arrived at.   The Panel considered that:   * there was no evidence of any clear fault in the methodology, or statements that were plainly false and material to the conclusion in the reports; and * although aspects of both reports could have been better expressed, there is enough disclosure in the reports for Minemakers' shareholders to make their own assessment of value.   On the basis of the above, the Panel decided not to make a declaration of unacceptable circumstances.  The reasons for the decision are available on the [Takeovers Panel website.](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=media_releases/2012/067.htm&doctype=" \t "_new)  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h4)  **4.3** **IFS Construction Services Ltd**  On 20 August 2012, the Takeovers Panel announced that it had made a declaration of unacceptable circumstances and final orders in relation to an application dated 27 July 2012 by three applicant shareholders in IFS Construction Services Limited, in relation to the affairs of IFS.  The application concerned a meeting requisitioned pursuant to section 249D of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) by the applicants seeking to replace the existing directors of IFS. At the meeting, Mr David Sanders (a lawyer and principal of Perth law firm Bennett + Co), a newly appointed director and "Interim Chairman for the purposes of Chairing the General Meeting of Shareholders", declared that proxies received by Mr Vivian-Williams (representing approximately 38.3% of the voting shares in IFS) were invalid and adjourned the meeting for 2 months. The proxies had resulted from a circular that Mr Scott Vivian-Williams had sent out which included a pre-completed proxy form voting in favour of the resolutions and appointing Mr Vivian-Williams as a proxy.  The meeting was held on 18 July 2012. Prior to that, on 13 July 2012, IFS announced that it had received a notice of intention to make a takeover offer from Millennium Scaffolding Systems (Asia) Ltd, which has a relevant interest in approximately 21.82% of IFS. Directors of Millennium, Mr Billy Ong and Ms Anita Ong, are also directors of IFS.  The proposed bid is subject to conditions, including that the resolutions requisitioned by the section 249D Notice are not approved by shareholders of IFS at the General Meeting.  Since the adjournment, Mr Sanders has purported to resign as a director, and Millennium or its associates have acquired additional shares in IFS.  The Panel considered that the circumstances were unacceptable because:  1. Rejection of the proxies denied shareholders the ability to determine which directors would respond to the proposed bid during the important initial stages.  2. Adjournment of the meeting for 2 months:  2.1 denied shareholders the ability to trigger a defeating condition of the proposed bid before it was made and therefore potentially to forestall the making of the bid;  2.2 ensured that the same board would hold office until Millennium's bid was made and have the initial carriage of IFS's response to that bid;     2.3 assisted Millennium by giving it the opportunity to increase its existing substantial interest in IFS, having regard to the potential closeness of the vote if the proxies were not invalid; and  3. The acquisition of additional shares increased Millennium's ability to determine the outcome of the meeting.  Accordingly, the Panel made a declaration of unacceptable circumstances and also made orders.  The reasons for the decision are available on the [Takeovers Panel website](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=media_releases/2012/068.htm&doctype=" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h4) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Research Papers** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%236) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **5.1** **The tenuous case for derivatives clearinghouses**   Mandatory use of swaps clearinghouses represent the major regulatory response to the systemic risk from credit derivatives. Scholars are divided on the merits of clearinghouses; some scholars see them as reducing systemic risk, others contend they increase it.    The case for swaps clearinghouses comes down to two propositions: (1) that clearinghouses are better able to manage risk than dealer banks in the over-the-counter derivatives market, and (2) that clearinghouses are better able to absorb risk than dealer banks. Both propositions are heavily dependent on the details of clearinghouse design, the shape of the clearinghouse market, and the manner of its regulation.    In theory, however, a well-designed clearinghouse boasts one major advantage over dealer-banks: capital. Clearinghouses can have deep capital structures, including callable capital from their members. Clearinghouses thus diffuse losses out across their membership, thereby avoiding catastrophic losses to any single institution. If designed properly, a clearinghouse should be much more resilient to losses than an individual dealer bank. Clearinghouse owners, however, are likely to pursue lower capitalization, leaving it up to regulators to ensure sufficient capitalization.   Clearinghouses concentrate risk and also potentially encourage greater risk taking via underpricing to gain market share. Therefore, if they lack sufficient capital, they can present a dangerous increase in systemic risk relative to dealer banks. Thus, the case for clearinghouses remains tenuous and ultimately dependent upon the still-to-be-determined particulars of their regulation.   The paper is available on the [SSRN website.](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2119249" \t "_new)  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h5)  **5.2** **For diversity in the international regulation of financial institutions: Redesigning the Basel architecture**   This paper challenges the prevailing view of the efficacy of harmonization of international financial regulation and provides a mechanism for facilitating regulatory diversity within the Basel accords framework. Recent experience suggests that regulatory harmonization can increase, rather than decrease, systemic risk. By incentivizing financial institutions worldwide to follow broadly similar business strategies, regulatory error contributed to a global financial crisis. Furthermore, the fast-moving, dynamic nature of financial markets renders it improbable that regulators will be able to predict with confidence what optimal capital requirements or other regulatory policies are to reduce systemic risk, the objective of global harmonization efforts, nor what future financial innovations, activities or institutions might generate systemic risk.    The paper contends, accordingly, that there would be value added from increasing the flexibility of the international financial regulatory architecture and advocates, as a means of implementing that goal, fostering regulatory diversity and experimentation within the existing Basel framework. It proposes making the Basel architecture more adaptable by creating a procedural mechanism by which departures along multiple dimensions from Basel's strictures would be permitted while providing safeguards, given the limited knowledge that we do possess, against the ratchetting up of systemic risk from such departures. The core of the proposal is peer review of proposed deviations from Basel, and ongoing monitoring of departures, for their impact on global systemic risk. If a departure were found to increase systemic risk, it would be disallowed. Such a mechanism would improve the quality of regulatory decision-making by generating information on what regulation works best under what circumstances, and by providing a safety valve against a harmonized regulatory error's increasing systemic risk, by reducing the likelihood that international banks worldwide will follow broadly similar flawed strategies in response to regulatory incentives.   The paper is available on the [SSRN website.](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2127749" \t "_new)  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h5)  **5.3** **The undermining of UK corporate governance (?)**   Over the past decade numerous overseas based businesses with dominant shareholders have become quoted on the London Stock Exchange, prominent examples of which have joined the 'blue chip' FTSE 100 stock market index. While this trend has generated serious concerns about the 'undermining' of UK corporate governance it has thus far escaped academic attention. This paper explains why companies with dominant shareholders have been migrating to London and discusses the policy implications, arguing in so doing that due to various legal and market-oriented protections outside investors benefit from, the case for substantial reform is not yet made out.   The paper is available on the [SSRN website.](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129686" \t "_new)  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h5)  **5.4** **Market declines: What is accomplished by banning short-selling?**   In 2008, US regulators banned the short-selling of financial stocks, fearing that the practice was helping to drive the steep drop in stock prices during the crisis. However, a new look at the effects of such restrictions challenges the notion that short sales exacerbate market downturns in this way. The 2008 ban on short sales failed to slow the decline in the price of financial stocks; in fact, prices fell markedly over the two weeks in which the ban was in effect and stabilized once it was lifted. Similarly, following the downgrade of the US sovereign credit rating in 2011 - another notable period of market stress - stocks subject to short-selling restrictions performed worse than stocks free of such restraints.   The paper is available on the [SSRN website.](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128827" \t "_new)  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h5)  **5.5** **A question of credibility: Enhancing the accountability and effectiveness of credit rating agencies**   In the wake of the financial crisis, Credit Rating Agencies (CRAs) have been criticised for having played a significant role in the market turmoil. Numerous reports have identified failures on the part of CRAs that have affected the quality and integrity of the rating process. In light of the critiques, a strong consensus has emerged among policymakers that regulatory intervention is needed. In Canada, the European Union and the United States, policymakers have opted for registration systems. Three major areas of reform should be pursued. The first pertains to the elimination of regulatory references to ratings. The second area relates to the development of a due diligence obligation for institutional investors with respect to the creditworthiness of issuers. The final area of reform concerns the disclosure of information on underlying assets by issuers of structured finance products. Given that these reforms imply important changes to the regulatory landscape, an incremental approach is the preferable route.   The paper is available on the [SSRN website.](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130806" \t "_new)  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h5)  **5.6** **A transactional genealogy of scandal: From Michael Milken to Enron to Goldman Sachs**   Three scandals have fundamentally reshaped US business regulation over the past thirty years: the securities fraud prosecution of Michael Milken in 1988, the Enron implosion of 2001, and the Goldman Sachs "Abacus" enforcement action of 2010. The scandals have always been seen as unrelated. This article highlights a previously unnoticed transactional affinity tying these scandals together - a deal structure known as the synthetic collateralized debt obligation (CDO) involving the use of a special purpose entity (SPE). The SPE is a new and widely used form of corporate alter ego designed to undertake transactions for its creator's accounting and regulatory benefit. The SPE remains mysterious and poorly understood, despite its use in framing transactions involving trillions of dollars and its prominence in foundational scandals.  The integration of SPEs into regulatory systems requires a ground-up rethinking of traditional legal models of the firm. A theory is emerging, not from corporate law or financial economics but from accounting principles. Accounting has responded to these scandals by abandoning the equity touchstone in favour of an analysis in which contractual allocations of risk, reward, and control operate as functional equivalents of equity ownership, an approach that redraws the boundaries of the firm. Transaction engineers need to come to terms with this new functional model as it could herald unexpected liability, as Goldman Sachs learned with its Abacus CDO.   The paper is available on the [SSRN website.](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2126778" \t "_new)  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h5) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%237) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **6.1** **ASIC decision made under section 11(4) of the ASIC Act found to be unreviewable by the Administrative Appeals Tribunal**   (By Andrew Kim, Ashurst)   Duffy v ASIC [2012] AATA 556, Administrative Appeals Tribunal, Senior Member John Handley, 24 August 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/TribunalA/2012/556.html](http://www.austlii.edu.au/au/cases/cth/AATA/2012/556.html" \t "_new)   **(a) Summary**   This case considers an application by Mr Mark Duffy (the Applicant) to the Administrative Appeals Tribunal (Tribunal) for a review of a decision made by the Australian Securities and Investments Commission (ASIC) (the Respondent).   Over the course of some 15 months, the Applicant disclosed information to ASIC with an allegation that the conduct of certain officers of a corporation contravened the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act).    The Applicant also alleged he had been victimised by the corporation and sought whistleblower protection under Part 9.4AAA of the Corporations Act (whistleblower provisions). After ASIC indicated it would not be taking action, the Applicant sought a review of this decision.  The main issue considered by the Tribunal was whether it had jurisdiction to review ASIC's decision. The Tribunal concluded that the decision was not reviewable, because:   * ASIC's decision to take no further action was made under section 11(4) of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default) (the ASIC Act) and not the whistleblower provisions of the Corporations Act; and * a decision under section 11(4) was not a decision reviewable by the Tribunal.   On this basis, the Tribunal dismissed the application pursuant to section 42A(4) of the [Administrative Appeals Tribunal Act 1975 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7115" \t "_default) (the AAT Act).   **(b) Facts**     Commencing 25 January 2010, the Applicant disclosed information to ASIC with an allegation that the conduct of certain officers of ANZ Bank (the corporation) contravened the Corporations Act. The Applicant also alleged he had been victimised by the corporation and sought whistleblower protection under Part 9.4AAA of the Corporations Act.   Several exchanges of correspondence between the Applicant and ASIC took place from 25 January 2010 to 7 May 2012.  Importantly:   * On 16 March 2012, ASIC stated in a letter to the Applicant that, after investigating the matter, it has decided that no action would be taken against the allegations made; and * On 7 May 2012, after meeting with the Applicant on 27 April 2012 and being asked to confirm minutes of the meeting as prepared by the Applicant, ASIC stated in an email to the Applicant that ASIC did not confirm the minutes as an accurate record and did not propose engaging in further dialogue with the Applicant concerning this matter.   The Applicant applied to the Tribunal for a review of ASIC's position expressed in the email of 7 May 2012.   The main issue before the Tribunal was whether it had jurisdiction to review ASIC's decision. The Applicant submitted that a decision was made under the whistleblower provisions and the Tribunal did have jurisdiction to review the decision.    On the contrary, ASIC submitted that:   * the relevant decision was made by ASIC on 16 March 2012, not 7 May 2012, and hence the Applicant's application for review was made out of time (as section 29 of the AAT Act requires that an application for review be lodged with the Tribunal within 28 days of the decision being made) and no extension of the statutory time period should be granted to the Applicant; and * in any event, the decision by ASIC in the 7 May email was not a reviewable decision under the AAT Act, and therefore the Tribunal should dismiss the application.   **(c) Decision**    **(i) The timing of ASIC's decision**   The Applicant suggested that ASIC had decided orally (in the meeting on 27 April 2012) that the Applicant qualified for protection under the whistleblower provisions, and subsequently should have made that decision in writing. In the Applicant's view, the email from ASIC on 7 May 2012 that stated otherwise was the relevant decision made by ASIC not to take action and use its powers and functions conferred on it by Part 9.4AAA of the Corporations Act.   However, the Tribunal was not satisfied that ASIC had made a decision at the meeting on 27 April 2012 that the Applicant qualified for protection, or that ASIC had made a decision subsequently on 7 May 2012. Rather, as a matter of fact, the Tribunal considered that a decision was made by ASIC not to take action against the Applicant's allegations, confirmed in the letter of 16 March 2012, and subsequently in the email of 7 May 2012.   **(ii) The nature of ASIC's decision**   The Tribunal considered the nature of ASIC's decision with regards to ASIC's powers granted under the Corporations Act and the ASIC Act.    In summary, the Tribunal found that:   * When it received disclosure from the Applicant, ASIC had regard to the whistleblower provisions, in particular section 1317AA(1) of the Corporations Act, which sets out the five elements which a disclosure must satisfy to qualify the discloser for whistleblower protection. However, in the Tribunal's view section 1317AA(1) does 'no more than set the foundation for an investigation' and ASIC's consideration of these provisions enabled it to determine whether to conduct an investigation; * ASIC conducted an investigation under section 13(1)(a) of the ASIC Act, which provides that 'ASIC may make such investigation as it thinks expedient for the due administration of the corporations legislation where it has reason to suspect that a contravention of the corporations legislation may have been committed'; and * ASIC completed the investigations and subsequently decided that it would not take any further action, a decision made out of the performance of its statutory responsibility under the broad ambit of section 11(4) of the ASIC Act, which provides that 'ASIC has power to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions'.   **(iii) Whether ASIC's decision was reviewable**   Having formed the view that ASIC's decision was made under section 11(4) of the ASIC Act, the Tribunal considered whether the decision was reviewable.   In this regard, the Tribunal noted the operation of section 25(1) of the AAT Act, which stated that an enactment may provide that applications may be made to the Tribunal for review of decisions made under that enactment. In the Tribunal's view, this meant that the Tribunal can review decisions only where its jurisdiction to do so is found within an enabling Commonwealth Act.   In this context, the Tribunal noted that it is empowered to review decisions made by ASIC under section 244 of the ASIC Act, which stated that applications may be made to the Tribunal for review of a decision by ASIC:   * to make an order under section 72 or 73; or * to make an order under subsection 75(1) varying an order in force under Division 8 of Part 3; or * to refuse to vary or revoke an order in force under Division 8 of Part 3.   The Tribunal considered that the above wording in section 244(2) confined reviewable decisions to those made under sections 72, 73 or 75(1) of the ASIC Act.    As ASIC's decision in this instance was made under section 11(4), the Tribunal concluded that the decision was not reviewable by the Tribunal.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h6)  **6.2** **Factors to be considered for an interim appointment of receivers to a managed investment scheme**    (By Steven Grant, Minter Ellison)   Valuestream Investment Management Ltd v Richmond Management Pty Ltd [2012] FCA 898, Federal Court of Australia, McKerracher J, 22 August 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/898.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/898.html" \t "_new)   **(a) Summary**   This case concerns an ex parte interlocutory application to appoint receivers to a managed investment scheme and considers the circumstances which may lead to such an appointment.    **(b) Facts**    The application was brought by Valuestream Investment Management Ltd in its capacity as responsible entity of the Addwealth Achiever Fund (Valuestream) for the appointment of joint and several receivers and managers of all of the assets held by Richmond Management Pty Ltd (Richmond) as trustee of the Richmond Equity Fund (REF). The object of the appointment was to ascertain, protect and administer the assets of the REF for the benefit of all the unit holders of the REF.    REF was established to provide investment opportunities to and for the Addwealth Achiever Fund (AAF).   In or about March 2011, AAF's responsible entity and auditors determined that the accounts of REF for the year ended 30 June 2011 should be consolidated into the accounts of AAF. This was to be subject to an independent audit of the same kind and of the same standard as that which was required to be performed in respect of AAF. However, because Richmond failed to provide the auditors with the information they required, the auditors disclaimed expressing an opinion about the accuracy of the financial statements.    There was further evidence provided to the court that:   * Richmond failed to keep complete and accurate accounting records; * Richmond failed or refused to respond adequately or at all to requests by Valuestream and AAF's auditors for information in respect of the REF; * Richmond failed to prepare and provide to Valuestream any financial report for the REF for the year ended 30 June 2011; * Richmond failed to appoint an auditor to audit the financial accounts of the REF for the year ended 30 June 2011 or at all; * despite Valuestream's requests, Richmond failed to have the assets of the REF valued (or revalued) since 30 November 2011; * despite Valuestream's request, Richmond failed and refused to convene a meeting of unit holders in the REF; and * Richmond failed to manage prudently and secure the assets of the REF.   In this respect, it was contended by AAF that Richmond had not acted in accordance with the REF Constitution or the REF Management Agreement.   In addition, Valuestream complained that investments apparently made by Richmond as trustee of the REF appeared to have been 'imprudent if not improper'.   On 9 August 2012, Valuestream as responsible entity of AAF commenced this proceeding by originating process. The process was originally to be returnable on 30 August 2012. However, additional matters came to light and attempts were made to serve the originating process on Richmond at its registered office. In the process of serving the originating process it was discovered that the registered office had been all but abandoned.   On 14 August 2012, an up-to-date historical company extract was obtained in respect of Richmond. It showed that Richmond did not have a director ordinarily resident in Australia contrary to section 201A(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act). In addition, Richmond did not appear to have any company secretary and Richmond's holding company, Richmond Capital Group Pty Ltd, has no current company officers.   **(c) Decision**   McKerracher J granted the injunction.   Based on the evidence before the court, McKerracher J held that Richmond appeared to have shown a similarly underdeveloped sense of trusteeship in relation to the REF and that the orders were necessary to protect the unit holders and preserve the status quo. On the face of matters before the court, it appeared that there were not only serious breaches of the Corporations Act but also no active management of Richmond. The lack of any director resident in Australia, the apparent vacation of the company office and the lack of response to requests for information were all matters of concern having regard to the very significant investment apparently at risk.    There was protection for those affected by the orders by the undertaking as to damages and liberty to apply at short notice for any party affected by the orders. If the picture painted on the urgent ex parte application was inaccurate, there would be an opportunity to promptly rectify the impression created by the evidence. In all the circumstances recorded in the extensive affidavit evidence and outlined briefly in the reasons of the court, McKerracher J considered that there was a greater risk of injustice by allowing time to march on without limited intervention at short notice.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h6)  **6.3** **Application to set aside a creditor's statutory demand: whether the Graywinter principle was satisfied**  (By Natasha Koravos, DLA Piper Australia)  In the matter of Infratel Network Pty Limited [2012] NSWSC 943, Supreme Court of New South Wales, Black J, 17 August 2012  The full text of this judgment is available at:  [http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=160249](http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=160249" \t "_new)   **(a) Summary**  The plaintiff, Infratel Networks Pty Limited (Infratel) sought orders under sections 459G, 459H(1)(a) to 459H(1)(b) and/or 459J of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) that a creditor's statutory demand dated 16 February 2012 (Demand) served by the defendant, Gundry's Telco & Rigging Pty Limited (Gundry's) be set aside. The court held that Infratel's initial affidavit, which was served within the 21 days required under the Act, did not sufficiently raise matters necessary to establish a genuine dispute as per the principle in *Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund* (Graywinter).  **(b) Facts**  Infratel filed and served an Originating Process and supporting affidavit (Initial Affidavit) of Mr Michael O'Neill on 8 March 2012. Infratel relied on affidavits of its managing director sworn in April and May 2012. The dispute was whether matters raised in the affidavits could be used as a basis to set aside the Demand having regard to the principle in Graywinter.  In May and June 2011, Infratel had contracted with Ericsson Australia Pty Limited (Ericsson) to provide certain site upgrades for a project (Telstra Project) and Nokia Siemens Networks Australia Pty Ltd (Nokia) to perform certain works in relation to the Optus NU 900 Project (Optus Project). These contracts were not tendered in evidence.  In June 2011, Infratel entered into a contract with Gundry's (Infratel Contract) by which Gundry's was to provide rigging works. Infratel characterised the Infratel Contract as a 'subcontract' and as having a relationship with the Telstra Project and Optus Project. The Infratel Contract provided that services be provided by Gundry's to a specific standard and in a particular manner.  In the Infratel Contract clause 13.11 contained a right of set-off and clause 14.1 provided that if any part of the work done by Gundry's was defective, Gundry's would remedy the defect including any consequential effects of the defect.  Gundry's issued several invoices to Infratel. There was no dispute as to the accuracy of the invoices, subject to issues as to the quality of work.  Infratel contended that:   * It received 'non-conformance' reports (NCRs) from Ericsson relating to sites where Gundry's had undertaken work; and * Gundry's work on the Optus Project contained defects that did not meet Optus standards. Therefore, Nokia had refused to sign-off on the Optus Project sites.   Infratel provided a schedule of NCRs and a schedule of defects but did not provide evidence as to the scope of work that Gundry's was to undertake on those sites and what it did in fact provide. Infratel contended that in consequence of the NCRs and the missing final sign-off, Infratel was not paid by Ericsson or Nokia. No documents recording that refusal or the basis of it were in evidence.  Infratel contended that as a result of Gundry's defects it had to conduct rectification work at its own expense. It had not invoked the contractual mechanism under clause 14.1 to require Gundry's to rectify the defects.  **(c) Decision**  **(i) Whether the Initial affidavit raised the necessary matters**   Gundry's submitted that Mr O'Neill's affidavit was the only one within the 21 day period specified in section 459G of the Act, and did not sufficiently raise the matters necessary to establish a 'genuine dispute' as to the claimed debts. Therefore, Infratel did not meet the requirement to apply to set aside the statutory demand under the Graywinter principle. Specifically, Gundry's contended that the affidavit did not identify the relevant work or defects, the content of the various standards and why the work did not meet the standards.  Black J considered whether the relevant areas of controversy were sufficiently identified in the supporting affidavit filed within the 21 day period to raise, whether expressly or by a necessary or reasonably available inference, the grounds of challenge to the statutory demands. He held that the affidavit referred to rectification in respect of the Telstra Project, not the Optus Project, but this was sufficient to identify the nature of the dispute. It at least identified the nature of the asserted failure, namely the non-compliance with the specified standards.  **(ii) Whether a genuine dispute existed on the facts**  The parties were in dispute as to how the relevant principles, which determined whether a genuine dispute or offsetting claim was established, applied to the current facts. Section 459H(1)(a) of the Act provides that a statutory demand may be set aside when the court is satisfied that there is a genuine dispute about the evidence or amount to which that demand relates. The test for 'genuine dispute' has been variously formulated as not 'plainly vexatious or frivolous' or 'may have some substance' or involves 'a plausible contention requiring investigation'.  Infratel contended that the required standard for Gundry's work on the site was clearly a genuine claim and it was clear from the parties' correspondence that there was a dispute as to the quality provided by Gundry. The 'genuine dispute' was not a dispute as to the quality of the work done, but as to the debt claimed by Gundry's.  Black J stated that whether such a dispute exists depends upon construction of the Infratel Contract, reading it in a way that provides a sensible and business-like meaning. He held that:   * Clause 13 imposes an obligation to pay for the services but clause 14 enables Infratel to direct Gundry's to remedy its defects. * Infratel did not establish that it invoked the remediation mechanism under the Infratel Contract so as to allow a deduction from the amount payable to Gundry's, as distinct from a potential claim in damages against Gundry's which might give rise to an offsetting claim under the Act. Therefore, a genuine dispute as to the debt was not established.   **(iii) Whether an offsetting claim was established**  Infratel sought to set aside the Demand on the basis that it had an offsetting claim under section 459H(1)(b) of the Act. It contended that the affidavit sufficiently identified a plausible and coherent basis for asserting a claim to a sum which can be seen to be greater than the amount of the debt the subject of the statutory demand.  Gundry's contended that the affidavit did not sufficiently raise the matters related to the offsetting claim for the purposes of the Graywater principle. It argued that the losses alleged from the Telstra Project were for unidentified rectification work in an unidentified amount and no loss was alleged to arise from the Optus Project matters.   Black J noted that there was authority that an offsetting claim will be sufficiently raised by an initial affidavit where that affidavit states that the claim's amount is greater than the debt's amount, even if it does not provide an indication of the quantum of that claim. However, in this case the Initial Affidavit did not contain a general statement that the quantum of the offsetting claim exceeded the debt. Furthermore, the affidavit identified that Infratel had undertaken rectification works pursuant to the NCRs but not the Optus Project.   **(iv) Whether there was some other reason to set aside the Demand**  Infratel contended the Demand should be set aside under section 459J(1)(b) for 'some other reason' as Gundry's did not follow the contract's dispute resolution process. Black J did not accept this argument as the scenario was not a 'dispute' under the contract and the service of the Demand did not amount to the commencement of litigation.  Infratel submitted that it was unconscionable for Gundry's to demand payment if it was aware that Infratel had not been paid by Ericsson and Optus because of Gundry's defective work. Black J accepted that this claim was sufficiently raised in the affidavit, however it was not unconscionable for Gundry's to require payment.  **(v) Order**  Infratel did not establish that it had not paid by Ericsson or Nokia because of Gundry's defective work, as distinct from defects that arose for other reasons or on other sites. Its Originating Process was dismissed.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h6)  **6.4** **Judicial reviewability of a decision made by a legislatively-sanctioned private dispute resolution body**   (By Rhys Ryan and Marissa Bendyk, King & Wood Mallesons)                                                                      Mickovski v Financial Ombudsman Service Limited [2012] VSCA 185, Supreme Court of Victoria, Court of Appeal, Buchanan, Nettle JJA and Beach AJA, 17 August 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSCA/2012/185.html](http://www.austlii.edu.au/au/cases/vic/VSCA/2012/185.html" \t "_new)   **(a) Summary**   This case considered whether a decision made by a private dispute resolution body, which had been granted ASIC approval pursuant to the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act), was susceptible to judicial review. The Court recognised the desirability of allowing judicial review of decisions where private bodies exercise duties of a public nature, but concluded this was not a case where it was necessary to make such a ruling. Rather, the Court relied solely on the terms of the tripartite contract which bound the complainant, the party against whom the complaint was brought, and the dispute resolution body deciding the matter. Those terms provided that the dispute resolution body's decision was 'final', and in the absence of any fraud, dishonesty or lack of good faith, the Court held that judicial review of the dispute resolution body's decision was therefore not possible, even if the decision had been made erroneously.    **(b) Facts**   In 1995, the appellant was injured in a workplace accident and subsequently claimed salary continuance payments under a salary continuance insurance policy (SCI policy) issued by the second respondent (MetLife). These benefits ceased in 1999 when the appellant received a lump sum payment under a total and permanent disability insurance policy (TPD policy).    In 2007, MetLife instituted proceedings against the appellant's employer in the Supreme Court of New South Wales to rectify the SCI policy to the effect that payments under that policy were to cease on payment of benefits under the TPD policy. The decision in those proceedings impacted on the interpretation of the two policies and prompted the appellant to claim that the rectification entitled him to back payments under the SCI policy. MetLife rejected the claim and the appellant lodged a complaint with the first respondent, Financial Ombudsman Service Limited (FOS), which operates an industry alternative dispute resolution scheme approved by ASIC pursuant to section 912A(1)(g) of the Corporations Act.   After initial consideration by an FOS delegate, the complaint was referred to the FOS Panel Chair, pursuant to clause 15.3 of the FOS terms of reference, to make a final ruling on whether the complaint should be dismissed as being beyond FOS' jurisdiction by reason of clause 14.1(p) of the terms of reference. That clause excludes complaints where the complainant knew or should have known of all of the relevant facts more than six years before first notifying FOS of the complaint. The Panel Chair rejected all four of the appellant's 'relevant facts' which allegedly arose within the six years preceding the complaint to FOS - including the rectification of the SCI policy in 2007 inasmuch as it affected the appellant's right to receive benefits. The Panel Chair ruled that FOS therefore had no jurisdiction to hear the complaint, and under clause 15.3 of the terms of reference, the Panel Chair's decision was 'final'.    The appellant sought relief in the Supreme Court of Victoria by way of judicial review in accordance with the Datafin principle (see below), or alternatively declaratory relief on the basis of breach of contract. The trial judge dismissed the claim on the grounds that the Panel Chair's decision was not judicially reviewable because it fell outside the scope of the Datafin principle, and further, that the tripartite contract between the appellant and two respondents had not been breached by the Panel Chair's decision. The matter was appealed.   **(c) Decision**   There were two key issues to be decided by the Court of Appeal:  (i) whether the trial judge erred in concluding that the Datafin principle did not apply in the circumstances of the case and therefore the Panel Chair's decision was not amenable to judicial review; and (ii) whether the trial judge erred in concluding that FOS did not breach the tripartite contract that existed between the appellant and two respondents.   **(i) Application of the Datafin principle**   The Datafin principle was enunciated in *R v Panel on Take-overs & Mergers; ex parte Datafin plc* [1987] QB 815 and provides that decisions of a private body exercising duties of a public nature are amenable to judicial review. The applicability of the principle in Australia is not a settled question of law. The Court of Appeal recognised that, despite doctrinal difficulties which may prevent extending judicial review beyond the realms of statutory and prerogative decision making, the Datafin principle is appealing; especially in the face of increasing privatisation of governmental functions in Australia. However, the Court noted that the clear implication of the High Court's decision in *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 227 was that a court should not make a decision about the application of the Datafin principle unless and until it is necessary to do so. The Court of Appeal held that such a determination was not necessary in this case.   However, the Court went on to state that even if the Datafin principle is recognised in Victoria, it could not have applied in the circumstances of this case. In the Court's opinion, 'it is doubtful that the principle has any application in relation to contractually based decisions and, even if it does.the public interest evident in having a mechanism for private dispute resolution of insurance claims of the kind mandated by section 912A [of the Corporations Act] is insufficient to sustain the conclusion that FOS was exercising a public duty or a function involving a public element in circumstances where FOS' jurisdiction was consensually invoked by the parties to a complaint' (at paragraph 32). Despite the provisions of the Corporations Act requiring a dispute resolution mechanism, FOS' power over the appellant and MetLife was solely derived from contract. Accordingly, the Datafin principle could not be applied to enable judicial review of the Panel Chair's decision.    **(ii) Alleged breach of the tripartite contract**   In addressing the alleged breach of the tripartite contract, the Court first clarified that once the appellant and MetLife agreed to submit their dispute to the processes of FOS, 'they became bound in contract to observe the [FOS terms of reference] and entitled as a matter of contract to require that FOS proceed in accordance with those rules' (at paragraph 35). The Court then turned its attention to the Panel Chair's decision and whether it was reviewable as a matter of contract.   Citing the decision in *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 564, the Court of Appeal held that if there is doubt about the exact meaning of a law which it is the function of a domestic tribunal to interpret, and that tribunal's decision derives its binding quality from a contract, a party to the contract is entitled to seek the opinion of a court about the meaning of that law. Here, there was a dispute about the Panel Chair's interpretation of clause 14.1(p) of the terms of reference (which excludes complaints where all relevant facts were known more than six years before lodging the complaint) and whether that clause operated to prevent FOS from hearing the matter. In those circumstances, the Court held that it would ordinarily be open to either party to seek a declaration of right as to the correct interpretation of that clause.    This conclusion, however, was subject to clause 15.3 of the terms of reference which deems the Panel Chair's decision 'final'. 'Final' was held to mean that any review of the decision is precluded unless it is affected by fraud, dishonesty or lack of good faith, or it is otherwise apparent that the determination has not been carried out in accordance with the agreement. The Court of Appeal held that the Panel Chair erred in law in his construction of clause 14.1(p) because, contrary to his initial decision, the rectification of the SCI policy in 2007 should have been deemed a 'relevant fact' within the meaning of clause 14.1(p). Despite this error, the Panel Chair was not guilty of fraud or lack of good faith, he was not prejudiced, and he did not misconceive the task which he was required to undertake. He simply made an error in the process of reasoning which he adopted in the execution of his decision making responsibility. Under the terms of clause 15.3, such an error was not reviewable.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h6)  **6.5** **Derivative claims in the context of a quasi-partnership**  (By Nicholas Whittington, DLA Piper Australia)  Hughes v Weiss Re Iuvus Ltd [2012] EWHC 2363 (Ch), England and Wales High Court (Chancery Division), Keyser J, 15 August 2012  The full text of this judgment is available at:  [http://www.bailii.org/ew/cases/EWHC/Ch/2012/2363.html](http://www.bailii.org/ew/cases/EWHC/Ch/2012/2363.html" \t "_new)   **(a) Summary**  Ms Suzy Hughes (Hughes) sought permission to carry on against Mr Nigel Weiss (Weiss) derivative claims in respect of causes of action vested in Iuvus Limited (Iuvus). Hughes and Weiss had incorporated Iuvus as the vehicle of a joint venture between them for the provision of commercial legal services. The pair had fallen out and Hughes sought permission to pursue Weiss through a derivative action. Permission was granted.   **(b) Facts**  Iuvus was incorporated on 18 February 2005 as the vehicle of a joint venture between Hughes and Weiss for the provision of commercial legal services. Hughes and Weiss were the two directors of Iuvus, and each held one of the two issued shares. It was agreed that they would each take a modest salary which would be supplemented by the receipt of equal dividends at such times and in such amounts as might be appropriate.   The relationship became strained. On 21 June 2007, Hughes and Weiss agreed to terminate their quasi-partnership. On 26 July 2011, Iuvus was dissolved after it had failed to file annual returns. However, with a view to bringing a derivative action, Hughes procured the restoration of Iuvus to the register.   The three claims advanced by Hughes which vested in Iuvus were that Weiss:   * had wrongfully transferred £100,000 out of Iuvus' bank account and into his own personal account and had since failed to return or account for it; * had carried on business in competition with Iuvus in breach of his fiduciary duties to Iuvus; and * had diverted payment of invoices from Iuvus to himself and had failed to account for the receipts.   Hughes also brought a personal claim against the company in respect of debts that she had personally discharged on behalf of the company. This claim amounted to a total sum of £5,490.  **(c) Decision**  **(i) Consideration of the derivative claims**  On consideration of the limited evidence placed before the court, Judge Keyser was 'singularly unimpressed by Mr Weiss's evidence and explanations'. The preliminary defences offered by Weiss were described as rationalisations of misappropriation. Weiss's defence against the claim that he had carried on business in competition with Iuvus revealed 'a surprising lack of understanding of the scope of his fiduciary duties to Iuvus'.   **(ii) The statutory framework**   The UK *Companies Act 2006* (the Act) allows a derivative claim to be brought 'only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company'.   Under the Act, a member of a company who brings a derivative claim must apply to the court for permission to continue it. Permission must be refused if the court is satisfied that:   * a person acting in accordance with section 172 of the Act (broadly, the duty to promote the success of the company) would not seek to continue the claim; or * the act or omission was authorised by the company before it occurred or has since been ratified (this was not an issue in this case, as Hughes and Weiss were the only two directors and shareholders of the company, and Iuvus was therefore deadlocked).   Further, the court must take into account, amongst other things, whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company.   Weiss argued that no director acting in good faith promoting the success of the company (section 172) would continue the claim since it would open the company to the risk of costs. Further, it could not be said that this would promote the success of the company as Iuvus would soon be dissolved and would not continue trading and therefore the action could not therefore be related to the 'success' of the company.   Judge Keyser rejected the notion that 'success' was associated only with a trading company. The notion of 'success' in relation to Iuvus would be the fair distribution of benefits to its members. In relation to the question of costs, it was found that this argument was reliant on the fact that ordinarily a company would be ordered to indemnify a claimant who brought a derivative claim on its behalf. Judge Keyser found that since the substance of the dispute was between two persons who are alone entitled to the company's assets, there would be no good reason for the company to indemnify Hughes should she fail in her claim.   **(iii) Was a derivative claim the appropriate action in the circumstances?**  Another factor to be taken into account in the exercise of the court's discretion was the existence of an available remedy. The question in this case was whether it was more appropriate for Hughes to petition for a liquidator to be appointed.  Weiss argued that such an action would be more appropriate because it would allow for all of the issues to be resolved before the affairs of Iuvus could be finally resolved. Further, such an action would be more appropriate because the issues would be resolved at the risk of the members rather than of the company.   In rejecting these claims, Judge Keyser referred to the observation made earlier about costs in this proceeding, noting that the company was not indemnifying any party in this action, nor was it likely that it would be ordered to. Further, in considering each available remedy, Judge Keyser found that a derivative claim was most appropriate in the circumstances due to the 'fundamentally different nature of the two forms of proceedings'. That is, Hughes did not seek an order that Weiss sell Hughes his shares (or that he buy hers). Rather, Hughes sought 'financial remedies for the company for misfeasance'. It was also noted that it was highly unlikely that a liquidator would fund litigation in this instance.   **(iv) The personal claim**  In relation to the personal claim brought by Hughes, Judge Keyser found that this claim did not fall within the scope of the derivative claims. Hughes was not granted permission to run claims for and against the company contemporaneously.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h6)  **6.6** **Clarification of requirements for delivery of a deed**   (By Timothy Lau, Freehills)   Segboer v A J Richardson Properties Pty Ltd [2012] NSWCA 253, New South Wales Court of Appeal, Allsop P, Campbell JA and Sackville AJA, 14 August 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWCA/2012/253.html](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2012/253.html" \t "_new)  **(a) Summary**  The New South Wales Court of Appeal has clarified the requirements for delivery of a deed. The Court confirmed that physical delivery is not required for a deed to be valid and enforceable. Rather, the more important question is whether the party executing the deed evinced an intention to be bound immediately.   **(b) Facts**     The Appellant, a builder, was required under a construction agreement to provide an unconditional bank guarantee in the amount of $375,000 in favour of the First Respondent, a property developer. The Second Respondent (the bank) issued the bank guarantee in favour of the First Respondent in the form of a deed. Acting on the instructions of the Appellant, the Second Respondent faxed a copy of the guarantee to the project manager for the First Respondent along with a cover letter stating that the original would be forwarded to it in due course. The Appellant collected the original from the Second Respondent but did not forward it to the First Respondent. Almost 12 months later, the Appellant returned the original to the Second Respondent and instructed that the guarantee be cancelled. The First Respondent subsequently called on the bank guarantee and requested the sum of $375,000 from the Second Respondent.   The First Respondent successfully sued the Second Respondent for $454,137.83 in the District Court. The Second Respondent successfully cross-claimed against the Appellant indemnifying it from the costs of enforcing the guarantee.   **(c) Decision**    On appeal, the Appellant raised several submissions which, if accepted by the Court, would have resulted in the bank guarantee being invalid and unenforceable. Each of these submissions will be analysed in turn.   **(i) Has the guarantee been delivered?**   The Appellant submitted that if the guarantee was to be construed as a deed, it is essential that the guarantee be 'delivered'. The guarantee had not been delivered because the Second Respondent did not intend to be bound immediately by the deed. In support of this submission, the Appellant raised the fact that the Second Respondent had handed the original to the Appellant before they were called upon as well as the fact that the Second Respondent sought to cancel the guarantee upon the Appellant's instruction.    The Court rejected the Appellant's submission. In doing so, the Court confirmed that delivery is an essential requirement for execution of a deed. Further, the question in the present case is not whether, on the evidence, the guarantees had been delivered to the First Respondent. Physical delivery is not required for a deed to be effective. The critical question is whether the party executing the deed has evinced an intention to be bound immediately.   The Court held that the acts and words of the Second Respondent point overwhelmingly to an intention that the Second Respondent should be immediately bound by the guarantee.  In particular:   * the Second Respondent executed the deed with the appropriate formality, including the affixation of the seal in the presence of a witness; * the Second Respondent sent the documents by facsimile to the First Respondent's project manager, as instructed by the Appellant; * the Second Respondent's covering letter to the project manager stated that it was in a position to be able to provide the bank guarantees to assist the Appellant in the construction project. The letter did not state that the Bank would execute the guarantees at some future time or when some stated contingency was satisfied; it attached copies of the executed guarantees; and * the Second Respondent stated that the originals of the guarantees 'will be forwarded in due course'. This was an unequivocal statement; the Second Respondent clearly implying that there was no obstacle to forwarding the originals, thereby confirming that the executed guarantees were intended to take immediate effect.   **(ii) Promise to pay contingent on return of original guarantee?**   In the alternative to the first submission, the Appellant submitted that the guarantee, when construed as a whole, made the Second Respondent's obligation to pay the guaranteed sum on demand dependent or conditional upon the First Respondent complying with its obligation under clause 6 to return 'this document' to the Second Respondent. As the First Respondent only had facsimile copies of the guarantee and no original, it was unable to return 'this document' and therefore enforce the guarantee.   The Court confirmed that a promise to pay money in a deed can be a dependent obligation if it is expressly or impliedly contingent on the occurrence or non-occurrence of some event. Whether an obligation is dependent in this sense is a question of construction of the relevant instrument.   The Court construed the guarantee as not being contingent on any event or circumstance.  In particular:   * Under clause 2 of the guarantee, the Second Respondent promised to pay the guaranteed sum to the First Respondent on demand without reference to the customer. * The promise to pay is not expressed to be contingent on the First Respondent performing any particular act. Specifically, the promise to pay is not expressed to be dependent on the First Respondent complying with its obligation under clause 6 to 'return this document to the Bank upon termination of the Bank's liability under this guarantee'. * No express link exists between the Second Respondent's promise under clause 2 and the First Respondent's promise under clause 6. * It is payment of the guaranteed sum by the Second Respondent that triggers the First Respondent's obligation to return the guarantee. In other words, the guarantee contemplates a sequence of events, with payment of the guaranteed sum by the bank a necessary precondition to the First Respondent's obligation to return the guarantee.   **(iii) Conclusion**   The Court dismissed the appeal by the Appellant. The Appellant was ordered to pay the First Respondent's costs of the appeal and the Appellant to pay the Second Respondent's costs of the appeal.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h6)  **6.7** **Redemption, withdrawal rights, capacity and contractual obligations on change of responsible entity**   (By Dylan Barber, Ashurst Australia)   MacarthurCook Fund Management Ltd v Zhaofeng Funds Ltd [2012] NSWSC 911, Supreme Court of New South Wales, Hammerschlag J, 10 August 2012   The full text of this judgment is available at:  [http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=160144](http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=160144" \t "_new)   **(a) Summary**   Pursuant to certain Facility Agreements, MacarthurCook subscribed for Units in a managed investment scheme. Under the Facility Agreements, the responsible entity was to redeem the Units within 12 months of issue and guaranteed to purchase all Units not redeemed after that period. The responsible entity for the scheme was replaced by a new responsible entity within 12 months of issue of the Units and the Units were not redeemed. MacarthurCook sought damages for the failure to redeem the Units.   The Court found that there was nothing stopping the responsible entity entering into a binding obligation to redeem the Units. Furthermore, despite the fact that the original responsible entity had purported to guarantee to purchase all Units not redeemed in its personal capacity, the obligations and liabilities associated with the guarantee were properly characterised as obligations and liabilities in relation to the scheme. The obligations and liabilities of the former responsible entity in relation to the guarantee became those of the new responsible entity.   **(b) Facts**   MacarthurCook subscribed for 15 million units (Units) in a managed investment scheme now known as P-REIT. A series of facility agreements (Facility Agreements) set out the terms and conditions of those subscriptions. The Facility Agreements were executed by MacarthurCook and the responsible entity of P-REIT, Zhaofeng Funds Management Limited (Zhaofeng).   Under the Facility Agreements, Zhaofeng was to redeem the Units, subject to compliance with the requirements of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) and its constitution, within 12 months of issue, using funds received by P-REIT from subscriptions to new units (Redemption Obligation). The Redemption Obligation was expressed in the Facility Agreements to be imposed on Zhaofeng as responsible entity for P-REIT.   Under the Facility Agreements, Zhaofeng also guaranteed to purchase all the Units still held by MacarthurCook at the end of the 12 month period (Guarantee Obligation). The Guarantee Obligation was expressed in the Facility Agreements to be imposed on Zhaofeng in its personal capacity.   Thus, the Facility Agreements were expressed to have been executed by Zhaofeng both in its capacity as responsible entity for P-REIT and in its personal capacity in respect of the various obligations.   Zhaofeng did not redeem the Units as required by the Redemption Obligation. Before the end of the 12 month period after the Units were issued, Zhaofeng was replaced as responsible entity of P-REIT by TFML Limited (TFML).   MacarthurCook looked to the Court to enforce the Redemption Obligation and the Guarantee Obligation under the Facility Agreements.   **(c) Decision**   MacarthurCook's claim for damages resulting from the failure to redeem the Units was upheld by the Court.   **(i) Redemption Obligation**   The Redemption Obligation under the Facility Agreements was stated to be subject to compliance with the Corporations Act and P-REIT's constitution. The responsible entity did not have a discretion to redeem the Units based on whether it considered that the redemption was in the best interests of unitholders as a whole. Nothing prevented the responsible entity from giving a binding undertaking to make a withdrawal offer of the nature of the Redemption Obligation.   Section 601KB of the Corporations Act sets out the requirements for a withdrawal offer and a withdrawal request for non-liquid schemes (P-REIT was a non-liquid scheme). Those requirements were met by the terms of the Facility Agreements. The terms of the Facility Agreements did not call into question the treatment of the Units held by MacarthurCook as a special class of units which could be the subject of a withdrawal offer and withdrawal request exclusive to that special class of units.   As such, Justice Hammerschlag found that the responsible entity was required to redeem the Units.   **(ii) Guarantee Obligation**   Justice Hammerschlag then turned to the nature of the Guarantee Obligation. MacarthurCook sought damages for the breach of the obligation to purchase the Units given that all Units were still held by MacarthurCook at the end of the 12 month redemption period.   The Court found that the Guarantee Obligation imposed obligations on Zhaofeng as responsible entity of P-REIT. This was despite the fact the Zhaofeng purported to undertake the Guarantee Obligation in its personal capacity.   Section 601FS of the Corporations Act provides that '[i]f the responsible entity of a registered scheme changes, the rights, obligations and liabilities of the former responsible entity in relation to the scheme become rights, obligations and liabilities of the new responsible entity.' TFML contended that the obligations and liabilities of Zhaofeng pursuant to the Guarantee Obligation were not those of TFML given that they were not obligations and liabilities of the former responsibility entity in relation to the scheme. It was argued that the Guarantee Obligation was not imposed on Zhaofeng as responsible entity of P-REIT, the Guarantee Obligation was imposed on Zhaofeng in its personal capacity, and therefore the Guarantee Obligation was not part of the proper duties of the former responsible entity.   However, the Court found that the expression 'in relation to' used in section 601FS was of wide application. The expression would only be read down with a compelling reason.   Also, the capacity in which a party contracts was to be determined objectively. Although the parties may seek to set out the nature of their relationship, the parties could not deem the capacity in which a party contracts to be something that it is not.   In this case, the Facility Agreements (including the Guarantee Obligation) concerned the obligations and liabilities which Zhaofeng undertook as responsible entity. Furthermore, a party cannot contract with itself. Also, a trustee always remains the same person, notwithstanding the capacity in which it purports to contract.   On the true construction of the Facility Agreements, the Guarantee Obligation was undertaken by Zhaofeng as responsible entity of P-REIT. Despite the fact that it purported to contract in its personal capacity, the obligations and liabilities under the Guarantee Obligation were in relation to the scheme.   Accordingly, the obligations and liabilities under the Guarantee Obligation became obligations and liabilities of TFML when TFML became the new responsible entity of P-REIT.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h6)  **6.8** **Court slaps AWB CFO for authorising payments to Saddam, but not too hard**  (By Louisa Macdonald, Clayton Utz)   Australian Securities and Investments Commission (ASIC) v Ingleby [2012] VSC 339, Supreme Court of Victoria, Robson J, 10 August 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2012/339.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/339.html" \t "_new)   **(a) Summary**  Payments made by AWB Limited (AWB) under various contracts for the sale of wheat in Iraq resulted in Saddam Husseim's government receiving hard currency in breach of UN sanctions. The defendant in this case, Mr Paul Ingleby, was the Chief Financial Officer (CFO) of AWB during the period when these payments were made (1999-2006).  Prior to the hearing of this case, ASIC and Mr Ingleby settled a statement of agreed facts, including joint submissions as to penalty. Mr Ingleby agreed that he had contravened section 180(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act), which imposes a civil obligation on directors and other officers to exercise their powers and discharge their duties with due care and diligence.   Justice Robson decided to impose a less onerous period of disqualification and pecuniary penalty than the ones proposed in the joint submissions. He held that Mr Ingleby should be disqualified from managing corporations until the end of 2012 (a period of less than five months, rather than the fifteen months agreed by ASIC and Mr Ingleby) and he should pay a penalty of $10,000 (rather than $40,000).  **(b) Facts**    During the period from 1 October 1999 to 30 September 2005, Iraq was consistently one of the largest markets into which the AWB sold wheat. Following Iraq's invasion of Kuwait, in 1990 the UN imposed sanctions on Iraq so that member states, including Australia, were required to prevent the sale to Iraq of any commodities or products except medicines and, in humanitarian circumstances, food. Under the sanctions, proceeds from the sale of Iraqi petroleum were paid into a UN escrow account. Funds from that account could only be released to pay for medicines and food imported into Iraq, such as wheat from the AWB. This program for importing necessary goods into Iraq was known as the Oil for Food Program (OFFP). The intention of the sanctions and the OFFP was that the Iraqi Government would be deprived of hard currencies, without giving rise to adverse humanitarian outcomes.   From July 1999 onwards the Iraqi government required importers of wheat to pay an agent of the government an 'inland transport fee' in hard currency. Purportedly this fee was to cover the transport of the wheat and the AWB agreed to pay it. The fee was, in fact, much higher than the actual cost of the transport. The AWB included the value of the fee for inland transport in the sale price provided to the UN. The money the AWB was paid from the UN escrow account therefore covered the actual sale price and the transport fee. Accordingly, the Iraqi regime was able to obtain hard currency. In addition, the UN Escrow Account was misused.  As CFO, Mr Ingleby co-authorised payments to agents for the inland transport fees. Aggregated, the AWB transport fee payments amounted to approximately $37.7 million. There is no suggestion that Mr Ingleby was aware that these fees were being misused. However, he did have information available to him to raise questions about their legitimacy. Mr Ingleby admits that he failed to 'join the dots' between documents provided to him. In the statement of agreed facts, he admits to having contravened section 180(1) of the Corporations Act by his negligent actions.  **(c) Decision**   Justice Robson held that the defendant had breached his statutory duty to exercise due care and diligence, but imposed civil penalties which were less onerous on the defendant than those which had been agreed between the parties.  In a separate judgment (*ASIC v Lindberg* [2012] VSC 332), Justice Robson imposed a larger pecuniary penalty and longer period of disqualification on the Chief Executive Officer (CEO) of the AWB. The CEO had admitted to four breaches of the Corporations Act. The legal principles articulated in that judgment apply equally to this case.  **(i) Actions that amounted to contravention of section 180(1) of the Corporations Act**  Justice Robson found that the defendant had contravened section 180(1) by his negligence. This section requires directors and officers to exercise their powers and discharge their duties with a reasonable degree of care and diligence. The judge was careful to make it clear that the defendant did not do anything deliberately wrong, nor was he dishonest, nor did the defendant act with moral turpitude. Nevertheless, he found that Mr Ingleby had been negligent in failing to exercise his powers and discharge is duties with the degree of care and diligence that a reasonable person in his position at AWB would have done in the same circumstances.   The evidence which Justice Robson relied upon to reach this finding was in the statement of agreed facts. Specifically, Justice Robson cited the defendant's acknowledgement that he:   * co-authorised payments under certain contracts; * took no steps to ascertain whether the inland transport fees were ultimately being paid to the government of Iraq; and * took no or no reasonable steps to inform the Board of the AWB of the information available to him which suggested that inland transport fees were being paid to the government of Iraq.   **(ii) Considering circumstances and admissions in deciding appropriate civil penalties**  In determining what civil penalty was appropriate in this case, Justice Robson took into account various factors, including retribution, deterrence, reformation, contrition and protection of the public. He emphasised the object of general deterrence over specific deterrence, given the limited risk of repeated contravention. The facts, however, informed how each of these factors were analysed and objectives were met.  The court took into account the damage suffered by the AWB, including to its share price, its reputation and its operations. Justice Robson questioned whether the harm would have been reduced by stopping the payments at an earlier stage, but he agreed that damage had been caused to AWB by the defendant's actions.  The facts which carried weight in deciding how the defendant should be penalised included:   * the defendant's wealth of experience, excellent reputation and competency as a CFO; * the defendant's wide ranging and significant responsibilities in this role; * the volume of documents that came across the defendant's desk; * the defendant's (reasonable) reliance on staff and other executive officers to do their jobs appropriately; * the defendant's lack of direct involvement in the making of the contracts with provisions for the payment of the inland transportation fees; and * the defendant's authorisations for the five payments in issue only having taken place after another signatory had signed and presented the payments for co-authorisation.   Personal references tendered on the defendant's behalf also carried weight. The defendant's contrition and the significant time elapsed before the matter was brought to trial were noted.   The nature and severity of the damage suffered by the corporation were also facts that went to the appropriateness of the pecuniary penalty.  Section 1317G of the Corporations Act provides that a pecuniary penalty order of up to $200,000 may be imposed if a declaration has been a made, a civil penalty provision has been contravened, and the contravention:   * materially prejudices the interests of the corporation or scheme; or * materially prejudices the corporation's ability to pay its creditors; or * is serious.   In this case, Justice Robson held that the contravention was serious as a question of fact. He noted that without the defendant's admission that the offence was serious, he may have found otherwise. Further, the judge emphasised that the contravention did not materially prejudice the interests of the corporation or the corporation's ability to pay its creditors.  In the joint submissions as to penalties, the defendant agreed to a fifteen month period of disqualification and a $40,000 penalty. Justice Robson was clear that the Court should not depart from an agreed penalty which is in the 'permissible range'. However, the judge found that, for Mr Ingleby, 'the agreed period of disqualification and pecuniary penalty broadly speaking [were] too severe and [fell] outside the permissible range'. In addition to the facts already canvassed, he cited the decision in *ASIC v Adler* (2002) NSWSC 483, where a finance director received a penalty which was significantly lower than that agreed between the parties in this case. Following this, Robson J imposed on Mr Ingleby a period of disqualification until the end of 2012 (just under 5 months) and a pecuniary penalty of $10,000.  *ASIC v Ingleby*, like other recent decisions, demonstrates that courts will find directors negligent for failing to ask further questions about the information they have available to them. However, it also demonstrates that a court will consider submissions and assess evidence before it even where facts and penalties have been agreed between the parties. Ultimately, it provides an example of where a court may reduce penalties it considers on the facts to be outside the 'permissible range'.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h6)  **6.9** **Rectification for unilateral mistake and presumption of insolvency**   (By Laura Robb, Corrs Chambers Westgarth)   Equititrust Limited v Willaire Pty Ltd [2012] QSC 206, Supreme Court of Queensland, McMurdo J, 9 August 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/qld/QSC/2012/206.html](http://www.austlii.edu.au/au/cases/qld/QSC/2012/206.html" \t "_new)   **(a) Summary**    In 2004, Equititrust Limited (Equititrust) advanced a loan of $13.21 million to GAMP Developments Pty Ltd (GAMP), to enable it to pursue a development in Townsville. After default by GAMP, Willaire Pty Limited (Willaire), a company controlled by one of GAMP's directors, Mr Spottiswood, gave two mortgages to Equititrust as further security for GAMP's debt. The first was given in April 2008 over a property at Nerang (the Nerang Mortgage). The second was given in September 2008 over a property at Southport (the Southport Mortgage). A dispute arose about the effect of the mortgages when, after ongoing default by GAMP, Equititrust threatened to appoint receivers to Willaire. Equititrust claimed their effect was that Willaire was, in all relevant respects, a guarantor for the unpaid portion of the GAMP loan. Willaire said that Equititrust was entitled to no more than recourse against the mortgaged properties, and to a limit of $3 million.    Equititrust brought two proceedings which, at the request of the parties, were tried together. In the first proceeding, Equititrust sought to have the Southport Mortgage rectified on the basis of a unilateral mistake that Willaire's liability would be unlimited. The question was whether Equititrust had executed the mortgage under a unilateral mistake and, if so, whether Willaire was implicated in the mistake so as to justify rectification. McMurdo J found that Equititrust had executed the Southport Mortgage under a unilateral mistake, that the mistake was induced by the conduct of Willaire and its solicitor, and his Honour ordered that it be rectified.    In the second proceeding, Equititrust made an application to wind up Willaire in insolvency. The issue was whether Willaire's failure to comply with a statutory demand served after the application was made gave rise to a presumption of insolvency. McMurdo J concluded that it did and ordered that Willaire be wound up.    **(b) Facts**     In 2004, Equititrust Limited (Equititrust) advanced a loan of $13.21 million to GAMP Developments Pty Ltd (GAMP) to enable it to pursue a development in Townsville.    By April 2008, GAMP was in default. It was agreed that Equititrust would refrain from exercising its rights until 19 May 2008 on condition that, amongst other things, Willaire grant the Nerang Mortgage in favour of Equititrust. Willaire's liability under the Nerang Mortgage was limited to $3 million.    By August 2008, GAMP remained in default and it was agreed that it would furnish further security, including the Southport Mortgage. On 16 September 2008, Equititrust provided Willaire with a draft form of the Southport Mortgage. The draft comprised two pages and was in similar terms to the Nerang Mortgage, save that it did not provide that Willaire's liability was limited to $3 million. On 18 September 2008, the Southport Mortgage, in the form provided by Equititrust, was executed by Mr Spottiswood on behalf of Willaire. But, at that stage, it was not returned to Equititrust. The following day, Willaire's solicitor advised Equititrust that the loan documentation, including the Southport Mortgage, had been executed.    On 23 September 2008, in response to a request by Equititrust, Willaire's solicitor emailed a copy of the loan documentation, including the Southport Mortgage, to Equititrust and its solicitor. Attached was not only the two page document which had been signed by Mr Spottiswood, but also a third page which purported to limit the liability of Willaire in certain respects. Settlement of the sale of the Townsville property took place late in the afternoon of 23 September 2008. On that day, Mr James, on behalf of Equititrust, signed the Southport Mortgage in its three page form. It was registered on 25 September 2008.    There was a contest between the parties about the events that took place in the period from 16 September until settlement. The evidence of Mr Spottiswood and his solicitor included evidence:   * of a telephone conversation between Mr Spottiswood and Mr McIvor of Equititrust in the period from 15-17 September 2008, in which Mr Spottiswood said that Willaire would grant the Southport Mortgage provided its liability was limited to $3 million; * that Mr McIvor agreed to this proposal; * that the draft mortgage was thereby amended 'to reflect agreed terms and the intention and belief of [Mr Spottiswood] and [Willaire's] solicitor'.   Mr McIvor and Mr James disputed any conversation about a monetary limit. Mr James' evidence was that he looked at the documents emailed to him on 23 September 2008, but did not notice that the third page had been added. He said that Equititrust's solicitors brought the third page to his attention at some time after 27 July 2010. At about that time, Equititrust was threatening to appoint receivers to Willaire and had given notice of exercise of power of sale over the Nerang property. On 29 July 2010, Equititrust served a statutory demand on Willaire for the sum of $3 million. The demand was prepared by Equititrust's solicitors for that amount only 'to try and avoid any dispute ... about the [$3 million] cap on Willaire's liability', with the view that it could 'always issue another demand later on the balance'.  By deed dated 23 September 2010, Equititrust appointed receivers to the Nerang and Southport properties. Willaire applied to set aside the statutory judgment and, on appeal, was successful.    Equititrust brought two proceedings which, at the request of the parties, were tried together. In the first, Equititrust sought to have the Southport Mortgage rectified on the basis of a unilateral mistake. It the alternative, it sought relief under the [Trade Practices Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default), or a construction of the loan documentation by which the Southport Mortgage could not limit Willaire's indebtedness (the Rectification Claims).    In the second proceeding, Equititrust made an application to wind up Willaire in insolvency under section 459P of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) (the Winding up Claim). It relied on events which were said to result in the presumption of insolvency pursuant to section 459C(2); namely, its own appointment of receivers and an appointment by the CBA, but it did not rely on the statutory demand. After making the application to wind up Willaire, Equititrust served another statutory demand on it. Willaire failed to comply with that demand, and Equititrust was given leave to amend its application to rely also upon that failure as giving rise to the presumption of insolvency. The issue was whether that failure could, in fact, give rise to the presumption.   **(c) Decision**    **(i) Rectification Claims**   There were two key issues:   * whether Equititrust executed the Southport Mortgage under a unilateral mistake; and * if so, whether the conduct of Willaire justified rectification.   Having regard to the evidence before him and the circumstances in which the transaction was made, McMurdo J found there was no discussion between the parties regarding any limitations of liability, that Equititrust assumed Willaire's liability would be unlimited and that Mr Spottiswood and his solicitor understood that this was Equititrust's state of mind. On that basis, McMurdo J concluded that Equititrust completed the transaction and executed the Southport Mortgage under a unilateral mistake, which was induced by the conduct of Willaire and its solicitor. His Honour found that that conduct consisted of a representation that the two page mortgage had been signed, and the subsequent provision of the three page mortgage without correcting the impression that it was in the form in which it had provided to Willaire.  Generally speaking, a unilateral mistake is not a ground for rectification. An exception to this rule arises where the unmistaken party is guilty of fraud, whether actual, constructive or equitable. Accordingly, the next question was whether Willaire's conduct justified rectification of the Southport Mortgage, to accord with the objective intention of Equititrust that Willaire's liability would be unlimited. McMurdo J found that Willaire had acted unconscionably in its deliberate omission of any reference to any alteration of the Southport Mortgage, particularly in the context of what had been said about its execution. On that basis, McMurdo J ordered rectification of the Southport Mortgage by deleting the third page.    **(ii) Winding up Claim**   Section 459C(2)(a) through (f) of the Act provides that for the purposes of, amongst other things, an application to wind up a company under section 459P, the Court must presume that a company is insolvent if certain events occur 'during or after' the three months ending on the day the application was made, including a failure by the company to comply with a statutory demand.    The issue was whether a failure to comply with a statutory demand served after an application under section 459P was made could, in fact, give rise to a presumption of insolvency.    McMurdo J referred to obiter dicta in *Golden Plantation v TQM Design and Construct* [2010] NSWSC 1453, where Palmer J interpreted section 459C(2) as meaning that although any of the events in paragraphs (b) through (f) might be relied upon if they occurred after the making of the application to wind up, the event within (a), that is, a failure to comply with a statutory demand, would not be relevant if it occurred after the application was filed. However, his Honour distinguished the present case on the basis that Equititrust's application was filed originally upon other events giving rise to the presumption and found that, in such a case, there was no authority that a subsequent failure to comply with a statutory demand must be disregarded. Having regard to the language of section 459C(2), the relevant authorities and the objective intent of Part 5.4 of the Act, his Honour found that to exclude such an event in those circumstances would be 'anomalous'. On that basis, it followed that the presumption of insolvency was made, and McMurdo J ordered that Willaire be wound up.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h6)  **6.10** **Ability of Financial Ombudsman Service to compensate for losses**   (By John O'Grady and Leah Cutri, Corrs Chambers Westgarth)   Utopia Financial Services Pty Ltd v Financial Ombudsman Service Ltd [2012] WASC 279, Supreme Court of Western Australia, Le Miere J, 7 August 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/wa/WASC/2012/279.html](http://www.austlii.edu.au/au/cases/wa/WASC/2012/279.html" \t "_new)   **(a)  Summary**   The Plaintiff, Utopia Financial Services Pty Ltd (Utopia), is a licensed Australian financial services provider. Based on advice from Utopia, Mr and Mrs Rees borrowed a sum of money in order to make a number of investments. Utopia's investment strategy for the Rees anticipated that the income from the investments would be sufficient to cover the interest payments on the loans.    The capital value of the Rees' investments subsequently diminished and the Rees were required to make up the difference between the income from investments and interest on the loans by other means. The Rees sought compensation from Utopia from these losses and, when Utopia refused, lodged a complaint with the Financial Ombudsman Service (FOS). FOS found that Utopia had breached its obligations to the Rees and awarded compensation for their losses.   Utopia commenced proceedings against FOS, arguing that FOS had acted beyond the scope of its terms of reference in its determination. As the terms of reference formed a binding contract between FOS and Utopia, Utopia argued that the FOS determination and compensation awarded to the Rees was in breach of this contract.   The Court found that the compensation represented direct financial loss and, as the loss could be ascertained at the time of the FOS determination, this was loss actually suffered by the Rees. The Court then ordered specific performance of Utopia's obligation to pay the Rees the amount awarded by FOS.   **(b)  Facts**   The Plaintiff, Utopia, is a licensed Australian financial services provider. In 2007, it prepared a statement of advice for Mr and Mrs Rees based on a client data form and risk profile questionnaire they completed. Utopia recommended that Mr and Mrs Rees:   * set up a family trust; * borrow $100,000 against the equity in their principle residence to invest in unlisted diversified property trusts jointly with the family trust (the Property Trust Investment); * borrow $100,000 by a capital protected loan to invest in shares in the four major Australian banks for a five-year term (the Capital Protected Investment); and * establish an additional loan to fund the first year's interest for the capital protected investment.   In February 2007, Mr and Mrs Rees gave their authority to Utopia to proceed based on the recommendations in the statement of advice.    In April 2010, Mr and Mrs Rees complained to Utopia that the capital value of the investments had diminished and that the dividends from their investments and the tax benefits they were receiving were not sufficient to meet the interest payments on their loans. The Property Trust Investment had also been frozen. The Rees sought compensation from Utopia for these losses they were suffering from acting on Utopia's advice. Utopia rejected these complaints.   On 25 May 2010, Mr and Mrs Rees lodged a dispute against Utopia with FOS seeking financial compensation. Utopia is a member of FOS which is an approved dispute resolution scheme under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act). FOS's constitution provides that the provisions of its constitution and the dispute terms of reference form a binding contract between the member and FOS.    A FOS panel found that Utopia had breached its obligations to Mr and Mrs Rees as Utopia:   * did not have a reasonable basis for the advice it provided to them in breach of section 945A of the Act; and * failed to adequately disclose the risks of the suggested strategy.   The panel decided that Utopia should pay the Rees $142,015 being, in summary, the original $200,000 invested less the value of the assets and any other benefits gained by the Rees. However, as the Property Trust Investment was frozen and its value uncertain, the panel found that no deduction for the value of the Property Trust Investment should be made from the determination. The panel instead required that the investment be assigned to Utopia if it so requested.   The present dispute arose from a claim by Utopia that, in reaching its decision, FOS acted outside of its terms of reference and therefore was in breach of its contract with Utopia. Utopia did not challenge the finding that it breached its obligations to the Rees, however it argued that FOS was restricted by FOS's terms of reference to a remedy which compensated actual direct financial loss that had been suffered. FOS denied these claims and counterclaimed for specific performance of Utopia's obligation to pay the Rees in accordance with the determination.   Under its terms of reference, FOS is entitled to order that the financial services provider compensate the applicant for direct financial loss or damage. It may only award payment of compensation for consequential financial loss or damage up to a maximum amount of $3000 and may only compensate non-financial loss in certain circumstances. In considering the remedy, FOS must do what is, in its opinion, fair in all the circumstances.   **(c)  Issues**   The key issue for the Court to decide was whether the compensation awarded to the Rees represented direct financial loss and loss that was actually suffered. If so, FOS had made a valid award in accordance with its terms of reference.   **(d)  Decision**   Le Miere J considered the tests for direct loss from *Hadley v Baxendale* (1854) 9 Exch 341 and *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* [2008] VSCA 26. Le Miere J stated that both the losses resulting from the difference between the interest payments and income from investments, and the diminution in the value of the investments, were losses which directly and naturally in the ordinary course of things flow from the breach of obligation by Utopia.    Utopia argued that the Rees had not, in fact, suffered loss at the time of the determination. This meant that FOS was acting beyond the terms of reference as it was only entitled to compensate for loss or damage actually suffered, not loss it was likely to suffer. Utopia asserted that the loss was only prospective at the time of determination because it could not be ascertained until the investments were realised.   Le Miere J considered that assessing the time at which loss is suffered is a question of fact and, in the case of loss caused by negligence, it will depend on the interest of the plaintiff that has been infringed and the nature of that infringement (*Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514). Le Miere J, summarising Wardley, stated that 'where loss is not capable of being ascertained until some time in the future, loss or damage is suffered when the loss is capable of being ascertained. However, loss occurs when it is reasonably ascertainable not when it is ascertained.'   His Honour stated that the risk to which Utopia had exposed the Rees by their breach of obligation had come to fruition at the time of the determination and, as such, the Rees had suffered actual economic loss. These economic losses were ascertainable and it was held that the Rees had suffered actual direct financial loss or damage.   These findings meant that FOS did not act outside the terms of reference and was not in breach of its contract with Utopia.    FOS lodged a counterclaim, seeking specific performance of Utopia's obligation to pay the Rees the amount awarded by the FOS panel.  Although the Rees were not a party to the contract, this was no bar to an order of specific performance that would benefit the Rees, as it is open to the court to award specific performance of a promise for the benefit of a third party.    The court ordered that Utopia's claim be dismissed, and that FOS's counterclaim for specific performance of the payment to the Rees be upheld.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h6)  **6.11** **Standing of a prospective or contingent creditor in an application for the winding up of a company**    (By Stephanie De Vere, Minter Ellison)   In the matter of Tabtill Pty Limited [2012] QSC 204, Supreme Court of Queensland, McMurdo J, 6 August 2012   The full text of this judgment is available at:   [http://www.austlii.edu.au/au/cases/qld/QSC/2012/204.html](http://www.austlii.edu.au/au/cases/qld/QSC/2012/204.html" \t "_new)   **(a) Summary**   This case provides useful guidance on the Court's considerations when determining whether leave should be granted under section 459P(1)(b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act), to allow a prospective or contingent creditor to apply for the winding up of a company.   **(b) Facts**     This was an application by Hopgood Ganim, a law firm, for the winding up of Tabtill Pty Ltd (Tabtill) under section 459P of the Act.  Section 459P(1)(b) of the Act provides that a creditor (even if the creditor is a secured creditor or is only a contingent or prospective creditor) may apply to the Court for a company to be wound up in insolvency. Section 459P(2) of the Act provides that an application by a person who is a creditor only because of a contingent or prospective debt may only be made with leave of the Court. Further, section 459P(3) of the Act provides that the Court may give leave if satisfied that there is a prima facie case that the company is insolvent but not otherwise.    The application was resisted by Tabtill and, through different legal representatives, John Creswick as a member of Tabtill.   Hopgood Ganim represented Felix Creswick in litigation between the members of the Creswick family and Tabtill. Hopgood Ganim claimed that it was a creditor of Tabtill under the terms of a Deed Poll (Deed). Under the Deed, Tabtill, John Creswick and William Creswick each guaranteed the due and punctual payment by Felix Creswick of any reasonable legal expenses incurred by him in respect of the proceedings between the Creswick family. Their guarantee was limited to a maximum of $100,000 and was qualified by a term which made the guarantors' obligation to pay any sum under the deed one which should commence upon 'discontinuance, dismissal or determination by judgement in respect of the whole of the Proceedings which include the Claim and Counterclaim'. Hopgood Ganim claimed that the 'whole of the Proceedings' had been determined and therefore it was entitled to call on the guarantee and claim the payment of its legal fees.   Hopgood Ganim served Tabtill with a statutory demand on 10 April 2012 for payment of its legal fees. Tabtill failed to satisfy the demand and it did not apply to the Court to set the demand aside. Consequently, Hopgood Ganim made an application for the winding up of Tabtill.   Tabtill sought leave under section 459S of the Act to rely on an argument that there was no debt presently due to Hopgood Ganim. Section 459S of the Act provides that in so far as an application for a company to be wound up in insolvency relies on a failure of the company to comply with a statutory demand, the company may not, without leave of the Court, oppose the application on a ground that the company could have relied on, but did not rely on.    Tabtill and John Creswick claimed that the 'whole of the Proceedings', more particularly the counterclaim, had not been determined because the Court of Appeal remitted the proceedings to the Trial Division to trace any benefits of the fraud the subject of the proceedings. Therefore, they argued that Hopgood Ganim was not a creditor of Tabtill and hence could not make the application for the winding up of Tabtill.   On a separate ground, Tabtill and John Creswick argued that Tabtill was not required to pay the legal costs claimed by Hopgood Ganim unless they had been assessed under the [Legal Profession Act 2007 (Qld)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=96388" \t "_default) (the Legal Profession Act).   Tabtill and John Creswick also submitted that the application should otherwise be dismissed upon discretionary grounds because:   * an order for the winding up of Tabtill would unfairly advantage Felix Creswick in the litigation of the balance of his counterclaim; * in accordance with *ASIC v Lanepoint Enterprises Pty Ltd* [2011] HCA 18 at [16], the Court should not, as a general principle, order winding up where a debt was bona fide disputed upon some substantial ground; and * an order for the winding up of Tabtill would affect the relationship between the respective guarantors under the deed.   **(c) Decision**    Justice McMurdo ordered Tabtill be wound up as no reason was demonstrated by Tabtill for refusing or staying the application.   Justice McMurdo held that the whole of the proceedings had not yet been determined because there were some matters which were litigated before but had not been determined by the original trial judge and those matters would require determination by a judgment. Consequently, there was no present debt due to Hopgood Ganim and that at least for that reason Hopgood Ganim was only a prospective or contingent creditor. Justice McMurdo noted that a contingent or prospective creditor, who by definition does not have an accrued cause of action for the debt, is a competent applicant, subject to the grant of leave, for a winding up order.   Justice McMurdo held that because of her conclusion that Hopgood Ganim was a prospective creditor, it was unnecessary to make a finding on the Legal Profession Act argument advanced by Tabtill.   Justice McMurdo referred to the presumption of insolvency contained in section 459C of the Act. Section 459C of the Act provides that the Court must presume that a company is insolvent if it failed to comply with a statutory demand. As Tabtill failed to comply with the statutory demand, the Court was required to presume that Tabtill was insolvent unless the contrary was proved. No attempt was made to prove that Tabtill was not insolvent. Consequently, Justice McMurdo determined that Tabtill was insolvent, thereby providing a powerful reason for the grant of the leave. Justice McMurdo noted that irrespective of this, there remained some discretionary power to refuse leave. However, in this case, Justice McMurdo determined there were no circumstances which provided any reason to refuse leave.   Justice McMurdo refused Tabtill's application for leave under section 459S of the Act. Justice McMurdo noted that Tabtill could have applied to set aside the statutory demand, upon the basis that the debt was not due and payable. However, leave under section 459S of the Act could not be granted because those grounds, which could have been relied on in an application to set aside the demand, were not material in the hearing that Tabtill was solvent. There was no suggestion that the existence or otherwise of a debt owed to Hopgood Ganim was material to Tabtill's solvency.  In respect of the argument that the application should be dismissed upon some discretionary ground, Justice McMurdo noted that there was a power to dismiss an application pursuant to section 467(1)(a) of the Act, although a ground had been proved on which the Court may order the company to be wound up and that there was also power to stay the application notwithstanding the proof of that ground.   Justice McMurdo noted that the submissions made for John Creswick in respect of the discretionary grounds seemed to rely upon a principle which predated the current Pt 5.4 of the Act. John Creswick referred to the general principle from the case of *ASIC v Lanepoint Enterprises Pty Ltd* [2011] HCA 18 at [16] that, prior to Pt 5.4, the Court would not, as a general principle, order winding up where a debt was bona fide disputed upon some substantial ground. However, Justice McMurdo noted that the High Court determined in that case, because the principle had no application in the case of an insolvent company, it could not apply in the context of the current Pt 5.4, where the statutory presumption of insolvency operates. Further, Justice McMurdo held that none of the arguments for Tabtill and John Creswick, about Hopgood Ganim not being a creditor, could deny Hopgood Ganim the standing of a prospective or contingent creditor.   Justice McMurdo rejected John Creswick's claim that an order for the winding up of Tabtill would unfairly advantage Felix Creswick in the litigation of the balance of his counterclaim. Justice McMurdo did not accept that the potential for any disadvantage in the proper conduct of a defence to the remainder of the counterclaim had been established and also did not accept that it would be relevant to consider any impact upon the interests of other defendants to that counterclaim in doing so, most particularly John Creswick.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h6)  **6.12** **No breach of trust or director's duty for spending in excess of cap and releasing bond moneys**   (By Nicole Parlee, King & Wood Mallesons)  In the matter of Marriner v Australian Super Developments Pty Ltd [2012] VSCA 171, Supreme Court of Victoria Court of Appeal, Neave and Mandie JJA and Judd AJA, 3 August 2012  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSCA/2012/171.html](http://www.austlii.edu.au/au/cases/vic/VSCA/2012/171.html" \t "_new)   **(a) Summary**   This case considered whether bond moneys paid by Construction and Building Unions Superannuation Fund (CBUS) into a set-off account in the name of Laguna Management Pty Ltd (Laguna Management), and later released in three stages, were expended in breach of trust. Australian Super Developments Pty Ltd (ASD), the beneficiary of the set-off account, alleged that Mr David Marriner (Marriner), in allowing for release of the money, had knowingly procured or induced the breaches of trust, or alternatively, that he was liable for any misappropriation because he had breached his statutory duties as a director of ASD.  ASD also alleged that Marriner exceeded an expenditure cap imposed on him as Chief Executive Officer without ASD Board approval.  The Court overturned the decision at first instance, finding that Marriner was not in breach of trust or his statutory duties as Director of ASD. The Court further held that the expenditure limit imposed on Marriner was not a limit on the work that Marriner could undertake, but instead a limit on his liability.  **(b) Facts**  CBUS and Marriner had been involved in a number of joint ventures where Marriner provided expertise as a property developer and CBUS provided funding. The various joint ventures were conducted through ASD. On the winding up of a joint venture, Marriner agreed to acquire the Laguna Quays resort project. ASD was the ultimate proprietor of part of the land upon which the Laguna Quays resort was located.  CBUS became dissatisfied with Marriner's involvement in the joint venture and the parties agreed to end their relationship, effected by a series of agreements. By Heads of Agreement dated 30 June 2000 between ASD, certain of its wholly owned subsidiaries and Laguna Australia Pty Ltd (a Marriner company) (30 June Heads of Agreement), ASD agreed to sell the Laguna Quays project to Laguna Australia. Marriner was not a party to the 30 June Heads of Agreement.   Under the 30 June Heads of Agreement, ASD agreed to, at its own cost, complete (or procure completion) of certain identified capital works 'provided always that the liability of [ASD] to complete such works shall not exceed A$4.7 million.'  Marriner had earlier informed ASD Board members that $1.6 million would be required to secure payment of a bond to the Mackay Electricity Board (MEB). In May 1999, a bond was issued by a bank for Laguna Management in favour of MEB for that amount and an additional $400,000 paid to Laguna for balance day adjustments. The money was provided by CBUS.    Subsequently, Marriner negotiated an agreement with MEB that the security would be reduced progressively in three tranches. Joint company secretary, Mr Peter Jephson (Jephson), instructed the bank to pay the second tranche to two companies, one of which was a wholly owned subsidiary of ASD. ASD claimed that Marriner instructed Jephson to make these orders. Jephson also ordered that the third tranche of money be paid to meet debts owed to third parties. Jephson had already resigned as secretary of Laguna Management by this time.    ASD alleged that Marriner knowingly procured or induced the breaches of trust in directing payment of their monies. Alternatively, it argued that he was liable for any misappropriation because he had breached his statutory duties as a director of ASD. ASD claimed that the bond moneys were held on trust for ASD when they were paid into Laguna Management's account, and when the second and third tranche repayments were made.  **(c) Decision**   There were two key issues before the Court:   * Was the bond released in breach of trust? Relevant to this question was whether the bond was held on Quistclose trust and, if so, whether Marriner procured or induced a breach of trust in relation to the second tranche funds; and * Is Marriner liable for payments made in excess of his expenditure cap?   **(i) Bond not released in breach of trust**   **Issue 1: Were the bond moneys held on Quistclose trust?**   The Court found that the trial judge correctly held that the bond moneys were not held on trust for ASD under a 'Quistclose' trust. The Court held that a Quistclose trust can arise where a loan is made to a borrower for a specific purpose and where the borrower is not free to apply the money for any other purpose (Lord Millett in Twinsectra [2001] 2 AC 164, [68]-[69]).   The Court held that 'a Quistclose trust can co-exist with a contractual right to repay the debt' (*Re Australian Elizabethan Theatre Trust* (1991) 30 FLR 491, 502). Consistent with UK authority, they found however 'the fact that the parties intended that the money borrowed from CBUS by ASD and then lent by ASD to Laguna Management would be used to cover the bond moneys is not necessarily sufficient to establish the existence of a Quistclose trust.' The Court suggested that ASD needed to establish that it intended to retain a beneficial interest in the $2 million paid into the Laguna Management account. It did not establish this. Therefore, a Quistclose trust did not exist.   **Issue 2: Did Marriner procure or induce a breach of trust in relation to the second tranche funds?**   The Court found that as a Quistclose trust had not arisen, Marriner could not be held liable for knowingly inducing a breach of trust by Jephson. Even if a Quistclose trust had arisen, the Court would still have found that Marriner would not be liable for breach of trust. Although the evidence was open to an inference that Marriner authorised Jephson to make payments (knowing that they would be paid out of a tranche of bond repayments), the Court did not consider that the inference was not compelling.  **(ii) The excessive capital expenditure claim**  Marriner made payments of $824,890 above his expenditure cap of $4.7 million. ASD argued that Marriner breached his duty to ASD by making payments in excess of the expenditure cap and that Marriner should repay the excess amount. The Court found that the cap did not limit the work that Marriner could do, but instead imposed a limit on his liability for the works. The Court found that to limit the works to $4.7 million would 'have presented significant practical challenges to even the most sophisticated management structure.' The practical difficulties supported the interpretation that the cap was 'intended to impose a limit on the liability of ASD, rather than on the scope of the work that could be carried out'.  The Court found that the second tranche of bond moneys belonged to Laguna Investments, and not ASD. Therefore, it was not ASD's money and should not be included in any calculation of the amount, if any, spent by Marriner in breach of his duty owed to ASD.   The Court found that the trial judge failed to provide adequate reasons for rejecting defences and therefore also remitted the question of defences to the trial judge.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h6)  **6.13** **Court strikes down section 601GC(1)(b) amendments to scheme constitution by responsible entity**   (By Frankie Barbour, Freehills)   Watts & Watts v 360 Capital Re Limited [2012] VSC 320, Supreme Court of Victoria, Sifris J, 31 July 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2012/320.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/320.html" \t "_new)   **(a) Summary**   Watts v 360 Capital represents the most recent attempt to specify the parameters of a responsible entity's capacity to modify the constitution of a managed investment scheme under section 601GC(1)(b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). Under this section, an RE may amend the scheme's constitution without unitholder approval if the RE reasonably considers that the changes will not adversely affect unitholders' rights. The decision emphasises the importance of properly considering the impact of the changes on unitholders' rights, and discusses what constitutes a 'right'.   **(b) Facts**     360 Capital RE Limited (the RE) is the responsible entity of 360 Capital Industrial Fund (the Fund), a registered managed investment scheme owning various industrial property assets. To partly fund the acquisition of a property portfolio, the RE intended to issue redeemable convertible notes (the Notes) to retail investors to raise up to $40m. In order to do this, certain changes to the Fund's constitution (the Constitution) were required.   On 31 May 2012, the RE purported to amend the Constitution to provide for the issue of the Notes, by removing the constitutional provisions that:   * prevented the issue of options unless the Fund was listed; * provided that an option conferred on the optionholder no interest in the Fund; and * required units to be issued at a price determined in accordance with the Constitution.   On 5 July 2012, the RE further purported to amend the constitution to restrict the convening and conduct of meetings of members, and the manner in which members could appoint proxies.   A product disclosure statement for the issue of the Notes was issued on 6 July 2012. The issue was scheduled to occur on 7 August 2012. On 12 July 2012, a notice of meeting was sent to members for a proposed meeting of members on 8 August 2012.   The plaintiffs, members of the Fund, brought the action seeking declarations that the modifications of the Constitution were of no effect and that the new noteholders were not members of the Fund, and an injunction restraining the RE from putting to members the resolution contained in the notice of meeting.   **(c) Decision**    Sifris J found that the purported amendments to the Constitution were of no effect and restrained the RE from conducting the meeting of members on 8 August 2012.   The decision concerned two issues: whether the Board of the RE had in fact considered the impact on members' rights, and whether the provisions restricting the issue of options were 'rights' accruing to the members. While the decision turned on the former point, Sifris J went on to consider the latter.   His Honour emphasised the importance of the three-step process to be undertaken by responsible entities in considering making constitutional changes under section 601GC(1)(b), following *ING Funds Management Ltd v ANZ Nominees Ltd* [2009] NSWSC 243 (ING Funds Management) and *Premium Income Fund Action Group Incorporated v Wellington Capital Limited* [2011] FCA 698 (Premium Income Fund). Responsible entities must consider:   * members' rights prior to the modification; * members' rights after the modification; and * if the rights differ, whether the difference will be, from a members' perspective, unfavourable.   Each step must be properly considered, and the rationale for any such decision recorded. The decision will not be interfered with if it was reasonably open to the responsible entity. A responsible entity may not completely defer to legal advice to make this decision: advices from Counsel and a law firm were followed by the RE, but the Board did not consider, discuss and analyse the advice such that they made the decision themselves. Confirming that certain matters were considered and that the members' rights would not adversely affected is insufficient - the specific matters considered must be recorded.    Sifris J rejected the RE's purported compliance with this decision-making process for both sets of constitutional amendments, and they were held to be of no effect.    Sifris J held that there was a right in this case: to ensure that no options were issued unless the Trust was listed, that an option holder would not have any interest in the fund, and that new issues were issued on the terms and at the price calculated in accordance with the Constitution. He distinguished this 'right' from the right in the matter of *Centro Retail Limited and Centro MCS Manager Limited in its capacity as Responsible Entity of Centro Retail Trust* (2011) 255 FLR 28 (Centro), which were the 'rights associated with a proposed new pricing structure that was to be applied uniformly', and likened it more to the right to have units issued at a certain price in the Premium Income Fund case. The difference between the two remains difficult to discern.   Whether there has been a 'right' impacted for the purposes of section 601GC(1)(b) depends on the extent or strength of the alleged right, and whether it is 'beyond the (rejected) right to have the scheme administered in accordance with the constitution'. The modification must affect 'the characteristics and nature of the rights', not merely their enjoyment or value. Where the issue of new shares falls on this spectrum is somewhat confused.   An injunction was issued restraining the Fund from holding the planned meeting to list the Fund, since the proposed resolutions were underpinned by assumed valid amendments to the Constitution struck down by Sifris J. Nor could the meeting be used to effect the modifications, since the Notice, proposed resolution and Explanatory Memorandum were inadequate. As such it was not proper to hold the meeting.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h6)  **6.14** **Bondholder exit consents nixed by English Court**    (By Louise McCoach and Eugene Bong, Clayton Utz)   Assenagon Asset Management SA v Irish Bank Resolution Corporation Limited [2012] EWHC 2090 (Ch), England and Wales High Court (Chancery Division), Briggs J, 27 July 2012   The full text of this judgment is available at:  [http://www.bailii.org/ew/cases/EWHC/Ch/2012/2090.html](http://www.bailii.org/ew/cases/EWHC/Ch/2012/2090.html" \t "_new)   **(a) Summary**   The English High Court held that an 'exit consent' resolution passed by a majority of holders of subordinated floating rate notes was invalid.    The exit consent was part of an exchange offer of those notes by the issuer for new notes. As described by Justice Briggs, an exit consent is a technique whereby 'the issuer wishes to persuade all holders of a particular bond issue to accept an exchange of their bonds for replacement bonds on different terms. The holders are all invited to offer their bonds for exchange, but on terms that they are required to commit themselves irrevocably to vote at a bondholders' meeting for a resolution amending the terms of the existing bonds so as seriously to damage or, as in the present case substantially destroy, the value of the rights arising from those existing bonds.'   The Court held that the exit consent was invalid because:  (1) all noteholders who voted in support of the resolution held their notes at the time of the meeting beneficially for, or for the account of, the issuer and,accordingly, all those votes should have been disregarded in accordance with the voting restrictions contained in the trust deed; and  (2) the resolution constituted an abuse of power by the voting majority as it conferred no conceivable benefit on the noteholders as a class and was both oppressive and unfairly prejudicial to the minority.  This is the first decision by an English court on the legality of exit consents under English law. It is significant because of the widespread use of exit consents in debt restructurings and the fact that they have survived judicial scrutiny in the United States.   **(b) Facts**     The notes were issued pursuant to an English law governed trust deed.   Paragraph 18 of a schedule to the trust deed provided, among other things, that 'a majority of noteholders by Extraordinary Resolution have the power to sanction any abrogation, modification, compromise or arrangement in respect of the rights of the noteholders ... against the Issuer or against any of its property whether such rights shall arise under these presents or otherwise'.    Paragraph 13 provided that 'neither the Issuer nor any subsidiary shall be entitled to vote at any meeting in respect of Notes beneficially held by it or for its account'.    Paragraph 19 provided that 'a resolution duly passed at a Noteholders' meeting would be binding upon all Noteholders whether present or absent, voting or abstaining'.   As a result of the Global Financial Crisis, the issuer announced an exchange offer pursuant to which noteholders were invited to exchange their notes for new senior notes at an exchange ratio of 0.20 (ie for every ?1 of notes, noteholders would receive 20 cents of new senior notes).    It was a condition of exchange that noteholders who wished to participate in the exchange offer also vote in favour of a resolution which, if passed by two-thirds majority of noteholders, would entitle the issuer the right to redeem all outstanding notes following the completion of the exchange offer for a nominal amount equal to ?0.01 per ?1,000 in principal amount of notes.   Approximately 92% of noteholders by value agreed to exchange their notes and vote in favour of the resolution (which they subsequently did).   Following the passing of the resolution, the issuer exercised its right to redeem the remaining outstanding notes at the nominal price and the claimant, which had neither participated in the exchange offer nor voted on the resolution, received ?170 for its ?17 million principal amount of notes.   The claimant argued that the resolution was invalid and should be overturned on the following grounds:  (1) the resolution was ultra vires the powers of the majority under paragraph 18;  (2) at the time of the noteholders' meeting, all those noteholders whose votes were counted in favour of the resolution held their notes beneficially for, or for the account of, the issuer and accordingly, all those votes should be disregarded pursuant to the voting restrictions contained in paragraph 13; and  (3) the resolution constituted an abuse of power of the voting majority because it was oppressive and unfair as against the minority who had not agreed to participate in the exchange offer in that it conferred no conceivable benefit on the noteholders as a class and it could only have affected the minority.  **(c) Decision**    Justice Briggs recognised the significance of the court's decision in determining, for the first time, the legality under English law of a technique known as an 'exit consent' that 'has been put into significant, if not yet widespread, use within the context of bonds structured under English law, in particular in connection with the affairs of banks and other lending institutions requiring to be re-structured as a result of the 2008 credit crunch'.    **(i) Ultra vires**   The claimant argued that the power of the voting majority to abrogate under paragraph 18 should be interpreted narrowly, in light of the other powers in paragraph 18 which all related to modifications, compromises or arrangements, so as to fall short of authorising a complete abandonment by the majority of all of the noteholders' rights against the issuer.    In particular, the claimant relied on the decision in *Re NFU Development Trust* [1972] 1 WLR 1548 where the phrase 'compromise or arrangement' was construed as 'excluding confiscation or expropriation of rights without any compensating advantage'.   The Court held that the power to abrogate under paragraph 18 was capable of extending to the complete forfeiture of rights conferred under the notes in circumstances not otherwise amounting to abuse. The Court reached its conclusion on the basis that quorum provisions in the trust deed specifically contemplated a special quorum to approve a reduction or cancellation of principal or interest payable on the notes.   **(ii) Disenfranchisement**    The Court then considered whether the noteholders who had participated in the exchange offer effectively held their notes for the benefit or account of the issuer and, therefore, were disentitled under paragraph 13 to vote in favour of the issuer's interests when voting on the resolution.    The Court firstly held that the applicability of the voting restriction under paragraph 13 should be tested at the date of the noteholders' meeting rather than, as argued by the issuer, at an earlier date when noteholders decided whether or not to offer their notes for exchange.    In particular, the Court took into account the fact that the restriction under paragraph 13 expressly referred to the notes being voted 'at any meeting'.    The Court also felt that determining the applicability of the restriction based upon the date on which a particular noteholder may have made up his mind to vote would give rise to practical difficulties. As Justice Briggs described, '[s]uch a flexible timing test, however precisely attuned to fulfilling the underlying purpose of conflict avoidance would in any event be extremely difficult for those responsible for the conduct of a Noteholders' meeting to adjudicate upon, all the more so in a case (such as the present) where votes are cast by previously arranged proxy rather than in person and no Noteholder attends the meeting or otherwise assists those charged with its conduct by explaining when its decision was made'.    The Court further held that at the date of the noteholders' meeting, which occurred a day before the settlement date of the exchange, the issuer had a beneficial interest in the notes held by the relevant majority who participated in the exchange.    In particular, the Court considered that the voting restriction would only apply in respect of a particular note if the relevant noteholder was obliged to either transfer a proprietary interest or the whole of the economic risks and rewards arising from the note to the issuer at the time of the noteholders' meeting.    The Court then concluded that the notes of the voting majority that participated in the exchange offer were held for the benefit of the issuer at the time of the noteholders' meeting given that those notes were the subject of a specifically enforceable contract for sale at that time.    Accordingly, the Court agreed with the claimant that the voting majority who participated in the exchange were disentitled under paragraph 13 to vote in favour of the issuer's interests in approving the Resolution.   **(iii) Abuse of power**   The Court acknowledged that its conclusions on the second issue were sufficient to determine this case in favour of the claimant. Nevertheless, it considered the third issue raised by the claimant (abuse of power) should be considered since it was a 'question of wide importance within the bond market' and one which 'could prima facie apply to any form of exit consent which imposed less favourable consequences upon those who declined to participate in the associated exchange offer, even if not amounting in substance, as they do in the present case, to a complete expropriation of the relevant securities from the dissentient minority'.   Based on general principles of English law that the power conferred on a majority to bind a minority within a class must be exercised for the purpose benefiting the class as a whole and not merely individual members only, the Court held that the resolution was an abuse of power of the majority noteholders and therefore invalid, as it did not have any conceivable benefit for noteholders and was both oppressive and unfairly prejudicial to the minority noteholders.    In particular, Mr Justice Briggs decided that '[t]he exit consent is, quite simply, a coercive threat which the issuer invites the majority to level against the minority, nothing more or less. Its only function is the intimidation of a potential minority, based upon the fear of any individual member of the class that, by rejecting the exchange and voting against the resolution, he (or it) will be left out in the cold ... Putting it as succinctly as I can, oppression of a minority is of the essence of exit consents of this kind, and it is precisely that at which the principles restraining the abusive exercise of powers to bind minorities are aimed.'    The Court also distinguished this from a 'drag-along' scheme which forces the dissentient minority into the same exchange as that accepted by the majority and therefore deprives the exit consent under that scheme of its coercive effect.   The issuer cited a number of cases in support of the proposition that an exit consent would not be an abuse of power if the inducement to support the scheme was properly disclosed to all members of the class. The Court dismissed this argument on the basis that, in all those cases, 'it was not irrational to conclude that the proposal, ignoring the benefit of the inducement, was nonetheless itself capable of being regarded as beneficial to the class'.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h6) | |  |  | | --- | |  |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **7. Contributions** |  |  | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/181-September-2012.html%23h1) | | | http://my.lawlex.com.au/alert/pic/spacer.gif |

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