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| **Bulletin No. 183**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, The University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Ashurst](http://www.ashurst.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Piper](http://www.dlapiper.com/Australia/%22%20%5Ct%20%22_new), [Herbert Smith Freehills](http://www.herbertsmithfreehills.com/%22%20%5Ct%20%22_new), [King & Wood Mallesons](http://www.mallesons.com/%22%20%5Ct%20%22_new), [Minter Ellison](http://www.minterellison.com/%22%20%5Ct%20%22_new).1.     [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/183-November-2012.html#h1)2.     [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/183-November-2012.html#h2)3.     [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/183-November-2012.html#h3)4.     [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/183-November-2012.html#h4)5.     [Recent Research Papers](http://www.law.unimelb.edu.au/bulletins/183-November-2012.html#h5)6.     [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/183-November-2012.html#h6)7.     [Contributions](http://www.law.unimelb.edu.au/bulletins/183-November-2012.html#7)8.     [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)  |

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

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| **1.1** **Supreme Court of Victoria Commercial Law Conference 2012** On 10 December 2012, the Supreme Court of Victoria will hold its annual Commercial Law Conference. A program of eminent speakers will address topical and important commercial law issues. The Conference details are as follows: **Date**  Monday 10 December 2012 **Venue** Banco Court, Supreme Court of Victoria210 Williams St, Melbourne **Time**  2.00pm - 5.45pm **Cost**  $220 (incl GST)  **Program**Remedies for breach of fiduciary duties: Lessons from two recent mega-cases: Grimaldi and Bell Resources Speaker: The Hon Keith Mason AC QC, former President of the NSW Court of Appeal Comment: The Hon Justice Neave AO Issues and Challenges in Resolving Class ActionsSpeaker: Mr Ken Adams, Partner, FreehillsComment: The Hon Justice Beach Western Export Services Inc v Jireh International Pty Ltd and the use of extrinsic materialSpeaker: Mr Joseph Santamaria QC Comment: Mr Stephen McLeish SC, Solicitor-General for Victoria How to assist the court in the efficient conduct of a large commercial trialSpeaker: The Hon Justice Hargrave To view the conference flyer and registration details, [click here](http://cclsr.law.unimelb.edu.au/files/Supreme_Court_Conference_2012_Flyer-Final_Draft.pdf%22%20%5Ct%20%22_new).etailed Contents**1.2** **APRA final package to implement Basel III capital reforms**On 13 November 2012, the Australian Prudential Regulation Authority (APRA) released a package of final measures that completes APRA's implementation of the Basel III capital reforms for authorised deposit-taking institutions (ADIs) in Australia.The package includes APRA's response to submissions received on its proposed requirements for counterparty credit risk capital and other measures, which were released in draft form in August 2012.In addition to the response paper, the package includes final versions of seven relevant prudential standards, two prudential practice guides and accompanying reporting standards, and revised guidelines on the recognition of External Credit Assessment Institutions. The Basel III capital framework was introduced by the Basel Committee on Banking Supervision in December 2010 to raise the quality and consistency of the capital base and harmonise other elements of capital. In addition, Basel III improves the risk coverage of the Basel II Framework by strengthening the capital requirements for counterparty credit risk exposures arising from banks' derivatives, repurchase and securities financing activities.APRA's consultations on implementing the Basel III capital reforms in Australia began with the release of a discussion paper outlining APRA's broad approach in September 2011 and have continued through 2012. In 2013, APRA will begin consultations on the Basel III disclosure requirements.The package is available on the [APRA website](http://www.apra.gov.au/adi/PrudentialFramework/Pages/Basel-III-CCR-Final-November-2012.aspx%22%20%5Ct%20%22_new).etailed Contents**1.3** **EU Select Committee report on women on boards**On 9 November 2012, the House of Lords European Union Committee released its report 'Women on Boards', following an inquiry into gender balance in the boardroom.  The Committee supports a leadership role for the EU in this area but does not believe that the European Commission has made a convincing case in support of board quotas. Instead of a quota Directive, the Committee believes that the EU should issue a non-binding Recommendation to Member States that urges strong action to address gender diversity on boards. The Recommendation should outline a range of recommended policy developments and a voluntary target of 30% of EU board posts being held by women five years after it is issued. The Commission should review progress against this Recommendation after three and then five years. Should there be a clear failure to address gender inequalities on corporate boards, the Commission should reserve the right to legislate on the issue at either stage. The report is available on the [UK Parliament website](http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/58/58.pdf%22%20%5Ct%20%22_new).etailed Contents**1.4** **APRA consultation package on ADI liquidity reporting requirements**On 9 November 2012, the Australian Prudential Regulation Authority (APRA) released a consultation paper outlining its proposed changes to liquidity reporting requirements for authorised deposit-taking institutions (ADIs). The consultation package includes seven draft reporting forms and associated instructions.APRA's proposed changes to these reporting requirements will assist it to better monitor ADI liquidity, including monitoring compliance with the new Basel III global liquidity standards. The proposed reporting requirements include:* detailed reports that will assist APRA to monitor compliance with the new Liquidity Coverage Ratio and the Net Stable Funding Ratio.  These global liquidity standards will be applied only to Australia's larger and more complex ADIs;
* minor amendments to the reports that APRA currently receives from credit unions and building societies; and
* standardised balance sheet maturity information that will allow APRA to better understand the funding and liquidity situation of the industry.

Consultation on the proposed new reporting requirements closes on 8 February 2013, and the final liquidity reporting standards are expected to be determined and released in the second half of 2013. The requirements in the final standards are expected to take effect for the reporting period ending 31 December 2013, meaning that ADIs will complete their first submission on the new reporting forms in January 2014.The discussion paper and draft reporting forms and instructions are available on the [APRA website](http://www.apra.gov.au/adi/PrudentialFramework/Pages/Liquidity-reporting-requirements-for-ADIs-November-2012.aspx%22%20%5Ct%20%22_new). etailed Contents**1.5** **APRA proposed amendments to prudential standard for Financial Claims Scheme** On 7 November 2012, the Australian Prudential Regulation Authority (APRA) released a consultation package on the Financial Claims Scheme (FCS) as it applies to locally incorporated authorised deposit-taking institutions (ADIs). The package comprises a discussion paper, information paper and draft amended 'Prudential Standard APS 910 Financial Claims Scheme' (APS 910).  The proposals in the package require ADIs to be operationally ready to meet payment, reporting and communications requirements should they be declared by the Minister to be subject to the FCS. Established in October 2008, the FCS is designed to protect depositors up to a defined amount of $250,000 per account-holder per ADI, and provide them with timely access to their deposits in the event that their ADI becomes insolvent and is declared to be subject to the FCS.APRA is proposing amendments to APS 910 that will facilitate the timely and accurate payment of account-holders in the event of the declaration of an ADI under the FCS. The additional FCS requirements in the package relate to: * the payment of FCS balances;
* generation of reports to APRA, the Australian Taxation Office and account-holders;
* communication with stakeholders;
* regular testing of each ADI's FCS capacity;
* external auditor reviews of some APS 910 requirements; and
* attestation by the ADI's chief executive officer regarding compliance with APS 910.

APRA will consult on the consultation package for eight weeks, with submissions due by 31 December 2012.APRA intends to finalise the amended APS 910 by the middle of next year and bring it into effect from 1 July 2013.  It is proposed that all ADIs will be given 12 months to comply with the new FCS requirements, with a deadline of 1 July 2014. The package is available on the [APRA website](http://www.apra.gov.au/adi/PrudentialFramework/Pages/Proposed-requirements-for-payout-reporting-and-communications-November-2012.aspx%22%20%5Ct%20%22_new).etailed Contents**1.6** **Survey of FTSE100 directors' earnings** On 6 November 2012, UK's Incomes Data Services released the results of its latest survey of FTSE100 directors' earnings.  Basic pay and bonus growth for FTSE-100 directors has slowed, almost to a halt, over the last year, with salaries matching inflation and bonuses down on the previous year. However a large rise in the value of vested long term incentive plans (LTIPs) awards means that their total earnings have still increased markedly, up 10% at the median. The payment of some high incentives pushed the average rise even higher to 27%. The median total earnings of FTSE100 CEOs was £3.2 million, while the average was £4 million. According to IDS, the salary rises for FTSE-100 directors increased by a median of 3.5% but the value of bonus payments received actually declined by 4.9%.  Across all FTSE-100 directors, the value of LTIPs rose by 81% from a median of £519,625 in 2011 to £938,888 this year. For chief executives, the value of vested LTIPs reached a median of £1.6million. IDS explains that LTIPs are now used by more than 90% of the FTSE-100 and are designed to incentivise directors over a longer term period. They are typically granted in the form of shares and are closely linked to shareholder returns, with directors typically having to reach a minimum target before any shares are granted. Further information is available on the [IDS website](http://www.incomesdata.co.uk/%22%20%5Ct%20%22_new).etailed Contents**1.7** **FRC collection of essays in celebration of 20 years of the UK Corporate Governance Code** On 5 November 2012, the Financial Reporting Council (FRC) released a collection of essays to mark the 20th anniversary of the Cadbury Code which introduced the UK's 'comply or explain' approach to best practice in the organisation of corporate boardrooms and their relations with shareholders.The collection of essays, entitled 'Comply or Explain: 20th Anniversary of the UK Corporate Governance Code', draws on the experience of a wide range of individuals both in the UK and overseas, reflecting the global impact of 'comply or explain' and its contribution to the UK's role as an international financial centre. The collection is available on the [FRC website](http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Comply-or-Explain-20th-Anniversary-of-the-UK-Corpo.aspx%22%20%5Ct%20%22_new).etailed Contents**1.8** **FSB progress reports to the G20 on financial regulatory reforms** On 5 November 2012, the Financial Stability Board (FSB) reported to the G20 Finance Ministers and Central Bank Governors on progress in the financial regulatory reform program. The FSB released the following reports:* a letter by the FSB Chair to the G20, sent ahead of their meeting, reporting on the progress being made in financial reforms, including in the following priority areas:     · building resilient financial institutions;    · ending 'too big to fail';    · strengthening the oversight and regulation of shadow banking activities; and   · creating continuous core markets by completing OTC derivatives and related reforms. The letter also welcomes the recent publication of the recommendations of the Enhanced Disclosure Task Force to improve risk disclosures by major banking institutions, and emphasises the importance of completing convergence on a single set of accounting standards.
* a summary of FSB member jurisdictions' declared regulatory approaches to achieving the G20 commitment that all standardised OTC derivatives be centrally cleared;
* a roadmap for authorities and market participants to implement the FSB's Principles for reducing reliance on CRA ratings; and
* the Charter for the Regulatory Oversight Committee of the global legal entity identifier (LEI) system, together with a progress report on the development of the global LEI system.

The reports are available on the [FSB website](http://www.financialstabilityboard.org/%22%20%5Ct%20%22_new).etailed Contents**1.9** **Survey of 2012 annual reports** On 2 November 2012, Deloitte UK released its 2012 survey of annual reports, based on a sample of UK reports published between 1 September 2011 and 31 August 2012 by 130 listed companies, including 30 investment companies.  The survey includes a review of:* how compliance with the disclosure requirements of the Companies Act 2006, the Listing Rules, the Disclosure and Transparency Rules and the UK Corporate Governance Code varied;
* how well listed companies 'tell the story' of their financial position and performance;
* the business review, including principal risks and uncertainties and key performance indicators, as well as commentary on the overall cohesiveness of annual reports; and
* which critical judgments and key estimations directors consider to be the most significant.

In relation to governance, it is noted that 54% of companies complied fully with the UK Corporate Governance Code, with the composition of the audit committee being the most common area of non-compliance. The survey is available on the [Deloitte website](http://www.deloitte.com/view/en_GB/uk/services/audit/0f5d074f3229a310VgnVCM1000003156f70aRCRD.htm%22%20%5Ct%20%22_new).etailed Contents**1.10** **Bank of England publishes three independent review reports** On 2 November 2012, the Court of the Bank of England released three independent reports which it commissioned in May 2012.    A set of three Reviews were commissioned into areas of the Bank's performance and existing capabilities. The three Reviews cover:* The Bank's provision of Emergency Liquidity Assistance in 2008-09;
* The Bank's framework for providing liquidity to the banking system as a whole; and
* The Monetary Policy Committee's forecasting capability.

Governance matters are considered in the second report which notes, amongst other things, concerns with what is described as 'informal governance' and 'some tendency for [less senior staff] to filter recommendations in such a way as to maximise the likelihood that senior staff will find recommendations palatable' (paras. 389 to 394). The Bank's executive will respond to the Court on the ideas set out in the Reviews early in 2013. A report on progress will be made in the Bank's 2013 Annual Report. The Bank's initial response to the reviews is available on the [Bank of England's website](http://www.bankofengland.co.uk/publications/Pages/news/2012/102.aspx%22%20%5Ct%20%22_new). etailed Contents**1.11** **FSB update on global adherence to regulatory and supervisory standards on international cooperation and information exchange** On 2 November 2012, the Financial Stability Board (FSB) published a statement providing an update of information on the jurisdictions evaluated to date under its initiative to encourage the adherence of all countries and jurisdictions to regulatory and supervisory standards on international cooperation and information exchange.  The initiative commenced in March 2010 in response to a call by the G20 Leaders at their April 2009 Summit in London for the FSB to develop a toolbox of measures to promote adherence to prudential standards and cooperation among jurisdictions. It complements similar initiatives by the Global Forum on Transparency and Exchange of Information for Tax Purposes to promote adherence to international standards in the tax area, and by the Financial Action Task Force for standards concerning anti-money laundering and combating the financing of terrorism. The statement has been published to recognise the progress that most jurisdictions evaluated by the FSB under the current initiative have made towards implementing regulatory and supervisory standards on international cooperation and information exchange standards, and to incentivise improvements by those jurisdictions not cooperating fully. The list includes those identified as non-cooperative jurisdictions. Of the 61 jurisdictions evaluated by the FSB (selected on the basis of their financial importance), 44 have demonstrated sufficiently strong adherence to the relevant standards. Fifteen others are taking the actions recommended by the FSB but have yet to demonstrate sufficiently strong adherence. As noted in the November 2011 public statement, a very small number of jurisdictions elected not to engage in dialogue with the FSB. The statement is available on the [FSB website](http://www.financialstabilityboard.org/publications/r_121102a.pdf%22%20%5Ct%20%22_new).etailed Contents**1.12** **Say on pay in the US: Takeaways from 2012 and strategies for 2013**On 1 November 2012, the Practical Law Company published an article titled 'Say on Pay: Takeaways from 2012 and Strategies for 2013'. The article explores:* say on pay voting results from the 2012 US proxy season;
* the influence of proxy advisors, particularly ISS, on the outcome of say on pay votes, including areas of concern with ISS's methodology for evaluating executive compensation; and
* practice pointers that companies should consider to prepare for say on pay votes in the 2013 proxy season.

The article is available on the [Practical Law Company website](http://uslf.practicallaw.com/0-522-0394?q=&qp=&qo=&qe" \t "_new).etailed Contents**1.13** **Implementation of OTC derivatives market reforms**  On 31 October 2012, the Financial Stability Board (FSB) released its latest progress report on the implementation of over-the-counter (OTC) derivatives market reforms.  The report takes stock of the readiness of market infrastructure across the FSB's member countries to provide clearing services, collect and disseminate trade data and provide organised trading platforms for OTC derivatives. The report also reviews the progress made by standard-setting bodies and national and regional authorities towards meeting the commitments made by G20 Leaders at the Pittsburgh 2009 Summit that, by end-2012, all standardised OTC derivative contracts be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties (CCPs); OTC derivative contracts be reported to trade repositories; and non-centrally cleared contracts be subject to higher capital requirements.  The key messages of the report are as follows: * Market infrastructure is in place and can be scaled up. The development of market infrastructure does not appear to be an impediment to further progress in meeting the G20 commitments for OTC derivatives trading, central clearing, and reporting (although regulators should take into account the start-up time for infrastructure to expand their activities and receive regulatory approvals).
* The international policy work on the four safeguards for global clearing is substantially completed and implementation is proceeding at a national level. Sufficient progress on the safeguards has therefore been made to enable all jurisdictions without delay to decide, and put in place, their regulatory approach to central clearing.
* Regulatory uncertainty remains the most significant impediment to further progress and to comprehensive use of market infrastructure.  Jurisdictions should put in place their legislation and regulation promptly and in a form flexible enough to respond to cross-border consistency and other issues that may arise. Regulators need to act by end-2012 to identify conflicts, inconsistencies and gaps in their respective national frameworks, including in the cross-border application of rules.  They need to work together quickly to address the identified issues.

The progress report is also available on the [FSB website](http://www.financialstabilityboard.org/publications/r_121031a.pdf%22%20%5Ct%20%22_new).etailed Contents**1.14** **UK Government responds to review recommendations on employee ownership and consults on share buyback proposals**  In July 2012 the Nuttall Review published its final report.  The review's purpose was to identify barriers to employee ownership and make recommendations.  Three broad barriers were identified - a lack of awareness, a lack of resources and actual (or perceived) legal, tax and regulatory complexities - and 28 recommendations were made.  On 30 October 2012, the UK Government published its response to these recommendations. A consultation paper was also published, setting out possible reforms to the UK Companies Act 2006 rules regarding share buybacks and employee ownership. The [Nuttall Review's final report](http://www.bis.gov.uk/assets/biscore/business-law/docs/s/12-933-sharing-success-nuttall-review-employee-ownership%22%20%5Ct%20%22_new) (including its recommendations), the [Government's response](http://www.bis.gov.uk/assets/biscore/business-law/docs/g/12-1161-government-response-to-nuttall-review%22%20%5Ct%20%22_new) and [consultation paper](http://www.bis.gov.uk/assets/biscore/business-law/docs/e/12-1162-employee-ownership-share-buy-backs-consultation.pdf%22%20%5Ct%20%22_new) are available on the UK Government's Department for Business Innovation & Skills website. etailed Contents**1.15** **APRA, ASIC and RBA report on the Australian OTC derivatives market**On 30 October 2012, the Australian Prudential Regulation Authority (APRA), the Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (RBA) released a 'Report on the Australian OTC Derivatives Market - October 2012'.The report reviews the risk management practices of market participants in the domestic over-the-counter (OTC) derivatives market.  A particular focus of the report is how market participants are using centralised infrastructure, and the prospects for increased usage. It reiterates the regulators' view that there are strong in-principle benefits from participants in the domestic OTC derivatives market making greater use of centralised infrastructure, such as trade repositories, central counterparties and trading platforms. The regulators recognise, however, that the suitability of using centralised infrastructure will not be the same for all products and participants. The main recommendations of the report are that:* the Australian Government consider a broad-based mandatory trade reporting obligation for OTC derivatives;
* central clearing of Australian dollar-denominated OTC interest rate derivatives should be adopted by larger market participants, and that this should be a mandatory obligation if the existing industry-led migration stalls; and
* there is scope for further improvements to operational and risk-management practices in relation to non-centrally cleared transactions.

In preparing the report, a wide-ranging survey of key participants in the Australian OTC derivatives market was undertaken during July 2012.  The survey covered large domestic and international banking groups, smaller authorised deposit-taking institutions, fund managers, government borrowing authorities, corporate treasuries and electricity companies. The report builds on the issues explored in the regulators' May 2009 [Survey of the OTC Derivatives Market in Australia](http://www.apra.gov.au/MediaReleases/Documents/Survey-of-the-OTC-Derivatives-Market-in-Australia-report.pdf%22%20%5Ct%20%22_new). The report has also been written in consideration of the [Corporations Legislation Amendment (Derivative Transactions) Bill 2012](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=135858" \t "_default), which the Australian Government has introduced into Parliament in line with the G-20's commitments to reform global OTC derivatives markets. The report is available on the [APRA website](http://www.apra.gov.au/MediaReleases/Documents/Report-on-the-Australian-OTC-Derivatives-Market-October-2012.pdf%22%20%5Ct%20%22_new).etailed Contents**1.16** **IOSCO report on implementation of commodity derivatives market principles** On 29 October 2012, the International Organization of Securities Commissions (IOSCO) released its report, titled 'Survey on Implementation of the Principles for the Regulation and Supervision of Commodity Derivatives Markets', which reviews how Market Authorities comply with IOSCO's recommendations on commodity derivatives markets. Results of the survey indicate that the majority of respondents were broadly compliant with the IOSCO 'Principles on the Regulation and Supervision of Commodity Derivatives Markets', which were published in October 2011 and endorsed by the G20. The G20 Leaders have stipulated that Market Authorities should be granted effective intervention powers to address disorderly markets and prevent market abuses. In particular, market regulators should have the ability to use formal position management powers, including the power to set ex-ante position limits, particularly in the delivery month where appropriate, among other powers of intervention. The G20 Leaders also reaffirmed their commitment to enhance transparency and avoid market abuse in cash and financial commodity markets, including over-the-counter markets.  The final report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD393.pdf%22%20%5Ct%20%22_new).etailed Contents**1.17** **Report to G20 Finance Ministers and Central Bank Governors on Basel III implementation**On 29 October 2012, the Basel Committee on Banking Supervision (BCBS) published its 'Report to G20 Finance Ministers and Central Bank Governors on Basel III implementation' by its member jurisdictions. The report covers all three levels of the Committee's Basel III implementation review program:* Level 1:  ensuring the timely adoption of Basel III;
* Level 2:  assessing regulatory consistency with Basel III; and
* Level 3:  assessing the consistency of outcomes (initially focusing on banks' calculation of risk-weighted assets).

The report is available on the [BIS website](http://www.bis.org/publ/bcbs234.htm%22%20%5Ct%20%22_new).etailed Contents**1.18** **OECD report on board member nomination and election** On 26 October 2012, the Organisation for Economic Cooperation and Development (OECD) released a report titled 'Board Member Nomination and Election'. It addresses the corporate governance framework and company practices that determine the nomination and election of board members.  The report covers 26 jurisdictions, including in-depth reviews of four jurisdictions: Indonesia, Korea, the Netherlands and the United States. The report is available on the [OECD website](http://www.keepeek.com/Digital-Asset-Management/oecd/governance/board-member-nomination-and-election_9789264179356-en%22%20%5Ct%20%22_new).etailed Contents**1.19****UK Government report on the future of computer trading in financial markets**  On 24 October 2012, following a two-year study, the UK Government released a report titled 'The Future of Computer Trading in Financial Markets: An International Perspective'. The study, which involved 150 experts from more than 20 countries providing analysis on computer trading, considered, amongst other things, the effects of high frequency trading on financial markets, including how it will evolve over the next 10 years.  The report notes that high frequency trading may have modestly improved the functioning of markets in some respects, but accepts that policymakers are justified in being concerned with the possible effects of high frequency trading on instability in financial markets. Regulatory measures are suggested to address these concerns. The [final project report](http://www.bis.gov.uk/assets/foresight/docs/computer-trading/12-1086-future-of-computer-trading-in-financial-markets-report.pdf%22%20%5Ct%20%22_new) and [executive summary](http://www.bis.gov.uk/assets/foresight/docs/computer-trading/12-1087-future-of-computer-trading-in-financial-markets-summary.pdf%22%20%5Ct%20%22_new) are available on the UK Government's BIS website.etailed Contents**1.20** **Research on governance-related disclosures in the chairman's statement within annual reports** On 23 October 2012, Grant Thornton published the findings of research looking at governance-related disclosures in the chairman's statement within 242 UK annual reports for 2011-2102. Titled 'Governance insights: The tone of governance', the research found a marked improvement in governance reporting:* almost one in four (23%) now include valuable insight into governance practice in the chairman's statement - up from 10% last year;
* only 5% of chairmen go further in their primary statement to discuss their company culture and the values they intend to instil in the business;
* the number of reports making no mention of governance in the chairman's primary statement although dropping 15%, is still high at 42%; and
* 75% of chairmen refer to governance in either their primary statement or the governance report, although 44% do so only briefly.

However, despite general progress, 25% of annual reports contain no chairman's comment on governance. The Financial Reporting Council's 2010 UK Corporate Governance Code calls for chairmen to 'report personally in their annual statements how the principles relating to the role and effectiveness of the board have been applied and the Board to set the company's values and standards'.  The research report is available on the [Grant Thornton website](http://www.grant-thornton.co.uk/Global/Publication_pdf/Governance-Insights-Tone-of-Governance.pdf%22%20%5Ct%20%22_new).etailed Contents**1.21** **SEC adopts standards for risk management and operations of clearing agencies** On 22 October 2012, the US Securities and Exchange Commission (SEC) adopted a rule that establishes standards for how registered clearing agencies should manage their risks and run their operations.Clearing agencies generally act as middlemen to the parties in a securities transaction. They play a critical role in the securities markets by ensuring that transactions settle on time and on the agreed-upon terms.The rule was adopted in accordance with the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Dodd Frank Act provides the SEC with additional authority to establish standards for clearing agencies, including for those clearing agencies that clear security-based swaps. The new rule requires registered clearing agencies that provide central counterparty services to maintain certain standards with respect to risk management and operations. Among other things, the rules set standards with respect to measurement and management of credit exposures, margin requirements, financial resources and margin model validation. The rule also establishes certain recordkeeping and financial disclosure requirements for all registered clearing agencies as well as several new operational standards for these entities.The new rule is available on the [SEC website](http://www.sec.gov/rules/final/2012/34-68080.pdf%22%20%5Ct%20%22_new).etailed Contents**1.22** **Report on Australia and NZ 2012 Proxy Season**  Institutional Shareholder Services (ISS) has published a report titled '2012 Voting Season Preview: Australia and New Zealand'. Key issues discussed include:* the 'two strikes' rule in Australia;
* capital raisings in Australia;
* directors' fees increases in New Zealand companies; and
* NZX companies prepare for new diversity rules.

The report is available on the [ISS website](http://www.issgovernance.com/files/private/AustraliaNZPreview2012.pdf%22%20%5Ct%20%22_new).etailed Contents**1.23** **Regulators and government agencies annual reports**Several regulators and other government agencies with responsibility for corporate law and corporate governance have recently released their annual reports for 2011-2012. They include: * [Australian Accounting Standards Board (AASB) Annual Report 2011-12](http://www.aasb.gov.au/admin/file/content102/c3/AASB_Annual_Report_2011-12.pdf%22%20%5Ct%20%22_new);
* [Australian Auditing and Assurance Standards Board (AUASB) Annual Report 2011-12](http://www.auasb.gov.au/admin/file/content13/c6/AUASB_Annual_Report_2011-12.pdf%22%20%5Ct%20%22_new);
* [Australian Office of Financial Management (AOFM) Annual Report 2011-12](http://www.aofm.gov.au/content/publications/reports/AnnualReports/2011-2012/index.asp%22%20%5Ct%20%22_new);
* [Australian Prudential Regulation Authority (APRA) Annual Report 2011-12](http://www.apra.gov.au/AboutAPRA/Publications/Pages/APRA-Annual-Report-2012.aspx%22%20%5Ct%20%22_new);
* [Australian Securities and Investments Commission (ASIC) Annual Report 2011-12](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC-Annual-Report--2011-12.pdf/%24file/ASIC-Annual-Report--2011-12.pdf%22%20%5Ct%20%22_new);
* [Australian Securities Exchange (ASX) Annual Report 2011-12](http://www.asxgroup.com.au/media/PDFs/ASX_Full-Year_Annual_Report%281%29.pdf%22%20%5Ct%20%22_new);
* [Commonwealth Director of Public Prosecutions (CDPP) Annual Report 2011-12](http://www.cdpp.gov.au/Publications/Annual-Reports/CDPP-Annual-Report-2011-2012.pdf%22%20%5Ct%20%22_new);
* [Commonwealth Treasury Annual Report 2011-12](http://www.treasury.gov.au/PublicationsAndMedia/Publications/2012/Treasury-Annual-Report-2011-12%22%20%5Ct%20%22_new);
* [Companies Auditors and Liquidators Disciplinary Board (CALDB) Annual Report 2011-12](http://www.caldb.gov.au/caldb/caldbweb.nsf/Attbyfilename/CALDB%2012%20Annual%20Report%20%28FINAL%29.pdf/%24file/CALDB%2012%20Annual%20Report%20%28FINAL%29.pdf%22%20%5Ct%20%22_new);
* [Corporations and Markets Advisory Committee (CAMAC) Annual Report 2011-12](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFAnnual%2BReport%2B2011%2B2012/%24file/CAMAC_AR_2011-12.pdf%22%20%5Ct%20%22_new);
* [Financial Reporting Council (FRC) Annual Report 2011-12](http://www.frc.gov.au/reports/2011_2012/index.asp%22%20%5Ct%20%22_new);
* [Insolvency and Trustee Service Australia (ITSA) Annual Report 2011-12](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/About%20Us-%3EPublications-%3EAnnual%20report%202012%20document/%24FILE/ITSA-Annual-Report-2011-12.pdf?OpenElement" \t "_new); and
* [Takeovers Panel Annual Report 2011-12](http://www.takeovers.gov.au/content/resources/reports/annual_reports/2011-12/default.aspx?pageid=015a" \t "_new).

etailed Contents**1.24** **Research study on the evolution of shareholder and creditor protection in Australia** A group of academics, including members of the Centre for Corporate Law and Securities Regulation at Melbourne Law School, have undertaken a study of changes in shareholder and creditor protection in Australia for the period 1970-2010.  A second paper compares changes in investor (shareholder and creditor) protection and changes in worker protection in Australia for the same period.  The details of the two papers are as follows: **(a) Shareholder and creditor protection in Australia**(Helen Anderson, Peter Gahan, Ian Ramsay and Michelle Welsh) This article utilises leximetric analysis, which involves the numerical coding of the strength of legal protections, to show changes in levels of shareholder and creditor protection in Australia for the period 1970-2010. The data shows levels of shareholder protection have increased, most notably against actions of the board of directors rather than against other shareholders. In contrast, levels of creditor protection have been relatively stable. The article explores how and why these developments in shareholder and creditor protection have occurred. The research also identifies that for most of the 40 year period of study, there was a positive correlation between shareholder and creditor protection. However, this is no longer the case for recent years and possible explanations for this finding are identified.  The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2162859" \t "_new). **(b) Investor and worker protection in Australia**(Helen Anderson, Peter Gahan, Richard Mitchell, Ian Ramsay and Michelle Welsh) The authors use leximetric analysis, which involves the numerical coding of the strength of legal protections, to document changes in the level of investor (shareholder and creditor) protection and worker protection in Australia for the period 1970-2010. For worker protection, the level of protection in 2010 was similar to the level of protection in 1970, with two abrupt increases and declines. In contrast, investor protection has increased over the 40 years. The statistical analysis of the data indicates that increased protection for investors is not obtained at the expense of protection for workers. Implications of this finding are explored by the authors.  The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2162840" \t "_new).etailed Contents |

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

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| **2.1** **Consultation on takeover guidance** On 14 November 2012, ASIC released a consultation paper proposing to update and consolidate its takeover regulatory guidance. The consultation paper is titled 'Takeovers, compulsory acquisition and substantial holdings: Update of ASIC guidance'.ASIC proposes to consolidate 17 existing regulatory guides, which represents the bulk of its policies covering Chapters 6-6C of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) - which deal with takeovers - into four new guides covering topics including takeover bids, substantial holdings, and compulsory acquisition and buy-outs.The guides will also contain updated policy to reflect ASIC's current views on takeovers and will also address some discrete issues ASIC has identified in the administration of the law.Specific revisions and new policy proposals include:* discussion on rights issues and underwriting arrangements which have the potential to affect control of an entity;
* updated guidance on when a selective benefit may be prohibited in a takeover bid because it may be likely to induce a person to accept the bid or dispose of target securities;
* new guidance and class order relief in relation to the use and operation of acceptance facilities in takeover bids; and
* updated guidance on when a person may have a 'relevant interest' in securities and the associated requirements to disclose substantial holdings and comply with the takeover provisions.

Submissions close 22 February 2013.Consultation Paper 193 and the four draft regulatory guides are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp193" \t "_new).etailed Contents**2.2** **Decision in James Hardie penalty proceedings** On 13 November 2012, the NSW Court of Appeal imposed penalties against James Hardie's former non-executive directors and former company secretary and general counsel.The decision follows ASIC's successful High Court appeal earlier this year.In 2009, the former non-executive directors and Peter Macdonald, the former director and CEO of James Hardie Industries Limited (JHIL - the former Australian listed entity) and JHIL were found to have breached the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) relating to the February 2001 ASX announcement about the adequacy of asbestos compensation funding.Messrs Peter Shafron, former company secretary and general counsel, and Phillip Morley, former chief financial officer, were found to have breached the Corporations Act in relation to failing to advise the JHIL Board meeting on 15 February 2001 of certain matters.James Hardie Industries NV (JHINV - based in the Netherlands) was also found to have breached the Corporations Act when making statements in 2002 about the adequacy of asbestos compensation and JHINV was also found to have breached its continuous disclosure obligation in 2003.The Supreme Court imposed fines on the directors and officers and banned each of them from being involved in the management of a corporation for varying periods of time. JHINV was also fined.With the exception of Mr Macdonald, the officers and directors appealed to the NSW Court of Appeal regarding the trial findings relating to the February 2001 announcement.In December 2010 the NSW Court of Appeal upheld the appeal of the non-executive directors and in part upheld the appeal of Mr Shafron.In October 2011, the High Court heard an appeal by ASIC against the Court of Appeal's ruling in favour of the non-executive directors and Mr Shafron.  The High Court's decision was handed down in May 2012. The decision, among other things, upheld the finding of the trial judge that the directors of James Hardie did approve the draft ASX announcement made by the company and, in doing so, breached their duty to the company.The High Court also dismissed an appeal by Mr Shafron against a finding that he had contravened the Corporations Act by failing to discharge his duties as an officer of James Hardie.The matter of penalties was referred back to the NSW Court of Appeal. The Court of Appeal imposed the following penalties, reduced from those imposed by the trial judge, as follows.

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| **Name of Director** | **Disqualification** | **Fine** |
| Michael Brown  | 24/9/2009 to 17/12/2010 and 3/5/2012 to 30/4/2013 | $25,000 |
| Michael Gillfillan  | 24/9/2009 to 17/12/2010 and 3/5/2012 to 31/12/2012 | $20,000 |
| Meredith Hellicar  | 24/9/2009 to 17/12/2010 and 3/5/2012 to 30/4/2013 | $25,000 |
| Martin Koffell  | 24/9/2009 to 17/12/2010 and 3/5/2012 to 31/12/2012 | $20,000 |
| Geoffrey O'Brien  | 24/9/2009 to 17/12/2010 and 3/5/2012 to 30/4/2013 | $25,000 |
| Gregory Terry  | 24/9/2009 to 17/12/2010 and 3/5/2012 to 30/4/2013 | $25,000 |
| Peter Willcox  | 27/8/2009 to 17/12/2010 and 3/5/2012 to 31/3/2013 | $25,000 |

In relation to Mr Shafron, by consent, the Court re-imposed the fine and disqualification as determined by the trial judge namely $75,000 and 7 years. Key developments in the James Hardie proceedings are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/James%2BHardie?openDocument" \t "_new).etailed Contents**2.3** **Updated investor guide for unlisted property schemes** On 12 November 2012, ASIC released an updated investor guide to improve awareness of the risks associated when investing in unlisted property schemes.'Investing in unlisted property schemes' is an update of ASIC's previous investor guide, and follows the release of updated regulatory guidance for unlisted property schemes in March 2012. The updated guide helps investors: * find out about the investment product itself;
* understand the features and risks and ask the right questions;
* use the benchmark and disclosure principle information in the PDS and other disclosure documents to assess the risks; and
* decide if the investment suits financial goals and objectives.

Responsible entities of existing unlisted property schemes should be disclosing the benchmark and updated disclosure principle information to investors from 1 November 2012. For new product disclosure statements, prominent and clear disclosure of the benchmark and disclosure principle information should be included in those issued on or after 1 November 2012. The updated investor guide is available on the [ASIC website](https://www.moneysmart.gov.au/tools-and-resources/publications%22%20%5Cl%20%22investing%22%20%5Ct%20%22_new).etailed Contents**2.4** **Corporate insolvencies - September quarter 2012** On 9 November 2012, ASIC released its insolvency statistics for the first quarter of 2012-13. The data indicates an increase in insolvency appointments, up 10% on the previous quarter, with the overall number of external administrations (EXADs) appointments remaining relatively high (2,807).All EXAD appointment types increased from the previous quarter; director-initiated creditor voluntary liquidations (up 7.9%), Court liquidations (up 9.2%), receiverships (up 13%) and voluntary administrations (up 17.2%). Further information, including insolvency statistics and tables, is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-271MR%2BCorporate%2Binsolvencies%2B-%2BSeptember%2Bquarter%2B2012?openDocument" \t "_new).etailed Contents**2.5** **Release of guidance on insolvency reforms: Winding up of abandoned companies and Assetless Administration Fund** On 8 November 2012, ASIC released policy guidance on its power to wind up an abandoned company under new powers contained in the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).ASIC has also updated its guidance on ASIC's approach to, and criteria for, funding liquidator investigations, reports and actions from the Assetless Administration Fund (AA Fund).**(i) ASIC's new power to wind up abandoned companies**Regulatory Guide 242 'ASIC's power to wind up abandoned companies' (RG 242) contains final policy guidance on how ASIC intends to exercise its new power. The guidance, which follows consultation with industry earlier this year, also explains how ASIC will prioritise companies for winding up. Report 310 'Response to submissions on CP180 ASIC's power to wind up abandoned companies', summarising the submissions received as part of that consultation process, has also been released.In developing the final guidance, ASIC has considered how it will exercise this power to facilitate greater access to GEERS. GEERS is a scheme funded by the Australian Government to assist employees of companies that have gone into liquidation and who are owed certain employee entitlements. However, companies are sometimes abandoned by their directors without being put into liquidation. This can result in employees of the company who are owed employee entitlements being unable to access GEERS.ASIC now has a discretionary power to order the winding up of an abandoned company where it will facilitate employee access to GEERS. RG 242 explains that in deciding when to exercise this discretion, ASIC will consider a number of factors including:* the amount of outstanding employee entitlements claimed;
* whether there is another creditor capable of winding up the company; and
* the amount of money available in the AA Fund and how this money would best be used. ASIC may decide not to reinstate companies that have already been deregistered in order to wind them up later.

RG 242 outlines how a request to ASIC to wind up an abandoned company can be made, how ASIC will assess a request and what will occur next if ASIC does decide to wind up a company. It also outlines the other options available to employees who may be owed employee entitlements if ASIC decides not to wind up a company.ASIC may appoint a registered liquidator when exercising its power to wind up an abandoned company and will remunerate the liquidator from the AA Fund.**(ii) Funding liquidator actions from the AA Fund**ASIC has reviewed its approach to funding liquidators under the AA Fund, as ASIC is now able to fund liquidator actions to recover assets for creditors.ASIC also updated its guidance on funding liquidator investigations and reports out of the AA Fund.  Regulatory Guide 109 'Assetless Administration Fund: Funding criteria and guidelines' (RG 109) explains ASIC's approach to funding liquidators to pursue their gatekeeper role of monitoring and reporting on potential misconduct by company officers in assetless administrations. The AA Fund finances preliminary investigations and reports into the failure of companies with few or no assets. The scope of the AA Fund has been expanded so that it may also provide funds to a liquidator to recover assets in certain circumstances.RG 109 now includes guidance to liquidators seeking funding to enable them to bring an action to recover assets where fraudulent or unlawful phoenix activity is suspected.This includes actions to deprive people of the benefits of breaches of duty by company officers, including breaches by former liquidators that have had a sizeable adverse effect on employees, consumers or small business. This may include funding a replacement liquidator to investigate a former liquidator where there are concerns that the former liquidator was complicit in the breach of duty.The guidance outlines:* the criteria for assistance from the AA Fund;
* how to apply for funding;
* ASIC's approach to funding liquidator investigations, reports and actions;
* what to include in a funded report to ASIC; and
* the liquidator's rights to request a review of ASIC's decision about funding.

[RG 242](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg242" \t "_new), [REP 310](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep310" \t "_new) and [RG 109](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg109" \t "_new) are available on the ASIC website.etailed Contents**2.6** **Release of updated guidance on financial requirements for AFS licensees** On 1 November 2012, ASIC released guidance clarifying the financial requirements with which Australian financial services (AFS) licensees must comply as part of their licensee obligations.Regulatory Guide 166 'Licensing: Financial requirements' sets out the financial requirements that ASIC has set for licensees, according to the types of financial services and products that they provide.ASIC is currently in the process of reviewing the requirements applying to different types of licensees. ASIC has restructured RG 166 to ensure it is clearer and easier to navigate for the different licensees to which it applies.Major changes in this version of RG 166 include:* updated requirements for responsible entities, which were announced in November 2011, and updated in October 2012, and which have become effective as of 1 November 2012;
* new requirements for issuers of over-the-counter derivatives to retail clients - these were previously released in Regulatory Guide 239 Retail OTC derivative issuers: Financial requirements (RG 239), but have now been incorporated into RG 166, and RG 239 will be withdrawn; and
* new guidance on financial requirements for market participants, to reflect changes to the way these AFS licensees are regulated since ASIC assumed responsibility for supervising market participant capital requirements from ASX on 1 August 2011.

All other requirements remain unchanged. Regulatory Guide 166 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg166" \t "_new).etailed Contents**2.7** **Taskforce to review Banksia and regulation of unlisted debentures** On 31 October 2012, ASIC announced an internal taskforce to look at the failure of Victorian debenture issuer Banksia Securities Limited and regulation of the wider Australian unlisted debenture sector. The taskforce will make recommendations to Treasury.ASIC's recent activity in this sector more broadly has included undertaking general market reviews into the Australia unlisted debenture market and ASIC has conducted risk based surveillances on a small number of debenture issuers. ASIC's historical work in the debenture sector reflects the fact that a disclosure regime is in place for debentures, coupled with the requirement that a trustee is in place to monitor the issuer and seek to protect the interests of debenture holders. Unlisted debenture issuers, like Banksia, ask investors to loan them money for a fixed term (or sometimes at call) and at a specified rate of interest. There is a trustee that is appointed to protect the interests of investors. Debenture issuers unlike banks, building societies and credit unions etc are not generally regulated by the Australian Regulation Prudential Authority nor are there any prudential standards that apply. ASIC is not a prudential regulator but will monitor disclosures made by debenture issuers. People wishing to provide feedback on these issues can send submissions to the following email address: debenturesandnotes@asic.gov.au.etailed Contents |

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

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| **3.1** **Reports** On 5 November 2012, ASX released:* the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Group_Monthly_Activity_Report_-_October_2012.pdf%22%20%5Ct%20%22_new);
* the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2012/notice2012_254.pdf%22%20%5Ct%20%22_new); and
* the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Compliance_Monthly_Activity_Report_-_October_2012.pdf%22%20%5Ct%20%22_new)

for October 2012.etailed Contents**3.2** **Amendments to ASX Listing Rules Chapter 1 - Admission** On 1 November 2012, amendments to the 'spread test' for entities applying for admission to the official list as ASX Listings took effect. These amendments were announced along with the Capital Raising amendments on 25 July 2012. There was a three month transitional period for the admission amendments. The amendments are described in [Listed Entities Update 07/12](http://www.asx.com.au/resources/newsletters/companies_update/archive/CompaniesUpdate_20120725_0712_HTML.html%22%20%5Ct%20%22_new).etailed Contents**3.3** **Consultation paper - Derivatives Account Segregation and Portability** On 25 October 2012, ASX released a consultation paper 'Derivatives Account Segregation and Portability', seeking views on potential changes to the derivatives account structures and the means by which margins are calculated and held, under its central counterparty services for clearing futures, options and other derivative financial products. The potential changes raised in the paper are in response to new regulatory standards (CPSS-IOSCO principles and RBA Financial Stability Standards) and to the growing demands from customers for a client clearing model option which provides greater protection in the event of a clearing participant default. ASX is inviting comments on the proposals by 7 December 2012. The Consultation Paper is available on [ASXGroup.com.au](http://www.asxgroup.com.au/media/Derivatives_Account_Segregation_and_Portability.pdf%22%20%5Ct%20%22_new). etailed Contents**3.4** **Submission to ASIC consultation paper CP186 - Clearing and settlement facilities: International principles and cross-border policy (update to RG 211)** On 19 October 2012, ASX provided a submission to the ASIC consultation paper 'Clearing and settlement facilities: International principles and cross-border policy (update to RG 211)' (CP 186).   The ASX submission argues that any decision on a licence application from an overseas or domestic clearing house for cash equities listed on ASX should include a full assessment of whether the public interest is served, including a cost-benefit analysis. ASX also reaffirmed views expressed in earlier submissions that it does not agree that a graduated approach is an appropriate way of imposing regulatory standards on foreign clearing and settlement facilities servicing important Australian markets. Such an approach is both inconsistent with a public interest test and practically difficult to implement. The ASX submission can be found on [ASXGroup.com.au](http://www.asxgroup.com.au/media/ASX_Submission_to_ASIC_CP_186_19Oct12.PDF%22%20%5Ct%20%22_new).etailed Contents**3.5** **Submission to RBA consultation paper - Consultation on New Financial Stability Standards**On 19 October 2012, ASX also provided a submission to the related RBA consultation paper on clearing and settlement regulation, 'Consultation on New Financial Stability Standards'. The ASX submission supports the objectives of the revised RBA Financial Stability Standards, in recognition of the important role clearing and settlement facilities play in maintaining systemic stability in Australia. The submission also provides ASX's initial views on the detailed revisions to ensure that they reflect the characteristics of the Australian market and that they are in line with emerging overseas standards. The ASX submission can be found on [ASXGroup.com.au](http://www.asxgroup.com.au/media/ASX_submission_to_RBA_CP_revised_FSS_19Oct12.pdf%22%20%5Ct%20%22_new).etailed Contents |

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| **4. Recent Takeovers Panel Developments** |  | ext Section |

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| **4.1** **LinQ Resources Fund** On 30 October 2012, The Takeovers Panel announced that it had accepted undertakings from inQ Capital Limited and LinQ Capital No 2 Pty Ltd and IMC Resources Holdings Pte Ltd and declined to conduct proceedings on an application dated 23 October 2012 from WA Fire and Emergency Services Superannuation Board, in relation to a bid by IMC for all the units in LinQ Resources.The application concerned (among other things) a condition of IMC's bid requiring the acceptance in respect of approximately 37% of the units in LinQ Resources held as treasury units, within three weeks after the opening of the offers under the bid.The Panel concluded that there was no reasonable prospect that it would declare the circumstances unacceptable after accepting the undertakings provided by LinQ Capital, LinQ Capital No 2 and IMC. Accordingly, the Panel declined to conduct proceedings.The reasons are available on the [Takeovers Panel website](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=reasons_for_decisions/2012/021.htm&pageID=&Year=" \t "_new).etailed Contents |

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| **5. Recent Research Papers**  |  | ext Section |

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| **5.1****The first year of 'say on pay' under Dodd-Frank: An empirical analysis and look forward** In this article, the authors ask whether the Dodd-Frank Act has made a difference in how shareholders vote on executive pay practices and whether the Act has changed the dynamic in shareholder-management relations in US companies. Using voting data from the first year of 'say on pay' votes under Dodd-Frank, the authors look at the patterns of shareholder voting in advisory votes on executive pay. Consistent with expectations based on the more limited experience with 'say on pay' voting before Dodd-Frank, shareholders in the first year under Dodd-Frank gave generally broad support to management pay packages. Yet, during the first year under Dodd-Frank, not all pay packages received strong shareholder support. At some companies, management suffered the embarrassment of failed 'say on pay' votes - that is, less than 50% of their company's shareholders voted in favour of the proposal. In particular, the authors find that poorly-performing companies with high levels of 'excess' executive pay, low total shareholder return, and negative voting recommendations from the third-party voting advisor Institutional Shareholder Services (ISS) experienced greater shareholder 'against' votes than at other firms. ISS and other third party voting advisors appeared to have played a significant role in mobilizing shareholder opposition at these firms - and often a management response.  Although these votes are non-binding and corporate directors need not take action even if the proposal fails, most companies receiving negative ISS recommendations or experiencing low levels of 'say on pay' support undertook additional communication with shareholders or made changes to their pay practices - reflecting a change in their interactions with shareholders. During 2012, the second year of 'say on pay' under Dodd-Frank, the authors find similar patterns, with companies responding proactively when the company comes onto shareholders' radar screens because of an unfavourable ISS recommendation or an earlier poor, or failed, 'say on pay' vote in 2011. The authors use four case studies to illustrate this new dynamic.  In all, the findings suggest that the Dodd-Frank 'say on pay' mandate has not broadly unleashed shareholder opposition to executive pay at US companies, as some proponents had hoped for. Nonetheless, it has affected pay practices at outlier companies experiencing weak performance, high executive pay levels, which are identified by proxy advisory firms like ISS. In addition, mandatory 'say on pay' seems to have led management to be more responsive to shareholder concerns about executive pay and perhaps toward corporate governance generally. This shift in management-shareholder relations may be the most important consequence of the Act thus far. The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2162957" \t "_new).etailed Contents**5.2** **Securities litigation risk for foreign companies listed in the US** The authors study securities litigation risk faced by foreign firms listed on US exchanges. They find that US listed foreign companies experience securities class action lawsuits at about half the rate as do US firms with similar levels of ex ante litigation risk. The lower rate appears to be driven partly by higher transaction costs in uncovering and pursuing litigation against foreign firms. However, once a lawsuit triggering event like an accounting restatement, missing management guidance, or a sharp stock price decline occurs, there is no difference in the litigation rates between a foreign and comparable US firm. This suggests that effective enforcement of securities laws is constrained by transaction costs, and the availability of high quality information that reveals potential misconduct is an important determinant of a well-functioning litigation market for foreign firms listed in the US.  The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2163864" \t "_new).etailed Contents**5.3****The limits of disclosure** Disclosure has its limits. One big focus of attention, criticism, and proposals for reform in the aftermath of the 2008 financial crisis has been securities disclosure. But most of the criticisms of disclosure relate to retail investors. The securities at issue in the crisis were mostly sold to sophisticated institutions. Whatever retail investors' shortcomings may be, it can be expected that sophisticated investors will make well-informed investment decisions. But many sophisticated investors appear to have made investment decisions without making much use of the disclosure. The authors discuss another example where disclosure did not work as intended: executive compensation. The theory behind more expansive executive compensation disclosures was that shareholders might react to the disclosures with outrage and action, and companies, anticipating shareholder reaction, would curtail their compensation pre-emptively. But it was apparently not the reality and instead compensation spiralled higher.  The two examples, taken together, serve to elucidate the authors' broader point: underlying the rationale for disclosure are common sense views about how people make decisions - views that turn out to be importantly incomplete. This does not argue for making considerably less use of disclosure. But it does sound some cautionary notes. The strong allure of the disclosure solution is unfortunate, although perhaps unavoidable. The admittedly nebulous bottom line is this: disclosure is too often a convenient path for policymakers and many others looking to take action and hold onto comforting beliefs in the face of a bad outcome. Disclosure's limits reveal yet again the need for a nuanced view of human nature that can better inform policy decisions. The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2168427" \t "_new).etailed Contents**5.4****Pride and prestige: why some firms pay their CEOs less** The authors investigate the impact of measures of firms' prestige on CEO compensation and find that CEOs of more prestigious companies earn less. For example, total CEO compensation is on average 9% lower for firms rated among Fortune's ranking of America's most admired companies. The authors suggest that CEOs derive social benefits in the form of an enhanced social status if they work for a company that enjoys public admiration, and that boards extract pay concessions for this non-monetary benefit. Results obtain only for firms with independent compensation committees and other measures of strong boards, presumably because weak boards leave rents to powerful CEOs. The effect also obtains for alternative measures of firm prestige and for older CEOs. The authors perform a range of robustness checks and can exclude several alternative explanations, including that CEOs wish to signal higher status through lower pay, and that the results are driven by career concerns or by owner-CEOs who forego higher compensation. The paper is available on the [SSRN website.](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2081856" \t "_new)etailed Contents |

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| **6. Recent Corporate Law Decisions** |  | ext Section |

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| **6.1** **Setting aside winding up order on ground of irregularity in service of statutory demand**  (By Karen Lee, Ashurst Australia) Deputy Commissioner of Taxation v Starpicket Pty Ltd [2012] FCA 1196, Federal Court of Australia, Greenwood J, 31 October 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2012/1196.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/1196.html%22%20%5Ct%20%22_new) **(a) Summary** In Deputy Commissioner of Taxation v Starpicket Pty Ltd (Starpicket), Greenwood J considered an application for an order under rule 39.05 of the [Federal Court Rules 2011 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=125286" \t "_default) (the Federal Court Rules) to set aside an order for the winding up of Starpicket on the ground of irregularity in the service of a statutory demand under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) and in the service of the originating proceedings together with supporting material. Alternatively, the application sought an order under section 482 of the Corporations Act that the winding up of Starpicket be terminated immediately.  Greenwood J considered the presumptions arising under sections 160 and 163 of the [Evidence Act 1995 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6191" \t "_default) (the Evidence Act) and section 29 of the [Acts Interpretation Act 1901 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "_default) (the Interpretation Act), and also considered the methods of service under section 109X of the Corporations Act. Greenwood J held that on the balance of probabilities, the letters sent by the Deputy Commissioner of Taxation by pre-paid post and properly addressed to the registered office of Starpicket, were not likely to have been delivered to the relevant place; that is, the registered office of Starpicket. Greenwood J found that there was at least evidence sufficient to raise doubt about the presumption for the purposes of sections 160 and 163 of the Evidence Act. Greenwood J held that the order made by District Registrar Baldwin should be set aside, subject to the question of whether the order is sustainable on the footing that tarpicket was insolvent.  **(b) Facts**   Craig Scott was the sole director of Starpicket. Craig Scott and his wife Patrina Scott were the holders of all of the issued shares in Starpicket. Starpicket and Craig and Patrina Scott (together, the Applicants) applied for an order under rule 39.05 of the Federal Court Rules that the order made by District Registrar Baldwin on 5 October 2012 that Starpicket be wound up in insolvency under the provisions of the Corporations Act be set aside.  Alternatively, the Applicants sought an order under section 482 of the Corporations Act that the winding up of Starpicket be terminated immediately.  The records of the Australian Securities and Investments Commission (ASIC) maintained under Part 9.1 of the Corporations Act record that Starpicket was registered on 13 June 2007. Its 'Current Registered Office' and 'Current Principal Place of Business' were recorded as '127 Alfred Street, Charleville, Qld, 4470'. The start date for that place or address as the registered office of Starpicket was 13 June 2007. ASIC records and the Scotts did not suggest that Starpicket's current registered office or current principal place of business address had changed since that date.  As at 5 October 2012, the date of appointment of the liquidator, Starpicket employed nine staff, had an annual turnover in excess of $3 million and had retained earnings of $1.2 million.  On 29 May 2012, an employee of the Australian Taxation Office placed a number of documents inside an envelope which he addressed as follows: 'Starpicket Pty Ltd, 127 Alfred Street, Charleville Qld 4470'. He then affixed a 60 cent stamp to the front of the envelope and posted the envelope. The documents enclosed inside the envelope were a creditor's statutory demand for payment under section 459E of the Corporations Act signed by the Deputy Commissioner of Taxation asserting a debt due to the Commonwealth of $315,939.23 and an affidavit sworn by the employee in relation to that demand. Starpicket did not respond to the statutory demand. On 28 August 2012, the Deputy Commissioner of Taxation filed an application under section 459P of the Corporations Act for an order under section 459A of the Corporations Act that Starpicket be wound-up in insolvency. The facts which were asserted in reliance were that: * Starpicket was indebted to the Deputy Commissioner in an amount of $315,939.23, which sum was then due to the Commonwealth of Australia;
* a statutory demand had been made under section 459E which had been 'served' by posting the demand on 29 May 2012 by pre-paid post to the registered office of Starpicket;
* Starpicket had failed to pay the amount of the debt so demanded within 21 days after the demand was served; and
* none of the documents posted on 29 May 2012 were returned to the Deputy Commissioner of Taxation through the postal system.

So far as Australia Post was concerned, if a third party (such as any citizen having reason to engage with Starpicket) wrote a letter to Starpicket at its registered office, having established the relevant registered address by searching the ASIC record of registered information, the letter will not be delivered to that address by Australia Post. That was because although '127 Alfred Street, Charleville' was a valid postal address, that address was not recorded on Australia Post's sorting frame for delivery of letters. The third party's letter may or may not reach the company indirectly. In the ordinary course of mail communications, a third party who sent a letter or article to Starpicket was likely to suffer the fate of the letter or article being returned to sender by Australia Post, or depending upon circumstance or the state of knowledge of the particular Australia Post employee on duty on the day, the letter or article might be placed in Starpicket's PO Box 623 operated by Australia Post under the name 'Outback Spares'.  The combination of Australia Post's practice of choosing not to deliver to a real and operational properly identified place in the same street as the post office, and Craig Scott's failure to establish a redirection of mail from Starpicket's registered address to its daily working PO Box number, had in a real and practical sense, defeated on the facts any third party's reliance upon the registered office for Starpicket recorded with ASIC, for the purposes of transmitting letters or articles to Starpicket by pre-paid post to its registered office.  **(c) Decision**  **(i) Corporations Act** Section 109X(1) of the Corporations Act provides that for the purposes of any law, a document may be served on a company by either leaving the document at the company's registered office, or by posting it to the company's registered office, or by delivery of a copy of the document personally to a director of the company who resides in Australia. The method of service on Starpicket selected by the Deputy Commissioner of Taxation was posting each letter enclosing the documents by pre-paid post to Starpicket at its registered office. However, section 109X(6) of the Corporations Act provides that section 109X does not affect any provision of 'another law' that permits a document to be served in a different way or the power of a Court to authorise a document to be served in a different way.  **(ii) Interpretation Act** The Interpretation Act was 'another law' that contained provisions permitting a document to be served in a particular way. Apart from section 109X(6) of the Corporations Act, section 5C(2) of the Corporations Act has the effect that the Interpretation Act applies to the Corporations Act. Section 28A(1)(b) of the Interpretation Act provides that for the purposes of any Act that permitted a document to be served on a person, the document may be served on a body corporate by 'leaving it at, or sending it by pre-paid post to, the head office, a registered office or a principal office of the body corporate'. Section 28A(2)(a) of the Interpretation Act provides that nothing in section 28A(1) affected the operation of any other Commonwealth law that authorised service of a document otherwise than as provided in section 28A(1)(b).  Section 29 of the Interpretation Act provides that where an Act authorised any document to be served by post, the service shall be deemed to be effected by 'properly addressing, pre-paying and posting the document as a letter and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post'.  Greenwood J found that in this case, the 'ordinary course of post' suggested that a pre-paid, properly addressed (to the registered office) and posted letter would, at least be likely, not to be delivered at all, by Australia Post.  **(iii) Evidence Act**Section 160(1) of the Evidence Act provides that it is presumed, unless evidence sufficient to raise doubt about the presumption is adduced, that a postal article sent by pre-paid post addressed to a person at a specified address in Australia, was received at that address on the fourth working day after having been posted. Section 163(1) of the Evidence Act provides that a letter from a Commonwealth agency (such as the Deputy Commissioner of Taxation) addressed to a person at a specified address is presumed, unless evidence sufficient to raise doubt about the presumption is adduced, to have been sent by pre-paid post to that address on the fifth business day after the date that purported to be the date on which the letter was prepared.  **(iv) Application** Greenwood J held that section 109X of the Corporations Act was permissive and facultative only, and then only if there was compliance with pre-conditions. Non-delivery, notwithstanding the exercise of the permission contemplated in section 109X, might be proved by Starpicket on the balance of probabilities.  Greenwood J held that the deeming or presumptions contained in section 29 of the Interpretation Act and sections 160 and 163 of the Evidence Act were expressly rebuttable. The onus of doing so fell upon the party seeking to establish non-service.  Greenwood J noted that while there was a distinction between delivery of a letter or postal article to a particular place and its receipt by a particular person, there was no distinction between delivery of an article to a place and its receipt at that place.   Greenwood J held that on the balance of probabilities, the letters sent by the Deputy Commissioner of Taxation by pre-paid post and properly addressed, to the registered office of Starpicket, were not likely to have been delivered to the relevant place; that is, the registered office of Starpicket. Greenwood J found that there was at least evidence sufficient to raise doubt about the presumption for the purposes of sections 160 and 163 of the Evidence Act.  Greenwood J held that District Registrar Baldwin's order made on 5 October 2012 that Starpicket be wound up in insolvency ought to be set aside, subject to the question of whether the order was sustainable on the footing of whether Starpicket was insolvent. Because Greenwood J was satisfied that the statutory demand was not served, no presumption arising out of a failure to satisfy that demand within the time limited by the Corporations Act arose.etailed Contents**6.2** **Shareholders not associates in a section 411 scheme** (By Esteban Gomez, Clayton Utz) Perpetual Custodians Ltd (as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli) v IOOF Investment Management Ltd; Murray v Perennial Investment Partners Ltd [2012] NSWSC 1318, Supreme Court of New South Wales, Stevenson J, 30 October 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/1318.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/1318.html%22%20%5Ct%20%22_new) **(a) Summary** In this decision of the Supreme Court of New South Wales, Stevenson J held that shareholders who voted in a section 411 scheme of arrangement were not associates, the effect of which was that a change of control under a share sale and purchase agreement did not occur and an accelerated payment to the vendors under the agreement was not triggered.  The claim was brought by executives (Executives) of Perennial Investment Partners Ltd (PIPL), the vendors under a share sale agreement entered into between PIPL and IOOF Investment Management Ltd (IOOF). The executives in PIPL sought to exercise an entitlement to an accelerated payment under the share sale and purchase agreement (Share Sale Agreement) on the basis that a change of control in IOOF had occurred as a result of IOOF's merger with Australian Wealth Management Limited (AWM), effected by a scheme of arrangement under section 411 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) between AWM and its members (Scheme). The judgment focuses on the relevant provisions of the Corporations Act dealing with the meaning of the word 'associate'.  **(b) Facts**   The Share Sale Agreement was entered into on 5 October 2006, pursuant to which IOOF agreed to purchase the remaining 21.85% interest in PIPL held by the Executives which it did not already own. The consideration for the sale and purchase comprised an initial payment of $67.9 million and two entitlements to deferred consideration, the first being based on PIPL's future performance and the second being an accelerated payment of approximately $35 million if a trigger event occurred. One such trigger event was a 'change in the control' of IOOF, which was defined in the Share Sale Agreement as follows: 'In relation to the shareholding of IOOF where a person and that person's Associate together become entitled to more than 40% of the voting shares in IOOF'. The expression 'Associate' was defined as having the same meaning as in the Corporations Act. In May 2009, the Scheme became effective in the form of a reverse takeover. Relevantly for the purposes of the decision, AWM and AWM shareholders who had voted in favour of the Scheme (Relevant Shareholders) became entitled to almost 50% of the voting shares in IOOF. The Executives claimed that this amounted to a change in control in IOOF under the Share Sale Agreement, and sought to exercise their entitlement to the accelerated payment.  **(c) Decision**  Stevenson J held that, for the definition of 'change of control' in the Share Sale Agreement, AWM and its shareholders became 'entitled' to their IOOF shares on 1 May 2009, the date that they lost their right to trade AWM shares but obtained an equivalent right to trade the IOOF shares on a deferred settlement basis, notwithstanding that the IOOF shares were not issued until 12 May 2009. However, Stevenson J held that a change in control in IOOF had not occurred as the Relevant Shareholders were not associates, as that term is defined in sections 12 and 15 of the Corporations Act. Section 12(2) of the Corporations Act relevantly provides that a second person is an associate of the primary person in relation to a body if one or more of the following apply: * the persons have or propose to enter into a relevant agreement for the purpose of controlling or influencing the composition of the body's board or the conduct of its affairs; or
* the persons act or propose to act in concert in relation to the body's affairs.

Section 15(1) of the Corporations Act relevantly adds that the associate reference includes a reference to:* persons acting or proposing to act in concert; and
* persons who are, or propose to become, associated, whether formally or informally, in any other way, in respect of the matter to which the associate reference relates.

Dealing with section 12(2) first, the court considered whether a relevant agreement had been entered into between the Relevant Shareholders for the purposes of controlling or influencing the composition of IOOF's board, or the conduct of its affairs.  By reference to the wording in section 411(1) of the Corporations Act which in the context of schemes of arrangement speaks of 'a compromise or arrangement' between a body and its members, and the observations of Mansfield J in In the Matter of Hostworks Group Ltd [2008] FCA 64, the court held that the Scheme was a relevant agreement for the purposes of section 12(2). The court then considered whether in entering the Scheme the Relevant Shareholders held the purposes required by section 12(2) of the Corporations Act.  Stevenson J held that there was no 'operative, subjective purpose' to control or influence the composition of IOOF's board (even though this was the effect), and with reference to previous Takeovers Panel decisions he was unable to conclude that the Relevant Shareholders held the purpose of controlling or influencing the conduct of IOOF's affairs.  The inference drawn by Stevenson J was that the purpose of the Relevant Shareholders was no more than to act on recommendations of the board and Ernst & Young in the Scheme booklet, and to acquire shares in IOOF. Next, the court considered whether the Relevant Shareholders acted, or proposed to act, in concert in relation to the affairs of IOOF and in respect of the change of control provision in the Share Sale Agreement.  Stevenson J considered the case law indicia for acting 'in concert' and held that there was no community of purpose or other cooperation or collaboration between the Relevant Shareholders, pointing out that the only overt act raised by the Executives was that the Relevant Shareholders had voted in favour of the Scheme.  Again, Stevenson J held that the overarching purpose of the Relevant Shareholders had been to enter into the Scheme on the basis of the recommendations in the Scheme booklet.  Further, each Relevant Shareholder was separately pursuing their own interests (acquiring shares in IOOF), and these interests merely coincided which those of each other Relevant Shareholder. Finally, Stevenson J quickly dismissed the submission under section 15(1) of the Act that the Relevant Shareholders were otherwise associated formally or informally for the purposes of the change of control provision in the Share Sale Agreement.  In the absence of any direct evidence of the Relevant Shareholders being associates, and as the requirements of section 12(2) of the Corporations Act had not been met, Stevenson J found that it was difficult to see how section 15(1) could be satisfied. Accordingly, Stevenson J held that IOOF was not liable for the accelerated payment to the Executives of PIPL under the Share Sale Agreement.etailed Contents**6.3** **Reaffirmation of the corporate veil in family law disputes**  (By Nicholas Whittington, DLA Piper) Petrodel Resources Limited v Prest [2012] EWCA Civ 1395, England and Wales Court of Appeal (Civil Division), Thorpe LJ, Rimer LJ and Patten LJ, 26 October 2012 The full text of this judgment is available at:[http://www.bailii.org/ew/cases/EWCA/Civ/2012/1395.html](http://www.bailii.org/ew/cases/EWCA/Civ/2012/1395.html%22%20%5Ct%20%22_new) **(a) Summary** A husband was ordered in a judgment at first instance to transfer property to his wife which was held by companies controlled by him. The companies appealed the decision on the basis that the Court did not have the jurisdiction to make such an order. A majority found that no such power was conferred on the Court, and made a call for Family Law approaches in dealing with corporate bodies to be brought into line with the mainstream corporate law.  **(b) Facts**   The parties to the original proceeding were a husband and wife, both about 50 years of age. They had married in 1993 and had four teenage children. There were also seven corporate respondents. The principal issues in the case according to Moylan J were:* the extent of the husband's wealth; and
* whether the Court was able to make orders 'directly against properties and shares held in the name of some of the respondent companies'.

The case did not run smoothly. Moylan J stated that the husband's evidence 'consisted significantly of obfuscation and dissembling'. On appeal, Thorpe LJ noted that responsibility for the difficult and frustrating task faced by Moylan J 'rested squarely with the husband and his companies.' Moylan J's decision reflected a conclusion that the assets held by the companies were effectively the property of the husband and so ordered that the husband effect a transfer to his wife of a number of the properties held by the companies. The appeal was made by a number of the respondent companies.  **(c) Decision**  On appeal, the key issue was whether the Court at first instance had the jurisdiction to make orders against properties which were held by the respondent companies.  Section 24(1)(a) of the Matrimonial Causes Act 1973 (UK) provides that on the granting of a decree of divorce, a Court may make an order that 'a party to the marriage shall transfer to the other party, . such property as may be specified, being property to which the first-mentioned party is entitled, either in possession or reversion'. **(i) Decision of Thorpe LJ** Lord Justice Thorpe, in dissent, dedicated a large part of his judgment to describing what he saw as 'a truly exceptional case for the scale of the husband's litigation misconduct'.  For Thorpe LJ, the case was a simple one of statutory interpretation.  In asking whether the individual is entitled to property within the meaning of section 24(1)(a), Thorpe LJ expressed support for 'the need to get to the reality in determining the assets to which the husband is entitled'.  In dismissing the appeal, Thorpe LJ described the husband's actions as the 'invocation of company law measures in an endeavour to achieve his irresponsible and selfish ends'. **(ii) Decision of Rimer LJ** Lord Justice Rimer found that Moylan J, at first instance, and Thorpe LJ, on appeal, were wrong to hold that section 24(1)(a) could apply to the properties. In so doing, Rimer LJ emphasised the continued application of the principles espoused in Salomon v A Salomon and Company Limited [1897] AC 22. That is, a distinction must be drawn between 'the respective legal personalities, rights and liabilities of a company and those of its shareholders'.  Moylan J, however, had 'simply equated the companies with the husband and regarded their assets as his'.  Rimer LJ noted that the question in the appeal was not as to the ownership of the shareholding that conferred control over the companies, but as to the ownership of the properties which were the subject of the order. The wording of the Act prevented a Court from ordering the husband to transfer these properties, unless it could be seen that the properties held by the companies amounted to property to which the husband was 'entitled, either in possession or reversion'.  According to Rimer LJ, the question was whether the husband's control of the companies meant that the husband was in fact the beneficial owner of assets held by the companies. In considering this question, Rimer LJ undertook a thorough and detailed analysis of family law authority dealing with corporate entities. In conclusion, it was emphasised that a company's separate corporate identity is 'a fact of legal life that all courts are required to recognise and respect'.  Unless a company's controllers have used the fact of its separate identity for improper purposes, a court is not able to pierce the corporate veil. Thus, in this case, section 24(1)(a) could not apply to empower the court to order the husband to transfer assets held by the companies, despite the fact that he controlled them.  **(iii) Decision of Patten LJ**  In a three paragraph judgment, Lord Justice Patten agreed with the approach taken by Lord Justice Rimer. In so doing, Patten LJ expressed disapproval at the manner in which judges of the Family Division had developed a 'separate system of legal rules' in their approach to company owned assets, observing, 'that must now cease'.etailed Contents**6.4** **The indoor management rule - was a guarantee purportedly signed on behalf of a company binding on the company?** (By John Whitehill, Clayton Utz) ANZ Banking Group Ltd v Tiricovski [2012] NSWSC 1304, Supreme Court of New South Wales, Adams J, 26 October 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/1304.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/1304.html%22%20%5Ct%20%22_new) **(a) Summary** This judgment concerns loan agreements and cross-agreements between ANZ and certain companies and their directors in 2001 and 2008. In addition to various issues of fact surrounding execution of the documents, the Court considered whether a guarantee executed by a single director (who was not also a secretary) was binding on a company by virtue of the 'indoor management rule'. Adams J relevantly made the ruling that a contract executed under section 127 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) by a single director but purportedly also by a secretary is not binding where:* there is no actual authority for a single director to bind the company; and
* a bank seeking to rely on the assumptions in section 129 does not consider its prudential and ethical duties, as well as considering the transaction as a whole from its client's perspective, to overcome the rule in section 128(4) (being that a person cannot rely on the assumptions if at the time that person knew or suspected that the assumption was incorrect).

**(b) Facts**   **(i) Background** RV & Sons Pty Ltd (RV) manufactured liquorice in a factory located on land owned by Frenmast Pty Ltd (Frenmast).  RV sold liquorice in its own right as well as supplying Australian Fresh Confectionary Pty Ltd (AFC) for distribution. During the relevant period of 2001 to 2008, the following corporate structures applied:* RV - Robert Tiricovski (Robert) and Vlado Tiricovski (Vlado) were the only directors of RV and Robert acted as secretary. Robert and Vlado each held 50% of the shares in RV.
* Frenmast - Robert, Vlado and Steve Tiricovski (Steve) were the directors of Frenmast and Robert acted as secretary.  Robert, Vlado and Steve collectively held around 97% of the shares in Frenmast (with the remaining nominal interest held by the previous sole shareholder).
* AFC - Robert and his wife, Slavica Tirivocski (Slavica), were the directors of AFC and Slavica acted as secretary. Robert and Slavica each held 50% of the shares in AFC.

In regard to RV's operations, Robert and Vlado both undertook production work whilst Robert undertook the majority of the office work as Vlado was unable to write in English.  Frenmast did not engage in any activity except as owner of the land used by RV. Although Steve was a director of Frenmast, he spent most of his time overseas and did not participate actively in the management of RV. In the years 2001 and 2008, various of the above companies and their directors entered into guarantees in respect of various loans. The issues of the case arise from these guarantees. In 2006, Steve and Vlado had a major disagreement with Robert and ceased communication with him. **(ii)  2008 guarantee** In 2008, Frenmast entered into a guarantee which concerned the debts of AFC, Robert and Slavica. This guarantee purported to be executed by Robert as director and Vlado as secretary. At the time, however, Robert was a director and sole secretary of Frenmast while Vlado was a director (and not a secretary) and, as it purported to be signed by two persons who were directors, Adams J did not consider it significant that Robert had not signed as both director and secretary.  Vlado alleged that his signature was a forgery and both Vlado and Steve (who was the other director of Frenmast at the time) denied that Frenmast had any authority to execute the guarantee. **(c) Decision**  Adams J identified the central question with respect to the execution of the 2008 guarantee as being whether, 'having apparently been signed by two directors but in fact only one of them. the bank was entitled to assume that it was duly executed by [Frenmast].'  Such assumptions are provided in section 129 and the entitlement to make the assumptions is predicated upon there being past dealings between the person (ANZ) and the company (Frenmast).  Even if past dealings are present, however, Adams J cited Story v Advance Bank Australia Ltd (1993) 31 NSWLR 722 as authority for the proposition that apparent authority must be supported by a representation by the company as to the agent's authority.  Adams J referred to a history of minutes in which do and Steve had given Robert apparent authority relating to a guarantee entered into in 2001, but that:* those minutes did not extend to fresh obligations (ie the 2008 guarantee);
* past dealings with a person as director does not make that director an agent of the company merely by virtue of holding that office; and
* Robert was only a director amongst others and that office did not give him any actual authority to bind Frenmast in respect of a guarantee, nor did it confer any ostensible authority to do so.

Accordingly, '[s]ince ANZ could only rely on the guarantee if it dealt with Frenmast in relation to the guarantee, and it did not do so, even assuming that it negotiated with Robert as a director of Frenmast, it is unable to rely on the assumption in section 129 in respect of the 2008 guarantee'. Adams J went further and referred to section 128(4) of the Corporations Act which notes that a person cannot make an assumption in section 129 if they knew or suspected that the assumption was incorrect. In this case, Adams J found that ANZ's knowledge of enmast's business and the debts being guaranteed should have invoked knowledge or suspicion that the 'transaction was doubtful as providing substantial financial support to third parties otherwise than in the course of business for no evident advantage, especially in light of Robert's obvious conflict of interest'. Adams J concluded by stating that the bank's 'prudential' and 'ethical' duty to make enquiries was not lessened by the fact that Frenmast was a customer. In fact, he noted that the bank appeared to have 'favoured one set of clients over another for the evident purpose of boosting its security in respect of debts owed to it by those other clients'.etailed Contents**6.5** **Moneys held on trust for secured creditor upon crystallisation of charge not affected by subsequent dealings with moneys** (By Rhys Ryan and Marissa Bendyk, King & Wood Mallesons)                                                                    Brava Trading Pte Ltd v Leybourne Nominees Pty Ltd [2012] QSC 328, Supreme Court of Queensland, Philippides J, 24 October 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/qld/QSC/2012/328.html](http://www.austlii.edu.au/au/cases/qld/QSC/2012/328.html%22%20%5Ct%20%22_new)  **(a) Summary** This judgement considered whether, after obtaining default judgment, a judgment creditor acquired an interest in or entitlement to moneys owed by the judgment debtor capable of defeating a third party creditor's security interest in the moneys created by a registered charge. According to the facts of the case, although the default judgment was obtained prior to crystallisation of the charge, the charge crystallised before payment of the judgment debt could be effected. The Court held that, once the charge crystallised, the moneys were held on trust for the secured creditor, and no subsequent handling of the moneys defeated that secured party's interest. **(b) Facts** In 2007, the plaintiff (Brava Trading) and second defendant (Brava Marine) entered into a loan facility agreement under which Brava Marine granted Brava Trading a fixed and floating charge over the assets of Brava Marine (the Charge). The Charge was duly registered. On 22 June 2009, the first defendant (Leybourne) obtained default judgment from the District Court of Queensland against Brava Marine for claimed outstanding rental moneys. Three enforcement warrants were issued in respect of the default judgment; the third, issued on 14 July 2009, was directed to the National Australia Bank (NAB).  On 20 July 2009, NAB debited the sum of $67,321.53 from the trading account of Brava Marine, and drew a cheque in favour of Leybourne.  Also on 20 July 2009, Harrap Constructions Pty Limited (another creditor of Brava Marine) filed an application for the winding up of Brava Marine after it failed to satisfy a Creditor's Statutory Notice of Demand served on or about 19 May 2009. On 17 July 2009, Brava Marine applied to set aside the default judgment obtained by Leybourne, and on 24 July 2009, orders were made by McGill J to the effect that the first two enforcement warrants be stayed.  In respect of the third enforcement warrant, McGill J ordered that upon payment of $67,321.53 from NAB being received by Leybourne's solicitors into their trust account, that sum be retained in the trust account 'until further order of the court or as otherwise agreed between the parties'. Additionally, Leybourne's solicitors were required, within one business day of receipt of the moneys from NAB, to file and serve an affidavit deposing to their receipt.  It was ordered that, upon filing the affidavit, the default judgment and three enforcement warrants be set aside. On 27 August 2009, a receiver was appointed over the assets of Brava Marine pursuant to the Charge.  On 28 August 2009, Brava Marine was wound up and liquidators appointed. Brava Trading sought a declaration from the Supreme Court of Queensland as to its security interest, created by virtue of the crystallisation of the Charge, in the moneys held in the trust account of Leybourne's solicitors.  **(c) Decision** The key issue to be decided by the Court was whether Leybourne acquired an interest in or entitlement to the funds which was able to defeat Brava Trading's security interest under the Charge. As a preliminary matter, the Court held that the Charge crystallised on 20 July 2009 when Harrap filed an application for the winding up of Brava Marine.  Although this was contrary to Brava Trading's primary submissions, as identified by the Court, this conclusion did not impact the final decision.  Rather, the Court held that Leybourne did not acquire any interest in or entitlement to the moneys prior to crystallisation of the Charge on 20 July 2009. The Court reached this conclusion by considering two issues: the effect of the enforcement warrant, and the effect of the District Court order, on the competing priorities.  **(i) Effect of enforcement warrant** On 20 July 2009, two events occurred: the Charge crystallised as a result of Harrap filing a winding up application, and NAB debited moneys from Brava Marine's account in order to draw a cheque in favour of Leybourne. As a result of the Charge crystallising, the NAB moneys were held on trust for Brava Trading and, by virtue of the District Court order, Leybourne was precluded from itself receiving payment of the moneys under the enforcement warrant. This is because the District Court ordered that the execution proceeding under the warrant would not be complete until payment was made to Leybourne's solicitors and an affidavit confirming receipt had been lodged. Because the NAB moneys were held on trust for Brava Trading from the same day on which they were drawn, the enforcement warrant in favour of Leybourne was never executed or completed. Citing the case of MG Charley Pty Ltd v FH Wells Pty Ltd [1963] NSWR 22, the Court recognised that, in the context of garnishee proceedings, a discharge as against the judgment debtor is a discharge only against that person and not against any third party who may claim the debt. The ground for recognising the beneficial interests of others in a debt which is legally owing to the judgment debtor is that the judgment creditor cannot obtain more in execution from the judgment debtor than the judgment debtor himself had.  In the present case, the Court accepted Brava ding's submission that a judgment creditor (Leybourne) cannot, by means of attachment, stand in a better position as regards the garnishee (NAB) than did the judgment debtor (Brava Marine); the judgment creditor can only obtain what the judgment debtor could honestly give them. In the Court's opinion, the payment made in discharge of NAB's obligations under the warrant did not affect the entitlement of Brava Trading to assert its claim to the funds.  **(ii) Effect of the District Court order**Leybourne submitted that the effect of the District Court order requiring moneys to be paid to (and held on trust by) Leybourne's solicitors was analogous to moneys paid into court as a condition of leave to defend a claim.  Leybourne relied on a line of authority which supported the argument that, upon payment of moneys into court, the payer ceased to have any legal or equitable interest in the money.  It was further argued that these principles were not limited to cases of payment into court, but extended to where the court controlled the disposition of the funds: Harmer v Federal Commissioner of Taxation (1991) 173 CLR 264 (Harmer).  In the present case, Leybourne argued that the moneys held in its solicitors' account were subject to the control of the court, and that now judgment against Brava Marine had been obtained for an amount well in excess of the sum held in that account, the moneys should be released to Leybourne. The Supreme Court did not accept Leybourne's submissions on this point. The Court held that, once the Charge crystallised, Brava Marine became a trustee of the moneys for Brava Trading. Neither the 'subsequent payment of the moneys into Leybourne's account en route to their solicitors' trust account, nor the payment into the solicitors' trust account to give effect to the [District Court order], derogated from Brava Trading's then existing entitlement pursuant to the crystallised Charge'. Citing dicta in Harmer, the Court held that, when trust moneys are paid into court, the funds remain subject to any pre-existing trust notwithstanding the payment in.  Here, the funds paid into the solicitors' account remained subject to Brava Trading's beneficial interest arising from the crystallisation of the Charge. Accordingly, the Supreme Court made the declaration that Brava Trading sought: the amount of $67,321.53 (together with accretions and interest) held on trust in Leybourne's solicitors' account was held subject to the Charge in favour of, and on trust for, Brava Trading. It ordered that the sum be paid to Brava Trading.etailed Contents**6.6** **Consideration of commercial morality in an application to terminate a winding up under section 482(1)** (By Katrina Sleiman and Ben Williams, Corrs Chambers Westgarth) Sevior v Morgan [2012] VSC 480, Supreme Court of Victoria, Sifris J, 22 October 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2012/480.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/480.html%22%20%5Ct%20%22_new) **(a) Summary** R.A.N.S. Pty Ltd (in liquidation) (the Company) was placed into liquidation on 11 December 2009 and the defendant, Mr Morgan, appointed as liquidator (Liquidator). The plaintiff (Mr Sevior) applied under section 482(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) to terminate the winding up of the Company.  The Liquidator supported the application and the Australian Securities and Investments Commission (ASIC) did not oppose it. The application was dismissed by Efthim AsJ. Mr Sevior appealed from that decision by way of a hearing de novo before Sifris J. Sifris J, having considered the Company's solvency, the public interest and the commercial morality concerning the behaviour of the Company, allowed the appeal and ordered that the winding up be terminated. **(b) Facts** The Company was incorporated in 1994 and was set up to operate the electrical business of Mr Sevior, a director of the Company.  In September 2009, the Company entered into a licence deed with Schematic Electrical Pty Ltd (Schematic) and Thyristors Pty Ltd (both of which Mr Sevior is a director) and then ceased trading.  On 11 December 2009, the Company was placed into liquidation.  On 14 March 2012, the creditors of the Company voted to appoint the Liquidator as administrator of the Company under section 436B of the Act. Mr Sevior subsequently proposed a Deed of Company Arrangement (DOCA) by which:* Mr Sevior would contribute $55,000;
* any priority creditors would be paid in full;
* unsecured creditors (including the Deputy Commissioner of Taxation (DCT)) would receive a return of 15 cents in the dollar; and
* related creditors (Mr Sevior and Schematic) who were owed around $660,000 would not be proved in the DOCA.

In his report to creditors of 11 April 2012, the Liquidator noted:* a possible preference claim against the DCT;
* possible claims against Mr Sevior in respect of director related transactions and for trading whilst insolvent in the amount of $283,153;
* Mr Sevior may have breached his duties as a director; and
* Mr Sevior may have engaged in phoenix activity.

With respect to alleged phoenix activity, the Liquidator noted that Schematic purchased the Company's assets, trades under the Company's business name and transferred all employees to itself, leaving the Company with supply creditors and statutory liabilities totalling $283,153.  Further, Schematic received the proceeds of work done by the Company prior to liquidation where the Company had paid expenses in respect of that work. **(c) Decision** Section 482(1) of the Act provides that at any time during the winding up of a company, the Court may, on application, make an order staying the winding up either indefinitely or for a limited time or terminating the winding up on a day specified in the order. Following a review of the authorities that consider when an order ought to be made under section 482 (or its predecessors), his Honour stated that the court needs to:* be satisfied as to the solvency of the Company; and
* consider the public interest and whether granting the order would be detrimental to commercial morality.

**(i) Solvency** Mr Sevior indicated that he did not intend to trade after the fulfilment of the DOCA and so did not consider that there was a risk of the Company becoming insolvent.  Further, Mr Sevior proposed to convert the related party debt owed to himself and to Schematic into equity.  The Liquidator estimated that, assuming a successful claim against the DCT and Mr Sevior, the creditors would receive 19 cents in the dollar in liquidation. Under the DOCA, the creditors would receive 15 cents in the dollar with much greater certainty. The creditors voted in favour of the DOCA; however the related creditors (Mr Sevior and Schematic) were the only creditors to vote in favour of it and the DCT was the only creditor to vote against it. In those circumstances, Sifris J held that solvency was not an issue in the application. **(ii) Public interest and commercial morality** With respect to commercial morality, Sifris J stated that the critical focus was on the future of the Company and the risk to future creditors, rather than any past conduct. However, previous instances of non-compliance or breach by a company and its directors might be serious enough that the court could not have confidence that a company would act in future as a 'good corporate citizen according to law'. His Honour ultimately held that 'although some aspects of the conduct of Mr Sevior and the Company are peculiar, unexplained, and indeed fail to measure up to the standard required, there is, given the present structure and circumstances, no risk to future creditors of the Company' and 'no real or sufficient risk that past breaches of duty by Mr Sevior and non-compliance of the kind exposed by the Liquidator will be repeated'.  In so finding, Sifris J dealt with the following matters, which his Honour considered were the most relevant with respect to commercial morality:* the Company's failure to pay tax;
* possible insolvent trading; and
* possible phoenix activity.

Sifris J noted that the failure to pay tax was an important matter but that after the Company was obliged to cease trading, the tax debt was one amongst others owing and payable and which would be dealt with by the DOCA. At the behest of the Liquidator, Mr Sevior eventually accounted to the Company for a number of breaches, including purchasing the assets of the Company for amounts which the court found were at or about market value. In addition, Schematic took over liabilities to employees and to lease creditors.  Importantly, Sifris J held that notwithstanding the fact that the Liquidator had to take steps to have Mr Sevior account for various breaches, his Honour was entitled to look at the circumstances at the time of the application.  In so doing, his Honour found that the Plaintiff acknowledged his past failings and had taken various steps to address them. His Honour also took particular comfort from the fact that the allegations of insolvent trading and phoenix activity were referred to ASIC and it had not taken action and did not oppose the application. In addition to satisfying himself with respect to the above conduct, his Honour also considered that allowing the termination furthered the objects of Part 5.3A of the Act, that is, to maximise the chance of the Company continuing in existence or providing a better return for the creditors than an immediate winding up.etailed Contents**6.7** **Adjournment of winding up application where the Court is satisfied that it is in the interests of the creditors for the company to continue under administration**  (By Stephanie De Vere, Minter Ellison) Deputy Commissioner of Taxation v Helico Pty Ltd (Administrator Appointed) [2012] FCA 1155, Federal Court of Australia, Collier J, 19 October 2012 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2012/1155.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/1155.html%22%20%5Ct%20%22_new) **(a)  Summary**This case provides some useful guidance on the Court's considerations when determining whether the hearing of an application to wind up a company that is under administration should be adjourned in accordance with section 440A(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act). **(b)  Facts**   The defendant was a corporation involved in the business of supplying and trading in helicopter spare parts. The sole director and shareholder of the company was Mr Murray Bolton. On 16 August 2012, the plaintiff, the Deputy Commissioner of Taxation (Deputy Commissioner) filed an application for the winding up of the defendant under section 459P of the Act. Section 459P of the Act allows an application to be made for a company to be wound up in insolvency. The defendant entered into voluntary administration on 14 September 2012 and Mr Andrew Wily was appointed the administrator of the defendant. The second meeting of creditors pursuant to section 439 of the Act was scheduled to be held on 22 October 2012. On the 12 October 2012, the administrator presented a report to the creditors pursuant to section 439A of the Act, which contained the following observations:* the defendant may not have maintained adequate books and records as required by section 286 of the Act;
* the only employee of the defendant was Mr Bolton, who was owed $182,000 in unpaid wages. Mr Bolton claimed that he had also loaned the defendant $132,000;
* while liquidation would be unlikely to result in a return to creditors, a Deed of Company Arrangement (DOCA) could yield a dividend of approximately 4 cents in the dollar;
* there were three transactions totalling $12,000, that the administrator considered might constitute unfair preferences. However, further investigation would be required to establish whether the payments to the creditors in question were unfair preferences; and
* there was indicia that Mr Bolton might have allowed the defendant to trade whilst insolvent but further investigations would be required to be conclusive.

A formal proposal for a DOCA had been put by Mr Bolton with the following features:* Mr Wily to be appointed the Deed Administrator;
* Mr Bolton to take ownership of the company's assets;
* a total of $70,000 to be contributed into the Deed Fund in three instalments by Mr Bolton, a first payment of $30,000 upon execution of the DOCA, a further payment of $20,000 on or before three months from the date of execution of the DOCA and a final payment of $20,000 to be paid on or before six months from the date of execution of the DOCA; and
* Mr Bolton would subordinate his claims against the defendant.

The Deputy Commissioner sought an order from the Court that the defendant be wound up in insolvency under the provisions of section 459P of the Act. The defendant in turn sought an order from the Court in accordance with section 440A(2) of the Act that the hearing of the plaintiff's application be adjourned for one week to allow the meeting convened by the administrator to proceed on 22 October 2012 and to allow the creditors to vote on the DOCA. Section 440A(2) of the Act provides that the Court is to adjourn the hearing of an application for an order to wind up a company if the company is under administration and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up. The Deputy Commissioner submitted that the Court should refuse an adjournment of the winding up application because:* the comparison prepared by the administrator in respect of the anticipated return to creditors from liquidation and acceptance of the DOCA was flawed because the administrator provided no basis upon which he estimated the realisable value of the assets other than his previous experience;
* the administrator's report is vague and incomplete, being based on very limited information;
* Mr Bolton, in exchange for providing $70,000, would acquire a clean skin company free of existing debts, whereas the creditors would receive a dividend of only 4 cents in the dollar;
* the administrator did not take into account, in considering assets available in liquidation, the possibility of recovering funds in the sum of $12,000 in a voidable preference claim; and
* the $70,000 offered by Mr Bolton as a contribution to the Deed Fund is not guaranteed, and the administrator acknowledges uncertainty in relation to whether those funds will actually be forthcoming pursuant to the DOCA.

**(c)  Decision**  Justice Collier held that the hearing of the Deputy Commissioner's application be adjourned for one week to allow the meeting of the creditors to take place on 22 October 2012. Justice Collier referred to Justice Gordon's statement in Deputy Commissioner of Taxation v Scuttle Clothing Pty Ltd [2011] FCA 496 at [14] that 'to grant the adjournment, the Court must be satisfied that it is in the interests of the company to continue under administration, rather than be wound up ...  It is accepted that if the court is so satisfied, then it is obliged to adjourn the hearing of the winding up application.' Justice Collier held that it is not necessary for the company the subject of the winding up application to demonstrate as a matter of certainty that it is in the interests of the creditors for the administration to continue. Rather, section 440A(2) of the Act requires only that there be a sound basis for the Court being satisfied in that regard. Here, Justice Collier was satisfied that it was in the interests of the creditors of the defendant that the second meeting of the creditors be held on 22 October 2012 in accordance with section 439A of the Act and that the Deputy Commissioner's application be adjourned for one week, rather than the Court order the defendant be wound up for insolvency. Justice Collier made this determination on the basis that:* 4 cents in the dollar is certainly a lot more than nothing;
* cancellation of the meeting would cause not only inconvenience and wasted costs to all concerned, but would also deny creditors the opportunity to make a decision about the DOCA or alternative options in respect of the debts owed to them by the defendant;
* the administrator had drawn to the attention of the creditors the apparent uncertainty concerning the $70,000 to be contributed by Mr Bolton. The creditors should be given the opportunity to not only assess the prospects of that sum being contributed, but the terms upon which it is to be contributed;
* the plaintiff only sought an adjournment of one week to allow the meeting to take place;
* Justice Collier was not satisfied that the preparation of the administrator's report reflected a poor job as contended by the Deputy Commissioner; and
* while the prospect of Mr Bolton potentially benefitting from the acceptance of the DOCA by the creditors in the sense of acquiring a clean skin company is of some concern, it is an issue for the creditors to consider.

etailed Contents**6.8** **Bonus account advances and short-term loans: how serious misconduct deprived an employee of termination payments** (By Natasha Koravos, DLA Piper) Downer EDI Limited v Gillies [2012] NSWCA 333, New South Wales Court of Appeal, Allsop P, Macfarlan JA and Meagher JA, 18 October 2012 Full text of the judgment is available at: [http://www.caselaw.nsw.gov.au/action/PJUDG?s=1000,jgmtid=161286](http://www.caselaw.nsw.gov.au/action/PJUDG?s=1000,jgmtid=161286" \t "_new) **(a)  Summary** The court found that Mr Gillies, a former senior executive of Downer EDI Limited, had engaged in serious misconduct justifying summary dismissal and was not entitled to termination payments.  He had breached section 180 and section 181 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) and possibly section 182.  Mr Gillies had also dealt with company funds for his own private purposes by receiving related party benefits. **(b) Facts** Mr Gillies was managing director and CEO of Downer EDI Limited (Downer) for 10 years. His contract of employment entitled him to exercise rights to a bonus under the 'Phantom Option Scheme' (POS).  He had to have an employment contract on foot to exercise his rights to a bonus. On 1 August 2007, discussions between the board and Mr Gillies confirmed that he would step down from his executive position.  In a letter to the board on 3 August 2007, Mr Gillies confirmed that he intended to exercise his rights to a performance bonus. After he did not hear from the board, he elected to receive the bonus by notice to the company, where he stated that he presumed his contract was still on foot.  On 7 August 2007, the Board sent him a letter stating that his employment had been terminated earlier that month.  The date of termination became relevant to the allegations of misconduct. Mr Gillies had annual bonuses declared in his favour into a 'retained bonus account'. The misconduct allegations related to payments out of the account which Mr Gillies requested and received. Downer complained of misconduct on the following bases:* Payments to Mr Gillies for a boat, if referable to the retained bonus account, meant Mr Gillies owed Downer the excess of what he borrowed, and Downer had an unfunded taxation liability for the borrowed amounts, because Mr Gillies had not paid tax on these advances.
* Payments made to Mr Gillies through unsecured interest-free loans to facilitate the purchase of an investment property.

Under the employment contract, where an employee had engaged in serious misconduct, summary termination was permitted without payment of termination benefits or notice payments. Downer argued that this applied to Mr Gillies.  Therefore, the issues on appeal were:* whether the POS had been ratified, and became binding and effective;
* what was the effect of what occurred in early August 2007 in respect of the termination of the employment relationship between Downer and Mr Gillies;
* if the POS was binding and effective, whether Mr Gillies was employed when he made his election;
* whether Mr Gillies engaged in serious misconduct during his employment, such that as per the terms of his employment contract, he had no right to termination payments; and
* whether Mr Gillies was indebted to Downer in respect of a loan for a car.

**(c) Decision** **(i) Ratification of the POS, termination of employment and the car loan** The court held that there was documentary substantiation providing the basis for an inference that the POS was ratified. This was despite the scheme not being disclosed in the Annual Reports. There was no clear evidence of the Remuneration Committee ratifying the decision, however conversations were held which assumed its existence and other documents referred to it. The media release on 3 August 2007 stated that the Board and Mr Gillies agreed he would 'step down' from his position. The court held that Mr Gillies' employment was not terminated before he elected to receive his bonus.  He had not agreed to resign, and the media release and board minutes referred to him staying on as a consultant for three months. The Court of Appeal agreed with the primary judge that Mr Gillies' employment was not terminated on 1 August 2007. It held that the first notice of termination was given on 7 August 2007. The court held that the car loan was given to Mr Gillies by the board on terms that it could be returned at the end of ownership to discharge the loan. The Board sought to rely on a letter which did not mention this right, and claimed it was a binding agreement. The court held this letter was merely a brief record of what was discussed and previously approved. The car could be returned to discharge the loan. **(ii) The misconduct**   The primary judge held that there was no misconduct or fraudulent activity entitling Downer to dismiss Mr Gillies under his employment contract.  On appeal no challenge was made as to Mr Gillies' honesty or Mr Bruce's honesty (the employee who Mr Gillies requested the payments from). The relevant questions were whether Mr Gillies had contravened either section 180 (care and diligence), section 181 (good faith), section 182 (use of position) or Chapter 2E (related party transactions) of the Act. The court stated that Mr Gillies' conduct must be determined objectively to assess whether the conduct was sufficiently serious to warrant summary dismissal. **(iii) Payments for the boat** In relation to payments made to Mr Gillies for his boat, Mr Gillies claimed these were not loans but advances of his bonus and therefore not subject to related party provisions. He said he relied on his subordinate, Mr Bruce, to tell him of any tax implications and to let him know of any overdraw of his bonus account.  The court stated that although Downer suffered no detriment, Mr Gillies borrowed or advanced significantly more than his entitlement. Mr Gillies could not justify this based on the lack of interest on the advance and retained bonuses because he himself had requested the bonus deferral. Furthermore, it was clear that Mr Gillies appreciated that tax was payable on the exhausted bonus pool as he claimed to not regard it as a loan arrangement. Mr Bruce did think it was an interest free loan but was aware that if it was an advance, tax was payable.  The court held that neither the approach to the matter by Mr Bruce, nor the findings of the primary judge accorded with Mr Gillies' understanding, nor did they accord with any clear factual foundation in conversation or writing. Mr Gillies took no steps to acquaint himself with the basis of his entitlement to draw money.  He took large sums of money from the company with scant attention to the legalities and legal consequences of the payments. The position of Downer was compromised and subjected to the risk of loss and criticism.  Downer was left unfunded for a potential tax liability and risked damage to its reputation. Furthermore, if the payment was a loan, no consideration was made to it being a related party transaction.  This further exposed Downer to risk of loss and reputation damage. The court held that the Board could properly have considered that at least sections 180 and 181 of the Act were breached, and possibly section 182, constituting serious misconduct.  Mr Gillies' employment could be terminated without the provision of termination benefits or notice payments.  **(iv) The New Zealand foreign currency transactions** Payments to Mr Gillies were made in NZ dollars and Mr Gillies made repayments in Australian dollars. The court held that Downer had no practice of permitting employees to take interest free loans.  It stated that utilisation of a treasury function was one thing (in particular if related to employment), but taking short term loans in large amounts for private reasons was another. It was a related party benefit and could not be characterised as remuneration. These loans were inappropriate and improper and Mr Gillies' conduct was inconsistent and repugnant to his duties as the most senior executive of a company. **(v)  Conclusion** It did not matter whether or not Mr Gillies' misconduct was known at the time of termination. His conduct was sufficiently serious for the board to rely on in justifying his termination on 9 August 2007. Mr Gillies was not entitled to termination benefits or notice payments under his employment contract. The appeal was allowed in part and the orders of the trial judge were set aside.etailed Contents**6.9** **Options issued as underwriting fee not within exception 2 of Listing Rule 7.2** (By Jack Hill, King & Wood Mallesons) Oil Basins Limited v Bass Strait Oil Company [2012] FCA 1122, Federal Court of Australia, Gordon J, 16 October 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2012/1122.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/1122.html%22%20%5Ct%20%22_new) **(a)  Summary** This decision analyses the ambit of exception 2 of ASX Listing Rule 7.2 and provides guidance on how a company's constitution should be interpreted. Importantly, it confirms that the ASX Listing Rule exception does not extend to the issue of securities to an underwriter as a fee for services.  Such an extension of the exception would be inconsistent with the express words of the exception and the spirit, intention and purpose of ASX Listing Rules 7.1 and 7.2.  **(b)  Facts** On 31 March 2011, the Board of Bass Strait Oil Company Limited (BAS), a publicly listed company, terminated the contract of the BAS managing director. On 8 September 2011, BAS announced a fully underwritten rights issue. The underwriter of the rights issue received an underwriting fee paid in the form of the issue of 10 million options over BAS ordinary shares (Underwriting Fee Options) and cash.  On 13 August 2012, the Board of BAS resolved to appoint Mr Whittle (Whittle) as interim managing director (Whittle Resolution) and to issue securities to Somerton Energy Ltd through a placement (Disputed Securities). The Disputed Securities were issued on that day. Prior to the issue of the Disputed Securities, Oil Basins Limited (OBL) held 19.9% of the shares in BAS.  Following the issue of the Disputed Securities, OBL's interest decreased to 17.38%. OBL sought orders reversing the dilution of its holding in BAS.  It alleged that the resolution of the BAS Board approving the issue of the Disputed Securities (Placement Resolution) was invalid for a lack of quorum and that the issue of the Disputed Securities was a breach of ASX Listing Rule 7.1 because it resulted in the issue of more than 15% of BAS' 'equity securities' without shareholder approval. Whether a breach had occurred turned on the classification of the issue of the Underwriting Fee Options for the purposes of the ASX Listing Rules. **(c) Decision** **(i) Validity of the Whittle and Placement Resolutions** OBL alleged that, given BAS had no managing director at the Meeting, there was no quorum present to enable business to be transacted - including the Whittle Resolution and the Placement Resolution.  Under rule 45(b) of the BAS constitution, 'until the directors decide differently', two directors, one of whom must be a managing director, constitute a quorum. OBL argued that as there could not be a quorum at the Meeting, BAS should have called a meeting of shareholders to approve both matters. In response, BAS's primary submission was that the Whittle Resolution was valid.  It argued rule that 45(c) of BAS constitution permitted the Board to fill a vacancy in the office of managing director, which the Board did. Therefore, BAS submitted that a quorum was present at the Meeting to approve the Placement Resolution.  Rule 45(c) provides that if there is a vacancy in the office of a director, the remaining directors may act. If their number is not sufficient to constitute a quorum, they may only act to, relevantly, 'increase the number of directors to a number sufficient to constitute a quorum'.  Gordon J agreed with BAS.  Her Honour held that the Whittle Resolution was valid and, consequently, that the Placement Resolution was also valid as there was a quorum at the Meeting. Her Honour noted that the answer to how the existing directors could validly approve the Whittle Resolution in the absence of a managing director lay in the BAS constitution, and that rule 45(b) must be read in the context of the constitution as a whole, and not in isolation.  Her Honour considered that under rule 52, the directors were, and remain, the appointing authority of the managing director - not the shareholders in general meeting - and that rule 45(c) provided a basis for the valid appointment of Whittle as managing director.  Her Honour concluded that 'by the express power vested in the directors, the company has by its constitution delegated to the Board the sole right to appoint the managing director.  What took place on the 13 August 2012 was the Board of directors exercising that power to appoint a managing director'. Even if the appointment of Whittle was invalid, her Honour confirmed that she would have validated the appointment under section 1322(4) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) as the appointment was procedural in nature and of itself did not result in any prejudice to OBL. **(ii) Breach of ASX Listing Rule 7.1** Whether the placement of the Disputed Securities breached ASX Listing Rule 7.1 depended on whether the Underwriting Fee Options were issued under exception 2 of ASX Listing Rule 7.2.  Broadly, ASX Listing Rule 7.1 restricts a company from issuing more than 15% of its issued capital in any 12 month period without obtaining shareholder approval (unless an exception applies). If the Underwriting Fee Options were issued under an exception, the issue of the Disputed Securities would not breach the 15% rule. Conversely, if the Underwriting Fee Options did not fall within the ambit of an exception, BAS would have breached the 15% rule when it issued the Disputed Securities. Relevantly, exception 2 of ASX Listing Rule 7.2 states that the 15% rule does not apply to 'an issue under an underwriting agreement to an underwriter of a pro rata issue to holders of ordinary securities if the underwriter receives the securities within 15 business days after the close of the offer' ('Exception').  OBL argued that the Underwriting Fee Options were not issued under the Exception and therefore that a breach had occurred. It submitted that the Exception applies only to an issue of 'shortfall securities' to an underwriter under an underwriting agreement for a pro rata rights issue, and not to securities issued as a fee for services.  In contrast, BAS argued that the Exception should be read so as to apply to any issue of securities to an underwriter under an underwriting agreement, regardless of whether that has the effect of diluting the securityholding. On that basis it argued that the Underwriting Fee Options were granted under the Exception and that therefore the issue of the Disputed Securities did not breach ASX Listing Rule 7.1  Gordon J agreed with OBL's interpretation of the Exception and found that BAS had breached the 15% rule in issuing the Disputed Securities. She held that OBL's interpretation accorded with the spirit, intention and purpose of ASX Listing Rules 7.1 and 7.2. Her Honour noted that the purpose of the 15% rule is to protect a securityholder from dilution of their voting and economic interests in an entity and that the Exception exists to address those situations where the protection is not necessary because securityholders have the opportunity to participate in an issue of securities and protect their securityholding from dilution. Securityholders can, alternatively, choose not to participate, and so allow their securityholding to be diluted by the underwriter taking up the securities and by other securityholders taking up their own entitlement.  The issue of securities as a fee for services was viewed by her Honour as being comparable to a placement, as existing securityholders have no involvement in the underlying issue and no way of protecting themselves against dilution. In rejecting BAS's interpretation, Gordon J noted that if it were to be adopted, a company would be free to issue as many securities as it wished to an underwriter as payment of the underwriter's fee, diluting existing securityholders, circumventing ASX Listing Rule 7.1 and doing so without restriction of any kind.  Her Honour held that such an interpretation is clearly inconsistent with the purpose and principles of ASX Listing Rules 7.1 and 7.2. Her Honour also rejected BAS's submission that it was necessary for small cap companies with limited cash to pay underwriters by issuing securities on the basis that they would otherwise have limited opportunities to raise capital. Any commercial factors and considerations do not, and cannot, alter the requirement that a publicly listed company comply with the Listing Rules. **(iii) Relief** A declaration that BAS had breached ASX Listing Rule 7.1 was made but her Honour declined to grant OBL further relief.  In making that decision, her Honour was swayed by the fact that only 10 million more securities were issued than in fact should have been issued, resulting in an illegitimate dilution of OBL's holding by less than half of one percent. Her Honour also took into consideration BAS's undertaking to the ASX that for the period to 13 August 2013, it would reduce by 10 million the number of securities it is able to issue under ASX Listing Rule 7.1. That undertaking was regarded by her Honour as being a pragmatic, effective and equitable way to address OBL's dilution. etailed Contents**6.10** **Conflict of laws and assignment of entitlement to indemnity**  (By Laura Southwell, Herbert Smith Freehills) The Ocean Marine Insurance Company Limited v CSR Limited [2012] NSWSC 1229, Supreme Court of New South Wales, Stevenson J, 12 October 2012 The full text of this judgment is available at:[http://www.caselaw.nsw.gov.au/action/pjudg?s=1000,jgmtid=161253](http://www.caselaw.nsw.gov.au/action/pjudg?s=1000,jgmtid=161253" \t "_new) **(a)  Summary** The defendant, CSR Limited (CSR) was an Australian company formerly involved in the mining, manufacture and sale of asbestos products. The plaintiffs, Ocean Marine Insurance Company Limited (Ocean Marine) and Aviva Insurance Limited (Aviva), were insurance companies domiciled in the United Kingdom. CSR and various insurers described as 'the NZI Group' entered a deed on 3 March 1995 (the Deed) to settle litigation related to pre-1978 insurance policies. Aviva was a party to the Deed, however Ocean Marine was not.  Under a subsequent settlement agreement for unrelated litigation in the United States regarding post-1978 insurance policies, CSR's reinsurer, ACE Insurance Limited (ACE) was required to pay some AUD$120 million to CSR. Coincidentally, ACE was reinsured by Aviva and other insurers under separate reinsurance policies. ACE made claims on its reinsurance policy in respect of the money it had paid pursuant to the settlement with CSR.  The plaintiffs sought an indemnity from CSR, relying on indemnity clause 4.4.1(d) of the Deed, for reinsurance payments made by it to CSR's reinsurer, ACE. To establish standing to sue on the indemnity, Ocean Marine relied on the operation of orders made by the High Court of Justice of England and Wales (the UK High Court) which gave effect to a scheme to transfer the general insurance business of various insurers associated with the NZI Group (including Aviva) to Ocean Marine (2004/2005 Orders).  Stevenson J considered the following questions:* First, whether Ocean Marine was entitled to sue CSR on the Deed, by operation of the 2004/2005 Orders made by the UK High Court.
* Second, whether on the proper construction of the Deed, Aviva and Ocean Marine were entitled to an indemnity from CSR in relation to payments made by Aviva and certain corporate predecessors of Ocean Marine.
* Third, assuming the answers to each of the preceding questions were 'yes', whether Aviva and Ocean Marine had established an entitlement to indemnity in the amount claimed.

His Honour found that the answer to each of these questions was 'no' and that the plaintiffs' claim failed.  **(b) Facts**   CSR and various insurers described as 'the NZI Group' entered a deed on 3 March 1995 (the Deed) to settle litigation related to pre 1978 insurance policies. The NZI Group included the following insurers: General Accident Reinsurance Company Limited (GARC), Scottish Insurance Corporation Limited (SIC) and a predecessor of Aviva. The Deed required that the NZI Group pay AUD$100 million to CSR in return for releases and other obligations, including indemnities, of CSR under the Deed. Aviva was, but Ocean Marine was not, a party to the Deed. In November 1978, CSR adopted a reinsurance regime underwritten by Insurance Company of North America Australia Limited. This company subsequently became known as ACE Insurance Limited (ACE). As it happened, in four successive periods between 1979 and 1985, Aviva, GARC and SIC reinsured ACE under separate reinsurance polices.  Between 1995 and 2006, CSR was involved in litigation in the United States against, inter alia, ACE regarding coverage provided under post 1978 insurance policies issued by ACE to CSR. The litigation was settled and the settlement required that ACE pay some AUD$120 million to CSR. ACE then made claims on its reinsurance policies in respect of the money it had paid pursuant to the settlement. Aviva and Ocean Marine accordingly made payments to ACE in respect of the reinsurance policies.  Aviva and Ocean Marine commenced these proceedings against CSR on 1 December 2009. Aviva and Ocean Marine demanded that CSR indemnify them, pursuant to clause 4.4.1(d) of the Deed, for the reinsurance payments made to ACE. Clause 4.4.1(d) provided that:  'CSR as a separate and independent obligation indemnifies and agrees to defend and keep indemnified the NZI group for: - . (d) All claims against the NZI Group of any person in respect of an Asbestos Related Claim .' In 2004 and 2005, the UK High Court made orders (2004/2005 Orders) pursuant to the Financial Services and Markets Act 2000 (UK). The 2004/2005 Orders gave effect to a scheme to transfer the general insurance business of various insurers associated with the NZI Group (including Aviva) to Ocean Marine. Ocean Marine relied on the operation of the 2004/2005 Orders to give it standing to sue on the indemnity.  **(c) Decision**  **(i) Ocean Marine's standing to sue - a conflict of laws?** An issue arose as to the standing of Ocean Marine to bring the action. Ocean Marine sued CSR on the indemnity in clause 4.4.1(d) of the Deed, although it was not a party to the Deed. Ocean Marine relied on the operation of the 2004/2005 Orders to give it standing to sue on the indemnity. It submitted that the effect of those orders was to transfer to it the chose in action represented by the entitlement to indemnity under clause 4.4.1(d). Stevenson J found the effect of the 2004/2005 Orders was, relevantly, to transfer to, and vest in Ocean Marine the property of GARC and SIC constituted by the chose in action under clause 4.4.1(d) of the Deed.  **(ii) Was the assignment effective under the lex situs?** The lex situs of the chose in action was plainly NSW. In his Honour's opinion, the assignment was not effective under NSW law for the following reasons:* First, the 2004/2005 Orders of the UK Court purported to deal with property situated in NSW.
* Second, the Deed contained a prohibition on assignment in the following terms:     '4.11 No Assignment - The rights created by this deed are personal to the parties and must not be dealt with at law or in equity.'

His Honour found that the language used by the parties in clause 4.11 revealed their intention that any purported assignment had no effect.  **(iii) What is the lex causae?** On the assumption that the lex locus actus, or the proper law of the assignment was English law, his Honour found that the assignment was one which the NSW courts would not recognise.  His Honour found that the Deed was strongly connected to NSW. It was caught up by the 2004/2005 Orders but otherwise had little connection with English law, save that Ocean Marine (but not CSR) was resident there. The chose in action represented by the indemnity in clause 4.4.1(d) of the Deed was located in NSW. In these circumstances, his Honour found that 'the most appropriate law to govern' the issue of assignment was that of NSW. Accordingly, as the assignment was not effective under NSW law, Ocean Marine had no standing to bring these proceedings. **(iv) Applicability of the principles relevant to recognition of foreign judgments** CSR submitted that a further reason why Ocean Marine was not entitled to enforce the indemnity under clause 4.4.1(d) of the Deed was because the conditions for the recognition and enforcement of judgments had not been satisfied. In view of his Honour's conclusion regarding Ocean Marine's standing, his Honour found that it was not necessary to express any conclusions regarding this issue. However, his Honour noted that he was inclined to accept Ocean Marine's submission that the principles to which CSR referred in relation to the enforcement of foreign judgements had no bearing on the issue before the Court. The question before the Court was one of the recognition of the effect of the 2004/2005 Orders.  Ocean Marine was not seeking to enforce the 2004/2005 Orders in NSW. This was a choice of law question.  **(v)  The proper construction of clause 4.4.1(d)** In any event, putting the issue of Ocean Marine's lack of standing aside, his Honour found that on the proper construction of the Deed, neither Aviva nor Ocean Marine (assuming that it did have standing), were entitled to indemnity for the amounts sought.  Aviva and Ocean Marine claimed that, on the proper construction of clause 4.4.1(d), they were entitled to indemnity from CSR for the payments made by them to ACE under the reinsurance policies. His Honour found that the context in which the indemnity in clause 4.4.1(d) was given made clear that the parties did not intend that the indemnity extended to amounts paid by NZI Group under contracts of reinsurance entered into by them with CSR's insurer in an entirely separate, and later period of insurance. It was a coincidence that Aviva, GARC and SIC were insurers of CSR in the period up to November 1978 and also reinsurers of ACE in the years following.  His Honour stated that it seemed 'improbable', in circumstances where the relationship of the insurer and insured between CSR and the NZI Group had come to an end in November 1978, that the parties to the Deed intended that the Deed operate to impose on CSR a liability to indemnify members of the NZI Group who happened to reinsure their successors as CSR's insurer, at any time in the future, for an unlimited amount.  His Honour therefore concluded that the indemnity given by CSR in clause 4.4.1(d) was only enlivened by claims made against members of the NZI Group in their capacity as insurers.  The indemnity clause was not intended by parties to oblige CSR to reimburse the NZI Group in respect of the reinsurance liabilities. etailed Contents**6.11** **Entitlement of purchaser of property to return of deposit: Effect of liquidator of vendor disclaiming the contract**  (By Mulin Zang, Ashurst Australia) Grant v Harlgate Pty Ltd [2012] VSC 464, Supreme Court of Victoria, Beach J, 9 October 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2012/464.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/464.html%22%20%5Ct%20%22_new) **(a) Summary** Mrs Grant applied to the Supreme Court of Victoria for the repayment of her deposit which was released by the estate agent of the vendor without her consent or knowledge, after the contract of sale of property was disclaimed by the liquidator of the vendor and subsequently rescinded by Mrs Grant.  Beach J held that following the termination of the contract by either the disclaimer of the vendor or the rescission of Mrs Grant, the release of the deposit by the estate agent was contrary to the provisions of the [Sale of Land Act 1962 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=562" \t "_default) (the SLA), and ordered the agent to return the deposit together with interest.  **(b) Facts**   **(i) Parties** Mrs Grant (the Purchaser) entered into a contract of sale of property (the Contract) with Verve Homes (Aust) Pty Ltd (the Vendor). The Purchaser paid a deposit of $160,000 to Harlgate Pty Ltd (the Agent) which was acting as an agent of the Vendor.  The Vendor was later placed in liquidation. The liquidators of the Vendor (Liquidators) considered the Contract to be onerous and gave the Purchaser a notice disclaiming the Contract. Settlement of the Contract has never taken place. The Purchaser subsequently rescinded the Contract by giving a written notice to the Liquidators.  The Purchaser then requested immediate repayment of the deposit, together with interest from the Agent. The Agent advised the Purchaser that the deposit had been released to the first mortgagee with respect to the property and two other agents of the Vendor, including the Agent, on account of commissions and advertising expenses.  The release was prior to the notice of disclaimer by the Liquidators and without the Purchaser's consent and knowledge.  The Purchaser commenced proceedings against the Agent seeking the return of the deposit together with interest, or alternatively damages and interest.  Despite being joined later as the second defendant by leave of the Court, the Vendor never took part in this proceeding.  **(ii) Relevant law** The Liquidators disclaimed the Contract pursuant to section 568(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the CA). Section 568(1) relevantly provides that a liquidator of a company may at any time, on the company's behalf, by signed writing disclaim property of the company that consists of a contract. Section 568D of the CA provides that the disclaimer terminates the company's rights, interests, liabilities and property in the disclaimed property, and only affects another person's property if it is necessary to release the company and its property from liability. The Purchaser submitted that release of the deposit by the Agent was in breach of section 24 of the SLA. Section 24 relevantly provides that any deposit moneys received by an estate agent in the course of a transaction for the sale of land shall be held by that estate agent as a stakeholder until, in the case of a cash transaction, the purchaser becomes entitled to a transfer or conveyance of the land, at which time the deposit moneys may be paid to the vendor in his own rights or as the vendor directs. **(iii) Issues** The issues before Beach J were: (1) What is the legal effect of the disclaimer by the Liquidators? (2) Whether the Purchaser is entitled to have the deposit and interest returned by the Agent. (3) Had the Agent released the deposit in breach of the provisions of the SLA? **(c) Decision**  **(i) Judgment on issues**  In relation to the above issues, Beach J held as follows: (1) The Contract was terminated upon the notice from the Purchaser to the Liquidators rescinding the Contract, if not upon the disclaimer by the Liquidators.   Beach J confirmed that the consequences of the disclaimer,pursuant to section 568D of the CA, is that the Vendor and the Purchaser no longer have any contractual rights or liabilities under the Contract.  (2)The Purchaser is entitled to the return of the deposit together with interest, or alternatively to damages equivalent to the amount of the deposit and interest. The deposit was paid to the Agent as a stakeholder, pending payment to the Vendor, or otherwise, in accordance with the provisions of the SLA. Circumstances entitling the Vendor to payment of the deposit have never arisen.  (3) No provision of the SLA permitted the Agent to release the deposit at the time he made the payments to the first mortgagee and the agents. The release of the deposit was contrary to the provisions of the SLA. Most relevantly, section 26 of the SLA provides that if the purchaser rescinds the contract as the result of a default by the vendor, the purchaser shall be entitled to the immediate return of the deposit moneys.   **(ii) Order** Beach J ordered the Agent to pay to the Purchaser the sum of $160,000 together with interest. etailed Contents**6.12 Whether 'cause shown' for the removal of a liquidator** (By John O'Grady and Alicia Ayton, Corrs Chambers Westgarth) In the matter of St Gregory's Armenian School (in liq) [2012] NSWSC 1215, Supreme Court of New South Wales, Brereton J, 9 October 2012 The full text of this judgment is available at:[http://www.caselaw.nsw.gov.au/action/pjudg?s=1000,jgmtid=161169](http://www.caselaw.nsw.gov.au/action/pjudg?s=1000,jgmtid=161169" \t "_new) **(a)  Summary** The Applicants (Mr Ghougassian and related companies) were secured and unsecured creditors of St Gregory's Armenian School Inc (the Association), an association incorporated under the [Associations Incorporation Act 1984 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3727" \t "_default) (the Associations Incorporation Act), which operated a school on property it owned in Beaumont Hills (the Property).  On 21 June 2010, an order was made for the Association to be wound up on the ground that it was insolvent. The Respondent, Mr Sutherland, was appointed by the court as liquidator of the Association. The Applicants objected to the liquidator's conduct in relation to the mortgages over the Property and other non-fixed assets of the Association. They applied for the removal and replacement of the Respondent as liquidator pursuant to section 473 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act). The basis for this application was an alleged lack of impartiality, diligence and competence by the liquidator in his conduct of the liquidation. Alternatively, the Applicants applied for an inquiry into the liquidator's conduct under section 536 of the Act, as well as leave to commence proceedings and seek damages against the liquidator for conversion of goods. Brereton J found that the liquidator had acted reasonably and that the evidence did not objectively demonstrate any lack of impartiality or of unreasonableness in the liquidator's dealings with the Applicants.  With regard to the application for an inquiry into the conduct of the liquidator, Brereton J found that it would be inappropriate to order an inquiry as the removal proceedings had already provided an opportunity for the Applicants' allegations to be examined. His Honour also refused to grant leave to commence the proceedings for damages due to the lack of sufficient prospects of success to justify a grant of leave and discretionary considerations. **(b) Facts**   The Association operated a school on the Property up until 21 June 2010. On 21 June 2010, an order was made for the Association to be wound up pursuant to section 51(1)(c) of the Associations Incorporation Act on the ground that the Association was insolvent. The Respondent, Mr Sutherland, was appointed by the court as liquidator of the Association. The First Applicant, Michael Ghougassian and his brother Daniel Ghougassian, were committee members of the Association, and were secured and unsecured creditors of the Association. The Second and Third Applicants, Nareg Internet Pty Ltd and Nareg Bookshop Pty Ltd, were companies owned or controlled by Michael Ghougassian and his wife, which operated from the Property, and claimed title to some of the goods located at the Property. The principal asset of the Association was the Property, which was subject to two registered mortgages, one to the Ghougassians (the Ghougassian Mortgage) and one to the Commonwealth Bank of Australia (CBA) (the CBA Mortgage), which had priority over the Ghougassian Mortgage. Aside from the two secured creditors, the Association also owed amounts to the Australian Tax Office, employees and former employees, and the Ghougassians for unsecured loans. In relation to the CBA Mortgage, the CBA had commenced proceedings seeking judgment against the Association and possession of the Property prior to the winding up order made on 21 June 2010. The proceedings ultimately resulted in the liquidator consenting to orders for default judgment in favour of CBA to be reinstated on 1 July 2010. CBA proceeded to sell the Property at auction on 14 December 2010 and discharged its mortgage with the proceeds. The Applicants complained that the liquidator had consented to reinstatement of the default judgment without due investigation of the merits of the defence and a potential cross-claim, and that the liquidator obstructed or did not facilitate the Ghougassians' efforts to refinance the CBA debt to avert a sale of the Property. With regard to the Ghougassian Mortgage, the liquidator sought and obtained orders that an account be taken of the amount secured by the Ghougassian Mortgage as the exact amount secured under the Deed of Loan was uncertain. The Applicants complained that this amounted to the liquidator refusing to acknowledge the validity of the Ghougassian Mortgage, and that the liquidator's treatment of the Ghougassian Mortgage was in marked contrast to the liquidator's treatment of the CBA Mortgage. With regard to the Association's non-fixed assets, the liquidator realised the assets before CBA possessed the Property, except for items which the Applicants claimed were their personal property, which were placed in storage. The Applicants argued that in realising the assets, the liquidator dealt with property claimed by the Applicants without their consent, with notice of their claim and without proper regard for their interests and had converted their property. The Applicants submitted that these actions of the liquidator demonstrated a lack of impartiality, diligence and competence expected of a liquidator, and required the removal of the liquidator under section 473 of the Corporations Act. **(c) Decision**  In deciding whether to remove the liquidator, Brereton J considered the 'show cause' test set out in section 473(1) of the Act and the following principles of the test recently summarised in SingTel Optus Pty Limited v Weston [2012] NSWSC 674. Firstly, the burden of showing cause for removal rests with the applicant, and Brereton J noted that this onus is not lightly discharged. Secondly, an order for removal of a liquidator will only be made if it is demonstrated that it would be 'for the better conduct of the [liquidation]' or 'to the general advantage of persons interested in the winding up' or 'in the best interests of the liquidation'.  Brereton J noted, citing Apple Computer Australia v Wily [2003] NSWSC 719, that 'cause shown' is a broad concept, and is more concerned with a general enquiry into what is for the benefit of the administration and interested persons than with a search for particular instances of wrong or inappropriate conduct. His Honour also noted that the mere existence of hostilities between the liquidator and a creditor or a mere loss of confidence in the liquidator is insufficient to found the removal of a liquidator. His Honour noted that while the 'show cause' test does not require the court to work through particulars of misconduct, in this case they provided a framework for an examination of the liquidator's conduct.With regard to the liquidator's treatment of the CBA Mortgage, his Honour held that the treatment was reasonable, and was not evidence of a lack of impartiality. His finding was based on the fact that the merits of a defence against the CBA judgment were weak, and that in any case, the Property would have had to be sold to pay debts. Further, his Honour held that there was no evidence to suggest that the liquidator obstructed or did not facilitate the refinancing of the CBA debt. While the liquidator was open to discussing solutions to avoid the sale of the Property, his Honour held that the options available to the liquidator were limited due to the short time frame and the specific circumstances, such as the Association's lack of commercial viability. His Honour also found that the liquidator's decision to commence proceedings for an account of the Ghougassian Mortgage was an entirely reasonable one. The differential approaches to the two mortgages were justified by differences between the claims, as CBA's claim was clear, documented and un-defendable, whereas the Ghougassians' claim was unclear, poorly documented and highly debatable as to quantum. His Honour also dismissed the Applicants' complaint relating to the liquidator's dealings with their goods. His Honour held that the liquidator did not disregard the claims of the Applicants, and where the title of the goods was disputed the liquidator removed these goods from the auction in a show of good faith.  His Honour ultimately held that the evidence did not reveal conduct on the part of the liquidator which a reasonable observer would perceive as a lack of impartiality, lack of objectivity or lack of competence. Further, as the liquidation was well-advanced, and no other creditor besides the Ghougassians was seeking or supporting the liquidator's removal, and given the accumulated knowledge and information of the liquidator, there would be inefficiencies and waste in replacing the liquidator.With regard to the application for a section 536 inquiry, Brereton J held that given the allegations had already been considered, it would be inappropriate to order an inquiry into the liquidator's conduct under section 536 of the Corporations Act. Brereton J also refused to grant leave to sue the liquidator for damages for conversion because there was no evidence of acts of conversion and because the Applicants knew the liquidator was planning to sell the goods and had an opportunity to prove title, but failed to do so.  Brereton J ordered that the Interlocutory Process be dismissed with costs.etailed Contents**6.13** **Breach of fiduciary duty between partners** (By Coralie Horsfall, Herbert Smith Freehills) Jacques v Forte Enterprises Pty Ltd [2012] NSWSC 1241, Supreme Court of New South Wales, Rein J, 14 September 2012 The full text of this judgment is available at:[http://www.caselaw.nsw.gov.au/action/pjudg?s=1000,jgmtid=161309](http://www.caselaw.nsw.gov.au/action/pjudg?s=1000,jgmtid=161309" \t "_new) **(a)  Summary** In this case, one partner breached his fiduciary duties to the other partner by failing to inform him of his personal interest, as a director and shareholder, in a company which had made an offer to buy the partnership property.  Furthermore, the partner failed to reasonably consider an alternative offer made by another company, due to his personal desire to ensure the partnership accepted the first company's offer.  In a decision based largely on the credibility of the two partners as witnesses, Rein J found in favour of the plaintiff and ordered damages for loss caused by failure to explore and potentially finalise the alternative purchase offer. **(b) Facts**   In 1988, the plaintiff, Mr Phillip Jacques (Mr Jacques), and the first and second defendants, Forte Enterprises Pty Ltd (Forte) and Ahtram Nominees Pty Ltd (Ahtram) formed a partnership, with assets consisting of a business and a property.  Forte is an investment vehicle for the third defendant, Mr George Senes (Mr Senes). In 1996, Mr Senes took over the interest of Ahtram so that in effect he held a two thirds interest in the partnership and Mr Jacques held the remaining third. In 1995, the business was struggling and kept afloat by loans from Mr Senes.  Mr Senes told Mr Jacques that he thought the partnership should consider developing the property and that he knew of two developers, Rod Hills and Paul Kelly, who might be interested in undertaking the development.  In July 1996, Mr Senes told Mr Jacques that the partnership could sell the land to Rod Hills, Paul Kelly and their company Landmark-Forum Pty Ltd (Landmark) for $2.8 million.  Landmark is a company established in July 1996, the shares in which were held by companies connected to Mr Senes, Rod Hills and Paul Kelly, and all three were directors of Landmark.  Mr Jacques was concerned that the sale of the property under this offer would yield no return to him as a partner, given nearly the entire amount would go to paying off the partnership's loans.  In August 1996, he obtained an offer, through a real estate agent, from Sterling Estates (SA) Pty Ltd (Sterling) which was worth to the partnership, in effect, $4.65 million (less selling costs).  As part of the deal, the partnership would receive eight apartments and $1.45 million at the end of the construction and sale process.  Mr Jacques told Mr Senes of the offer, who responded that he could not see the deal with Sterling as a genuine offer and did not want to investigate it further.  On 29 August 1996, Mr Jacques signed a call option agreement by which he agreed that Landmark could purchase his interest in the partnership.  Mr Jacques engaged a lawyer to negotiate the Landmark deal and the final offer amounted to $2.32 million being paid to the partnership plus Mr Jacques receiving certain other benefits, such as being permitted to take the gym equipment.On 1 November 1996, Mr Jacques, Mr Senes and Ahtram entered into the contract for the sale of the property to Landmark. Mr Jacques' case was that as a partner, Mr Senes owed him a fiduciary duty and that he had breached this duty by not disclosing his involvement in Landmark to Mr Jacques and not properly considering the offer from Sterling due to his personal interest and his desire that Landmark proceed with the development. **(c) Decision**  There was no dispute that the partnership gave rise to a fiduciary duty owed by each partner to the others: see Birtchnell v Equity Trustees Executors & Agency Co Ltd (1929) 42 CLR 384 at 407 per Dixon J. **(i) Disclosure of Mr Senes' interest in Landmark** During cross-examination, Mr Senes asserted that he believed he had told Mr Jacques of his interest in Landmark. After weighing the evidence of both Mr Jacques and Mr Senes, and taking into account the absence of any evidence of it in Mr Senes' affidavit, the expression of 'belief' and the absence of any precise conversation, Mr Senes' failure to admit the interest on the pleadings and Rein J's impression of Mr Senes' credibility generally, Rein J found that Mr Jacques did not know, at the time of the receipt of the Sterling offer and at the time of the execution of the call options, that Mr Senes was a director and 50 per cent shareholder of Landmark. **(ii) Proper consideration of the offer from Sterling** Rein J did not accept Mr Senes' evidence that he properly considered the Sterling offer stating that, even on Mr Senes' own evidence, he seemed to have reacted with a surprising lack of enthusiasm for what on its face appeared to be a very attractive offer. Rein J considered the conditions attached to the Sterling offer, including that the partnership would not receive any money under the deal for at least 12 months.  In contrast, the Landmark offer presented an immediate payment of money to the partnership. However, Rein J considered that immediate payment of $2.32 million under the Landmark offer had to be weighed against $4.65 million to be paid 12 or 18 months later under the Sterling offer. Rein J was satisfied that Mr Senes' rejection of the Sterling offer was based on his interest in Landmark and not on a proper consideration that the Sterling offer was inadequate or impracticable. **(iii) Breach of fiduciary duty** Rein J found that, given Mr Senes' failure to disclose his interest in Landmark and his rejection of the Sterling offer due to his own personal interests, Mr Senes breached the fiduciary duties of loyalty (Pilmer v The Duke Group (in liq) (2001) 207 CLR 165) and disclosure.  A partner cannot have a personal interest which is inconsistent with the interests of his partners unless there is fully informed consent (Chan v Zacharia (1984) 154 CLR 178 at 198-199). The situation was one in which independent legal advice would have been a necessary precondition to excusing the breach (Maguire & Tansey v Makaronis (1997) 188 CLR 449 at 466-467). Although Mr Jacques had obtained legal advice in relation to the Landmark offer, with the benefit of that advice being that he was able to negotiate a significantly improved result, he asserted that he did not discuss the Sterling offer with his lawyer. There was no evidence given to challenge this assertion and, given that the onus of establishing fully informed consent lies on the fiduciary, Rein J held that this advice did not amount to independent legal advice for the purposes of excusing the breach. **(iv) Loss of benefit and damage** Rein J considered the most appropriate method of assessing the loss caused by the failure to explore and potentially finalise the Sterling offer was to use a valuation of the eight units offered by Sterling as at October 1996 ($3.2 million), added to the $1.45 million residual value for the land which formed part of the Sterling offer, and:* discount this amount by 35% to allow for a number of uncertainties relating to the offer; and
* deduct from this the selling costs.

The figure arrived at after this calculation was $3,873,100, from which Rein J deducted numerous other amounts including the payment of a mortgage to ANZ Bank ($2.1 million) and payment of the amount owing to Mr Senes for his loans to the partnership ($472,000).  The final figure produced was $60,514 damages payable to Mr Jacques.etailed Contents |

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