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We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | |  | |      |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%231) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1 Central clearing of OTC derivatives in Australia - discussion paper**   On 17 June 2011, the Reserve Bank of Australia, on behalf of the Council of Financial Regulators (comprising the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission and the Treasury, and chaired by the Reserve Bank), issued a discussion paper on Central Clearing of Over-the-counter (OTC) Derivatives in Australia as part of its consideration of Australia's response to the substantial international reform efforts underway in global OTC derivatives markets.    The paper discusses the evolving global landscape for OTC derivatives and central clearing, the Australian market for OTC derivatives, and a range of considerations that need to be weighed if central clearing in the domestic market is to be established.  In the discussion paper, the Council agencies suggest the following propositions regarding what might be the future path of central clearing of Australian OTC derivatives markets:  In the absence of Australian regulatory action, central counter party (CCP) domestic solutions may not emerge. Hence decisions by regulators and participants in major overseas OTC derivatives markets may have the effect of inducing Australian-based market participants to use offshore CCPs for a significant part of their business. This might be the case even in the absence of any Australian clearing requirements.  Where offshore CCPs are clearing domestic markets that are of systemic importance, this may introduce risks to the Australian financial system that do not currently exist. It is likely that Australian regulatory agencies would have less scope to oversee offshore CCPs relative to domestic ones, and to respond as needed in conditions of stress. For this, and other public policy reasons, the Council agencies have reservations about a mandatory clearing requirement that resulted in a systemically important domestic market being cleared though offshore CCPs.  The Council agencies consider that the market for Australian dollar-denominated interest rate derivatives (such as overnight indexed swaps, forward rate agreements, and interest rate swaps) is systemically important within Australia, given the wide range of domestic participants that use these instruments, and the interdependencies between these derivatives markets and other domestic capital and credit markets.  In light of this, the Council agencies are considering the case for a requirement that activity in Australian dollar-denominated interest rate derivatives be centrally cleared and whether this should take place domestically. A mandatory clearing requirement to that effect would generally apply to financial institutions acting in the domestic market (such as Authorised Deposit-taking Institutions and Australian Financial Services Licensees); the Council agencies would expect that some market participants would be exempt from this mandatory requirement, depending on their size or class.  The purpose of the discussion paper is to seek feedback on the Council agencies' views and propositions before making any recommendations to the Government.    The consultation paper is available on the [Reserve Bank of Australia website](http://www.rba.gov.au/publications/consultations/201106-otc-derivatives/pdf/201106-otc-derivatives.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.2 UK Government publishes financial regulation White Paper and draft Bill**  On 16 June 2011, the UK Government published its financial regulation White Paper and draft Bill.  These provide further detail on the Government's proposed reforms to the financial regulatory regime within the UK. The White Paper, which contains the draft Bill, is titled 'A new approach to financial regulation: the blueprint for reform'.  Last year, the Government outlined plans for major reform of the UK financial regulatory system including:  establishing a macro-prudential regulator, the Financial Policy Committee (within the Bank of England) to monitor and respond to systemic risks;  transferring responsibility for prudential regulation to a focused new regulator, the Prudential Regulation Authority established as a subsidiary of the Bank of England; and  creating a focused new conduct of business regulator - the Financial Conduct Authority - to ensure that business across financial services and markets is conducted in a way that advances the interests of all users and participants.  The White Paper contains a number of new policy proposals which have been developed in light of stakeholder feedback, including:  a specific statutory objective governing the Prudential Regulation Authority's responsibilities for the insurance sector;  an updated and enhanced competition regime under the Financial Conduct Authority; and  steps to strengthen the handling of cases of widespread consumer detriment, including misselling.  The White Paper is available on the [UK Treasury website](http://www.hm-treasury.gov.uk/consult_finreg_blueprint.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.3 Proposed changes to the Singapore Code of Corporate Governance**   On 14 June 2011, the Singapore Corporate Governance Council ("Council") released a consultation paper on proposed revisions to the Code of Corporate Governance ("Code") which applies to Singapore listed companies on a 'comply or explain' basis.  The consultation paper sets out the key proposals recommended by the Council. The key proposals are made in the areas of director independence, board composition, director training, multiple directorship, alternate directors, remuneration practices and disclosures, risk management, as well as shareholder rights and role.   The key proposed changes are:  To include in the Code the following relationships as additional instances where a director will be deemed non-independent: - if the director is or was, in the current or any of the past three financial years, a substantial shareholder, partner, executive officer, or director of organisations to which the company or any of its related corporations made, or received, significant payments or material services in the current or immediate past financial year; - if the director is a substantial shareholder or an immediate family member is a substantial shareholder of the company,  - if the director is or has been directly associated with a substantial shareholder of the company in the current or any of the past three financial years; and -  if the director has served on the Board for more than nine years from the date of his or her first election.  To introduce in the Code a new provision that independent directors should make up at least half of the Board where (i) the Chairman and the Chief Executive Officer ("CEO") is the same person; (ii) the Chairman and CEO are immediate family members; (iii) the Chairman and CEO are both part of the management team; or (iv) the Chairman is not independent.  To introduce in the Code new requirements for companies to arrange and fund training for new and existing directors, and disclose the induction, orientation and training provided to new and existing directors in its annual report.  To introduce in the Code a new requirement for the Nominating Committee to review and make recommendations to the Board on training programs for the Board.  To introduce in the Code a provision that the Nominating Committee should decide if a director is able to and has been adequately carrying out his or her duties as a director, taking into consideration the director's number of listed company board representations and other principal commitments. The Board should further determine the maximum number of listed company board representations which any director may hold, and disclose this in the company's annual report.  To introduce in the Code a provision that directors should not appoint alternate directors except for limited periods in exceptional circumstances.  To include in the Code that the level and structure of remuneration should be aligned with the long-term interests and risk policies of the company. Additional guidance will also be given to companies to consider provisions allowing the company to reclaim incentive components of remuneration from directors and key management personnel in exceptional circumstances of misstatement of financial results, or of misconduct resulting in financial loss to the company.  To introduce in the Code a provision that the Remuneration Committee should ensure that existing key relationships between the company and its appointed remuneration consultants will not affect the independence and objectivity of the remuneration consultants.  To include in the Code additional guidance that companies should disclose more information on the link between remuneration and performance of directors, CEOs and key management personnel.  To introduce in the Code a provision that companies should fully disclose the remuneration of each individual director and the CEO on a named basis.  Companies should disclose in aggregate the total remuneration paid to the top five key management personnel (who are not directors or the CEO).  To introduce in the Code provisions that (i) the Board is responsible for the risk governance of the company and should determine the nature and extent of risks which the company may undertake, and that it should ensure that management maintains a sound system of risk management and internal controls; and (ii) the Board should assess appropriate means to carry out its responsibility of overseeing the company's risk management framework and policies.  To introduce in the Code a provision that the Board should comment on whether it has received assurance from the CEO and CFO that (i) the financial records have been properly maintained and the financial statements give a true and fair view of the company's operations and finances; and (ii) an effective risk management and internal controls system has been put in place.  To introduce in the Code a new principle, and accompanying guidelines, on 'Shareholder Rights' to guide companies in their engagement with shareholders.  To introduce as an annexure to the Code a statement on the role of shareholders in engaging with the companies in which they invest.  To introduce in the Code a provision that companies should put all resolutions to vote by poll and make an announcement of the detailed results showing the number of votes cast for and against each resolution and the respective percentages.  The consultation document is available on the [Monetary Authority of Singapore website](http://www.mas.gov.sg/resource/publications/consult_papers/2011/Consultation_Paper_on_Proposed_Revisions_to%20the%20CCG_14Jun2011.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.4 Regulation of the insolvency profession - reform proposals**   On 2 June 2011, the Parliamentary Secretary to the Treasurer and Attorney-General jointly released an options paper titled 'A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia'.    The options paper examines reforms to address possible misconduct in the insolvency profession and to improve the value for money for recipients of insolvency services. It seeks to achieve these reforms by ensuring that the framework for insolvency practitioners:  promotes a high level of professionalism and competence by practitioners  promotes market competition on price and quality  promotes increased efficiency in insolvency administration  enhances communication and transparency between stakeholders.  The topics dealt with in the options paper include:  standards for entry into the insolvency profession  the registration process for insolvency practitioners  the remuneration framework for insolvency practitioners  communication and monitoring  funds handling and record keeping  insurance requirements for insolvency practitioners  discipline and deregistration of insolvency practitioners  removal and replacement of insolvency practitioners  regulator powers  specific issues for small business.  Last year, the Senate Economics References Committee examined the extent of insolvency practitioner misconduct and the adequacy of efforts to oversee and regulate the corporate insolvency regime. The Committee's evidence raised significant questions about the adequacy of the registration, remuneration and regulation of the insolvency profession.  The options paper explores reform areas that go beyond the recommendations of the Senate Committee including disbursements, the role of creditors in the setting of practitioner remuneration, the power of creditors to remove and replace insolvency practitioners and harmonisation of funds handling regulations.  The Government has decided not to accept the Senate Committee's recommendations to establish a new insolvency regulator, or refer the issue of harmonisation to the Australian Law Reform Commission. The Committee's other recommendations have been noted and canvassed in the reform options contained within the paper including ways to make the corporate and personal insolvency frameworks more consistent.   The options paper is available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2060" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.5 CEO performance and pay in the UK - study**   Remuneration committees in the UK are struggling to maintain their independence from their CEOs and are adopting increasingly expensive, short-term reward strategies according to the latest Manifest and MM&K Total Remuneration Survey published on 29 May 2011.    The 'Executive Director Total Remuneration Survey 2011' examines the latest remuneration reports of 624 UK companies finding little link between remuneration, performance and shareholder value. Although the median FTSE 100 CEO remuneration was up 32% to £3.5 million in 2010 over 2009, the FTSE100 index only rose 9% over the same period. Looking over a twelve-year horizon it finds that despite flat share prices CEO remuneration has quadrupled.   The survey identifies a shift from longer-term incentives (typically over three years) to annual bonuses, mirroring the approach that caused so many problems in the banking sector. Furthermore, as most remuneration strategies now involve the use of Long Term Incentive Plans (LTIPS), reward horizons have shortened to only three years. A decade ago, when share options were the favoured long-term incentive, the horizon average was seven to ten years.  This problem is accentuated among larger companies whose complex schemes contain multiple reward thresholds. This means, according to the report, that the typical CEO enjoys rewards for even the most basic levels of performance regardless of whether they attain an 'exceptional' outcome for the company with many requiring, to vest the maximum award, only EPS growth of RPI plus 9% p.a.  The survey has analysed deferred bonuses in detail for the first time. Deferral of bonus has become increasingly common. The Walker Report (2009) strongly recommended this for the financial sector, however the practice had already become increasingly prevalent in the non-financial sector well before that. Almost three quarter of the FTSE 100 companies are estimated to have a deferred bonus plan, and just over half of the FTSE 250. Mostly these plans have been introduced at that same time as bonus levels have also been increased, so the impact on executives' cash earnings have been mitigated and over the long run considerably enhanced. Not all these plans have made deferred bonus awards yet, so the data may reflect previous practice and next year's results are likely to be higher.  According to the report, there are many reasons why deferral is a good idea; it helps retention; it ensures that payment is only made if performance is maintained in the future (if the rules are so written); it can provide malus if future performance declines so providing (some more) alignment with shareholders; and it enables claw-back of bonus in the case of malfeasance. The benefit of deferral is that is much easier to claw-back that part of bonus that has not already been paid out.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.6 Financial claims scheme consultation paper**  On 27 May 2011, the Australian Government published a consultation paper on the Australian Financial Claims Scheme (FCS). The FCS protects depositors by providing them with certainty that they will recover their protected deposits (currently capped at $1 million per depositor, per institution) in the event that a bank, building society or credit union becomes insolvent. It also provides depositors with quick access to the deposit funds covered by the scheme.  The FCS was introduced at the height of the global financial crisis, so some of its settings were adjusted to address heightened concerns over global financial stability. When it introduced the FCS, the Government committed to review these settings in three years' time. The government has stated that it is now appropriate to review the design settings of the FCS and consider whether amendments are required in the new, post-crisis environment.  The Council of Financial Regulators (CFR), comprised of the Reserve Bank of Australia, the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission and Treasury, has reviewed the FCS. The CFR has advised that the FCS in its current form is largely appropriate to the post-crisis landscape. However, it has suggested some narrowing of the scheme from the settings that were put in place during the crisis, particularly in relation to the cap on the size of protected deposits and some refinements to the existing framework. The consultation paper seeks views on the CFR's proposals. It also seeks views on the current operation of the scheme and any impacts on industry and consumers.  The consultation paper is available on the [Treasury website](http://www.treasury.gov.au/documents/2025/PDF/CP_Financial_Claims_Scheme.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.7 European Council adopts EU rules for alternative investment fund managers**  On 27 May 2011, the European Council adopted a directive introducing harmonised EU rules for entities engaged in the management of alternative investment funds, such as hedge funds and private equity firms.  Adoption of the text follows an agreement reached with the European Parliament at first reading. The directive will enter into force on the 20th day following its publication in the Official Journal; member states will have two years to transpose its provisions into national law.  The directive is aimed at:  establishing common requirements for the authorisation and supervision of alternative investment fund managers (AIFM) in order to provide a coherent approach to the related risks and their impact on investors and markets in the EU;  allowing AIFM to provide services and market EU funds throughout the EU single market, subject to compliance with strict requirements.  The directive is intended to fulfil commitments made by the EU at the G-20, in the wake of the global financial crisis, as well as the European Council's pledge to regulate all players in the market that might pose a risk to financial stability.  The activities of AIFM are currently regulated by a combination of national regulations and general provisions of EU law, supplemented in some areas by industry standards. The global financial crisis showed that uncoordinated national responses to the risks to which the funds were exposed made the efficient management of these risks difficult.  In addition to hedge funds and private equity, the directive also covers real estate funds, commodity funds and all other funds that are not covered by the directive on collective investment funds.  The main features of the directive are as follows:  Authorisations. To operate in the EU, fund managers will be required under the directive to obtain authorisation from the competent authority of their home member state. Once authorised, an AIFM will be entitled to market funds established in the EU to professional investors in any member state. To obtain authorisation, AIFM will have to hold a minimum level of capital in the form of liquid or short-term assets.  Depositary: AIFM will be required to ensure that the funds they manage appoint an independent depositary responsible for overseeing the fund's activities and ensuring that the fund's assets are appropriately protected. The depositary will be liable to the investor and the manager. It should be located in the same country as the fund if the fund is established in the EU. If the fund is established in a third country, the depositary should be located in the EU, unless a cooperation and information exchange agreement exists between the supervisors ensuring that regulations are equivalent and supervision can be carried out in accordance with requirements in the EU.  Risk management and prudential oversight. AIFM will be required to satisfy the competent authority of the robustness of their internal arrangements with respect to risk management, including liquidity risks. To support macro-prudential oversight, they will be required to disclose on a regular basis the principal markets and instruments in which they trade, their principal exposures and concentrations of risk.  Treatment of investors. In order to encourage diligence amongst their investors, AIFM will be required to provide a clear description of their investment policy, including descriptions of the types of assets and the use of leverage.  Leveraged funds. The directive introduces specific requirements with regard to leverage, i.e. the use of debt to finance investment. Competent authorities will be empowered to set limits to leverage in order to ensure the stability of the financial system. AIFM employing leverage on a systematic basis will be required to disclose aggregate leverage and the main sources of leverage, and competent authorities will be required to share relevant information with other competent authorities.  AIFM acquiring controlling stakes in companies. The directive introduces specific requirements for AIFM acquiring controlling stakes in companies, in particular the disclosure of information to other shareholders and to representatives of employees of the portfolio company. It however avoids extending such requirements to acquisitions of SMEs, so as to avoid hampering start-up or venture capital.  Passport. The directive introduces a single market framework that will allow AIFM to "passport" their services in different member states on the basis of a single authorisation. Once an AIFM is authorised in one member state and complies with the rules of the directive, the fund manager will be entitled upon notification to manage or market funds to professional investors throughout the EU.  Funds and managers located in third countries. Following a two-year transition period and subject to conditions set out in the directive, the "passport" will be extended to the marketing of non-EU funds, managed either by EU AIFM or by AIFM based outside the EU. In accordance with the principle of "same rights, same obligations", this approach will ensure a level playing field and a consistently high level of transparency and protection of European investors. The phased introduction of the third country passports will allow European supervisors to ensure that the appropriate controls and cooperation arrangements necessary for the effective supervision of non-EU AIFM are working effectively. Before the third country passport is introduced, and for a period of three years thereafter, national regimes will remain available subject to certain harmonised safeguards. Once this period has elapsed, and on the basis of conditions set out in the directive, a decision will be taken to eliminate the national regimes. At this point, all AIFM active in the EU will be subject to the same high standards and enjoy the same rights.  Optional exemptions for smaller funds. The directive gives member states the option not to apply the directive to smaller AIFM, namely funds with managed assets below EUR 100 million if they use leverage, and with assets below EUR 500 million if they do not. Smaller funds will however be subject to minimum registration and reporting requirements.  The need for regulation and oversight of hedge funds is also the subject of ongoing discussion at international level within the G-20, the International Organisation of Securities Commissions and the Financial Stability Board.   The Directive is available on the [Council's website](http://register.consilium.europa.eu/pdf/en/10/pe00/pe00060.en10.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.8 External board evaluations in the UK - study**   Only 33 (16.5%) of the top 200 UK listed companies undertook some form of external board evaluation process in 2010 according to a report published on 26 May 2011 by the UK Institute of Chartered Secretaries and Administrators (ICSA). All but ten of these companies have used some form of external facilitation in the last five years. The report is based on ICSA's annual review of how companies choose to undertake and report their annual evaluation of the performance of the board and the audit, nomination and remuneration committees and the individual members of the board.    A new code provision (B.6.2) of the UK Corporate Governance Code recommends that externally facilitated board reviews should be carried out at least every three years. The FRC's Stewardship Code states that 'institutional investors should consider carefully explanations given for departure from the UK Corporate Governance Code.'   The report is available on the [ICSA website](http://icsa.org.uk/assets/files/pdfs/Publications/bereport2011.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.9 Report on executive remuneration**  On 25 May 2011, the Corporations and Markets Advisory Committee (CAMAC) published a report on executive remuneration. The report responds to a request from the Australian Government, following on from the Productivity Commission report 'Executive remuneration in Australia' (December 2009), for advice on the possibility of reducing the complexity of executive remuneration reports and revising the remuneration setting framework to simplify the incentive components of these arrangements.  In releasing the report, the Convenor of CAMAC, Joanne Rees, said:  "CAMAC sees remuneration reporting as a dynamic process, which needs to reflect evolving remuneration practices. Companies should be allowed to develop their response to this changing environment without simultaneously having to come to grips with wide-ranging new reporting requirements. Evolving remuneration reporting practice, and ideas for simplification of remuneration reports, may provide the basis for a fresh non-prescriptive legislative approach to remuneration reporting at some future time."   In the meantime, CAMAC has made specific suggestions to improve executive remuneration reporting, including to:  require companies to give a general description of their remuneration governance framework;  permit companies to withhold commercially sensitive information concerning a performance condition, provided that they disclose that fact and set out a general description of the omitted information;  remove the requirement to use accounting standards methodology in remuneration reports;  require the disclosure of all termination payments, identifying entitlement payments (amounts paid on termination that reflect statutory and other accumulated payments), severance payments (amounts paid specifically for termination, including gratuitous and discretionary payments) and post‑severance arrangements; and  require disclosure, for each executive, of crystallized past pay (remuneration granted at some previous time and paid in the current financial year), present pay (remuneration granted and paid in the current financial year) and future pay (remuneration that is deferred to some future period).  CAMAC considers that, in general, the incentive and other components of remuneration policies and arrangements are matters for each company to determine, taking into account various factors, including the experience and skills required of its senior management, the marketplace for executive talent and the expectations of shareholders and other stakeholders of the company.  The report is available on the [CAMAC website](http://www.camac.gov.au/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.10 SEC adopts rules to establish whistleblower program**  On 25 May 2011, the US Securities and Exchange Commission adopted rules to create a whistleblower program that rewards individuals who provide the agency with high-quality tips that lead to successful enforcement actions.   The new SEC whistleblower program, implemented under section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010, is primarily intended to reward individuals who act early to expose violations and who provide significant evidence that helps the SEC bring successful cases.   To be considered for an award, the SEC's rules require that a whistleblower must voluntarily provide the SEC with original information that leads to the successful enforcement by the SEC of a federal court or administrative action in which the SEC obtains monetary sanctions totaling more than US$1 million.   The rules are available on the [SEC website](http://www.sec.gov/rules/final/2011/34-64545.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.11 Updated OECD guidelines for multinational enterprises to promote responsible business conduct**  On 25 May 2011, Ministers from OECD and developing economies agreed new guidelines to promote more responsible business conduct by multinational enterprises.  The updated Guidelines include new recommendations on human rights abuse and company responsibility for their supply chains, making them the first inter-governmental agreement in this area. The Guidelines establish that firms should respect human rights in every country in which they operate. Companies should also respect environmental and labour standards, for example, and have appropriate due diligence processes in place to ensure this happens. These include issues such as paying decent wages, combating bribe solicitation and extortion, and the promotion of sustainable consumption.  The Guidelines are a non-binding code of conduct that OECD member countries and others have agreed to promote among the business sector. A new, more rigorous process for complaints and mediation has also been put in place.  The new Guidelines are available on the [OECD website](http://www.oecd.org/document/28/0,3746,en_21571361_44315115_2397532_1_1_1_1,00.html" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.12 APRA releases enhancements to Basel II Framework**  On 23 May 2011, the Australian Prudential Regulation Authority (APRA) released amendments to relevant prudential standards, prudential practice guides (PPGs) and reporting forms to give effect to enhancements to the Basel II Framework in Australia. The Basel II Framework is a global capital regime that was introduced for authorised deposit‑taking institutions (ADIs) in Australia on 1 January 2008.  The amendments are a response to a package of measures released by the Basel Committee on Banking Supervision in July 2009, and adjusted in June 2010.  The measures aim to enhance the Basel II Framework by ensuring that the risks inherent in banks' portfolios relating to trading activities, securitisations and exposures to off-balance sheet vehicles are better reflected in minimum capital requirements, risk management practices and accompanying public disclosures.  APRA has consulted with industry on these measures.   The changes to APRA's prudential standards include:  higher capital requirements to capture the credit risk of complex trading activities and the introduction of a stressed value-at-risk (VaR) requirement;  higher risk-weights for so-called 'resecuritisation' exposures to better reflect the risk inherent in these products, and increased credit conversion factors for short-term liquidity facilities provided to off-balance sheet conduits;  requirements in relation to valuation practices and the capture of off-balance sheet and securitisation activities; and  increased disclosure requirements for securitisations and off-balance sheet exposures.  APRA is also implementing a number of other amendments to its prudential standards on capital to clarify existing provisions and support the implementation of the Basel II enhancements.  The enhancements to the Basel II Framework are expected to have only a limited impact on ADIs, which largely avoided higher risk trading activities during the global financial crisis.  The amended prudential standards, PPGs and reporting forms will come into effect on 1 January 2012.  The package of changes can be found on the [APRA website](http://www.apra.gov.au/ADI/Enhancements-to-the-Basel-II-Framework-in-Australia.cfm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.13 Report on oversight of ASIC**   On 23 May 2011, the Parliamentary Joint Committee on Corporations and Financial Services published its report titled "Statutory Oversight of the Australian Securities and Investments Commission". The matters dealt with in the report are:  Market supervision  Complaints-handling  Litigation  Financial literacy  Freezing of investors' funds  Regulation of consumer credit  Regulation of the not-for-profit sector.  The report is available on the [Committee's website](http://www.aph.gov.au/Senate/committee/corporations_ctte/asic/index.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.14 IOSCO finalises principles to address dark liquidity**   On 20 May 2011, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a final report, 'Principles on Dark Liquidity', containing principles to assist securities markets authorities in dealing with issues concerning dark liquidity.   The principles are designed to:  minimise the adverse impact of the increased use of dark pools and dark orders in transparent markets on the price discovery process by generally promoting pre-trade and post-trade transparency and encouraging the priority of transparent orders;  mitigate the effect of any potential fragmentation of information and liquidity by generally promoting pre-trade and post-trade transparency and consolidation of such information;  help to ensure that regulators have access to adequate information to monitor the use of dark pools and dark orders for market monitoring/surveillance purposes and to enable an appropriate regulatory response to market developments; and  help to ensure that market participants have sufficient information so that they are able to understand the manner in which orders will be handled and executed.  The Technical Committee, in developing these principles, focused on a number of areas of regulatory concern which may adversely impact the market including transparency and price discovery, market fragmentation, knowledge of trading intentions, fair access; and the ability to assess actual trading volume in dark pools.  The principles establish that pre- and post-trade transparency are central to promoting the efficiency of the market and the integrity of the price formation process. In addition they recognise that a one size fits all approach may not be appropriate for all types of trading or platforms and therefore implementation of the principles may vary according to the type of trading and platform.  The Technical Committee recommends that regulators consider the structure of their respective markets as a whole to determine how best to implement these principles. Regulators should implement the principles in such a way as to maintain the efficiency of the market, the integrity of the price formation process and, where appropriate, to allow for the use of dark pools and dark orders for specific needs/trades.  **Principles on dark liquidity**  The principles set out below are designed to guide regulators, venues and general users of dark liquidity with respect to the following areas:  **(a) Transparency to market participants and issuers**  Principle 1: The price and volume of firm orders should generally be transparent to the public. However, regulators may choose not to require pre-trade transparency for certain types of market structures and orders. In these circumstances, they should consider the impact of doing so on price discovery, fragmentation, fairness and overall market quality.  Principle 2: Information regarding trades, including those executed in dark pools or as a result of dark orders entered in transparent markets, should be transparent to the public. With respect to the specific information that should be made transparent, regulators should consider both the positive and negative impact of identifying a dark venue and/or the fact that the trade resulted from a dark order.  **(b) Priority of transparent orders**  Principle 3: In those jurisdictions where dark trading is generally permitted, regulators should take steps to support the use of transparent orders rather than dark orders executed on transparent markets or orders submitted into dark pools. Transparent orders should have priority over dark orders at the same price within a trading venue.  **(c) Reporting to regulators**  Principle 4: Regulators should have a reporting regime and/or means of accessing information regarding orders and trade information in venues that offer trading in dark pools or dark orders.  **(d) Information available to market participants about dark pools and dark orders**  Principle 5: Dark pools and transparent markets that offer dark orders should provide market participants with sufficient information so that they are able to understand the manner in which their orders are handled and executed.  **(e) Regulation of the development of dark pools and dark orders**  Principle 6: Regulators should periodically monitor the development of dark pools and dark orders in their jurisdictions to seek to ensure that such developments do not adversely affect the efficiency of the price formation process, and take appropriate action as needed.  IOSCO intends to review these principles in light of market and regulatory developments.  In addition to outlining the principles, the report deals with:  Characteristics of dark pools and dark orders (extent and use of dark pools and dark orders; purpose of dark pools; and how dark pools operate)  The regulatory environment (current regulatory approaches to dark pool operators and dark orders; transparency; and reporting to the regulator)  Regulatory concerns (price discovery; potential fragmentation of information and liquidity; and fairness and market integrity).  The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD353.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.15 Rights issues guidance for issuers**  On 18 May 2011, the UK Institutional Investor Committee (IIC) published best practice guidance for issuers seeking to raise equity capital by means of rights issues. The guidance is intended to inform issuers and their boards about institutional shareholders' views on best practice when raising equity capital.  The guidance recommends that companies, amongst other things, discuss with their shareholders:  the appropriate capital structure for the company;  whether, and for how long, shareholders would be prepared to receive price sensitive information in the event of a capital raising exercise; and  whether in principle they have the ability or appetite to act as a sub-underwriter.  Once the need for a capital raising exercise actually arises, the recommendations include that companies:  consider whether their existing advisers are well placed to act on their behalf or whether additional sources of advice are required;  ask for a full breakdown of the advisers' proposed fees and satisfy themselves that they understand what it is being paid and for what purpose; and  in the event that the issue price is deeply discounted, consider whether the issue needs to be underwritten in whole, in part or not at all.  The guidance is available on the [IIC website](http://www.iicomm.org/docs/bpguidance0511.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.16 Revised OECD Guidelines on Insurer Governance**  In May 2011, the OECD Council agreed on revised OECD Guidelines on Insurer Governance. The revisions were based on a review that included a joint work program with the International Association of Insurance Supervisors (IAIS), an OECD review and assessment of evolving national and international principles and good practices, and public consultations.  The new Guidelines seek to reflect lessons learned from the financial crisis, including the need for a board with necessary leadership, expertise, and independent decision-making, effective risk management and internal control systems and integrated firm-wide reporting within an insurer, sound compensation arrangements, and well understood group structures.  The new Guidelines recognise that the governance of financial institutions, including insurers, should be of a high standard and are a key component of the regulatory and supervisory framework. Insurer corporate governance should, in particular, be comprised of the following key elements:  Expected prudent approach to business and financial strategies, consistent with the role of insurance in the economy and, where relevant, social security systems;  Well developed risk culture and risk management and internal control systems, supported by effective and independent control functions;  High level of financial expertise among board members and within senior management; and  Policies and procedures that ensure proper treatment of customers and policyholders (and any relevant beneficiaries), including mechanisms for redress.  The Guidelines are organised around four main sections -  governance structure, internal governance mechanisms, groups and conglomerates, and stakeholder protection - and are accompanied by detailed annotations.  They are structured in such a way as to promote clear presentation and comparability with other national or international standards and principles.   The Guidelines are non-binding. They are meant to provide guidance and serve as a reference point for insurers, governmental authorities, and other relevant stakeholders in OECD and non-OECD countries. The Guidelines are fully consistent and compatible with the OECD Principles of Corporate Governance, one of the twelve key Financial Stability Board standards for sound financial systems.   The Guidelines are available on the [OECD website](http://www.oecd.org/dataoecd/57/1/48071279.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1)  **1.17 Research study on use of infringement notices by the Australian Securities and Investments Commission**   The Centre for Corporate Law and Securities Regulation at the University of Melbourne has published a new research study titled 'The Use of Infringement Notices by ASIC for Alleged Continuous Disclosure Contraventions: Trends and Analysis'.   The Australian Securities and Investments Commission (ASIC) has several enforcement options available to it where a company breaches its continuous disclosure obligations by not promptly disclosing price sensitive information. The most recent enforcement option made available to ASIC is the use of infringement notices. Infringement notices are designed to be used for less serious contraventions of continuous disclosure obligations. ASIC can issue an infringement notice where it believes a company has not complied with its continuous disclosure obligations. The notice specifies a financial penalty to be paid by the company and the company can choose to comply with the notice by paying the penalty or the company can choose not to comply in which case ASIC may take other enforcement action.    This paper reports the results of the first detailed empirical study of ASIC's use of infringement notices since they were introduced in 2004. One of the findings is that although infringement notices were introduced on the basis they would be a fast remedy, this objective has not been achieved. On average, ASIC takes almost 250 days from the time of an alleged contravention to the issuance of an infringement notice.  The authors also compare ASIC's use of infringement notices with other enforcement measures available to ASIC for breach of continuous disclosure obligations. These measures include enforceable undertakings, civil penalty proceedings and criminal penalty proceedings.  The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1855891" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h1) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1 Consultation on case-specific variations to proposed relief from indirect self-acquisition provisions**  On 16 June 2011, ASIC issued a consultation paper, CP 162 'Indirect self-acquisition by investment funds: Further consultation - Employee share schemes' seeking additional public comment on a proposal to vary relief that permits certain indirect self-acquisitions. The variation is aimed at facilitating the operation of specific types of employee share schemes.  Under section 259C of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act), the issue or transfer of shares or units of shares of a company to an entity it controls (indirect self-acquisition) is void unless certain exceptions apply. ASIC's Consultation Paper 1 'Indirect self acquisition by investment funds' and Consultation Paper 137 'Indirect self-acquisition by investment funds: Further consultation' sought feedback on the circumstances in which relief from section 259C should be given. Based on the policy proposed in CP 1, ASIC has provided case-by-case relief.  **(a) Employee shares schemes and section 259C relief**  Since the release of CP 137, ASIC has become aware that some entities operating employee share schemes are having difficulty complying with one of the standard conditions of section 259C relief. This condition says that the company and its controlled entities must not acquire the power to control voting or disposal in more than five per cent of the company's voting shares in aggregate (the 5% limit).  ASIC understands that some institutions may not be able to comply with the 5% limit because of interests acquired by the company or its controlled entities for the purpose of employee share schemes. As a result, ASIC is consulting on whether it is appropriate to increase the 5% limit in the case of employee share schemes, and if so, the conditions that should be imposed.  ASIC is also seeking feedback on whether there is any need to impose a condition that limits the amount of the company's shares held by a controlled trustee or responsible entity to a certain percentage of the trust or scheme's assets.  **(b) Other issues concerning section 259C relief**  ASIC is also consulting on two other conditions ASIC has imposed in standard section 259C relief:  whether the parent company's interests or just the controlled entities' interests should be included in the calculation of the 5% limit; and  how companies should report economic interests acquired through derivatives.  Consultation Paper 162 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h2)  **2.2 Consultation on capital and related requirements for the ASX, ASX 24 and Chi-X markets**  On 3 June 2011, ASIC released a consultation paper proposing market integrity rules for capital and related requirements for the ASX market, the ASX 24 market (formerly known as the Sydney Futures Exchange market) and the proposed new Chi-X market. These rules will transfer across to ASIC the ASX Group's current capital and related requirements, consistent with ASIC's general approach to the transfer of supervision from the ASX Group to ASIC.  Consultation Paper 161 'Proposed ASIC market integrity rules for capital and related requirements: ASX, ASX 24 and Chi-X markets' proposes that ASIC:  insert new capital, reporting and margin rules into the existing ASIC market integrity rules for the ASX and ASX 24 markets, to start on 1 August 2011. ASIC has modelled these rules on the current ASX and ASX 24 Operating Rules, with the capital and reporting rules only applying to non-clearing market participants.  make market integrity rules for capital and reporting for the Chi-X market, to start on 31 October 2011 (i.e. to coincide with the earliest date that Chi-X could commence operation). These new rules are modelled on ASIC's proposed market integrity rules for the ASX market, to ensure a level playing field.  insert a new rule into the existing market integrity rules for the ASX 24 market, to start on 1 January 2012, that would require all ASX 24 market participants to complete daily client money reconciliations.  reduce the lodging time for ASX 24 market monthly capital returns to 10 business days (rather than one month) after the end of each calendar month, to start on 1 August 2011.  On 1 August 2010, ASIC took over general supervision of trading on the ASX and ASX 24 markets (and other domestic licensed financial markets). As part of that process, ASIC made the ASIC Market Integrity Rules (ASX Market) 2010 and the ASIC Market Integrity Rules (ASX 24 Market) 2010.   At that time, ASIC agreed with the ASX Group that the ASX Group would continue to impose capital, reporting and margin requirements on non-clearing market participants for a further 12 months until 1 August 2011, after which time, ASIC would take over that responsibility.   The consultation paper, proposed rules and forms are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/CP-161-Proposed-ASIC-market-integrity-rules-for-capital-and-related-requirements-ASX-ASX24-and-Chi-X-markets?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h2)  **2.3 Proposal for credit rating agencies' compliance reporting**  On 1 June 2011, ASIC released a consultation paper on the form and content of the compliance report that each of Australia's credit rating agencies must lodge with ASIC annually as part of moves to help boost the integrity and standards of Australia's financial system.  Consultation Paper 160 'Credit rating agencies: IOSCO Code Annual Compliance Report' proposes implementing reporting requirements for credit rating agencies (CRAs) concerning their compliance with obligations on matters such as the quality and integrity of their ratings process, conflicts of interest management and the transparency and timeliness of ratings disclosure.  Specifically, the proposed reporting requirement would require CRAs to provide a narrative description of any implemented or planned measures that have the aim of ensuring compliance with eleven obligations referrable to the IOSCO Code and the CRAs' AFS licence conditions.  **Background**  Following an announcement by the Australian Government in May 2008, ASIC and Treasury conducted a review of the Australian regulatory framework for CRAs and research houses. On 13 November 2008, the Government announced that ASIC would remove an AFS licensing exemption held by certain CRAs and require all CRAs to hold an AFS licence. This new regime came into force on 1 January 2010.  As a condition of their AFS licence, CRAs need to report to ASIC annually on their compliance with certain licence conditions, including their compliance with the IOSCO Code of Conduct. CP 160 seeks comment on the proposed form of that annual compliance report.  The consultation paper does not make any proposals concerning disclosure by research houses. ASIC is conducting a review of regulatory issues in the research house industry and plans to separately report on these issues at a later date.  The consultation paper is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h2)  **2.4 Quarterly report on relief decisions**  On 31 May 2011, ASIC released a report outlining decisions on relief applications between 1 October 2010 and 31 January 2011. The report also discusses the various publications released during this period.  The report, 'Overview of decisions on relief applications (October 2010 to January 2011)' (Report No 241), aims to improve the level of transparency and the quality of publicly available information about decisions ASIC makes when asked to exercise its discretionary powers to grant relief from provisions of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act), the [National Consumer Credit Protection Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "Default) (National Credit Act) or the [National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111363" \t "Default) (Transitional Act).  ASIC uses its discretion to vary or set aside certain requirements of the law where the burden of complying with the law significantly detracts from its overall benefit, or where ASIC can facilitate business without harming other stakeholders.  Report 241 summarises situations where ASIC has exercised, or refused to exercise, its exemption and modification powers under the Corporations Act, the licensing and responsible lending provisions of the National Credit Act and the registration provisions of Schedule 2 of the Transitional Act. The report also highlights instances where ASIC has decided to adopt a no-action position regarding specified non-compliance with statutory provisions. Decisions by ASIC to refuse to exercise its powers are described on an anonymous basis.  The report provides examples of decisions that demonstrate how ASIC has applied its policy in practice, which ASIC thinks will be of particular interest for participants in the capital markets and financial services industry. The report includes an appendix detailing the relief instruments ASIC executed.  Report 241 is available on the [ASIC website](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Reports" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h2)  **2.5 New guidance proposed for takeover acquisitions approved by members**  On 26 May 2011, ASIC invited industry feedback on proposed updates to its guidance relating to a key aspect of Australia's takeover regulation.   Consultation Paper 159 'Acquisitions approved by members: update to RG 74' details ASIC's plans to update guidance on the takeovers exception for acquisitions approved by members set out in item 7 of section 611 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). This exception allows a person to acquire more than 20 per cent of an entity on the condition members are provided with sufficient disclosure and approve the acquisition.  ASIC's policy on 'member approved acquisitions' is currently set out in Regulatory Guide 74 'Acquisitions agreed to by shareholders'. The proposed update of this guide emphasises that members need to be fully informed when deciding whether to give approval to acquisitions.  ASIC is also proposing to update RG 74 to take into account the significant developments to the law since the guide's initial publication in 1994. These developments include more specific disclosure requirements and an extension of the regime to listed managed investment schemes. Importantly, there is significant new guidance about the circumstances in which ASIC will provide relief for 'trust schemes'- complex transactions used to acquire control of a managed investment scheme.  Consultation Paper 159 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h2)  **2.6 ASIC sets out the Markets Disciplinary Panel practices and procedures**  On 25 May 2011, ASIC published the operational framework for its Markets Disciplinary Panel (MDP) to abide by when conducting proceedings into alleged breaches of the market integrity rules. The independent peer review body was set up last year.  The MDP has the power delegated by ASIC to issue infringement notices and accept enforceable undertakings relating to breaches of market integrity rules, as an alternative to civil proceedings.  Among the guidance that Regulatory Guide 225 'Markets Disciplinary Panel practices and procedures' provides, of particular note are:  panel proceedings are initiated either by the ASIC serving a statement of reasons, which the recipient can make a reply, or by way of a joint request by the parties for the panel to approve a negotiated settlement;  convening a sitting panel of the MDP;  determining any panel member conflicts of interest;  serving a notice of hearing;  options open to the recipient on how to proceed;  handling communication between the MDP and parties; and  making and communicating a decision.  RG 225 also sets out the options and the procedures available to a recipient once proceedings before the MDP are initiated, namely concerning:  negotiating and seeking approval of a settlement by the MDP;  a determination of the matter by the MDP on the papers; and  an oral private hearing.  The Markets Disciplinary Panel consists of members who have the appropriate market or professional experience, and will make decisions independently of ASIC.  ASIC's Regulatory Guide 216 'Markets Disciplinary Panel' sets out the policies and processes relevant to the operation of the Panel.  Regulatory Guide 225 and Regulatory Guide 216 are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h2) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1 ASX launches free online ETF courses**   The Australian Securities Exchange (ASX) has launched seven new and free online courses designed to help investors understand exchange-traded funds (ETFs).   The new ASX courses explain the essentials of investing in ETFs and explain how ETFs traded on ASX work.  They provide clear and easily understood information with practical exercises to reinforce learning.  The self-paced nature of ASX online courses means investors can work through the courses sequentially or just select the topics that interest them.   Further information about the courses is available on the [ASX website](http://www.asx.com.au/resources/online-courses.htm" \t "_new). This is the [media release](http://www.asxgroup.com.au/media/PDFs/110609ETF_course_media_release_final.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h3)  **3.2 Reports**  On 6 June 2011 ASX released:  the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/110606_asx_month_activity_may11.pdf" \t "_new);  the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2011/notice2011_103.pdf" \t "_new); and  the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/110606_asx_month_compliance_may11.pdf" \t "_new)  for May 2011.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h3) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1 Mintails Limited - Panel declines to conduct proceedings**  On 9 June 2011, the Takeovers Panel announced that it had accepted an undertaking from Mintails Limited and declined to conduct proceedings in response to an application dated 17 May 2011 from Mr Seager Rex Harbour in relation to the affairs of Mintails Limited.  The application concerned, among other things, a 1 for 4 renounceable rights issue at $0.16 per share to be underwritten by Trinity Asset Management (Pty) Ltd or its nominee announced by Mintails on 2 May 2011 and the assignment of a convertible note to a Trinity related party.  However, on 20 May 2011, Mintails announced that the rights issue would not be underwritten and the offer structure would include a shortfall facility.  The Panel was satisfied that:  given the rights issue will not be underwritten by Trinity and now includes a shortfall facility, any control effects of the rights issue had been adequately addressed and  given the further disclosure to be provided by Mintails in the offer document (as attached to the undertaking) shareholders will have sufficient information to assess the potential impact on control that the rights issue and convertible notes may have on Mintails.  Accordingly, the Panel declined to conduct proceedings.   The reasons for the decision are available on the [Takeovers Panel website](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=reasons_for_decisions/2011/011.htm&pageID=&Year=" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h4)  **4.2 Premium Income Fund - Declaration of unacceptable circumstances and orders**  On 3 June 2011, the Takeovers Panel made a declaration of unacceptable circumstances and final orders in relation to an application dated 11 May 2011 by Wellington Capital Limited as responsible entity for the Premium Income Fund (PIF) in relation to the affairs of PIF.  On 17 May 2010, ALF PIF Finance Limited (ALF Finance) lodged a bidder's statement with ASIC in respect of a proposal to acquire all of the units in PIF under an off-market bid. A replacement bidder's statement was lodged with ASIC on 15 June 2010. ALF Finance lodged a notice of variation dated 18 February 2011 with the National Stock Exchange and ASIC, purporting to extend the offer period to 14 June 2011.  On or about 2 May 2011, ALF Finance dispatched a letter dated 18 April 2011 to PIF unitholders. The letter enclosed a copy of the notice of variation and contained additional information for PIF unitholders. The bid was scheduled to close on 28 February 2011. However, the notice of variation was not dispatched to PIF unitholders until on or about 2 May 2011.  In the Panel's view, the bid was not extended in accordance with section 650D of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). ALF Finance has continued to communicate with PIF unitholders and receive acceptances after 28 February 2011 on the basis that the bid is still on foot.  The Panel considers that the communications after close of the bid, the receipt of acceptances after close of the bid, failure to prepare a further supplementary bidder's statement as required and the material deficiencies in the disclosure in the existing replacement bidder's statement and the 18 April letter has resulted in:  the acquisition of control over PIF units not taking place in an efficient competitive and informed market; and  PIF unitholders not having enough information to assess the merits of the bid.  The Panel considers that even if the bid was validly extended, the corrections required would not leave unitholders with a reasonable time to consider the proposal.    The Panel has made orders that:  1. ALF Finance make an announcement to the market that the bid ended on 28 February 2011 without the conditions having being fulfilled or waived and all acceptances will be returned; 2. no further acceptances be processed by ALF Finance in relation to the bid; 3. any acceptances that have been processed be reversed; 4. any acceptances be returned to unitholders as soon as practicable after the date of the orders; 5. none of ALF Finance, Mr James Byrnes or any associate of either of them communicate with PIF unitholders, except as required by these orders, until after ALF Finance has complied with the orders in paragraphs 1 to 4 above and ALF Finance has confirmed satisfaction of the orders in accordance with paragraph 6 below; and 6. ALF Finance confirm in writing to the Panel and all parties when it has complied with these orders.   The reasons for the decision are available on the [Takeovers Panel website](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=reasons_for_decisions/2011/010.htm&pageID=&Year=" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h4)  **4.3 oOh!media Group Limited - Panel accepts undertakings**  On 30 May 2011, the Takeovers Panel announced that it had accepted undertakings from QMS Asia Pacific Outdoor Pte Ltd (QMS) and William Shaw Capital Pty Ltd (WSC) and declined to make a declaration of unacceptable circumstances in response to an application dated 4 May 2011 from oOh!media Group Limited in relation to its affairs.  The application raised a number of concerns affecting an efficient, competitive and informed market. These included that the call option deed entered into by QMS with PFG Investments Pty Limited (in voluntary liquidation) (PFG) was not disclosed in a timely manner and that the deed with WSC may have caused QMS to contravene section 606 and may have been an abuse of section 609(7).  The Panel was satisfied that the terms of the undertakings adequately addressed the unacceptable circumstances alleged in the application. In particular, the terms of the undertaking by QMS require it to compensate OOH shareholders (other than PFG, WSC and their associates) in relation to on-market and certain off-market transactions from 23 August 2010 to 22 March 2011. This is expected to remedy the effects of any loss suffered.  Similarly, OOH will be compensated in relation to the placements.  Call option deed 2 will be unwound and shareholdings of QMS and WSC sold down. QMS's holding in OOH will be sold down to 15%. QMS will be restricted from voting more than 4.9% of its remaining holding until 31 January 2012, and will be subject to a standstill and board nomination freeze for 6 months.  The Panel therefore declined 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=reasons_for_decisions/2011/009.htm&pageID=&Year=" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h4) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%236) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **5.1 Rights of a director to access company documents**   (By Nicholas Kefalianos, DLA Piper)   Oswal v Burrup Holdings Limited [2011] FCA 609, Federal Court of Australia, Barker J, 3 June 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/609.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/609.html" \t "_new)   **(a) Summary**   Pankaj Oswal, a director of Burrup Holdings Limited (BHL) and Burrup Fertilisers Pty Ltd (Receivers and Managers appointed) (BFPL), sought access to certain books and financial records of BFPL and BHL, which was opposed by BFPL by its receivers and managers. This case examines the ability of directors to inspect company documents pursuant to their general law rights, and sections 198F, 290(2) and 421 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act). The Court held that in the circumstances, the statutory provisions and general law rights only provided the applicant with a right to inspect some of the documents requested.   **(b) Facts**   Oswal was both a director of BHL and BFPL and the holder of a 30% share in BHL, the parent company of BFPL. A receiver and manager had been appointed to BFPL.   Oswal sought access to certain books and financial records of both BFPL and BHL. As he was located outside the jurisdiction, Oswal sought to have the inspection conducted by agents - qualified lawyers and accountants.    **(c) Decision**    In considering whether to grant the applicant access to the books and financial records sought, Barker J considered the general law right of directors to access company documents, as well as sections 198F(1), 290(2) and 421 of the Act.   **(i)   General law**   The parties accepted that a director has a common law right to inspect documents of the company. Relying upon the decision of Geneva Finance Ltd; Quigley (Receiver and Manager Appointed) v Cook (1992) 7 WAR 496 (Geneva Finance), Barker J stated several principles relating to this right.   First, the right of a director to inspect the books and records is an incident of the office of the director and exists so that he or she can properly perform their duties as a director.   Second, the director may make inspection of such documents either personally or by an agent, and may make copies of the documents inspected.   Third, the Court has a residual discretion whether or not to order inspection. Generally speaking the court will presume the director intends to act consistent with his or her duties and will not abuse the confidence given to him or her by using the information for an improper purpose. As such, the director does not need to demonstrate why they are entitled to access the documents. The application to inspect may be refused where there is clear proof of a misuse of power.   Finally, where a receiver is in control of the company, they are justified in refusing to grant access to the documents where to do so would impede the receiver in the proper exercise of their functions or impinge prejudicially upon the position of the debenture holder by threatening the assets which are subject to charge. As such, a director is primarily entitled to inspect the documents subject to the demonstrated concerns of the receiver. The inspection required must not divert the primary responsibility of the receiver to realise assets and sell the existing business.   **(ii) Section 198F(1)**   Section 198F(1) of the Act provides that a director of a company may inspect the books of the company, excluding financial records, for the purpose of legal proceedings to which the director is a party. This section does not empower the Court to make orders about inspection, but pursuant to section 1303 of the Act, the Court is empowered to compel compliance. In the view of Barker J, this ability to compel compliance provides something in the nature of a discretion to grant or withhold a compliance order. Barker J also concluded that the right conferred by section 198F is a personal one, and does not entitle a person other than the director to inspect the books. This can be contrasted with section 290(2), which does provide for inspection by a person 'on the director's behalf'.   **(iii) Section 290(2)**   Section 290(1) establishes a statutory right of a director to access financial records of the company at all reasonable times. Unlike section 198F, section 290(2) empowers the Court to make an order concerning the inspection of financial records on behalf of the director by another person. If this statutory right is denied, a director may seek a compliance order pursuant to section 1303, similar to section 198F. This, as discussed earlier, does provide the Court somewhat of a discretion as to whether to grant or withhold a compliance order.   **(iv) Section 421**   Section 421(2) of the Act provides that any director, creditor or member of a corporation may, unless the court orders otherwise, access the records kept by a 'managing controller'. Barker J noted that the statutory right may be affected by discretionary considerations, and allows for the records to be accessed by the director either personally or by an agent.   **(v) Application to the current facts**   Applying the general law and the relevant statutory provisions to each category of documents the applicant sought to inspect, Barker J ultimately ordered, subject to a $50,000 costs undertaking, the applicant to inspect and take copies of a limited range of the books and records sought, either in person or by his specified agents.    There were some books and records to which access was sought in respect of which Barker J was not prepared to grant a compliance order for inspection on the basis that, in granting such an order, the activities of the receivers would be disrupted in that human and financial resources would be diverted away from the receivers realising the assets of the company. Barker J also concluded that, with regard to section 198F(1), the right of inspection conferred is personal to the director, and a compliance order could not be granted where the inspection was to be undertaken by an agent.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h5)  **5.2 High Court rejects principle that a company cannot be wound up on the basis of a disputed debt**   (By Gabe Chipkin, Freehills)   Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (Receivers and Managers Appointed) [2011] HCA 18, High Court of Australia, Gummow, Heydon, Crennan, Kiefel and Bell JJ, 1 June 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/HCA/2011/18.html](http://www.austlii.edu.au/au/cases/cth/HCA/2011/18.html" \t "_new)   **(a) Summary**   In this case, the High Court held that the principle (derived from the former companies code) that a company will not be wound up on the basis of a disputed debt has no operation under the current statutory regime for winding up insolvent companies contained in Part 5.4 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act"). The High Court held that even where a company's debts were in dispute, ASIC could rely on the statutory presumption of insolvency contained in section 459C of the Corporations Act for the purposes of making an application for winding up.    **(b) Facts**    In 2005, Lanepoint Enterprises Pty Ltd ('Lanepoint') was a property developer within the Westpoint Group. At that time, Lanepoint's operations were financed by a series of inter-group loans from another Westpoint Group entity ('WIF'). Lanepoint's loans were secured by floating charges over its assets.    In March 2006, following a series of financial difficulties (including a liquidator being appointed to WIF), Lanepoint's lenders appointed receivers and managers to Lanepoint.    In June 2006, ASIC applied to the Federal Court for orders that Lanepoint be wound up pursuant to section 459A of the Corporations Act. In its application, ASIC relied upon the statutory presumption of insolvency contained in section 459C(2)(c), which provides that a court must presume that a company is insolvent if a receiver and manager are appointed under an instrument relating to a floating charge in the three months prior to the application being made. This presumption is rebuttable but the onus is on the company to prove solvency. In accordance with section 459A, even if the company is presumed to be insolvent, the court still retains the discretion as to whether it will grant winding up orders.    At the application hearing, presided over by Gilmour J, Lanepoint led evidence to rebut the presumption of insolvency that ASIC was relying upon. A matter critical to establishing Lanepoint's solvency was the amount that it owed to WIF. Lanepoint's receivers and managers had concluded that Lanepoint owed $6.6 million to WIF. However, Lanepoint argued that its initial accounts were erroneous and instead, it only owed $1.6 million to WIF. The Westpoint Group chief financial officer had subsequently 'corrected' Lanepoint's accounts to reduce its debt to WIF by approximately $5 million. This was done by substituting another Westpoint Group entity as the debtor for several of Lanepoint's loans from WIF. Gilmour J did not accept the explanation for these 'corrections' proffered by the witnesses called by Lanepoint and concluded that Lanepoint had failed to rebut the statutory presumption of insolvency and made the winding up orders sought by ASIC.   The matter was appealed to the Full Court of the Federal Court, where a majority (North and Siopis JJ, Buchanan J dissenting) overturned Gilmour J's decision and ordered a stay of proceedings pending the conclusion of separate proceedings brought by the WIF liquidator to determine the extent of Lanepoint's debt. At the time of the appeal, the WIF liquidator had not brought proceedings nor evinced an intention to do so.    In its reasoning, the Full Court majority relied heavily upon the general principle, derived from the former companies code, that ordinarily a company will not be wound up on the basis of a disputed debt and that a court should usually exercise its discretion to order a stay of proceedings until the dispute over the debt had been resolved. The Full Court majority held that this principle was still valid even after the 1993 corporate law reforms which saw the introduction of the current Part 5.4 of the Corporations Act, under which ASIC was applying to have Lanepoint wound up.    ASIC appealed to the High Court.   **(c) Decision**    In a single joint judgment, the High Court (Gummow, Heydon, Crennan, Kiefel and Bell JJ) allowed ASIC's appeal, overturned the decision of the Full Court majority and granted the winding up orders that ASIC sought.    In reaching its unanimous decision, the High Court had to address the following issues:   **(i) Did the principle that a company would not be wound up on the basis of a disputed debt survive the 1993 corporate law reforms?**   The High Court held that a significant policy objective behind the introduction of the current Part 5.4 of the Corporations Act was the speedy resolution of applications to wind up insolvent companies within 6 months, subject to extensions only in extenuating circumstances. In doing so, the current Part 5.4 of the Corporations Act represented a significant departure from the previous statutory regime.   After considering the operation of Part 5.4 of the Corporations Act, the High Court held that there was no room in the current statutory regime for the general principle that a court will order a stay or dismissal of proceedings where a company is being wound up on the basis of a disputed debt. On the contrary, sections 459H and 459J provide a mechanism whereby a statutory demand can be set aside where the debtor disputes the existence or amount of a debt. Even in circumstances where the statutory demand procedure has not been invoked (such as these), in light of the policy objectives behind the 1993 corporate law reforms, the general principle in favour of granting a stay of proceedings until the bona fides of a disputed debt are determined does not apply.    **(ii) Should the disputed debt be resolved separately from the winding up proceedings?**   While the High Court indicated its preference, where possible, to resolve issues surrounding a disputed debt prior to an application for winding up being heard, should the disputed debt remain in existence at the time the application is heard, the court should have regard to the practical considerations outlined by Gibbs J in *re QBS Pty Ltd* [1967] Qd R 218.    In that case, Gibbs J held that in some instances it may be appropriate to resolve the disputed debt at the application hearing, while in other cases it may be preferable for the disputed debt to be resolved in separate proceedings that have or will be brought. Under Part 5.4, the question of solvency is affected by the statutory presumption of insolvency, and where the presumption operates, the 'starting point' is that the onus is on the company to rebut the presumption by proof of its solvency.    The High Court reiterated that in determining Lanepoint's solvency, Gilmour J had not actually set aside the 'corrections' made to Lanepoint's accounts, but rather, his Honour had merely failed to accept Lanepoint's evidence that the 'corrections' made to its accounts were justified. This was an important distinction to maintain and the High Court reaffirmed that Gilmour J's non-acceptance of Lanepoint's explanations for the alterations to its accounts was sufficient for the purpose of concluding that the statutory presumption in favour of insolvency had not been rebutted.   Also of significance was the fact that the WIF liquidator had not evinced an intention to bring separate proceedings to resolve the disputed debt. Accordingly, the High Court concluded that Lanepoint's liability to WIF was a matter to be properly determined by Gilmour J in connection with the issue of Lanepoint's solvency which was the primary issue before the court.    **(iii) Conclusion**   The High Court allowed the appeal and held that the discretion of Gilmour J in deciding not to stay the winding up application did not miscarry. The general principle that a company will not be wound up on the basis of a disputed debt has no operation under Part 5.4 of the Corporations Act. ASIC was entitled to the benefit of the presumption of insolvency contained in section 459C of the Corporations Act and there was no impediment to Gilmour J determining that Lanepoint had failed to prove its solvency at the application hearing, even in circumstances where Lanepoint's liabilities were in dispute.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h5)  **5.3 Members' access to the books of the company and ASX Listing Rule 11**    (By John O'Grady and Laura Gordon, Corrs Chambers Westgarth)    Smartec Capital Pty Limited v Centro Properties Limited [2011] NSWSC 495, Supreme Court of New South Wales, Barrett J, 30 May 2011    The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/495.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/495.html" \t "_new)    **(a) Summary**   Smartec Capital Pty Limited (Smartec) was a member of the stapled Centro Properties Group (Centro), owning 5% of Centro's capital. Smartec sought access to certain documents of Centro in relation to the sale of Centro's US property portfolio under section 247A(1) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  Smartec was seeking the documents in order to assess whether it had grounds for a derivative claim against Centro or its directors (including whether Centro should have sought shareholder approval under ASX listing rule 11).  Smartec was only partially successful, being able to access certain documents that related to an ancillary aspect of the transaction, but not the transaction documents.    **(b) Background**    On 1 March 2011, Centro notified the ASX of a 'proposed restructure' having multiple components. This announcement followed earlier disclosures that there was uncertainty about Centro's ability to continue as a going concern. The components of the proposed restructure the subject of the March announcement were as follows:  US Assets Sale;  Headstock Debt Restructure; and  Discussions of Australian Funds Amalgamation.  On 7 March 2011, there was a meeting between representatives of Centro and Smartec, wherein Smartec was advised that Centro intended to complete the US assets sale without shareholder approval, and that the ASX had indicated such approval was not required as listing rule 11.2 did not apply. On 6 April 2011, Centro made an announcement to the ASX to this effect.   On 6 May 2011, Centro made a further announcement to the ASX. This announcement referred to (1) submissions made by Smartec to the ASX to the effect that shareholder approval of the US assets sale transaction is required; and (2) further information on this point being provided by Centro at the request of the ASX. This announcement also stated, relevantly to listing rule 11.2, that the US assets sale would not result in a significant change in the nature of Centro's activities, and that Centro therefore continues to conduct its main undertaking.  Smartec then made an application to the court under section 247A(1) of the Corporations Act, seeking an order authorising inspection of all documents in Centro's possession related to the restructure, the US assets sale and submissions to the ASX. Section 247A(1) provides that where a member of a company or registered managed investment scheme makes an application to inspect documents, the Court can only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.  **(c) Issues**   The primary reason behind Smartec's application was its concern that the US assets sale, either alone or in combination with the headstock debt restructure, would have amounted to a disposal by Centro of its 'main undertaking' and shareholder approval is required under listing rule 11.2 or alternatively, that the case was one in which ASX should, under rule 11.1.2 have imposed such a requirement.   Listing rule 11 deals with corporate proposals which result in a change to the nature or scale of a listed company activities and the ASX's requirements in relation to such proposals. Listing rule 11.2 states that where a corporate proposal involves the entity disposing of its 'main undertaking', shareholder approval is required.   Barrett J took this opportunity to consider the interpretation of listing rule 11.2, and the role of the court and ASX in interpreting and applying the listing rules in general. Justice Barrett noted that the term 'main undertaking' is a problematic one. Justice Barrett considered that as the term 'undertaking' means a totality, then a reference to a 'main undertaking' is 'confusing and raises questions of degree and commercial judgment'.   Acknowledging that such questions of commercial judgment arise in interpretation of the listing rules, Barrett J emphasized that the ASX plays a supervisory and decision making role in determining the situations in which the listing rules, including listing rule 11.2, would apply. Justice Barrett referred to the discussion of this 'determinative' role played by the ASX in Bateman v Newhaven Stud Ltd (2004) 207 ALR 406.   Justice Barrett surmised that, viewed in context, Smartec's request for the Centro documents in fact amounted to an assertion that Smartec should be given access to Centro documents so that it may investigate whether Centro failed to provide accurate and complete information to the ASX or Centro shareholders.   **(d) Decision**   The Court considered that Smartec did not present any further information to suggest that listing rule 11.2 would apply in this case.    The Court considered evidence that the US assets held by the Super LLC group had such a level of debt associated with each entity, that the US assets were actually worth much less and so standing alone, did not constitute the 'main undertaking' of Centro.    Justice Barrett also considered the scope of section 247A(1). First, his Honour noted that the section requires a request for inspection to be made for a 'proper purpose'.  His Honour also noted that in justifying an exercise of the discretion conferred by section 247A(1), the applicant must satisfy the court that a shareholder has a right to be informed of the information sought.     Justice Barrett acknowledged that Smartec was 'understandably distrustful of what was, on the face of things, a radical change of position by Centro'. Therefore, Barrett J considered that Smartec, as a member of Centro, could properly pursue an inspection of the Centro documents consisting of correspondence between Centro and ASX on the question of applicability of listing rules 11.1.2 and 11.2 to the US assets sale transaction. Given the potentially commercially sensitive nature of written exchanges with ASX, Barrett J held such inspection should be on a confidential basis.    Smartec also cited the need to inspect the Centro documents based on the following concerns:  whether Centro had discharged its disclosure obligations in relation to ASX announcements;  Smartec's need for further information about the US assets sale and headstock debt restructure to contemplate 'next steps';  management of conflict of interest issues; and  Smartec's concerns that a 'pre-pack' reference in an April press report meant that Centro had in contemplation an alternative plan based on resorting to insolvency administration.  Justice Barrett did not, however, allow Smartec access to the sale agreement itself or other transaction documents, as he considered that this was information that extended beyond what should be disclosed to a shareholder. Justice Barrett considered that these requests were ancillary to the main request addressed above. The requests were promptly dismissed on the ground that Smartec had no 'proper purpose' to claim access to the Centro documents in these respects.   Subsequent to this decision, Smartec has commenced new proceedings against Centro in the Federal Court of Australia claiming that shareholder approval is required.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h5)  **5.4 The loss in priority to secured creditors that may eventuate from inadvertent errors to charges noted on the Register of Company Charges**  (By Monali Pandey and Aileen Chu, Corrs Chambers Westgarth)  Re Securecam Pty Ltd [2011] VSC 226, Supreme Court of Victoria, Gardiner AsJ, 27 May 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2011/226.html](http://www.austlii.edu.au/au/cases/vic/VSC/2011/226.html" \t "_new)  **(a) Summary**  This case concerned the construction of section 274 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (CA) with respect to the circumstances in which a Court would make orders to rectify the Australian Register of Charges (the Register) that is maintained by the Australian Securities and Investments Commission (ASIC).  QR Sciences Security Pty Ltd (QRS) brought an application against Securecam Pty Ltd (Securecam) and ASIC in respect of what it alleged was the erroneous discharge of its fixed and floating charge over Securecam's assets. The discharge was brought about by the lodgement of a Form 312 of the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default), entitled "Notification of Discharge or Release of Property from a Charge".  In considering whether the court had power to rectify the Register, his Honour Associate Judge Gardiner preferred the broader approach taken by Needham J in *State Bank of New South Wales v Berowra Water Holdings Pty Ltd Eq* 4408 1985 (Unreported, BC8500500) to that of Murray J in *Re St Barbara Mines; Commonwealth Bank of Australia v ASIC* (1998) 29 ACSR 238.  His Honour held that the Court had power to make orders to rectify the Register and made orders accordingly.  **(b) Facts**  QRS designs, supplies and delivers electronic security and technology systems. Securecam is a customer of QRS.  In September 2009, pursuant to a loan deed between QRS and Securecam, QRS loaned $535,000 to Securecam. Securecam was required to repay this in full to QRS by 4 February 2010. As security for the loan, on 2 November 2009 Securecam granted a fixed and floating charge to QRS over its assets. This charge was registered with ASIC on 13 November 2009 and assigned the serial number 1888931.  Securecam did not repay the moneys owed to QRS by 4 February 2010.  In March 2010, Securecam and QRS entered into an agreement in relation to the payment of the amount owing.  Also around this time, Securecam asked QRS for a new trading account so that it could continue to purchase products from QRS. The amounts owing under the new trading account were also secured by the charge that QRS held over Securecam's assets.  In November 2010, Securecam was still indebted to QRS in the amount of approximately $257,000 and in breach of its loan deed. QRS instructed its solicitors, Norton Rose, to take steps to recover the amounts still owing to QRS by Securecam.  In the course of taking steps to recover the moneys owed, Norton Rose conducted an ASIC historical company search on Securecam and discovered that QRS' charge over Securecam's assets was noted as having been satisfied on 24 June 2010. Up until the point that Norton Rose conducted the search and discovered the 'satisfaction' of the QRS' charge and notified QRS of same, QRS was not aware that the charge had been released.  Norton Rose conducted further enquiries with Securecam's sole director, Mr Robertson as to the basis for the change in the Register. Mr Robertson denied having signed any documents releasing the charge and also denied any fraud on his part on the removal of the charge. Mr Robertson in turn directed Norton Rose to seek further clarification from either Motorama Group or the Australian and New Zealand Banking Group (ANZ) being third parties that had been involved in the lease of a new motor vehicle to Mr Robertson a few months prior.  Enquiries to these third parties by Norton Rose revealed that, as a condition of the finance provided, ANZ had required a partial discharge of the QRS charge so that ANZ could take a first ranking fixed charge over the new motor vehicle as security for Securecam's obligations. ASIC's records indicated that on 15 June 2010, ANZ had lodged notification of a fixed charge over Securecam's assets with ASIC. ANZ had also lodged a Form 312 noting discharge of QSC's charge. However, ANZ was provided with a full discharge rather than a partial discharge of QRS' charge.  ASIC's records also indicated that on 23 December 2010, John Hawkins Enterprises Pty Ltd (John Hawkins) was given a fixed and floating charge over the assets of Securecam.  **(c) Decision**  QRS sought orders to rectify the erroneous release of its charge pursuant to section 274 of the CA. Relevantly for the present case, section 274 of the CA allows the Court to order that an omission or statement on the Register be rectified if it is satisfied of two things. First, that a particular with respect to a registrable charge on property of a company has been omitted from, or misstated in the Register. Second, that the omission or misstatement:  was accidental or due to inadvertence or to some other sufficient cause; or  is not of a nature to prejudice the position of creditors or shareholders; or  was due to a failure of an electronic system to lodge a notice in respect of a charge;  or that on other grounds it is just and equitable to grant relief.  In applying the legal principles, the court looked at Needham J's application of section 202 of the Companies (New South Wales) Code which was the legislative precursor to section 274 of the CA. Needham J held that the Court had power to order that an omission or misstatement be rectified on the Register, including where the misstatement is to note that a charge has been 'discharged'.    In the later in time case of Re St Barbara Mines; Commonwealth Bank of Australia v ASIC (1998) 29 ACSR 238, Murray J had taken a narrower view of the legislation and held that the court was not given the power to 'rectify' a Register by 'striking out all reference' to a 'memorandum of release' in the Register. In other words, the reference to 'omission or misstatement' in section 274(b) of the CA did not apply to omissions or misstatements in the Register but to omissions or misstatements in the memorandum of release which is required to be furnished pursuant to section 269 of the CA.     Gardiner AsJ preferred the broader reading adopted by Needham J on the basis that there is no obvious reason for restricting the power of the Court in circumstances where the Register is in a misleading form.    His Honour found that the Register relevantly contained a misstatement in that it referred to a charge as having been satisfied in circumstances where it had not been. His Honour found that the misstatement was due to accident or inadvertence or some other sufficient cause within the meaning of section 274.  In looking at whether the interests of those potentially affected by the order had been satisfactorily accommodated, his Honour took into account the fact that QRS had reached an agreement with ANZ and John Hawkins whereby the charges of ANZ and John Hawkins would take priority over the QRS reinstated charge and that such an agreement satisfactorily accommodated the interests of those other persons.  In applying the requirements of the section, Gardiner AsJ seems to have addressed each of the separate limbs in section 274(b) of the CA, even though each of the limbs within section 274(b) are drafted in the alternative form.  His Honour made orders to rectify the Register so that QRS' charge was changed from being noted as "satisfied" to "registered". This was subject to the condition that John Hawkins' charge be given priority over QRS' charge.  The outcome of this decision causes one to question whether section 274 of the CA adequately protects the interests of those parties that are put in the difficult position of QRS. QRS, through no fault of its own and without any knowledge to it of the erroneous 'satisfaction' of the charge that it held over Securecam's assets, was denied its priority in the charges held over Securecam's assets by virtue of an inadvertent error on the Register.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h5)  **5.5 Misapplication of sale proceeds by a sole director**   (By Andrew Sutherland, Blake Dawson)   Fodare Pty Ltd v Shearn [2011] NSWSC 479, Supreme Court of New South Wales, Barrett J, 25 May 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/479.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/479.html" \t "_new)  **(a) Summary**  Ms Shearn, the sole director of Fodare Pty Ltd ("Company") breached her fiduciary and corresponding statutory duties to the Company by distributing part of the sale proceeds of a property owned by the Company (as trustee) for purposes that were inconsistent with the Company's interests.  She also failed to maintain records illustrating how those funds had been applied and whether the manner of their application was proper.  Ms Hirtzell, a former director of the Company, was held liable under the "knowing receipt" doctrine because she received part of the sale proceeds when she had, at the very least, knowledge of circumstances that would indicate the facts of Shearn's impropriety to an honest and reasonable person.  Shearn was ordered to make equitable compensation to the Company for the amounts misapplied, together with interest.  Hirtzell, was also ordered to make equitable compensation, and some of the funds used to discharge a mortgage were ordered to be charged to the property involved.  **(b) Facts**  The Company acquired a property at Menangle Park in 1989.  It argued it made that acquisition as trustee of Shearn's family trust (known as the Alexandria Trust). In July 2003, whilst Shearn was the sole director of the Company, the Menangle Park property was sold for $1.2 million.  The settlement occurred in December 2003.  The proceedings in part concerned Shearn's application of the deposit and two of the three cheques that were received at settlement. One cheque was drawn to "The Alexandria Trust for Fodare Pty Ltd" for $383,468.94 ("first cheque").  The second cheque was drawn to "Citibank Pty Ltd" for $251,488.85 ("second cheque").  The only evidence Shearn was able to give in relation to the deposit of $120,000 was that it was likely that those funds had been deposited into a bank account.  The only information that had been kept regarding the disposition of the first cheque was that it had been deposited into a bank account maintained by Shearn and that she had then withdrawn and used the whole amount to pay debts she claimed were owed to her and debts which she claimed were owed by the Company.  However, no further evidence was produced concerning those alleged debts.  At the time of the settlement of the sale of the Menangle Park property, a mortgage was recorded on the title to Citibank Limited ("Citibank") but the Company did not owe any direct debt to Citibank.  Hirtzell received the second cheque in December 2003 from Shearn and used it to discharge a mortgage over her home. Hirtzell had been a director of the Company from August 1989 to May 2001 and had signed the deed of release.  Hirtzell argued she thought she had received the second cheque under an interest-free and unsecured loan from Shearn that was repayable at "some future time" but had not been reduced to writing.  **(c) Decision**  Barrett J held that when money belonging to a company comes into the company's directors hands or under their control, it must be put into the company's possession and be recognised as the company's property.  If that is not done, the directors must be able to explain why that was the case and how and why the application of the money in some other way was consistent with its status as an asset of the company.  Adequate record-keeping is not only prudent practice, but is also required under section 286 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act") which states that a company, registered scheme or disclosing entity must keep written financial records that correctly record and explain its transactions and financial position and performance and would enable true and fair financial statements to be prepared and audited.  The section also states that the obligation to keep financial records of transactions extends to transactions undertaken as trustee.  If a director of a company, registered scheme or disclosing entity fails to take reasonable steps to comply with or to secure compliance with section 286, they contravene section 344(1).  Further, section 344(2) states that a person commits an offence if that contravention is dishonest.  Shearn did not perform this duty and the amounts of the deposit and those to which the first and second cheques were drawn, were never recognised as being the company's property.  Barrett J held those funds had been paid away by Shearn to her own personal benefit and to the benefit of Hirtzell, who was a member of Shearn's family.  No evidence was produced that Shearn's application of those funds benefited the Company in any way.  Barrett J held that Shearn had not acted with the degree of care and diligence a reasonable person would have exercised if they had been a director of a corporation in the Company's circumstances and had occupied Shearn's position and held her responsibilities.  Shearn had not acted in good faith in the best interests of the Company and for a proper purpose and had used her position improperly to cause detriment to the Company by depriving it of money that belonged to it.  Barrett J held Hirtzell had known the Company had owned the Menangle Park property, that the property had been sold, that the settlement had occurred in December 2003 and that the property had been sold with vacant possession at about the same time the so-called "loan" had been made to her.  Barrett J held that this "of necessity, must have caused the sale of the substantial asset and the availability of the substantial sum of money to become associated together in the mind of Ms Hirtzell."  Barrett J held that as Hirtzell had been a party to the earlier proceedings, she had known that Shearn was a person without means and that the Company was obliged to pay $105,000 to the Official Trustee because she had signed the relevant deed of release.  Consequently, Barrett J held that Hirtzell could not possibly have believed that Shearn had available to her $251,488.85 at the relevant time.  Hirtzell's receipt of the $251,488.85 was a "knowing receipt" and as a result, Hirtzell incurred liability under the first limb of *Barnes v Addy* (1874) LR 9 Ch App 244.  Barrett J held that Hirtzell had, at the very least, knowledge of circumstances that would indicate the facts of Shearn's impropriety to an honest and reasonable person under the test in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.  It was not necessary for her to have had actual knowledge that the money was part of the sale proceeds of the Menangle Park property.  Shearn was held to be liable to render to the Company as equitable and statutory compensation (together with interest) $383,468.94, $120,000.00 and $251,488.85.  Shearn's liability with respect to the $251,488.85 was a concurrent liability with Hirtzell.  As such they were both jointly and severally liable.  Hirtzell's property was charged with payment to the Company of that amount.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h5)  **5.6 Lack of documentation no bar to proving debts owed to a company by directors and guidance on de facto directors**   (By Andrew Nicholls, DLA Piper)   Re Mumtaz Properties Ltd [2011] EWCA Civ 610, England and Wales Court of Appeal (Civil Division), Arden, Aikens and Patten LJ, 24 May 2011   The full text of this judgment is available at:  [http://www.bailii.org/ew/cases/EWCA/Civ/2011/610.html](http://www.bailii.org/ew/cases/EWCA/Civ/2011/610.html" \t "_new)   **(a) Summary**   Two directors and two de facto directors of an informally and family-run property development and letting company in the UK appealed decisions relating to money they owed the company when it first entered administration and then liquidation. In dismissing the appeal, the Court of Appeal provides useful guidance on both the necessary elements to prove de facto directorship under UK law, as well as the effect lack of documentary evidence would have in assisting the claims and credibility of directors of an informally run company.   **(b) Facts**    The four appellants appealed a decision by the UK High Court of Justice (Chancery Division). The original decision involved five members of the Ahmed family. These were Mr Muntaz Ahmed ('Mumtaz'), his three sons, Saeed, Shafiq and Muniz, and Saeed's son, Zafar. All had been involved in the running of a property development and letting company, Mumtaz Properties Ltd ('the Company').   On 19 March 2003, the Company had entered administration and on 8 November 2004 it entered creditors' voluntary liquidation, owing £621,786.54 to creditors. The Company liquidator pursued the five members of the Ahmed family through section 212 of the Insolvency Act (UK) for monies owed to the Company by the Ahmed family members through the debit balances on their Company directors' loan accounts.    In a decision dated 3 August 2010, HHJ Simon Brown QC, sitting as judge of the High Court, had found all five members jointly and severally liable to repay to the Company a total of £205, 211.75. Saeed and Shafiq were found liable as registered directors of the Company, while Zafar, Munir and Mumtaz were found liable as de facto directors.   Saeed and Shafiq appealed the original decision on the basis that they were not liable for the directors' loan accounts opened by and for other persons. Zafar appealed on the ground that he was not liable as a de factor director. Munir appealed on the ground of the quantum of the amount owed under his directors' loan account. Mumtaz did not appeal.    **(c) Decision**   The Court was required to answer four questions in the appeal:  Did the judge err in holding that Zafar was a de factor director?  Did the judge err in holding Saeed and Shafiq jointly and severally liable for the aggregate amount due under all the directors' loan accounts?  Did the judge err in refusing to allow the appellants to set off any amounts of the pre-liquidation debts owed by the Company to them?  Did the judge err in his holding on the quantum of the amount owed by Munir under his directors' loan account?  Before answering these questions, Arden LJ made some observations on the importance of contemporaneous written evidence in assessing credibility of witnesses. Arden LJ held that if contemporaneous documentation is likely to have existed were the oral evidence correct, and the party adducing the oral evidence is responsible for its non-production, then the absence of that documentation may be conspicuous by its absence and a judge may be entitled to draw inferences from its absence.   Arden LJ also observed that persons who 'have conducted the affairs of a limited company with a high degree of informality ... cannot seek to avoid liability or be judged by some lower standard than that which applies to other directors, simply because the necessary documentation is not available'.   **(i) Was Zafar a de facto director?**   In assessing whether the trial judge erred in holding that Zafar was a de facto director of the Company, Arden LJ referred to the factors based on leading UK cases considered by the trial judge in determining de facto directorship. These factors included:  whether the person undertook functions in relation to the company which could properly be discharged only by a director;  that it is not necessary that the person hold themselves out as a director, but any holding out as a director by the person will be important evidence;  that it is necessary that the person participated in the direction of the company's affairs on an equal footing with the other directors and not as a subordinate;  the person must have assumed the status and functions of a company director and have exercised 'real influence' in the corporate governance of the company; and  if it is unclear whether acts in question can be linked to an assumed directorship, the person is entitled to the benefit of the doubt.  In light of the above factors, Arden LJ held that the trial judge was entitled to hold Zafar was a de facto director. Although there was very little documentary evidence to suggest Zafar was a director, the Company was a family one run with a high degree of informality, it was relevant that there was little documentary evidence to suggest Zafar reported to the registered directors as an employee, Zafar had held a directors' loan account for two years and had listed himself as a director on the Company's statement of affairs. All were held to be indicative of his status as a de-factor director.    Accordingly this ground of appeal failed.   **(ii) Were Saeed and Shafiq jointly and severally liable for the aggregate amount due under all of the directors' loan accounts?**   Arden LJ noted that the key issue was whether Shafiq and Saeed were aware of and had permitted Munir and Zafar to operate overdrawn directors' loan accounts. Under section 330 of the Companies Act 1985 (UK), Shafiq and Saeed would be liable as registered directors for the money misapplied by others from the illegal directors' loan accounts, even if it had not been misapplied by them.   Her Honour could find no evidence to interfere with the trial judge's finding that Shafiq and Saeed had been fully aware of the use of the accounts by Munir and Zafar, nor any reason to overturn the trial judge's finding that by allowing Munir and Zafar to operate these accounts, Saeed and Shafiq had breached their fiduciary duty to act in the best interests of the Company and occasioned loss to the Company.   Arden LJ therefore held that this ground of appeal failed.   **(iii) Could the trial judge have allowed the appellants to set off any amounts of the pre-liquidation debts owed by the Company to them?**   Arden LJ could find no evidence to disturb the trial judge's conclusion that there was insufficient documentary evidence to prove that the Company owed any money to one of the directors. Her Honour made no ruling on the point of whether a pre-liquidation debt owed by the Company to the directors could be used to set off the amount owed by a director to the Company in liquidation.     **(iv) Was the quantum of the amount owed by Munir under his director's loan account incorrect?**   Munir appealed on the ground that £74,551.37 debited to his director's loan account just before the Company went into administration was not paid for his benefit, but for the benefit of the Company.    Arden LJ held that there was some force to suggest the trial judge's findings on the topic had been confused. However, in her Honour's opinion the trial judge had been trying to express the idea that if there had been a credited entry into Munir's directors' loan account just before the Company went into administration, this would have been an unjustified credit made purely for Munir's personal benefit at a time when the Company was insolvent and the directors of the Company owed duties to its creditors. This finding was assisted by the fact that there was no documentary evidence to show why the debit was made to Munir's account and what the money had been used for.   Arden LJ therefore held that this ground of appeal failed.   Accordingly, Arden LJ dismissed the appeal with Aikens and Patten LLJ agreeing.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h5)  **5.7 Liquidator's ability to appeal adverse costs order**   (By Caroline Wong, Mallesons Stephen Jaques)   Arena Management Pty Ltd (Receiver and Manager Appointed) v Campbell Street Theatre Pty Ltd [2011] NSWCA 128, New South Wales Court of Appeal, McColl, Campbell and Macfarlan JJA, 23 May 2011   The full text of this judgment is available at:  [http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=152010](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=152010" \t "_new)   **(a) Summary**   This case analysed the scope of a liquidator's ability to rely upon a provision of the [Supreme Court Act 1970](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3748" \t "Default) (NSW) ("Act") which provides the right to appeal an order which was made only as to costs which are in the court's discretion.  The Court held that the relevant section did not apply to the costs order in question because the order did not relate to costs only and because the costs to which the order relates were not within the Court's discretion.     **(b) Facts**   Arena Management Pty Ltd ("Arena") and its liquidator, Mr Joubert, brought proceedings claiming that a charge was ineffective.  Those proceedings were dismissed.  The court ordered Mr Joubert to pay costs personally on an indemnity basis, without relying on indemnification from Arena's assets, because he had not acted reasonably in bringing proceedings and the expenses incurred were not 'properly incurred' in the liquidation.  Among other things, Mr Joubert raised a case of fraud with no evidentiary basis, failed to present relevant evidence and advanced other claims that were either baseless or unintelligible.  Arena and Mr Joubert sought leave to appeal from the costs judgment.  They relied on section 101(2)(c) of the Act, which provides that leave to appeal may be sought from an order made with the consent of the parties or only as to costs which are in the Court's discretion.    **(c) Decision**   The Court noted that section 477(6) or possibly section 536 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) provide a basis on which the Court can order a liquidator to pay costs on an indemnity basis.  Section 477(6) effectively provides (among other things) that the power of a liquidator to bring legal proceedings in the company's name is subject to the control of the Court.  Section 536 provides that, where it appears to the Court that a liquidator has not faithfully performed or is not faithfully performing his or her duties, then the Court may enquire into the matter and take such action as it thinks fit.  The Court also noted that under section 556 of the Corporations Act, the liquidator can only recover 'expenses properly incurred' and therefore is not indemnified by the company's assets against expenses (including legal costs) that were not properly incurred.    The Court explained that section 101(2)(c) of the Supreme Court Act 1970 (NSW) enabled an appeal against a judgment or order, the subject matter of which is costs (and only costs) and the costs to which it relates are ones in the Court's discretion.  The section includes interlocutory orders, a stay of a costs order or an anticipatory costs order as well as final costs orders.     The Court held that section 101(2)(c) did not apply because the order did not relate only to costs and was not within the discretion of the Court.  The relevant order did not relate only to costs because the judge made an order that the liquidator was to pay the costs of the claims and could not rely on a right of indemnity out of Arena's assets as the liquidator's conduct had been improper.  Further, the order was not within the discretion of the Court because the liquidator had engaged in misconduct in his office.  After reviewing a line of British authority on sections from which section 102(2)(c) was derived, Campbell JA in his leading judgment found that a common theme in those authorities was that if a person who holds an office in which they would ordinarily have a right of indemnity from a fund they are administering (in particular, trustees, executors and liquidators) has engaged in misconduct in their office, then the right of indemnity does not apply to certain costs that the person is liable to pay.  The decision of the judge in those circumstances to deny the right of indemnity is not one within the discretion of the Court.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h5)  **5.8 Setting aside court orders for production and examination summonses under section 596B of the Corporations Act**   (By David Plant, Blake Dawson)   Re Hunter Bulk Materials Pty Ltd (subject to a deed of company arrangement) [2011] NSWSC 467, Supreme Court of New South Wales, Ward J, 20 May 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/467.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/467.html" \t "_new)    **(a) Summary**   In this case the court considered an application to set aside court orders for production of documents.  It also considered an application to set aside examination summonses issued under section 596B of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and an application for access to the confidential affidavits filed in support of the application for summonses.    **(b) Facts**   In March 2005, Laing O'Rourke (BMC) Pty Limited (BMC) subcontracted construction works it was to perform under a contract with Wambo Coal Terminal Pty Limited (Wambo) to Hunter Bulk Materials Pty Limited (Hunter).  In December 2005, Hunter was placed into voluntary administration, and BMC invoked its rights under the subcontract to complete the construction works itself.  This gave rise to a dispute as to whether BMC had repudiated the contract with Hunter.   On 12 January 2006, Hunter executed a deed of company arrangement.  As part of the deed, the administrators were to investigate and quantify claims held by Hunter against BMC in relation to the subcontract.  In June 2006, an order was issued against BMC for the production of documents.  Examination summonses for employees of BMC were also issued under section 596B of the Corporations Act 2001 (Cth) (CA).  The summons in relation to one employee, Peter Ryan, lapsed due to fact that BMC had not yet produced all of the documents under the production order and there were applications that had not yet been determined.   In April 2011, the deed administrators of Hunter sought a further order for production and a further examination summons in relation to Mr Ryan and one other individual. BMC and two individuals in its employ at the relevant time sought to set aside the order for production and examination summonses.  As a preliminary measure, the applicants sought an order for access to the confidential affidavits filed in support of the examination application under section 596C Corporations Act 2001 (Cth).    **(c) Decision**    Ward J held that the order for production be limited in scope and that the examinations be held in private.  Her Honour did not grant the applicants access to the confidential affidavit in support.   **(i) Confidential affidavit in support**   Her Honour applied the test set by Basten JA in Meteyard v Love [2005] NSWCA 444, which stated that for an affidavit in support to be before the court, the applicant must first show 'that there is an arguable case that the issue of the summons exceeded the court's power under s 596B CA and that access to the affidavit is likely to assist in determining the correctness of the challenge'.     The applicants claimed that there was an arguable case on the current facts, as there had been a failure to inform the court that the earlier order for production had been met by BMC, and that the earlier order covered the documents now sought under the second order.  Ward J held that there was an arguable case.     In reaching this conclusion, her Honour stated that where there is a reasonable basis for suspicion that the court may not be fully informed in a matter, a failure by the deed administrators to confirm that disclosure was made may permit an inference of non-disclosure.  However, after reviewing the affidavits her Honour determined that adequate disclosure had been made, and declined to give the applicants access.   In relation to the examination summonses, the applicants claimed that they were issued for an improper purpose, being an attempt to gain a forensic advantage through a 'dress rehearsal' for cross examination of the witnesses in litigation.  In the alternative, the applicants claimed that the issue was for an improper purpose as the company had elected not to pursue a claim that the examinations related to, and so the information sought was not an examinable affair.  The applicants also claimed that the documents sought, which were not limited to the affairs of Hunter, did not relate to the examinable affairs of Hunter and so were not sought for a legitimate purpose.   However, her Honour held that the examination was sought for a proper purpose, being the determination of the prospects of success of litigation on foot.  Her Honour stated that the fact that the deed administrator appeared to have prepared extensively before commencement of examinations did not indicate an attempt to have a dress rehearsal of cross examination.  Also, there had been no election not to pursue the claim, as indicated by the deed administrator seeking legal and expert advice.     **(ii) Order for production**    The applicants claimed that the order for production was oppressive and an abuse of process due to the fact that production had already occurred under the earlier order.  Her Honour held that any oppression was negated by the deed administrator limiting the documents he sought to those which he did not already have copies of.   **(iii) Examination summonses**   Ward J stated that an examination summons under section 596B CA may be set aside where it was issued for an improper purpose (thus constituting an abuse of process), where there has been material non-disclosure in the application, where the exercise of discretion by the Court has miscarried or a where review with the benefit of new evidence determines that the summons should be set aside.   Similar arguments were raised by the applicants in relation to the summonses as for the affidavit in support, being that there was non-disclosure of material matters and that there was an improper purpose.     Despite the 'heavy duty on the applicant seeking ex parte orders', her Honour was not satisfied after reviewing the confidential affidavits in support that there was any material non-disclosure.   With regard to the improper purpose submission, her Honour reached the same conclusion as with the affidavits in support, that the summonses were sought for a proper purpose.   In addition, the applicants submitted that the five year delay between the institution of proceedings and the application for examination summonses was relevant to considering the exercise of the court's discretion in issuing an examination order.  Although Ward J accepted that this was the case, her Honour held that in this situation, the delay was not excessive, given the reasons for the delay (which included the need to obtain funding for the examinations, an administrative error by the court registry and a dispute between BMC and the deed administrators).    Finally, her Honour accepted that due to the fact that proceedings had been issued against BMC by Wambo in relation to the subcontract between Hunter and BMC, the public nature of the examination could cause forensic disadvantage to BMC in those proceedings.  To counter this, her Honour ordered that the examinations be held in private.  Her Honour also set in place a regime that left open the question of whether access to the transcripts of the examinations be granted to any applicant.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h5)  **5.9 Claiming legal professional privilege - identifying third parties, solicitors' bills and the crime/fraud exception**   (By Steven Grant, Minter Ellison)   Hodgson v Amcor Ltd; Amcor Ltd v Barnes (No 2) [2011] VSC 204, Supreme Court of Victoria, Vickery J, 11, 16 May 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2011/204.html](http://www.austlii.edu.au/au/cases/vic/VSC/2011/204.html" \t "_new)   **(a) Summary**   This case provides an insight into the principles applied when identifying whether legal professional privilege applies to documents specified in an affidavit of documents.  In particular, Vickery J considers the overarching principles, the circumstances in which third parties with whom communications take place should be identified when claiming privilege, the circumstances in which a solicitors memorandum of time recorded is privileged and the scope of the crime/fraud exception to legal professional privilege.    **(b) Facts**   In Amcor Ltd v Barnes, a firm of solicitors, A J Macken & Co, was served with a summons dated 9 December 2010 and the affidavit of Janet Whiting dated 9 December 2010 was filed by the plaintiffs, Amcor Ltd and others (the 'Amcor parties') seeking non-party discovery of seven categories of documents.  This application was resisted by A J Macken & Co and Vickery J ordered that non-party discovery take place by the provision of an affidavit of documents by A J Macken & Co in the terms of the Amcor summons dated 9 December 2011.   A J Macken & Co served and filed its affidavit of documents dated 14 April 2011 in accordance with the order.  In the affidavit of documents, it was claimed that a number of documents discovered were the subject of legal professional privilege because they comprised confidential communications made either for the dominant purpose of obtaining or giving legal advice or were brought into existence for the dominant purpose of use in existing or anticipated litigation.  These documents were listed and described in Part 2 of Schedule 1 of the affidavit.  The list included 108 documents which were each numbered and briefly described and stated to be either an original or a copy with the basis of the claim to privilege in each case set out in brief terms and the date of the document provided.   On 6 May 2011 Vickery J heard arguments from the Amcor parties and A J Macken & Co as to whether the claims to privilege maintained by the firm could be sustained.  In relation to documents numbered 17, 46 and 54, 68 and 69, and 149, Vickery J directed that they be produced to the Court for inspection and in relation to the balance of the documents in contention, Vickery J ruled that the claim to privilege was sustained.  Having examined the documents produced to the court, Vickery J identified those documents which were privileged and those which were not.   **(c) Decision**   Having considered the development of statute and general law in respect of legal professional privilege, Vickery J applied the following principles to the exercise of the discretion to inspect the documents in question in this case:   The nature and description of the document may be sufficient to entitle a Court to be guided solely by the oath of the party making discovery, that the whole of the document or the nominated redacted parts of it are privileged.  On the other hand, there may be other cases where either the nature of the document, or other material, may be sufficient to put in doubt the claim by the deponent that the whole of the document or redacted parts of it have the protected status.  Alternatively, some uncertainty may arise as to the purpose for which documents the subject of the claim for legal professional privilege were prepared, or the precise basis of the claim sought to be established.  The Court should not be hesitant to exercise such a power.  Ultimately it is for the Court to determine whether the circumstances warrant inspection of some or all of the documents in question, either in their original form, in a proposed redacted form, or both, in order to determine the questions before it.    Applying these principles, Vickery J accepted that the characterisation of the documents sworn to Mr Macken as the solicitor on the record, except in a relatively small number of cases.  In making this finding, Vickery J considered each of the grounds on which the Amcor parties challenged the claims to privilege maintained by A J Macken & Co.   **(i) Identification of third parties**   The Amcor parties submitted that the claim to legal professional privilege was deficient because in relation to a number of documents, the identities of persons spoken to or communicated with by the clients of A J Macken & Co, by the firm on behalf of its clients, or by counsel engaged by the firm's clients, were not disclosed.   Mr Macken submitted that to reveal the identity of those third parties would disclose the nature of the privileged communications in question.  On the contrary, the Amcor parties submitted that the onus is on the privilege claimant to establish in what way the disclosure of the identity of third parties 'would disclose the nature of the privileged communications in question'.   The Amcor parties further submitted that the facts and circumstances surrounding the communication of legally privileged material to a third party (or to third parties), including the terms on which it occurred and the fact that the communication was confidential, should also be disclosed in order to establish that there has been no waiver.   Vickery J did not accept the submissions by the Amcor parties on these issues for the following reasons:  Rule 29.04(1)(d) of the [Supreme Court (General Civil Procedure) Rules 2005 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=88231" \t "Default) required the party making the affidavit of documents to state sufficiently the grounds of the privilege.  It did not require a statement as to the particulars of the evidence relied upon to support the privilege by, for example, describing the evidence upon which the claim may be founded, or to give such description as would enable the other party to test the truth of the claim for privilege.  The documents are not required to be listed in a manner which would result in the loss of the benefit of the privilege.  The description of the grounds for the claim to privilege is not a formulaic exercise and no particular form of words is either prescribed or called for.  If the identification and description of the document is adequate to support the claim to privilege and to enable production to be enforced if ordered, 'sufficiency' for the purposes of rule 29.04(1)(d) is established.  **(ii)  Memorandum of costs and time ledger**   Mr Macken's memorandum of costs and his time ledger, being documents 68 and 69 in the affidavit of documents, were also claimed to be privileged.  However, the Amcor parties submitted that documents of the type in question are not ordinarily privileged.     Vickery J noted that in the usual case, a memorandum of fees is brought into existence, not for the dominant purpose of obtaining legal advice, or for use in legal proceedings (which must be the case in order for privilege to apply), but principally for the purpose of recording and raising charges in respect of work which had been already completed.  However, where memoranda or bills of costs rendered by a solicitor are in detailed form and disclose, either directly or indirectly, communications concerning matters that are protected by the privilege, including instructions given by a client to his solicitors, the advice given, approaches to potential witnesses and other such things, the memoranda and bills of costs are privileged.   In this case Vickery J was satisfied that the memorandum of costs and the time ledger fell in the latter category and were therefore privileged.   **(iii) Crime/fraud exception**   The Amcor parties submitted that five documents (namely documents 17, 46, 54, 68 and 69) were not protected by legal professional privilege because there are reasonable grounds to believe that the documents evidence communications in furtherance of improper conduct based on the 'crime/fraud exception' to privilege.   It was submitted on behalf of A J Macken & Co that the 'crime/fraud exception' had no application because the first time that Mr Macken was retained by any of the individuals involved in the purported fraud was on 12 October 2004 whereas the fraud, if any, was committed by those persons occurred in 2002.  On the contrary, the Amcor parties submitted that there was evidence of conduct which amounted to a continuation and concealment of an illegal or improper purpose, namely the fraud committed by the individuals in question and others on the Amcor parties, arising from and concerning the sale of a business.   Having regard to the 'crime/fraud exception' which has now been enacted in section 125 of the [Evidence Act 2008 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=103718" \t "Default), Vickery J noted that in order for the exception to apply, there must be reasonable grounds for finding that:  the fraud, offence or act, or the abuse of power, was committed; and  a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power, before the exception may apply to otherwise privileged material.  In this context, fraud is given a broad meaning and the standard of proof for the fraud is a civil standard.   Because of the nature of the controversy as to the effect of these documents, Vickery J exercised the power of the Court to inspect the documents in issue, both in their redacted and unredacted forms.  As a result, Vickery J was satisfied that none of the documents examined evidenced any communication made or document prepared in furtherance of the commission of any fraud or for any other illegal or improper purpose such as to enliven the operation of the exception.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h5)  **5.10 Top-hatting schemes of arrangement with a change of domicile and listing**   (By Mark Joss, Clayton Utz)   Re Allied Gold Ltd [2011] QSC 108, Supreme Court of Queensland, McMurdo J, 11 May 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/qld/QSC/2011/108.html](http://www.austlii.edu.au/au/cases/qld/QSC/2011/108.html" \t "_new)   **(a) Summary**   Upon an application to the Supreme Court of Queensland by Allied Gold Limited ("Allied Gold"), her Honour Justice McMurdo considered two interdependent schemes of arrangement ("Schemes") pursuant to section 411 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act").  Implementation of the Schemes would result in Allied Gold becoming a wholly-owned subsidiary of, and being "top-hatted" by, a new company incorporated in the United Kingdom.   In making orders convening the scheme meetings and approving the scheme booklets, Justice McMurdo considered whether to order Allied Gold to convene separate meetings for potentially different classes of Allied Gold security holders arising from the differential impact of the Schemes on security holders in different jurisdictions.  Her Honour held that in the absence of a dissimilarity in the respective legal entitlements of Australian and non-Australian investors, separate scheme meetings would not be necessary.    **(b) Facts**   Allied Gold is a company incorporated in Western Australia and publicly listed on the Australian Securities Exchange ("ASX"), Toronto Stock Exchange ("TSX") and the Alternative Investment Market ("AIM") of the London Stock Exchange ("LSE"), with a number of wholly-owned subsidiaries domiciled in Australia and around the world ("Allied Gold Group").   Pursuant to section 411(1) of the Act, Allied Gold applied to the Supreme Court of Queensland for orders to convene a meeting of its members and a meeting of its option holders to consider the Schemes, which together provide for the "top hatting" of Allied Gold by Allied Gold Mining Plc ("TopCo"), a company newly incorporated in the United Kingdom ("Restructure").    Under the Schemes, all Allied Gold shareholders would exchange their shares in Allied Gold for shares in TopCo (on a one for six basis) and all Allied Gold option holders would have their existing options in Allied Gold cancelled in exchange for the issue of share options in TopCo.  Consequently, the Allied Gold Group, currently headed by Allied Gold, would become headed by TopCo (and all of the entities in the Allied Gold Group would become wholly-owned by TopCo), although the ultimate ownership of the Allied Gold Group would remain unchanged.  Further, Allied Gold would delist from the ASX, TSX and AIM and TopCo would apply to have its shares admitted to LSE and TSX and to have CHESS Depository Interests ("CDIs") in respect of its shares traded on ASX.   It was a term of the share Scheme that Allied Gold shareholders with a registered address in Australia would receive TopCo CDIs tradeable on ASX through the CHESS system rather than shares in TopCo tradeable on LSE through the CREST system. Justice McMurdo acknowledged the scheme booklet disclosure to the effect that Australian investors who would receive TopCo CDIs listed on the ASX would be disadvantaged as against other investors due to the general lack of liquidity in the market for foreign companies with secondary listings on ASX. This raised the question of whether the Court should order Allied Gold to convene separate meetings for Australian investors who would receive TopCo CDIs and trade through the CHESS system and non-Australian investors who would receive TopCo shares and trade through the CREST system.    **(c) Decision**   Justice McMurdo made orders that:  Allied Gold convene a single meeting of its shareholders (and a single meeting of its option holders) for the purpose of considering and, if thought fit, resolving to approve the Schemes in the form set out in the scheme booklet; and  the explanatory statements contained in the scheme booklet be approved.  Her Honour considered whether Australian investors who would receive CDIs tradeable on ASX through the CHESS system and non-Australian investors who would receive TopCo shares tradeable on LSE through the CREST system fell into distinct classes requiring separate meetings to be convened to consider the Schemes. Justice McMurdo (at paragraph [13]) stated that in determining this issue, the Court had to consider the differences (if any) in the legal rights of the potential different classes of investors.     Referencing the decision of Lord Millett in *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] 3 HKLRD 634, Justice McMurdo noted that the relevant test to determine whether investors are in separate classes is whether "the legal rights of persons are sufficiently similar or dissimilar, and not whether there is a sufficient similarity or dissimilarity of interests not derived from such legal rights."  Further, her Honour observed that Australian courts have followed Lord Millett's statement from that case that:   "[t]he fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings" (*UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] 3 HKLRD 634 at [27]).   Applying the test from *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] 3 HKLRD 634 to the facts, Justice McMurdo held that there was no dissimilarity in the respective legal entitlements of Australian and non-Australian investors and, as such, all Allied Gold shareholders could and ought meet together in a single meeting.  In coming to this conclusion, her Honour took into consideration the fact that TopCo CDIs could be converted to shares in TopCo (and conversely shares in TopCo could be converted to TopCo CDIs).  Consequently, the TopCo CDIs held by Australian investors and tradeable on ASX would confer the same entitlements as the legal ownership of the relevant shares listed on LSE (other than a CDI holder having to participate in a shareholders' meeting through proxy rather than being able to attend in person).  In concluding that the interests of all investors were sufficiently similar to participate in a single meeting, her Honour noted (at paragraph [14]):   "there would be but one class of shares in the UK company, the investor's interest would be in the same parcel of shares, and whether the investor chose to hold them through a nominee so as to trade them as CDIs on the ASX or to hold them in its own name so as to trade them as shares on the London Stock Exchange, would be that investor's choice according to its own circumstances."   The conclusions in the judgment as to a single meeting for scheme shareholders were stated to apply equally to the meeting for scheme option holders.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h5)  **5.11 High Court quashes Perth stockbroker's convictions for misleading trades**   (By Tracy Nau, Freehills)   Braysich v The Queen [2011] HCA 14, High Court of Australia, French CJ, Heydon, Crennan, Kiefel and Bell JJ, 11 May 2011   The full text of this judgment is available at:   [http://www.austlii.edu.au/au/cases/cth/HCA/2011/14.html](http://www.austlii.edu.au/au/cases/cth/HCA/2011/14.html" \t "_new)     **(a) Summary**   The High Court of Australia, by majority, allowed an appeal by Mr Braysich from his conviction for the offence of creating a false or misleading appearance of active trading on the stock market. A statutory defence was available if Mr Braysich could establish that he did not carry out the trades with a purpose of creating a false or misleading appearance of active trading. Mr Braysich had not given direct evidence of his subjective purposes at trial. The trial judge withheld the statutory defence from the jury on the basis of insufficient evidence.    The High Court held that taking the evidence at its highest, it would be open to a reasonable jury to conclude, on the balance of probabilities that Mr Braysich did not intend to create a false or misleading appearance of active trading. Accordingly, the High Court ruled that the Court of Appeal of the Supreme Court of Western Australia had erred in dismissing Mr Braysich's appeal and ordered the matter back to the District Court of Western Australia for retrial.    **(b) Facts**    Mr Braysich, a stockbroker, had been convicted by a jury in the District Court of 25 counts of creating a false or misleading appearance of active trading in securities on the stock market, in breach of former section 998(1) of the [Corporations Act (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the "Act"). Under a deeming provision in the Act, Mr Braysich was deemed to commit the offence if the prosecution proved that he caused the sale of securities knowing that there was no change in the beneficial ownership of the securities.     Mr Braysich sought to rely on a statutory defence that the purpose or purposes for which he caused the sales to take place, was not or did not include the purpose of creating a false or misleading appearance of active trading (the "proscribed purpose"). Mr Braysich did not give any direct evidence as to whether his subjective purpose or purposes in carrying out the transactions included the proscribed purpose. The evidence put forward for Mr Braysich was mainly directed to denying that he knew there was no change in the beneficial ownership of the securities, and included character evidence of his honesty.    The trial judge ruled that the defence was not raised due to insufficient evidence and on that basis, withheld the defence from the jury. The Court of Appeal dismissed Mr Braysich's appeal, finding that Mr Braysich's failure to lead any direct evidence that he did not carry out the transactions for the proscribed purpose, was a 'critical omission', and that the character evidence as to Mr Braysich's honesty was not sufficient to require the trial judge to put the defence to the jury. The outcome of the appeal to the High Court turned on whether the trial judge erred in withdrawing the statutory defence from the jury.    **(c) Decision**    The High Court, by majority, allowed Mr Braysich's appeal. The majority held that in determining whether to put the defence to the jury, the trial judge was required to consider whether there was any evidence, taken at its highest in favour of the accused, which could lead a reasonable jury properly instructed, to conclude that the defence was established on the balance of probabilities.    To discharge the burden of proof, Mr Braysich did not need to produce evidence of his actual purpose but could have produced or pointed to any evidence inconsistent with the proposition that he had the proscribed purpose. Given that the proscribed purpose is a dishonest purpose, the majority considered that it was relevant to take into account the character evidence of Mr Braysich's honesty. The majority held that if the defence had been put to the jury, the evidence taken at its highest (including the character evidence), could have led a reasonable jury to be satisfied on the balance of probabilities that he did not have the proscribed purpose and therefore acquit. In reaching a contrary conclusion, the Court of Appeal erred. The High Court therefore quashed Mr Braysich's conviction and remitted the matter to the District Court for retrial.   The minority accepted that Mr Braysich's failure to give direct evidence that he did not have the proscribed purpose did not preclude him from relying on that defence in the event the jury decided the question of knowledge against him. However, as the defence could only be invoked if the jury determined that Mr Braysich had the requisite knowledge, the circumstantial evidence regarding lack of this knowledge, could not be relied on in support of the defence. The minority considered that the remaining circumstantial evidence, which showed that Mr Braysich acted in the ordinary course of his business as a stockbroker in carrying out the transactions, was not sufficient to warrant leaving the defence for the jury's consideration. The minority therefore dismissed the appeal.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h5)  **5.12 Appeal dismissed in relation to uncommercial transactions and shadow directors**   (By Caroline Wong, Mallesons Stephen Jaques)   Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd [2011] NSWCA 109, New South Wales Court of Appeal, Hodgson, Young and Whealy JJA, 9 May 2011   The full text of this judgment is available at:  [http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=151534](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=151534" \t "_new)   **(a) Summary**   The case concerned two main issues:  whether a particular transaction entered into by Buzzle Operations Pty Ltd ("Buzzle") was a voidable uncommercial transaction; and  whether Apple or its representative could be construed as shadow directors, which could have the effect of rendering them liable under section 588G for insolvent trading or rendering the transaction voidable as an insolvent transaction entered into with a related entity.  **(b) Facts**    The case arose from the insolvency and liquidation of Buzzle, a company which formed through the merger of six resellers of Apple products.  At the time that the merger occurred, Apple consented to the transfer of stock from the six resellers to Buzzle.  Apple had a charge over the unsold stock and, after entering into a new reseller agreement with Buzzle, took a charge over Buzzle's assets for the amount owing on the stock.  The case concerned two payments made by Buzzle to Apple to repay amounts owing for the stock, and whether those payments were 'uncommercial transactions' and therefore voidable under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act").  The Merger Deeds specified that the payments in question were subject to Buzzle's directors forming the view on reasonable grounds that Buzzle had adequate cash flows to pay amounts owing to all vendors on either a pro-rata basis or in accordance with the vendors' requirements to pay their creditors.     **(c) Decision**    **(i) Uncommercial transaction?**   Section 588FB of the Act provides that a transaction is 'uncommercial' if a reasonable person in the company's circumstances would not have entered into the transaction, having regard to the benefit and detriment to the company and other parties to the transaction and other relevant matters.  If a company is being wound up, an uncommercial transaction is voidable (section 588FE(2B)).  However, a transaction is not voidable against a person who received a benefit because of the transaction in good faith and who, at the time they received the benefit, had no reasonable grounds for suspecting the company was insolvent or would become insolvent, and a reasonable person in their circumstances would have had no such grounds for so suspecting (section 588FG).    The majority were inclined to find that the payments were uncommercial transactions because Buzzle suffered detriment in making the payments, since it effectively deprived itself of liquidity at a time when it had other pressing creditors, needed to spend money on its computer accounting system, and there were no reasonable grounds on which to form the view that it would have adequate funds to pay the other vendors.  However, the Court held that the transaction could not be voided as Apple acted in good faith and had no reasonable grounds at the time for suspecting that Buzzle was insolvent or would become insolvent.   **(ii) Shadow director**    Buzzle alleged that Apple was a shadow director under a duty to prevent the company from insolvent trading under section 588G of the Act.  Buzzle also sought to void the transaction under section 588FE(4) of the Act, which provides that an insolvent transaction is voidable if entered into with a related entity of the company, on the grounds that Apple was a shadow director of Buzzle and therefore a related entity within the definition under section 9 of the Act.    The Court confirmed the trial judge's finding that Apple was not a shadow director as Buzzle's directors were not accustomed to act in accordance with Apple's instructions or wishes.  A party may impose conditions on its commercial dealings, with which directors feel obliged to comply, without being regarded as a shadow director.  The imposition of such conditions is different to giving instructions to directors about the exercise of their powers, as the directors are free to decide whether compliance with those terms is in the interests of the company.  Apple and its representative were therefore found not to be shadow directors.  In reaching this finding, Young JA (with whom the other members of the Court agreed) also emphasised the lack of the requisite causal connection between the instruction or wish and the directors' decision or action.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h5)  **5.13 Unregistered (registrable) charges and unfair preference claims**   (By Cyrus Ardeshirian, Clayton Utz)   Bradnam's Windows and Doors Pty Ltd v Offermans [2011] QCA 106, Court of Appeal of the Supreme Court of Queensland, Muir JA, Margaret Wilson AJA and Martin J, 20 May 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/qld/QCA/2011/106.html](http://www.austlii.edu.au/au/cases/qld/QCA/2011/106.html" \t "_new)    **(a) Summary**   The Applicant (on appeal, defendant at first instance) successfully appealed an order of the District Court striking out part of the Applicant's defence. The substantive matter concerned an unfair preference claim made by the Respondent, a liquidator, against the Applicant.    Under section 588FA of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"), a transaction is an unfair preference if the transaction results in the creditor receiving from the company, in respect of an unsecured debt, more than the creditor would have received during the winding up.   Under section 266, an unregistered charge is void against a liquidator. However, a charge over land is not required to be registered.    The Respondent submitted that, because the charge in respect of the relevant debt was unregistered, the debt was "unsecured".    Muir JA (Wilson AJA and Martin J agreeing) held that the Applicant's pleading disclosed a valid defence, being that the charge was, at least in part, over real property.  His Honour held that a charge partly over real property and partly over other property does not need to be registered for the purposes of enforcement against real property.     His Honour decided not to express an opinion on whether:  an unfair preference claim is concerned with a transaction between the creditor and the company (and accordingly, section 266 has no application); or  that payment of a debt secured by an unregistered charge is a payment in respect of an unsecured debt.  This leaves open for another day the question of whether a voided charge under section 266 makes any recoveries received by the creditor (before the charge was voided) undue preferences under section 588FA. That seems unlikely on the obiter commentary of the Court.    **(b) Facts**  The Applicant, a manufacturer and supplier of windows and doors, entered into an agreement with Eckerbuilt Pty Ltd ("the Company") in March 2007 under which it agreed to supply goods to the Company under credit ("Credit Agreement"). The Credit Agreement purported to charge the assets of the Company, however it was not registered with ASIC as per section 262.   The Respondent was appointed administrator of the Company on 7 January 2009 and its liquidator on 10 February 2009. During the six months preceding winding up of the Company ("the Relation Back Period"), the Company made payments to the Applicant totalling $80,870.82 in satisfaction of debts due and owing ("the Payments").    The Respondent applied to the District Court for recovery of the Payments from the Applicant on the basis they were recoverable as unfair preferences within the meaning of section 588FA.   The Applicant submitted, inter alia, that it was a secured creditor of the Company by virtue of the charge contained in the Credit Agreement and that each of the Payments represented the value of the supplied goods.    At first instance, the District Court made an order striking out part of the Applicant's defence and giving the Applicant leave to re-plead, on the basis that the pleading disclosed no reasonable defence. The primary judge found, as per section 266, non-registration of the Credit Agreement rendered the charge void against the Respondent as liquidator of the Company. As such, the debt was unsecured for the purposes of section 588FA.    This was the Applicant's application to the Supreme Court seeking leave to appeal against the District Court order.    **(c) Decision**   The Supreme Court made orders that:  the application for leave to appeal be granted;  the appeal be allowed;  those parts of the order striking out Bradnam's defence be set aside; and  the costs of the application and of the appeal be the parties' costs in the cause.  **(i) Relevant provisions of the Act**   Unfair preferences  A transaction is voidable if it is an insolvent transaction entered into during the relation back period (section 588FE).   A transaction is an insolvent transaction if it is an unfair preference given by the company (section 588FC).  Section 588FA deems a transaction an unfair preference given by a company to a creditor if the company and the creditor are parties to the transaction and the transaction results in the creditor receiving, in respect of an unsecured debt, more than the creditor would receive from the company if the creditor were to prove for the debt in a winding up of the company.  Charges  A charge must be registered with ASIC within 45 days after the creation of the charge (sections 262 and 263).  An unregistered charge is void against a liquidator or administrator (section 266).  The above sections do not apply in relation to a charge on land (section 262(8)).  **(ii) Issue - was the transaction an unfair preference?**   The primary issue was whether the Payments were made in respect of an unsecured debt (and accordingly, were capable of being unfair preferences).    His Honour noted that on a literal construction, section 588FA would not apply to the subject transactions, as the section only applies to a transaction which results in receipt by the creditor "in respect of an unsecured debt that the company owes the creditor". His Honour said that:  it was arguable that the words "unsecured debt" should not be construed as meaning "a debt not secured by a security which is void as against the liquidator";  nothing in Chapter 2K of the Act (which contains section 266) renders void an unregistered charge or renders a debt secured by the charge an "unsecured debt"; and  section 588FA is concerned with a transaction between the company and creditor concerning a debt owed by the company to the creditor. It does not specifically advert to the operation of section 266(1).  Counsel for the Respondent submitted that the above difficulties could be overcome by applying section 588FA at the date of the impugned transaction on the basis of a hypothetical winding up at that date. His Honour rejected that approach.    His Honour said that, arguably, there would be deficiency in the operation of the Act if an unregistered charge was void as a security against a liquidator under section 266, but valid as a security for the purposes of section 588FA. Furthermore, his Honour noted that the words "unsecured debt" must be construed in the context of a provision concerned with the setting aside by liquidators (although not exclusively) of unfair preferences. His Honour declined to make any further comment on the construction of the section, noting that the argument had not been developed at first instance or appeal, and that it may not be determinative of the true issues in dispute at trial.    His Honour noted that a charge over land is not required to be registered. His Honour said that there was authority for the proposition that a charge on both land and other property is not required to be registered in so far as it is a charge on land. Accordingly, his Honour said that "the defence ... raised the prospect of the charge being, in part, a security over real property". Accordingly, the appeal was allowed.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/166%20June%202011.htm%23h5) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. 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/166%20June%202011.htm%23h1) | | | http://my.lawlex.com.au/alert/pic/spacer.gif |

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