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| **Bulletin No. 159**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).[Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/159%20November%202010.htm#h1) [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/159%20November%202010.htm#h2) [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/159%20November%202010.htm#h3) [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/159%20November%202010.htm#h4) [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/159%20November%202010.htm#h5) [Contributions](http://www.law.unimelb.edu.au/bulletins/159%20November%202010.htm#6) [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 G20 Seoul Summit report - financial sector reform**Following the Summit in Seoul on 10-12 November 2010, the G20 Leaders issued a document which commits to and details action in areas including the following:financial sector reforms: G20 members will take action at a national and international level to raise standards, to implement new bank capital and liquidity standards and to address too-big-to-fail issues; monetary and exchange rate policies; trade and development policies; fiscal policies; structural reforms; and reform of the International Monetary Fund. In relation to financial sector reforms, the Leaders state: "We also firmly recommitted to work in an internationally consistent and non-discriminatory manner to strengthen regulation and supervision on hedge funds, OTC derivatives and credit rating agencies. We reaffirmed the importance of fully implementing the FSB's standards for sound compensation. We endorsed the FSB's recommendations for implementing OTC derivatives market reforms, designed to fully implement our previous commitments in an internationally consistent manner, recognizing the importance of a level playing field. We asked the FSB to monitor the progress regularly. We welcomed ongoing work by the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions (IOSCO) on central counterparty standards. We also endorsed the FSB's principles on reducing reliance on external credit ratings. Standard setters, market participants, supervisors and central banks should not rely mechanistically on external credit ratings. "We re-emphasized the importance we place on achieving a single set of improved high quality global accounting standards and called on the International Accounting Standards Board and the Financial Accounting Standards Board to complete their convergence project by the end of 2011. We also encouraged the International Accounting Standards Board to further improve the involvement of stakeholders, including outreach to, and membership of, emerging market economies, in the process of setting the global standards, within the framework of independent accounting standard setting process. In addition, we reiterated our commitment to preventing non-cooperative jurisdictions from posing risks to the global financial system and welcomed the ongoing efforts by the FSB, Global Forum on Tax Transparency and Exchange of Information (Global Forum), and the Financial Action Task Force (FATF), based on comprehensive, consistent and transparent assessment." The document identifies the following areas of financial sector reform that warrant further work:macro-prudential policy frameworks; strengthening regulation and supervision of shadow banking; regulation and supervision of commodity derivative markets; and enhancing consumer protection. The statement is available on the [Seoul Summit website](http://media.seoulsummit.kr/contents/dlobo/E2._Seoul_Summit_Document.pdf%22%20%5Ct%20%22_new).etailed Contents**1.2 FSB report to G20 Leaders on global finance reforms**On 12 November 2010, the Financial Stablity Board (FSB) issued a [press release](http://www.financialstabilityboard.org/press/pr_101111b.pdf%22%20%5Ct%20%22_new) reporting to the G20 Leaders at the Seoul Summit on the progress and next steps in the implementation of the G20 recommendations for strengthening financial stability.  The FSB also issued: A [letter](http://www.financialstabilityboard.org/publications/r_101109.pdf%22%20%5Ct%20%22_new) from the FSB Chairman to the G20 Leaders. A [policy framework](http://www.financialstabilityboard.org/publications/r_101111a.pdf%22%20%5Ct%20%22_new) for reducing the moral hazard posed by systemically important financial institutions. A [report](http://www.financialstabilityboard.org/publications/r_101111b.pdf%22%20%5Ct%20%22_new) on progress in the implementation of the G20 recommendations for strengthening financial stability. This report deals with the following matters: building high quality capital and liquidity standards and mitigating procyclicality; addressing systemically important financial institutions (SIFIs) and resolution regimes; improving the OTC derivatives markets; strengthening accounting standards; strengthening adherence to international supervisory and regulatory standards; reforming compensation practices to support financial stability; developing macroprudential frameworks and tools; and expanding and refining the regulatory perimeter. etailed Contents**1.3 New European directive on hedge funds and private equity** On 11 November 2010, the European Parliament voted through the Directive on Alternative Investment Funds Managers (AIFMD). The final step is now formal approval by the Council which should happen in the next few weeks. The Directive should come into force in early 2011 and be transposed into national law and applied by Member States by 2013.  The overarching objective of the AIFMD is to create, for the first time, a comprehensive and secure framework for the supervision and prudential oversight of AIFM in the EU. Once the AIFMD enters into force, all AIFM will be required to obtain authorisation and will be subject to ongoing regulation and supervision. According to the European Commission, the AIFMD will:increase the transparency of AIFM towards investors, supervisors and the employees of the companies in which they invest; equip national supervisors, the European Securities Markets Agency ('ESMA') and the European Systemic Risk Board ('ESRB') with the information and tools necessary to monitor and respond to risks to the stability of the financial system that could be caused or amplified by AIFM activity; introduce a common and robust approach to the protection of investors in these funds; strengthen and deepen the single market, thereby creating the conditions for increased investor choice and competition in the EU, subject always to high and consistent regulatory standards; and increase the accountability of AIFM holding controlling stakes in companies (private equity) towards employees and the public at large.  For example, the AIFMD will require that:conflicts of interest are avoided, or managed and disclosed; AIFM employ adequate systems to manage risks to which the fund is exposed, and to ensure that the liquidity profile reflects the obligations towards investors; a fund's assets are safe-kept by an independent depositary subject to a high liability standard; valuation is performed properly and independently; strict conditions are met when AIFM delegate functions to third parties; and AIFM implement remuneration policies that are consistent with and promote sound risk management and do not encourage risk-taking which is inconsistent with the risk profile and fund rules of the funds managed.  Further information is available on the [European Commission website](http://ec.europa.eu/internal_market/investment/alternative_investments_en.htm%22%20%5Ct%20%22_new).etailed Contents**1.4 Central bankers analyse market structure developments in the clearing industry and the implications for financial stability** On 10 November 2010, the Committee on Payment and Settlement Systems (CPSS), which represents central bankers, published a report that examines developments in the clearing industry's market structure, their drivers and the implications for financial stability.  The report, 'Market structure developments in the clearing industry: implications for financial stability', first provides a broad overview of the clearing industry in CPSS countries, covering both traditional markets and OTC derivatives markets. Market structures can be classified in two dimensions: vertical versus horizontal structures, and integrated versus fragmented structures.  Second, the report assesses how far these developments have given rise to new risks. It further outlines practical issues that regulators and overseers may wish to consider, either as part of their oversight role or in the context of their broader financial stability remit. Furthermore, the report examines to what extent changes in market structure or ownership might affect the expansion of central clearing services. Finally, the effect of ownership on CCPs' incentives to manage counterparty risk is considered.  The report shows that different types of market structure have developed over the last decade. Specific market structures may create specific risks and amplify interdependencies between systems and markets. These warrant careful consideration by both market participants and the authorities. However, there is no evidence that the industry is settling on one particular structure. Nor is evidence found to suggest that one market structure is superior to another, either in terms of CCP risk management or in terms of wider systemic risk. In fact, many risks occur in several types of structures.  Nevertheless, central banks, regulators and overseers may usefully pay attention to specific risks that are more likely to occur in some market structures than in others. These include incentives to weaken the robustness of CCP risk controls that may in turn reduce the CCP's ability to manage a member default. Although some of the risks considered in the report have yet to materialise, CCPs and their regulators or overseers face significant future challenges, in particular as market structures in many countries continue to evolve. Hence, public authorities will need to continue applying rigorous and consistent oversight. For each type of market structure, the report provides a checklist of questions that central banks, regulators and overseers could use to that end.  The clearing industry's structure also has a bearing on how far central clearing will be used in different market segments, and hence on the resilience of the financial system as a whole. In fact, the broader risk-mitigating benefits of central clearing may be diluted if changes in market structure affect access to CCPs, raise the cost of central clearing or hamper the process of creating new CCP services. The report is available on the [Bank for International Settlements website](http://www.bis.org/publ/cpss92.htm%22%20%5Ct%20%22_new).etailed Contents**1.5 FSA consults on remuneration disclosure requirements**  On 10 November 2010, the UK Financial Services Authority (FSA) published a consultation paper on the implementation of remuneration disclosure requirements based on those set out in the Capital Requirements Directive (CRD3). CRD3 requires firms to disclose information on their remuneration policies and pay-outs on an annual basis. This is to be included in their disclosures under Basel Pillar 3. Many important elements of these requirements are derived from the Financial Stability Board's principles and standards on remuneration disclosure. The FSA is consulting on the following:Items to be disclosed - in brief, these are:information on the remuneration decision-making process; the link between pay and performance; the most important design characteristics of the remuneration system; performance criteria for assessment of remuneration; the main parameters and rationale for variable compensation; and aggregate quantitative information on total remuneration, variable remuneration, deferred remuneration, and sign-on and severance payments, in respect of senior management and staff with a material impact on the firm's risk profile. Frequency of disclosure - Firms will need to disclose details of their remuneration policies at least on an annual basis. The FSA will require firms to make their first disclosure in respect of 2010 remuneration as soon as practicable, and no later than 31 December 2011. Form of disclosure - Disclosure may take the form of a stand-alone report or may be included in a firm's annual report and accounts. Proportionality - CRD3 permits regulators to apply the rules on a proportionate basis, taking account of firms' size and complexity. The FSA intends to divide firms into four tiers based primarily on their regulatory capital and type of regulatory licence or permission. Each group will be subject to a different degree of disclosure as follows: Tier 1 firms - Full disclosure of all items under CRD3 - This will include around 26 very significant groups. The FSA expects firms of this size and complexity to observe the highest standards of disclosure. Tier 2 firms - Disclosure of most qualitative items (including design characteristics of remuneration) and selected quantitative items - The FSA expects this category to include some 200 major firms which will be expected to provide a high degree of disclosure, although some finer details need not be disclosed. Tier 3 firms - Disclosure of most qualitative items (excluding design characteristics of remuneration systems) and selected quantitative items - The FSA expects this category to include around 300 firms, which will be expected to provide a high degree of disclosure, although details such as the design characteristics of remuneration need not be disclosed. Tier 4 firms - Disclosure of basic qualitative and quantitative items only - The FSA expects this category to comprise over 2,000 firms with limited regulatory licences or permissions. These firms will be expected to disclose only basic qualitative and quantitative information on remuneration.  In addition, the FSA is seeking feedback on whether there would be any meaningful disadvantages in extending the scope of disclosure requirements to include non-EEA firms operating as branches in the UK. Separately, the FSA will publish a policy statement in response to wider changes to its Remuneration Code in December, following the finalisation of the CEBS guidelines on the implementation of the Code. The revised Remuneration Code will come into force on 1 January 2011. It will apply to awards paid out in respect of the 2010 remuneration round. Firms coming into the scope of the Code for the first time will be able to make use of transitional provisions to implement certain provisions of the Code over a period of six months. Consultation paper 10/27 is available on the [FSA website](http://www.fsa.gov.uk/pages/Library/Policy/CP/2010/10_27.shtml%22%20%5Ct%20%22_new).etailed Contents**1.6 New US market integrity rules**  The United States Securities and Exchange Commission (SEC) has both approved and proposed new rules to enhance the integrity of the US financial markets.  **(a) New rules prohibiting market maker stub quotes** On 8 November 2010, the SEC approved new rules proposed by the exchanges and FINRA to strengthen the minimum quoting standards for market makers and effectively prohibit "stub quotes" in the US equity markets.A stub quote is an offer to buy or sell a stock at a price so far away from the prevailing market that it is not intended to be executed, such as an order to buy at a penny or an offer to sell at $100,000. A market maker may enter stub quotes to nominally comply with its obligation to maintain a two-sided quotation at those times when it does not wish to actively provide liquidity. Executions against stub quotes represented a significant proportion of the trades that were executed at extreme prices on 6 May 2010 during the US market crash, and subsequently broken. The new rules address the problem of stub quotes by requiring market makers in exchange-listed equities to maintain continuous two-sided quotations during regular market hours that are within a certain percentage band of the national best bid and offer (NBBO). The band would vary based on different criteria. Further information is available on the [SEC website](http://www.sec.gov/news/press/2010/2010-216.htm%22%20%5Ct%20%22_new). **(b) Proposed rule to prevent fraud in connection with security based swaps** On 3 November 2010, the SEC proposed a new rule to help prevent fraud, manipulation, and deception in connection with security-based swaps. The rule is proposed under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which generally authorises the SEC to regulate security-based swaps. The proposal would ensure that market conduct in connection with the offer, purchase or sale of any security-based swap is subject to the same general anti-fraud provisions that apply to all securities. It also would explicitly reach misconduct in connection with ongoing payments and deliveries under a security-based swap. The SEC's rule proposal recognises that security-based swaps are unlike other securities because they are typically characterized by ongoing payments or deliveries between the parties throughout the life of the swap. Therefore, it is possible that one party may engage in misconduct to trigger, avoid, or affect the value of such ongoing payments. Such fraud may occur separately from the sale, purchase, or offering. The proposed antifraud rule would apply not only to offers, purchases and sales of security-based swaps, but also explicitly to the cash flows, payments, deliveries, and other ongoing obligations and rights that are specific to security-based swaps. The rule would make explicit the liability of persons that engage in misconduct to trigger, avoid, or affect the value of such ongoing payments or deliveries.  Further information is available on the [SEC website](http://www.sec.gov/news/press/2010/2010-212.htm%22%20%5Ct%20%22_new). **(c) New rule preventing unfiltered market access** On 3 November 2010, the SEC approved a new rule to require brokers and dealers to have risk controls in place before providing their customers with access to the market. The new rule focuses on a practice in which broker-dealers hand their customer a special pass to access the markets called a market participant identifier. The customer then gains direct access to the applicable exchange or alternative trading system (ATS), also known as "sponsored access". The rule prohibits broker-dealers from providing customers with "unfiltered" or "naked" access to an exchange or ATS. It also requires brokers with market access - including those who sponsor customers' access to an exchange or ATS - to put in place risk management controls and supervisory procedures to help prevent erroneous orders, ensure compliance with regulatory requirements, and enforce pre-set credit or capital thresholds. Through sponsored access - especially "unfiltered" or "naked" sponsored access arrangements - there is the potential that financial, regulatory and other risks associated with the placement of orders are not being appropriately managed. Of particular concern is the quality of broker-dealer risk controls in "unfiltered" access arrangements. In some cases, the broker may be relying on assurances from its customer that the customer has appropriate risk controls in place. Further information is available on the [SEC website](http://www.sec.gov/news/press/2010/2010-210.htm%22%20%5Ct%20%22_new).etailed Contents**1.7 European Commission consultation on credit rating agencies** On 5 November 2010, the European Commission launched a consultation on credit rating agencies (CRAs).  On 7 December 2010, a new EU regulatory framework applicable to the credit rating sector will come into force. New rules will require credit rating agencies to comply with rules of conduct in order to minimise potential for conflicts of interest, ensure higher quality ratings and greater transparency of ratings and the rating process. (See IP/09/629). The new consultation asks a series of questions to gather views from all stakeholders on possible initiatives to strengthen the regulatory framework further for credit rating agencies. Questions asked include:**Overreliance:** the recent euro debt crisis has renewed concerns that financial institutions and institutional investors may be relying too much on external credit ratings. The question should be asked as to whether it is right that European and national legislation refer to credit ratings, thus giving them a very important role, and whether alternatives could exist. The Commission therefore asks which measures could reduce this possible overreliance and increase disclosure by issuers of structured finance instruments in order to allow investors to carry out their own additional due diligence on a well-informed basis; **Improving sovereign debt ratings:** sovereign debt ratings play a crucial role for the rated countries, since a downgrading has the immediate effect of making a country's borrowing more expensive. Given the importance of these ratings, it is essential that ratings of this asset class are timely and transparent. While the EU regulatory framework for credit ratings already contains measures on disclosure and transparency that apply to sovereign debt ratings, further measures could be considered to improve transparency, monitoring, methodology and the process of sovereign debt ratings in EU; **Competition:** Only a handful of big firms make up the CRA sector. There are high barriers to entry. Concerns have been expressed that the rating of large multinationals and structured finance products is concentrated in the hands of only a few CRAs. This lack of competition could negatively impact the quality of credit ratings. The Commission asks what options exist to increase diversity in this sector; **Liability:** the rules on whether and under which conditions civil liability claims by investors against credit rating agencies are possible currently vary greatly between Member States. It is possible that these differences could result in CRAs or issuers shopping around, choosing jurisdictions under which civil liability is less likely. The Commission asks whether there is a need to consider introducing a civil liability regime in the EU regulatory framework for CRAs; and **Conflicts of interest:** The "issuer-pays" model raises questions of conflict of interest. This model is when issuers solicit and pay for the ratings of their own debt instruments. This model is the prevailing model among CRAs. As rating agencies have a financial interest in generating business from the issuers that seek the rating, this could lead to assigning higher ratings than warranted in order to encourage the issuer to conduct more business with them in future for example. It may also lead to practices of "rating shopping", which is when an issuer chooses a CRA on the basis of its likely rating. The Commission asks what evidence there is for such practices and whether alternative models would be possible.  On the basis of the replies to the consultation, the Commission will decide on the need for any measures in 2011. The consultation paper is available on the [Commission website](http://ec.europa.eu/internal_market/securities/agencies/index_en.htm%22%20%5Ct%20%22_new).etailed Contents**1.8 SEC proposes new whistleblower program under Dodd-Frank Act**On 3 November 2010, the United States Securities and Exchange Commission (SEC) published a proposed whistleblower program to reward individuals who provide the agency with high-quality tips that lead to successful enforcement actions. The SEC's proposed rule under the Dodd-Frank Wall Street Reform and Consumer Protection Act maps out a straightforward procedure for would-be whistleblowers to provide critical information to the agency. It conveys how would-be whistleblowers can qualify for an award through a transparent process that provides them a meaningful opportunity to assert their claim to an award.Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act authorizes the SEC to pay rewards to individuals who provide the Commission with original information that leads to successful SEC enforcement actions and certain related actions. Dodd-Frank substantially expands the agency's authority to compensate individuals who provide the SEC with information about violations of the federal securities laws. Prior to Dodd-Frank, the agency's bounty program was limited to insider trading cases, and the amount of an award was capped at 10 percent of the penalties collected in the action.  The new SEC whistleblower program is primarily intended to reward individuals who act early to expose violations and who provide significant evidence that helps the SEC bring successful cases. Under the proposed rules, a whistleblower is a person who provides information to the SEC relating to a potential violation of the securities laws. To be considered for an award, a whistleblower must voluntarily provide the SEC with original information about a violation of the federal securities laws that leads to the successful enforcement by the SEC of a federal court or administrative action in which the SEC obtains monetary sanctions totalling more than US $1 million. In general, a whistleblower is deemed to have provided information voluntarily if the whistleblower has provided information before the government, a self-regulatory organization, or if the Public Company Accounting Oversight Board asks for it. Original information must be based upon the whistleblower's independent knowledge or independent analysis, not already known to the Commission and not derived exclusively from certain public sources. A whistleblower's information can be deemed to have led to successful enforcement in two circumstances: (1) if the information results in a new examination or investigation being opened and significantly contributes to the success of a resulting enforcement action, or (2) if the conduct was already under investigation when the information was submitted, but the information is essential to the success of the action and would not have otherwise been obtained.  The rule proposal is available on the [SEC website](http://www.sec.gov/rules/proposed/2010/34-63237.pdf%22%20%5Ct%20%22_new).etailed Contents**1.9 Director survey of liability laws** On 1 November 2010, the Australian Institute of Company Directors (AICD) published the results of a survey of Australian company directors asking their views on laws that impose liability on directors. According to the AICD, a key finding of the survey is that laws imposing personal liability on directors are stifling business decision-making and that liability is having a serious detrimental impact on key aspects of corporate performance. **(a) Business decision-making and strategic focus**More than 90 per cent of those surveyed said that personal liability of directors had an impact on optimal business decision-making or outcomes. Sixty five per cent said this risk of personal liability caused them or their board to take an overly cautious approach to business decision-making, either frequently or occasionally. Seventeen per cent said this happened frequently and only 15 per cent said it had no impact. Seventy nine per cent said they are concerned that the time their board devotes to compliance with regulations detracts from them focusing on issues like enhancing corporate performance and productivity. More than 90 per cent said they are concerned about lost time and opportunity costs for companies defending actions brought as a result of automatic liability for directors under a wide range of legislation. **(b) Board recruitment and retention**Almost a third said they had personally declined an offer of a directorship primarily due to the risk of personal liability. More than 22 per cent said they had resigned from a position for that reason. Fifty seven per cent said they knew of other directors who had declined an offer of a directorship because of liability risk. Fifty two per cent knew of someone who had resigned from a board due to liability concerns. Almost three quarters of aspiring directors said the risk of personal liability had made them reconsider directorship as a career. **(c) Lack of business judgment defences**More than 73 per cent of respondents believe there is a medium to high risk of directors being found personally liable for business decisions they made in good faith. Fifty four per cent thought there were no reasonable defences or "safe harbours" for directors making decisions in good faith - the so-called "business judgment rule". More than 64 per cent said they were seriously concerned about being subject to criminal and civil penalties as a director. The survey involved 623 directors from a range of sectors, including ASX 200 companies, small and medium enterprises and not-for profit organisations, drawn from across the Australian Institute of Company Directors' membership of over 27,000. According to the AICD, the survey results highlight the impact of personal liability for directors embodied in provisions in hundreds of pieces of legislation at the Commonwealth, State and Territory levels. There are more than 700 State and Territory laws alone which impose personal liability on individual directors for corporate misconduct. That is, directors are liable simply because they are a director, even where they may not have had any personal involvement in a breach. In some states and under some legislation the onus of proof is reversed, removing the presumption of innocence, and there are very narrow legal defences and limited rights of appeal. The survey respondents singled out particularly Occupational Health and Safety legislation, especially in NSW, as a cause of concern, saying these laws influenced decisions about the location of investment and restricted business activity in that state. The survey is available on the [AICD website](http://www.companydirectors.com.au/%22%20%5Ct%20%22_new). etailed Contents**1.10 Financial Stability Board report on supervisory intensity and effectiveness** On 1 November 2010, the Financial Stability Board (FSB) published a report setting out recommendations for strengthening the intensity and effectiveness of systemically important financial institution (SIFI) supervision. The report is based on an internationally co-ordinated assessment of lessons from this crisis, and its key findings form part of the FSB's overall recommendations on reducing moral hazard risk associated with SIFIs. The financial crisis revealed that some national supervisory regimes failed to detect problems proactively and/or to intervene early enough to reduce the impact of stresses on large systemically important firms and ultimately on the financial system as a whole. This happened for different reasons in different jurisdictions but generally included weaknesses in: the directives that drive the work of these organisations; the powers and resources given to these organisations to deliver effective consolidated oversight and to address potential problems; the strength of the supervisory methods used and the standards against which these authorities are judged in international assessments; and the frequency with which self assessments are made of the methods deployed by supervisory authorities. The goal of the recommendations in the report is to strengthen the intensity and effectiveness of supervision, particularly as it relates to systemically important firms. Every jurisdiction must have a supervisory system that is up to the task of ensuring strict compliance with new regulations, delivering high quality risk assessments through the use of leading-edge risk detection methods, and intervening early to address problems in firms before those problems become too large to address in an orderly way. The report contains 32 recommendations which focus on achieving four key outcomes:**Unambiguous mandates, independence and appropriate resources:** All supervisory authorities will take steps to ensure that their supervisory authorities have unambiguous mandates, are free to act independently, and have access to the resources (quality and quantity) required to be effective. **Full suite of powers:** Where supervisory authorities lack a full suite of powers to carry out early intervention, actions will be taken to correct those shortcomings. **Improved set of standards and methods:** The expectations placed on supervisors must be higher. The standards against which supervisors are judged will be enhanced to reflect the higher complexity of the financial system and the firms that comprise it. The higher standards will also underscore the need to apply more intense supervisory techniques to SIFIs. **Stricter assessment regime:** Assessors should have stricter and more relevant criteria against which they can assess and drive supervisors to high quality work, alert authorities to potential weaknesses in their oversight processes, and ultimately raise the effectiveness of supervision internationally. The report is available on the [FSB website](http://www.financialstabilityboard.org/%22%20%5Ct%20%22_new).etailed Contents**1.11 IOSCO report on commodity futures markets**  On 1 November 2010, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a report by a Task Force it established dealing with commodity futures markets. The Task Force on Commodity Futures Markets was established in response to global concerns, including those voiced by the G-8 Finance Ministers, concerning price increases and volatility in oil prices. Responding to these concerns, the Task Force met and authored a report in March 2009 containing recommendations for improving commodity derivative regulation by securities and futures regulators. The G-20 Leaders endorsed these March 2009 recommendations in their September 2009 Pittsburgh Leaders' Statement, called on the Task Force to collect more oil market data and requested further recommendations on ways to reduce volatility in energy prices.  The report deals with the following matters: **(a) Over-the-counter commodity derivatives market transparency** The Task Force's work continues to be informed by the conclusion in its March 2009 Report that price discovery in the financial commodity markets, as well as analysis of the interactions between the financial and cash commodity markets, should be improved by promoting greater transparency across futures, over-the-counter (OTC) derivative and cash commodity markets.   **(b) Legislative initiatives relating to OTC markets** The Task Force notes that Japan and the United States have adopted OTC derivatives market reforms and the European Union has proposed OTC market reforms. Although this is complimentary to the Task Force work it is essential to understand the measures presented to the G-20 in answer to its call relating to financial markets. These legislative efforts will significantly improve the transparency and oversight of the OTC derivative market, including OTC financial oil products. They include measures to increase the percentage of transactions which are traded on platforms, to increase the percentage of transactions which must be submitted for clearing, to improve the proportion of transactions which are standardized and can be submitted for clearing; to improve post trade transparency; to provide for the reporting of transactions to trade repositories and to enhance markets' operational efficiency. **(c) Futures market transparency**  The Task Force has recommended that jurisdictions publish more aggregated open interest data. Certain Task Force members, particularly those with significant exchange-traded markets, are already moving toward gathering information and publishing reports covering their jurisdictions. **(d) Physical cash market transparency** Although the Task Force is constrained in its ability to advance greater transparency of underlying physical market transaction data due to lack of jurisdiction, the Task Force reiterates that information about the underlying commodity is key - indeed critical - for the satisfactory functioning of financial markets and reliable price discovery. The main purpose of financial futures and OTC derivatives markets is to express an expectation of future prices in the physical cash markets. So the basis on which these expectations are formed is critical. **(e) Price reporting agencies** IOSCO members responsible for the oversight of commodity futures and swap markets should examine their relevant market authority to determine whether the cash commodity reference price on which pricing of the futures or swaps is based is reliable. In circumstances where the reliability of cash market reference prices cannot be demonstrated, the relevant market authority should engage with the price reporting agency to develop a more robust price series. **(f) Ongoing work** The Task Force has committed to collaborating with the CMD and ISDA Commodities Steering Committee to work towards the formation of a trade repository for commodities. The initial focus will be on financial oil derivatives, considering the necessary details of each product and the data fields to be included. This work will be set against the context of legislative initiatives, detailed later in the report, which call for the setting up of trade repositories. The transparency and functioning of cash markets for commodities remains a prominent concern. In order to address this, the Task Force recommends that a detailed study of the issues facing physical markets from the impact of price reporting agencies be undertaken. An international physical market agency should coordinate to lead this study. The report is available on the [IOSCO website](http://www.iosco.org/%22%20%5Ct%20%22_new).etailed Contents**1.12 UK director remuneration: new study** On 29 October 2010, Incomes Data Services (IDS) published its latest Directors Pay Report of remuneration for FTSE directors for the year to June 2010. FTSE-100 directors saw their total remuneration boosted by an average of 55% while across the FTSE-350 as a whole total board pay went up by an average 45%. FTSE-100 chief executives received £4.9 million on average in total earnings during the year. The report shows there has been a dramatic reversal in fortunes in the last 12 months. While basic salary increases across the board were subdued, growing at just 3.6% for FTSE-100 chief executives, pay packages were boosted by a resurgence in bonus payments, the value of share option gains and separate long-term incentive plans (LTIPs).  While the FTSE-100 rose 14.5% on the year, bonuses were up by over a third, share option gains by over 90% and LTIPs by over 70%. Despite the increasing scrutiny of shareholders, FTSE-100 chief executives received bonus payments averaging £701,512, up 34% from last year (based on a matched sample).  Paper profits on exercised share options for the FTSE-350 nearly doubled this year, up from a total gain of £95 million to £183 million. The LTIP total payment amount across all FTSE-350 directors soared by 73%, from £150m to £259m. etailed Contents**1.13 Financial Stability Board publishes principles to reduce reliance on CRA ratings** On 27 October 2010, the Financial Stability Board (FSB) published 'Principles for Reducing Reliance on Credit Rating Agency (CRA) Ratings'. According to the FSB, the use (or "hard wiring") of CRA ratings in regulatory regimes for banks and other financial institutions has contributed significantly to mechanistic market reliance on ratings. This in turn is a cause of herding and cliff effects from CRA ratings changes that can amplify procyclicality and cause systemic disruption. But, more widely, the official "seal of approval" implied by the use CRA ratings in regulatory rules has contributed to an undesirable reduction in banks', institutional investors' and other market participants' own capacity for credit risk assessment and due diligence. The goal of the principles is to reduce mechanistic reliance on ratings and to incentivise improvements in independent credit risk assessment and due diligence capacity. Banks, market participants and institutional investors should be expected to make their own credit assessments, and not rely solely or mechanistically on CRA ratings. The design of regulations and other official sector actions should support this. Accordingly, authorities should assess references to CRA ratings in laws and regulations and, wherever possible, remove them or replace them by suitable alternative standards of creditworthiness. The principles aim to catalyse a significant change in existing practices. They cover the application of the broad objectives in five areas:prudential supervision of banks; policies of investment managers and institutional investors; central bank operations; private sector margin requirements; and disclosure requirements for issuers of securities. The principles are available on [FSB website](http://www.financialstabilityboard.org/%22%20%5Ct%20%22_new). etailed Contents**1.14 IOSCO proposes regulatory oversight principles for dark liquidity**  On 27 October 2010, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a consultation report titled 'Issues Raised by Dark Liquidity', containing principles to assist securities markets authorities in dealing with issues concerning dark liquidity. The principles are designed to: minimise the adverse impact of the increased use of dark pools and dark orders in transparent markets on the price discovery process; mitigate the effect of any potential fragmentation of information and liquidity; help to ensure that regulators have access to adequate information to monitor the use of dark pools and dark orders; help to ensure that investors have sufficient information so that they are able to understand the manner in which orders will be handled and executed; and increase the monitoring of dark orders and dark pools in order to facilitate an appropriate regulatory response. The Technical Committee, in developing these principles, focused on a number of areas which had been identified as possibly having adverse effects on the market. These included transparency and price discovery, market fragmentation, knowledge of trading intentions, fair access, and the ability to assess actual trading volume in dark pools. The proposed principles were developed taking into account the potential adverse market effects and a number of other issues surrounding the use of dark pools and dark orders in transparent markets including: the impact on the price discovery process where there is a substantial number of dark orders and/or orders submitted into dark pools which may or may not be published; the impact of potential fragmentation on information and liquidity searches; and the impact on market integrity due to possible differences in access to markets and information.   **Draft principles to address regulatory concerns**  Despite the concept of dark pools differing across jurisdictions, the draft principles will assist regulators in their assessment of their regulatory regimes surrounding dark pools and dark orders. As the same approach may not be suited to all platforms or types of trading, the implementation of the proposed principles may vary according to the type of trading and platform.  **(a) Transparency to market participants and issuers**  **Principle 1:** The price and volume of firm bids and offers should generally be transparent to the public. However, where regulators consider permitting different market structures or order types that do not provide pre-trade transparency, they should consider the impact of doing so on price discovery, fragmentation, fairness and overall market quality.  **Principle 2:** Information regarding trades, including those executed in dark pools or as a result of dark orders entered in transparent markets, should be transparent to the public. With respect to the specific information that should be made transparent, regulators should consider both the positive and negative impact of identifying a dark venue and/or the fact that the trade resulted from a dark order.  **(b) Priority of transparent orders** **Principle 3:** In those jurisdictions where dark trading is generally permitted, regulators should take steps to support the use of transparent orders rather than dark orders executed on transparent markets or orders submitted into dark pools. Transparent orders should have priority over dark orders at the same price within a trading venue.  **(c) Reporting to regulators** **Principle 4:** Regulators should have a reporting regime and/or means of accessing information regarding orders and trade information in venues that offer trading in dark pools or dark orders.  **(d) Information available to market participants about dark pools and dark orders**  **Principle 5:** Dark pools and transparent markets that offer dark orders should provide market participants with sufficient information so that they are able to understand the manner in which orders are handled and executed.  **(e) Regulation of the development of dark pools and dark orders**  **Principle 6:** Regulators should periodically monitor the development of dark pools and dark orders in their jurisdictions to seek to ensure that such developments do not adversely affect the efficiency of the price formation process on displayed markets, and take appropriate action as needed.  The consultation report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD336.pdf%22%20%5Ct%20%22_new).etailed Contents**1.15 Guidance on handling confidential, price-sensitive information** On 26 October 2010, Chartered Secretaries Australia (CSA) and the Australasian Investor Relations Association (AIRA) released new guidelines to aid listed entities develop processes to maximise the protection of confidential price-sensitive information. The publication titled 'Handling confidential price-sensitive information: principles of good practice' has been developed in response to the Australian Securities and Investments Commission's (ASIC) consultation with industry stakeholders regarding the need for guidance on this issue.The guide highlights five principles of good practice, jointly developed by CSA and AIRA, which are applicable in the context of capital raisings, mergers and acquisitions and other corporate transactions which corporations may undertake. The principles are:Have internal systems in place to protect confidential price-sensitive information. Maintain an insider list when conducting a confidential price-sensitive transaction. Ensure directors, executives and employees are aware of their confidentiality obligations. Enter into confidentiality agreements with advisers and other service providers before passing on confidential price-sensitive information. Know which potential investors are being sounded on their behalf (and when and how) in relation to a transaction. The publication is available on the [CSA website](http://www.csaust.com/AM/Template.cfm?Section=Handling_Confidential_Information&Template=/CM/ContentDisplay.cfm&ContentID=16766" \t "_new).etailed Contents**1.16 Review of corporate governance and short-termism**  On 25 October 2010, the UK Secretary of State for Business launched a review to consider whether there are failures in corporate governance and the markets.  A consultation paper has been published, 'A Long Term Focus for Corporate Britain', which aims to investigate issues including the problems of short-termism, investor engagement, directors' remuneration and the economic case for takeovers. It also asks:Do boards understand the long-term implications of takeovers, and communicate the long-term implications of bids effectively? What are the implications of the changing nature of UK share ownership for corporate governance and capital markets? Whether disclosure of directors' pay should be more transparent? Do shareholders and investors focus too much on the short-term? The consultation paper is available on the [BIS website](http://www.bis.gov.uk/newsroom%22%20%5Ct%20%22_new).etailed Contents**1.17 Report on improving OTC derivatives markets** On 25 October 2010, the Financial Stability Board (FSB) published a report titled 'Implementing OTC Derivatives Market Reforms'. The report responds to calls by G20 Leaders to improve the functioning, transparency and regulatory oversight of over-the-counter (OTC) derivatives markets. The recent financial crisis exposed weaknesses in the structure of these markets that contributed to the build-up of systemic risk. While markets in certain OTC derivatives asset classes continued to function well throughout the crisis, the crisis demonstrated the potential for contagion arising from the interconnectedness of OTC derivatives market participants and the limited transparency of counterparty relationships. The report sets out common approaches to implementing reforms to OTC derivatives markets in an internationally consistent and non-discriminatory way. It was produced by a working group comprising international standard setters and authorities responsible for translating the G20 commitments into standards and implementing regulations. The report sets out 21 recommendations addressing implementation of the G20 commitments concerning standardisation, central clearing, organised platform trading, and reporting to trade repositories:**Standardisation:** The proportion of the market that is standardised should be substantially increased. Authorities should work with market participants to increase standardisation, including through introducing incentives and, where appropriate, regulation. **Central clearing:** All standardised derivatives should be centrally cleared in order to mitigate systemic risk. The report sets out the factors that should be taken into account when determining whether a derivative contract is standardised and should be centrally cleared. The recommendations also address mandatory clearing requirements; robust risk management requirements for the remaining non-centrally cleared markets; and supervision, oversight and regulation of central counterparties (CCPs). **Exchange or electronic platform trading:** IOSCO will complete an analysis by end-January 2011 identifying the actions that may be needed to fully achieve the G20 commitment that all standardised products be traded on exchanges or electronic trading platforms, where appropriate. **Reporting to trade repositories:** Authorities must have a global view of the OTC derivatives markets, through full and timely access to the data needed to carry out their respective mandates. All OTC derivatives transactions must be reported to trade repositories. Trade repository data must be comprehensive, uniform and reliable and, if from more than one source, provided in a form that facilitates aggregation on a global scale.   A key message of the report is the need to improve the availability of data on the OTC derivatives market as an input to policymaking to promote financial stability, as well as for monitoring whether targets to bring all standardised derivatives into central clearing are being met. Trade repositories will help to fill this gap, but a high level of coordination is necessary to ensure accessibility and usefulness of data on a global scale. The report is available on the [FSB website](http://www.financialstabilityboard.org/%22%20%5Ct%20%22_new).etailed Contents**1.18 New terms of reference published for improving board effectiveness** On 21 October 2010, the UK Institute of Chartered Secretaries (ICSA) published the terms of reference for board committees covering the audit, risk, nomination and remuneration committees. Aimed primarily at the corporate sector, the terms of reference draw on the experience of company secretaries and outline the role and responsibilities of each committee. They are based on good practice in some of the UK's top listed companies and are designed for those companies seeking to be fully compliant with the recommendations in the UK Corporate Governance Code and the Walker Review. Areas covered include duties, membership and frequency of meetings, reporting responsibilities and notice and minutes of meetings.The terms of reference are available on the [ICSA website](http://www.icsa.org.uk/about-icsa/latest-from-icsa/article/icsa-publishes-new-terms-of-reference%22%20%5Ct%20%22_new).etailed Contents**1.19 History of Australian corporate law - new website**The Centre for Corporate Law and Securities Regulation at Melbourne Law School has established a new section on its website dealing with the history of Australian corporate law. This section of the Centre's website provides links to key documents in the history of Australian corporate law. It also includes relevant UK documents. The objective is to provide a valuable resource for those researching Australian corporate law.The Centre's website is: [http://cclsr.law.unimelb.edu.au/](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new)etailed Contents |

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

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| **2.1 ASIC sets out expectations of lender practices on mortgage early termination fees** On 10 November 2010, ASIC published guidance for mortgage lenders that sets out how provisions in the National Credit Code and unfair contract terms law apply to mortgage early termination fees (exit fees). This follows consultation leading up to and after the 1 July 2010 start date for the new legislation. Regulatory Guide 220 'Early termination fees for residential loans: unconscionable fees and unfair contract terms' (RG 220) spells out ASIC's guidance on points including:what costs and types of loss can be included in exit fees; types of loss that should not be recovered through exit fees; and the limited circumstances in which a lender may vary exit fees during the life of a mortgage. The applicable laws, under which an exit fee can be challenged in court, are:the National Credit Code which is part of the [National Consumer Credit Protection Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "Default); and the [Australian Securities and Investments Commission Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default) (ASIC Act). The National Credit Code applies to home mortgages that were already in existence on 1 July 2010, or which have been established since then. The Code allows courts to review certain lender's charges - referred to the courts by ASIC or a consumer - on the grounds they are unconscionable.  Under the Code, a court can annul or reduce an exit or pre-payment fee if the court determines it exceeds a reasonable estimate of the lender's loss arising from early termination or pre-payment (i.e. the fees are found to be unconscionable under the National Consumer Credit Protection Act).  Under the unfair contract terms provisions of the ASIC Act, terms in a contract are unfair if:they would cause a significant imbalance in the parties' rights and obligations arising under the contract; they are not reasonably necessary to protect the legitimate interests of the party who would be advantaged by them; and they would cause detriment (financial or otherwise) if they were to be relied on.   In order to be 'unfair' under the unfair contract terms provisions, terms in a contract must meet all three tests. A court can declare terms void if the court finds the terms are unfair. The court may also make orders directed at redressing the loss suffered by consumers as a result of the unfair terms.  Under the National Consumer Credit Protection Act, lenders must be a member of an ASIC-approved EDR scheme. The two approved schemes are the Financial Ombudsman Service and the Credit Ombudsman Service Limited.  Regulatory Guide 220 is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg220.pdf/%24file/rg220.pdf%22%20%5Ct%20%22_new).etailed Contents**2.2 Guidance to improve margin lending disclosure**On 10 November 2010, ASIC published regulatory guidance which aims to improve protections for retail clients through better disclosure of non-standard margin lending facilities. Non-standard margin lending facilities are margin lending arrangements that use a type of 'securities lending' agreement instead of a loan agreement. Until 2008, non-standard margin lending facilities were used by companies such as Opes Prime Stockbroking Limited and Tricom Equities Limited. The key difference between standard and non-standard margin lending facilities is that in a non-standard margin lending facility, ownership of the securities under the margin loan passes to the lender and may pass to the lender's financiers. This can create significant risks for investors.Regulatory Guide 219 'Non-standard margin lending facilities: Disclosure to investors' outlines the information that ASIC expects a provider to include in a Product Disclosure Statement (PDS) for a non-standard margin lending facility. These requirements include:how the product differs from a standard margin lending facility; an explanation of the transfer of securities from the client to the provider of the facility and the risks associated with that transfer; a clear warning to the client of their responsibility to monitor the margin under the facility; and an explanation of the tax consequences of the transaction, together with a stark warning that the client should seek tax advice before entering into the transaction. Regulatory Guide 219 is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg219.pdf/%24file/rg219.pdf%22%20%5Ct%20%22_new).etailed Contents**2.3 Guidance on administrative powers to enforce new consumer credit legislation**On 10 November 2010, ASIC published new regulatory guidance to help the credit industry better understand ASIC's administrative powers to enforce the new consumer credit legislation.Under the [National Consumer Credit Protection Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "Default) (National Credit Act), which came into effect on 1 July 2010, ASIC has a number of powers available to it to enforce the law, including through criminal, civil, and administrative remedies.Regulatory Guide 218 'Licensing: Administrative action against persons engaging in credit activities' (RG 218) describes the administrative powers that are available to ASIC to enforce the new legislation. Such powers include, for example, suspending or cancelling a credit licence, banning a person from engaging in credit activities, or varying or imposing conditions on a licence.ASIC's powers are effective in the transition to the new legislation (i.e. until 1 July 2011), and beyond that date. In exercising its powers under the National Credit Act, ASIC's priority is to protect the public and reinforce the integrity of the consumer credit industry.RG 218 outlines the matters ASIC takes into account in determining whether administrative action is the most appropriate response in a particular case (relevant matters could include, for example, the nature and seriousness of suspected misconduct; the previous regulatory record of the licensee). RG 218 also provides some indicative guidance on the kinds of factors ASIC will consider when determining the length of a banning order, including providing examples of relevant misconduct for illustration.While ASIC assesses each matter on a case-by-case basis, the non-prescriptive factors - and the examples - set out in RG 218, are intended to provide transparency as to how ASIC determines the most appropriate regulatory response in a case.Under the National Credit Act, ASIC is responsible for regulating persons who engage in consumer credit activities, including by licensing those people, monitoring licensees for on-going compliance, and taking action - including the type of action described in RG 218 - where the law is breached by a licensee or a person who acts on behalf of a licensee. Regulatory Guide 218 is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg218.pdf/%24file/rg218.pdf%22%20%5Ct%20%22_new).etailed Contents**2.4 ASIC consults on equity market structure regulatory framework**On 4 November 2010, ASIC released a consultation package on enhancing regulation of Australia's equity markets, including the introduction of competition between exchange markets. The consultation package includes an overview summary document (this reproduces Part 1 of the consultation paper), a detailed consultation paper, draft market integrity rules and a supporting economic report on equity market structure.Consultation Paper 145 'Australian equity market structure' (CP 145) and ASIC's report on the 'Australian equity market structure' (REP 215) reviews recent and likely trends in global and Australian equity markets including the 6 May 'flash crash' in the US, high-frequency and algorithmic trading and the lessons from other jurisdictions that have introduced competition between exchange markets. Equity markets globally are undergoing considerable change and they are now overwhelmingly electronic and automated. Specifically CP 145 covers: new controls to curb extreme price movements and to require transparent cancellation arrangements - in response to the 'flash crash'; enhanced controls for direct electronic access and algorithmic trading - in response to the increasingly pervasive role of technology; formal obligations on market participants - to deliver best execution to clients; minimum disclosure about order and trade information - to promote efficient price formation on markets and reduce incentives for trading to shift to 'dark pools'; consolidation of market data across all execution venues - to ensure whole of market transparency; market operator cooperation on trading halts and related matters; and better regulatory data on orders and trades - to ensure ASIC's market supervision keeps pace with market developments. The following documents are available on the ASIC website: [Australian equity market structure - Background](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/10-227MR-Background.pdf/%24file/10-227MR-Background.pdf%22%20%5Ct%20%22_new) (this document provides information relating to the consultation process in the form of questions and answers)[Overview of Consultation Paper 145 and Report 215 - Australian equity market structure](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Overview-CP145-and-REP215.pdf/%24file/Overview-CP145-and-REP215.pdf%22%20%5Ct%20%22_new) (this document reproduces Part 1 of the consultation paper CP 145) [Consultation Paper 145 Australian equity market structure: Proposals](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp-145.pdf/%24file/cp-145.pdf%22%20%5Ct%20%22_new) [Report 215 Australian equity market structure](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep-215.pdf/%24file/rep-215.pdf%22%20%5Ct%20%22_new) [Australian equity market structure: draft market integrity rules](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/DraftMIR-Australian-Equity-Market-Structure.pdf/%24file/DraftMIR-Australian-Equity-Market-Structure.pdf%22%20%5Ct%20%22_new) etailed Contents**2.5 ASIC consults on telephone sales of general insurance products**On 28 October 2010, ASIC released a consultation paper regarding the requirement to provide retail clients with Product Disclosure Statements (PDSs) in instances where they are invited to apply for a general insurance product (in the form of a quote for a particular insurance policy) during a telephone call. Under the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act), a quote may be an invitation to a retail client to apply for the issue of a particular insurance policy on the terms specified in the quote. As the quote may constitute an 'offer to issue' that particular policy, a PDS must be given at, or before the time, the quote is provided.ASIC's Consultation Paper 144 titled 'Time for Giving a PDS During Telephone Sales of General insurance Products' (CP 144) outlines relief under consideration by ASIC.ASIC's proposals are set out in Section B of the consultation paper. ASIC is considering whether it would be appropriate to give class order relief to:allow some quotes for general insurance products to be provided in the course of telephone calls without giving a PDS at, or before, the time when a quote is provided; and require a regulated person who provides a quote without giving a PDS to instead: (i) give the client the PDS as soon as practicable, and before the client applies for the policy that is the subject of the quote; and(ii) provide the retail client with certain information before providing the quote. ASIC invites feedback from consumers, product issuers and financial services professionals on whether: the current PDS requirements result in significant commercial difficulties for general insurers marketing their products to retail clients in an efficient and cost-effective way; and consumer detriment would likely result from the proposed change. ASIC is seeking feedback on these proposals by 9 December 2010. **Background**ASIC has received submissions from the general insurance industry that the requirement to give a PDS at, or before, the time of making an invitation to apply for the issue of a financial product is not appropriate where:a retail client is given an invitation to apply for a general insurance product in the form of a quote for the premium payable on a particular insurance policy; and the invitation is made in the course of a telephone call. ASIC does not currently have sufficient information about whether limitations on the ability to provide a quote in a telephone call is a widespread problem in practice for the general insurance industry that would warrant either class order relief or law reform. The consultation paper is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp144.pdf/%24file/cp144.pdf%22%20%5Ct%20%22_new).etailed Contents**2.6 Review of superannuation PDSs underlines need for high-quality disclosure to consumers**On 28 October 2010, ASIC issued a media release in which it stated that product disclosure statements (PDSs) for superannuation products could be improved considerably by keeping disclosure up to date, making them more informative and easier to understand for consumers.In 2010, ASIC reviewed the quality of 200 PDSs for superannuation products. The review covered different types of issuers and superannuation funds with a range of different business models. Content requirements for PDSs are primarily set out in Part 7.9 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). ASIC has released a report on its review of the superannuation PDSs, Report 214 titled 'Review of Superannuation'. The review found superannuation PDSs that were not up to date and, in particular, did not include the reduced concessional contribution caps announced by the Government in the 2009 Budget. Consumers may rely on this information and over-contribute superannuation contributions, which can have serious tax consequences.While superannuation PDS requirements are about to change - to introduce shorter and simpler PDSs - ASIC says many of its findings would apply to shorter and simpler PDSs as well as the current long-form ones. Shorter and simpler PDSs are required from 22 June 2011 for all new superannuation products (and simple managed investment schemes) and from 1 January 2011 for standard margin-lending facilities.ASIC has acted to improve deficient PDSs found in the review, often by reaching agreement with PDS issuers, who have generally been responsive to ASIC's concerns. ASIC is also discussing disclosure issues with the superannuation industry as a result of this review and in the lead-up to the simpler and shorter PDS requirements. The report is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep214.pdf/%24file/rep214.pdf%22%20%5Ct%20%22_new).etailed Contents |

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

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| **3.1 ASX - SGX merger proposal** As noted in the [previous issue](http://my.lawlex.com.au/news.asp?id=8384&sp=1" \t "_new) of the Corporate Law Bulletin, on 25 October 2010 ASX Limited (ASX) and Singapore Exchange Limited (SGX) entered into a merger implementation agreement to create the premier international exchange in Asia Pacific. The proposal aims to generate significant benefits for Australian investors, listed companies and market participants, and will not alter the existing market integrity protections such as ASX listing rules, ASX Corporate Governance Council principles, and ASIC and RBA regulatory oversight. The merger proposal is subject to a number of government, regulatory and shareholder approval processes including a Parliamentary process to lift the current ownership restrictions that apply to ASX.  If approved, the merger is expected to be implemented during the second quarter of 2011. Further information about the merger proposal is available from the [ASX website](http://www.asx.com.au/about/shareholder/asx_sgx.htm%22%20%5Ct%20%22_new).etailed Contents**3.2 IRESS and ASX launching new market connectivity initiatives** On 27 October 2010, ASX and IRESS Market Technology announced that they are working together to offer an integrated IRESS trading solution for VolumeMatch, ASX's new large order execution service, by 31 January 2011. The IRESS platform will also offer trading for ASX PureMatch, an ultra-low latency execution facility for the top 200 ASX listed securities, planned for introduction by ASX later in 2011. IRESS already handles automated routing to ASX TradeMatch, including smart-routing to ASX Centre Point. As part of these new market access initiatives, ASX and IRESS have also agreed that IRESS will be a foundation customer of the new ASX co-location facility. The media release is available on the [ASX website](http://www.asx.com.au/about/pdf/20101027_iress_and_asx_launching_new_market_connectivity_ini.pdf%22%20%5Ct%20%22_new).etailed Contents**3.3 Reports** On 4 November 2010, ASX released the following reports for October 2010:the [ASX Group Monthly Activity Report](http://www.asx.com.au/about/pdf/20101104_asx_group_monthly_activity_report_oct_2010.pdf%22%20%5Ct%20%22_new); the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2010/notice2010_180.pdf%22%20%5Ct%20%22_new); and the [ASX Compliance Monthly Activity Report](http://www.asx.com.au/about/pdf/20101104_asx_compliance_monthly_activity_report_oct_2010.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 Leighton Holdings Limited - Panel declines to conduct proceedings and publishes reasons** On 8 November 2010, the Takeovers Panel announced that it has declined to conduct proceedings on the following three applications in relation to the affairs of Leighton Holdings Limited:an application dated 25 October 2010 from Leighton seeking a declaration of unacceptable circumstances (Leighton 01); an application dated 26 October 2010 from Hochtief Aktiengesellschaft seeking a declaration of unacceptable circumstances (Leighton 02); and an application dated 26 October 2010 from Hochtief seeking a review of two decisions of ASIC (Leighton 03). The applications concerned whether governance arrangements between Leighton and Hochtief, or a downstream bid for Leighton, should be ordered following the announcement of the proposed acquisition of additional shares in Hochtief by Actividades de Construcción y Servicios SA (ACS).  Hochtief holds 54.48% of Leighton (see TP10/63).  The three applications were considered together in one proceeding as they involved related matters.  The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable and no reasonable prospect of it reversing an ASIC decision not to modify the law.  The Panel's reasons can be found on the [Panel's website](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new).  Hochtief has announced that it is seeking a review of the decision of the Panel in Leighton 02.etailed Contents |

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

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| **5.1 Use of section 447A of the Corporations Act to cure invalid appointment of administrators** (By Sabrina Ng and Ellen White, Corrs Chambers Westgarth) Re Australian Property Custodian Holdings Ltd (administrators appointed) (receivers and managers appointed) [2010] VSC 492, Supreme Court of Victoria, Sifris J, 29 October 2010 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/vic/VSC/2010/492.html](http://www.austlii.edu.au/au/cases/vic/VSC/2010/492.html%22%20%5Ct%20%22_new)  **(a) Summary** A secured creditor purported to appoint an administrator to a company pursuant to section 436C of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act").  The court found that the terms of section 436C had not been satisfied, as the secured creditor's charge was not over "the whole, or substantially the whole" of the company's property. The court was required to determine whether section 447A of the Act could be used to validate the appointment.  It was held that section 447A could not be used to validate the invalid appointment by the secured creditor.  However, the court was prepared to use section 447A to make orders to the effect that the directors had made a valid appointment under section 436A of the Act in order to give effect to the intention of the parties. **(b) Facts**  Daytree Pty Ltd ("Daytree") was a secured creditor of Australian Property Custodian Holdings Limited ("the Company") by virtue of a registered charge dated 23 July 2008 ("the Charge").  Daytree appointed two individuals ("the Administrators") as joint and several administrators of the Company pursuant to section 436C of the Act. The Company:was the Responsible Entity of a trust known as the Prime Retirement and Aged Care Property Trust ("the Trust"); and held an Australian Financial Services Licence ("AFSL").  It was a condition of the AFSL that the assets of the Trust and a term deposit in the amount of $5,000,000 at the National Australia Bank be excluded from the operation of the Charge. As at June 2010, the balance sheet of the Company disclosed total assets of $15,751,942.63, and liabilities of $10,709,020.58. The Company had 18 wholly owned subsidiaries (Subsidiaries).  On and following Daytree's appointment of the Administrators to the Company, the directors of the Subsidiaries resolved that the Subsidiaries should be placed into administration and that the Administrators should be appointed as joint and several administrators of the Subsidiaries. **(c) Decision**  The issues which arose to be determined were the validity of the appointment of the Administrators to the Company, and whether any invalidity could be dealt with by the application of section 447A of the Act. **(i) Appointment of Administrators** Section 436C(1) of the Act is in the following terms:"A person who is entitled to enforce a charge on the whole, or substantially the whole, of a company's property may by writing appoint an administrator of the company if the charge has become, and is still, enforceable." The National Australia Bank argued that Daytree's appointment of the Administrators was invalid because the Charge was not over "the whole, or substantially the whole" of the Company's property.  Justice Sifris accepted this argument, noting that the AFSL excluded $5,000,000 from the operation of the Charge, leaving only 68% of the Company's assets in favour of Daytree.  His Honour considered that the $5,000,000 deposit was a significant asset of the Company, and as such Daytree's Charge did not meet the criteria of section 436C of the Act. For these reasons, Sifris J concluded that the appointment of the Administrators to the Company was invalid.  There was no attack on the validity of the directors' appointment of the Administrators to the Subsidiaries pursuant to section 436A of the Act, as Sifris J noted that there was no evidence to suggest that the directors would have taken a different approach had the Company not been placed into administration by the actions of Daytree. **(ii) Validation of appointment by Daytree** An application was made to validate the appointment of the Administrators to the Company.  Section 447A(1) is in the following terms:"The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company." Justice Sifris noted that the courts have interpreted the section "very broadly", including to cure defective appointments.  While his Honour hinted that section 447A may be broad enough to overcome section 436C's requirement that the Charge be over "the whole, or substantially the whole" of the Company's property, Sifris J noted that he did "not regard this as a suitable case to decide the issue or the outer limits or further limits of section 447A".  In addition, his Honour noted that there were important reasons for the difference in application of provisions allowing a secured creditor, versus a director, to place a company into administration. For these reasons, Sifris J concluded that section 447A should not be enlivened to cure Daytree's invalid appointment of the Administrators.   **(iii) Retrospective appointment by directors** While concluding that Daytree's appointment could not be cured by section 447A, his Honour went on to consider whether the section could be used to make an order that the directors of the Company had made a valid appointment of the Administrators. Evidence was presented to the effect that the directors had formed the view that the Company was insolvent, or nearing insolvency. Justice Sifris formed the view that the only reason that the directors had not appointed the Administrators to the Company themselves was because Daytree had already taken action to do so, and the appointment was assumed to be valid.  It was clearly then the intention of the directors that the Administrators be appointed both to the Company and the Subsidiaries. Justice Sifris considered authorities dealing with retrospective operation of orders under section 447A (including Panasystems Pty Ltd v Voodoo Tech Pty Ltd [2003] FCA 428 and In Re Couris; EPromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq) [2003] NSWSC 702 ("Couris").  Justice Sifris agreed with the reasoning expressed in Couris to the effect that section 447A is similar to the court granting leave to a party to do something (notwithstanding that some procedural provision has not been complied with).  In such circumstances, from the date of the relevant order the other party is not entitled to rely on past invalidity of the action. In applying the reasoning to the present circumstances, Sifris J found that the making of an order that the Company's directors had appointed the Administrators to the Company "merely regularises what was always intended and what the parties thought the situation to be".  Justice Sifris considered that had Daytree not appointed the Administrators, the directors would certainly have taken action to put the Company into administration pursuant to section 436A.  The use of section 447A to treat this as having been done was determined by Sifris J to be an appropriate application of the provision.  Following this case, it is important to note that while the courts indicate that section 447A of the Act is of broad application, there is an unwillingness to employ the provision to alter the fundamental operation of other provisions of the Act, in circumstances where a less radical option is open.  Further, the provision can be used in a retrospective sense to regularise the conduct of the parties.etailed Contents**5.2 Inherent jurisdiction of the court to recall and substitute orders that have unforeseen or unintended legal consequences** (By Aaron Shute, Blake Dawson) VFS Group Pty Ltd v BM2008 Pty Ltd (in liq) [2010] VSCA 277, Supreme Court of Victoria Court of Appeal, Nettle, Harper and Tate JJA, 22 October 2010 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/vic/VSCA/2010/277.html](http://www.austlii.edu.au/au/cases/vic/VSCA/2010/277.html%22%20%5Ct%20%22_new)   **(a) Summary** This case considered whether an Associate Judge had acted within power in recalling and substituting orders that extended the period for compliance with a statutory demand.  This involved consideration of whether an erroneous assumption made by the Associate Judge as to the legal consequences of the orders meant that the decision to recall and substitute the orders was within the inherent jurisdiction of the Court.  The Court held (amongst other things) that the Associate Judge had acted within power pursuant to its inherent jurisdiction.  The Court extended the period for compliance with the statutory demands and remitted the appeals to the trial Judge for determination. **(b) Facts**  BM2008 Pty Ltd (In Liquidation) (ACN 005 762 685) ("respondent") served on VFS Group Pty Ltd (ACN 121 880 751) and Perth Freight Lines Pty Ltd (ACN 129 516 990) (together as the "appellants") statutory demands requiring payment of a judgment debt of $2,577,072.49.  In response, the appellants filed applications under sections 459G and 459J of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the "Act") to set aside the statutory demands on the basis of an offsetting claim. The period for compliance with a statutory demand under section 459F(2)(b) of the Act is 21 days after the demand is served.  However, a Court on hearing an application to set aside a statutory demand may make an order pursuant to section 459F(2)(a) of the Act to extend the period for compliance with the demand. Efthim AsJ made orders extending the period for compliance with the statutory demands and varying the amount of the debt to $1,948,516.54.  The appellants lodged appeals against the dismissal of the applications to set aside the statutory demands.  The evidence established that Efthim AsJ had misunderstood the effect of such appellate proceedings on the orders.  Rule 77.06(8) of the [Supreme Court (General Civil Procedure) Rules 2005](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=88231" \t "Default) ("SCR") provides that unless ordered otherwise an appeal will not operate as a stay of proceedings.  However, Efthim AsJ erroneously assumed that if an appeal was lodged within the period for compliance, that period would be extended to the hearing and determination of the appeals. As a result, the time for compliance with the statutory demands expired before the appeal was due to be heard.  Efthim AsJ recalled and substituted the orders with an order to extend the period for compliance with the statutory demands to a date after the appeal was to be heard. The issue before the Court was whether Efthim AsJ had acted within power in recalling and substituting the orders.  Efthim AsJ had either impermissibly exercised a fresh discretion after the expiration of the period for compliance with the statutory demands (*Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corp Ltd* [2008] HCA 9) or alternatively had permissibly exercised the Court's inherent jurisdiction to correct the recalled orders, which were intended to be made but which had legal consequences that were unforeseen and intended (*Newmount Yandal Operations Pty Ltd v The J Aron Corporation* [2007] NSWCA 195).  In the former case, the appeals against the dismissal of the applications to set aside the statutory demands would be of no effect as the period for compliance with the demands would have expired without a further extension being granted, despite the appellants having lodged an appeal.  However, if the latter were to be correct, the appeals would not be rendered of no effect and the appellants would be entitled to pursue their grounds of appeal.  The trial Judge dismissed the appeals and set aside the substituted orders.  However, the trial Judge also made orders extending the period for compliance with the statutory demands to preserve the rights of the appellants. **(c) Decision**  The Court held that Efthim AsJ had acted within power as the recalling and substituting of the orders was within the inherent jurisdiction of the Court by virtue of rule 77.01(1) of the SCR.  The Court did not consider its inherent jurisdiction to be limited by rule 36.07 of the SCR, which contemplates the amendment of an order to correct a clerical mistake or an error arising from an accidental slip or omission (*Newmount Yandal Operations Pty Ltd v The J Aron Corporation* [2007] NSWCA 195).  Rather, the erroneous assumption made by Efthim AsJ as to the effect of lodging an appeal meant that the decision to recall and substitute the orders was within the Court's inherent jurisdiction as although the orders were intended to be made they had unforeseen or unintended legal consequences (*Newmount Yandal Operations Pty Ltd v The J Aron Corporation* [2007] NSWCA 195).  The substituted orders were found to correct the recalled orders and to speak from the date that the recalled orders were made, which then operated with full force as corrected (*Elyard Corp Pty Ltd v DDB Needham Sydney Pty Ltd* (1995) 61 FCR 385).  Accordingly, the substituted orders were effective in extending the period for compliance with the statutory demands and the appellants' appeals were not rendered of no effect. The Court set aside the orders of the trial Judge and ordered that the period for compliance with the statutory demands be extended until the hearing and determination of the appeals from the dismissal of the applications to set aside the statutory demands.  The Court remitted the matter to the trial Judge for the determination of those appeals.etailed Contents**5.3 Validity of removal and appointment of a director of a single member company**  (By Sarah Shnider, Freehills) Sheahan v Londish  [2010] NSWCA 270, New South Wales Court of Appeal, Hodgson JA, Young JA and Lindgren AJA, 21 October 2010  The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/270.html](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/270.html%22%20%5Ct%20%22_new) **(a) Summary** The directors of a company signed a notice to a wholly owned subsidiary of that company (First Subsidiary) giving notice as sole shareholder of the removal and replacement of a director of the First Subsidiary. The directors of the First Subsidiary then gave an equivalent notice as sole shareholder to its wholly owned subsidiary (Second Subsidiary) of the removal and replacement of a director of the Second Subsidiary. The directors of the Second Subsidiary then appointed administrators to the Second Subsidiary. In addition to questions of whether an appeal should be allowed and whether the matter should be remitted for hearing, the Court was asked to determine:the scope of section 249B of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act"); whether the appointment of the administrators could be validated by section 201M of the Act or the relevant Articles of Association; and whether the invalidity of the administrator's appointment was by reason of a "contravention of the Act" and whether the Court should make an order under section 1322. On appeal, the Court held that:section 249B distinguishes between an act of a member and a resolution of a company, and the requirements of that section must be strictly complied with. The intention of a member of a company, even a sole shareholder, is not equivalent to a resolution of that company. The notices to each of the wholly owned subsidiaries were not resolutions of those companies, but rather, an intention of the sole member.  Therefore, the notice did not meet the requirements of section 249B and section 249B could not be relied upon; section 201M and the relevant Articles of Association could not remedy the failure to comply with section 249B, as this was a case of non-appointment of a director, rather than an ineffective appointment; and it was just and equitable to make an order under section 1322(6)(a) validating the appointment of administrators of the Second Subsidiary in light of the reality of each of the sole shareholder's intention to remove and replace a director, an act which was within the scope of their power. **(b) Facts**  David Bowman and Sidney Londish, the two directors of Vesudi Investments Pty Ltd ("Vesudi"), signed a notice to Londish Nominees Queensland Pty Limited ("LNQ"), a wholly owned subsidiary of Vesudi,  advising that as sole shareholder, it gave notice of the removal of Peter Londish and appointment of Sidney Londish as a director of LNQ. Sidney Londish and David Bowman then signed an equivalent notice on behalf of LNQ, advising as sole shareholder of the removal of Peter Londish and replacement by Sidney Londish as a director of Valofo Pty Limited ("Valofo"), a wholly owned subsidiary of LNQ.  Sidney Londish and David Bowman then appointed administrators of Valofo. At first instance, Brereton J found that the removal and replacement of the directors of LNQ and Valofo was invalid, as the notice did not comply with section 249B of the Act, which states that a company with one member may "pass a resolution by the member recording it and signing the record". Brereton J held that the notice issued to LNQ was not a resolution of that company (LNQ) to remove a director as required by section 249B, rather, it was an act of the sole shareholder, Vesudi, giving notice of removal. The same applied to the notice issued to Valofo. Accordingly, there was no valid appointment of administrators of Valofo. **(c) Decision**  **(i) Scope of section 249B of the Act** The majority, Young JA and Lindgren AJA, held that the notices to LNQ and Valofo were not expressed as, and did not evidence, resolutions of those companies, rather, they were decisions of the members of the companies (being Vesudi and LNQ respectively), to give notice of removal and replacement of a director. Their Honours found that the members had not recorded and signed a resolution of the company, but had "assumed a removal and appointment" of a director (at [212]). Because there was no power provided for in the applicable Articles of Association for the members of LNQ and Valofo to remove and replace a director, the notices were a purported exercise of a non-existent power. Young JA and Lindgren AJA held that the formalities of section 249B must be complied with to properly identify corporate decision making. To equate the intention of a sole member with a resolution of the company would destroy the "century old distinction between the legal personality of the company and the legal personality of the shareholder" (at [97]). Accordingly, neither notice was effective in removing and appointing a director. Hodgson JA (dissenting) held that the notices to LNQ and Valofo were effective resolutions of those companies under section 249B. His Honour reasoned that there can be no resolution of a company under section 249B until there is a decision of the sole shareholder. Accordingly, to question whether the notice was a resolution of the company or of its sole shareholder would, "draw an over-technical distinction, frustrating what was the obvious intention of a sole shareholder" (at [27]).  **(ii) Section 201M and the Articles of Association** Article 54 of the Articles of Association of both LNQ and Valofo provided that an act done by any director is valid "notwithstanding ... that there was some defect in the appointment". Section 201M provides that "an act done by a director is effective even if their appointment ... is invalid".  Young JA and Lindgren AJA drew a distinction between a case of defective appointment and where that has been no appointment at all. Their Honours found that the wording of Article 54 and the use of the word "director" in section 201M "presupposes.a purported appointment as distinct from a non-appointment" (at [222]).  For the reasons set out in (i) above, their Honours found there was a case of non-appointment. As there was a purported appointment by a shareholder who was not authorised to make that appointment, neither section 201M or the Articles of Association were found to operate to validate that appointment. **(iii) Order under section 1322** Section 1322(4)(a) empowers the Court to make an order that any act is "not invalid by reasons of any contravention of a provision of this Act or a provision of the constitution...".  Young JA and Lindgren AJA held that the word "contravention" should be given a wide meaning, and extends to where a company "does not infringe the Act, but merely fails to take advantage of a provision of the Act" (at [161]). Further, their Honours held that section 1322(4)(a) must be considered "in light of the clear reality of the intention of the relevant shareholders and directors to effect a purpose which was within their mandate" (at [156]).  Accordingly, the majority found that it was just and equitable to make an order under section 1322(4)(a) to the effect that the appointment of the administrators of Valofo was not invalid by reason of there not having been a removal and replacement of a director of LNQ or Valofo.etailed Contents**5.4 Corporate knowledge, consent and the liability of third parties for a defective PDS**  (By Sarah Pfeiler, Clayton Utz) Clarke v Great Southern Finance Pty Ltd [2010] VSC 473, Supreme Court of Victoria, Croft J, 20 October 2010  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2010/473.html](http://www.austlii.edu.au/au/cases/vic/VSC/2010/473.html%22%20%5Ct%20%22_new)  **(a) Summary** This case involved applications to strike out an amended statement of claim (SOC).  For the purposes of the applications, Croft J considered various issues, including whether, in the circumstances of the case, knowledge could be inferred between various parties by reason of some common directors, the meaning of "consent" in the context of the product disclosure statement (PDS) provisions of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act), and the extent of the Court's power under section 1022C to make orders against a third party where necessary to do justice arising out of an action under section 1022B.  It was decided that:Common directorships did not establish common knowledge, common control or common liability. The meaning of "consent" in the context of the PDS provisions of the Corporations Act includes a requirement of some positive act. Section 1022C may empower the Courts to make orders binding third parties where necessary to do justice arising out of an action under section 1022B. **(b) Facts**  **(i) Background** Given that the present case was a strike out application, it does not provide a detailed factual background.  However, it is generally understood that certain investors (Plaintiffs) were suing Great Southern Managers Australia Limited (Receivers & Managers Appointed)(In Liquidation)(ACN 083 825 405) (GSMAL) for damages for an allegedly defective PDS, and also sought damages from Great Southern Finance Pty Ltd (Receivers & Managers Appointed)(In Liquidation)(ACN 009 235 143) (GSF) on the basis that GSF consented to each and every statement in the PDS (or alternatively did not withdraw its consent).   The Plaintiffs were also suing Bendigo and Adelaide Bank Limited (ACN 068 049 178) and other parties (Bendigo Bank Parties) seeking orders requiring the Bendigo Bank Parties to repay them monies they had borrowed to invest in the product offered under the PDS.   **(ii) Present case** The present case involved applications by the Bendigo Bank Parties to strike out the Plaintiffs' SOC in its entirety.  The SOC relevantly alleged that:As a consequence of GSMAL and GSF having common directors at various times ("common control"), the relevant matters with respect to GSMAL's alleged breaches of the Corporations Act were known to GSF. By virtue of the common control, GSF was knowingly concerned in GSMAL's alleged breaches of the Corporations Act. By virtue of the common control and the fact that GSMAL issued the PDS, GSF gave consent within the meaning of sections 1022B(1)(d)(i) and 1021L(1) to each and every statement in the PDS (or further or alternatively did not withdraw its consent within the meaning of sections 1022B(1)(d)(ii) and 1021L(2) to each and every statement in the PDS) (Consent Allegation). Accordingly, GSF was a liable person within the meaning of section 1022B(3)(c). It was generally submitted by the Bendigo Bank Parties that these allegations were critical to the Plaintiffs' claims against GSF and therefore the Plaintiffs' claims against the Bendigo Bank Parties.  Further, as the Consent Allegation was inadequately particularised, because reliance on the common control was not a proper basis for the pleaded allegation, it was submitted that the claims against the Bendigo Bank Parties should be struck out in their entirety.  In the context of this strike out application, Croft J considered the following questions of law:  whether critical knowledge on the part of GSF could be inferred on the basis of the knowledge of GSMAL by reason of some common directors at various times (Corporate Knowledge Question); and whether section 1022C allows the Court to make an order in favour of a party seeking loss or damage under section 1022B against a third person or whether it is a provision that is merely subsidiary to and cannot operate other than in aid of the cause of action under section 1022B of the Corporations Act (Corporations Act Question).  **(iii) Relevant legislation**  Generally, under section 1021L(1), a person commits an offence if they consent to the inclusion of a statement in a PDS, and that statement is misleading or deceptive or omits information, and that statement or omission is materially adverse from the point of view of a reasonable person considering whether to acquire the financial product.  Section 1021L(2) provides a similar offence where a person becomes aware that the statement is misleading or deceptive or omits information and they do not withdraw their consent.  Generally, under section 1022B(1)(d), if loss or damage results from a person having given consent under section 1021L(1) or from a person failing to take reasonable steps to withdraw such consent as required by section 1021L(2), the person who suffered the loss or damage may recover it by action against the liable person.   Section 1022C allows a Court, in an action under section 1022B, to make such orders "as it thinks are necessary to do justice between the parties".  **(c) Decision** **(i) Corporate knowledge question** Relying on various authorities, the Bendigo Bank Parties submitted that in order for a person to be "knowingly concerned" in a statutory contravention, they must have knowledge of the essential facts constituting that contravention and be positively associated with the contravention in some way.  On this basis, they argued that the Plaintiffs' allegation that knowledge could be imputed to GSF by reason of the common control was not entirely adequate, and the Plaintiffs had not pleaded any other material facts, including regarding any positive association.   Croft J agreed and held that the Plaintiffs' pleading did not address all of the necessary material facts.  His Honour stated that: "the 'mere' fact of common directorships, noting that the position was that the directorships were not entirely common as there were some directors who were directors of one company only, does not establish common knowledge, common control or common liability." The Bendigo Bank Parties also submitted that the Consent Allegation was inadequately particularised because reliance on common control was not a proper basis for the pleaded allegation.  They argued that even if knowledge of GSMAL was to be imputed to GSF, this fell well short of establishing that GSF had "consented" to each and every statement in the PDS, and that the meaning of the word "consent" in the context of the PDS provisions of the Corporations Act included a requirement of some positive act.  On this basis they submitted that it was insufficient to plead that consent in this context arose from or may be established as a result of the common control.   In support of this argument, the Bendigo Bank Parties submitted that consent should be distinguished from acquiescence.  They referred to the English case of Bell v Alfred Franks & Bartlett Co Ltd [1980] 1 WLR 340, in which it was stated that "an acquiescence can arise out of passive failure to do anything, but consent must involve a positive demonstrative act, something of an affirmative kind." Croft J found the Bell decision to be highly persuasive in the present context, and held that any allegation of "consent" must be of some act of a positive nature and not something in the nature of mere acquiescence.  In obiter, Croft J suggested that this interpretation of "consent" would apply to other parts of the Corporations Act which relate to the provision of consent for statements included in disclosure documents (section 716(2)), bidders' statements (section 636(3)) and target's statements (section 638(5)). **(ii) Corporations Act question** The Plaintiffs were suing the Bendigo Bank Parties under section 1022C.  No action was brought against the Bendigo Bank Parties under section 1022B.  The Bendigo Bank Parties argued that section 1022C did not empower the Court to make orders against someone who was not a party to a section 1022B action.  The Bendigo Bank Parties submitted that the Court's powers under section 1022C are additional to and consequential upon its powers under section 1022B to award loss and damage, enabling the Court to make consequential orders it thinks necessary to do justice between the parties, and that section 1022C is not a standalone provision under which relief can be sought independently of section 1022B.      Croft J disagreed.  His Honour noted that section 1022C makes provision for and empowers the Court to make orders to do justice between "the parties", a term which is not defined.  Given that the legislature did not limit the power of the Court to make orders under section 1022C by reference to the "liable person", a term which is defined in section 1022B(3), his Honour considered that the legislature may have intended section 1022C to have a broader operation and to have been intended to empower Courts to make orders binding third parties where necessary to do justice arising out of an action under section 1022B. Nonetheless, as a result of the deficiencies in the pleadings, Croft J held that it was appropriate and convenient that the whole SOC be struck out.etailed Contents**5.5 Standard of reasonable care and skill expected of an accountant** (By Glen Wright, Freehills) Metzke v Sali [2010] VSCA 267, Supreme Court of Victoria, Court of Appeal, Warren CJ, Neave JA, Beach AJA, 15 October 2010 The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSCA/2010/267.html](http://www.austlii.edu.au/au/cases/vic/VSCA/2010/267.html%22%20%5Ct%20%22_new) **(a) Summary** The case concerns the standard of reasonable care and skill expected of an accountant, and the tests for causation, contributory negligence, and concurrent wrongdoing. The accountant in this case advised a company to advance money to another company without first reaching an informed opinion as to its present financial health, and failed to warn of the risks and circumstances of which it was or ought to have been aware. The trial Judge held that the accountant had been negligent in firstly not reaching an informed opinion, and secondly not taking appropriate steps, consisting of requesting detailed information from the company, advising the cessation of the advancement of money, and resignation. This was upheld by the appellate Judges. The appellate Judges found contributory negligence on the part of the company, noting that the parties were knowledgeable businessman who had attended the board meetings and therefore would have understood the risk of advancing money. It was also held that it was open to the trial Judge to find concurrent wrongdoing with regards to a director of the company, finding a Hedley Byrne duty even though such a duty was not pleaded. It was also held that there is no requirement under the [Wrongs Act 1958](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=343" \t "Default) section 24AH that there must be a causal relationship between the loss caused by one wrongdoer and the loss caused by the other. **(b) Facts** The Sali parties acquired a small freight forwarding company in Melbourne, Universal Logistics (Universal). The Sali parties were non-executive directors of Universal and appointed Matthew Blizzard (Blizzard) as a director. Metzke & Allen, a firm of chartered accountants, was engaged by the Sali parties for many years. Universal's offices were the offices of Metke & Allen and its board meetings were conducted there. In early 1999, Russell Allen (Allen), a partner in the firm, began attending Universal's board meetings at the Sali parties' request. Universal suffered financial difficulties and an administrator was appointed on 9 March 2001. On 5 April 2001 the company went into liquidation. Unsecured creditors totalled $2,641,692; the Sali parties were owed $900,000. The Sali parties claimed that these losses were suffered due to breaches by Metke & Allen of duties owed to them. These alleged breaches occurred in two periods:Firstly it was alleged that between September-October 1999, the board of Universal, acting upon advice from Allen decided to expand the business. Two of the Sali parties advanced $200,000 to provide cash flow for this purpose (Period One); and Secondly it was alleged that between September 1999-March 2001 there was a continuous failure to properly advise and warn the Sali parties of the risks and circumstances of which Allen was or ought to have been aware. The Sali parties entered into a forbearance agreement with Universal, with only occasional payments being made. (Period Two). **(c) Decision** **(i) Period one** The appellate Judges upheld the findings of the trial Judge that Allen should not have advised the Sali parties on the issue of whether the $200,000 should be advanced without first reaching an informed opinion as to the outcome of the 1998/1999 financial year; however, the money would have been advanced in any case. **(ii) Period two** The trial Judge held that Metzke & Allen were negligent in not taking appropriate steps, consisting of requesting detailed information from Universal, advising the Sali parties to bring their forbearance agreement with Universal to an end, and resigning, which would have brought to an end the Sali parties forbearance by the end of August 2000. The appellate Judges rejected Metzke & Allen's argument that these steps were illegitimate as they did not accord with the way the case was pleaded. The Judges stated that while resignation was never raised, it was relevant to the central claim of the Sali parties that failure by Allen to advise them not to enter into the forbearance agreement caused them financial loss. **(iii) Causation** The appellate Judges upheld the test for causation used by the trial Judge: "the question of whether a particular loss was caused by a particular breach is to be answered by reference to commonsense and experience. The 'but for' test is a useful aid, but it must be applied in a practical commonsense way". **(iv) Contributory negligence** The appellate Judges overturned the trial Judge's decision finding no contributory negligence, holding that the Sali Parties were knowledgeable businessman who had attended Universal's board meetings and seen Allen pressing for detailed accounts. As such, the Sali parties would have understood the risk of permitting the escalation of Universal's forbearance debt. **(v) Concurrent wrongdoing** The appellate Judges upheld the trial Judge's finding that Blizzard was a concurrent wrongdoer with Metzke & Allen. It was open to the trial Judge to find a Hedley Byrne duty in relation to Blizzard, even though such a duty was not pleaded. There is no requirement under the Wrongs Act 1958 section 24AH, that there must be a causal relationship between the loss caused by one wrongdoer and the loss caused by the other.etailed Contents**5.6 The obligations of deed administrators to inquire into all claims** (By Laura Keily and Olivia Draudins, Corrs Chambers Westgarth) ION Ltd, in the matter of ION Ltd (subject to deed of company arrangement) [2010] FCA 1119, Federal Court of Australia, Dodds-Streeton J, 15 October 2010 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2010/1119.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/1119.html%22%20%5Ct%20%22_new) **(a) Summary** Following ION Limited (ION) and its subsidiaries being placed into administration, the deed administrators invited proofs of debt or claim from the present and former shareholders of ION and its subsidiaries.  The deed administrators sought directions from the Court under subsection 447D of the Act regarding the best course of action to satisfy their obligation to inquire into all the claims of the present and former shareholders of ION and its subsidiaries.  The deed administrators proposed to offer shareholders who purchased shares on or after 10 September 2004 to elect to prove for a discounted 80 percent of the value of their claim in exchange for which specific details of causation of the loss for those claimants would not need to be proved.  This was because the forensic investigation of the deed administrators revealed that ION should have been placed into administration on 10 September 2004, had it complied with its legal obligations.  The deed administrators also proposed that other shareholders who had already lodged proofs of debt or claim be provided with an updated report on the forensic investigation of the deed administrators and the opportunity to revise their claims, especially in relation to the requirement that those shareholders establish causation in their proofs. **(b) Facts**  ION was a public company listed on the Australian Stock Exchange, and it was the ultimate parent company of 22 Australian companies, as well as four New Zealand companies and three companies incorporated in the United States of America. On 7 December 2004, voluntary administrators were appointed for ION and its 22 Australian subsidiaries.  At meetings held for ION and its Australian subsidiaries on 6 May 2005, the creditors of ION and 17 of its 22 subsidiaries resolved that each company would execute a deed of company arrangement (the Plaintiff Companies).  The creditors of the five other subsidiaries resolved that those entities would be wound up.   Deeds of company arrangement were executed by the Plaintiff Companies on 27 May 2005.  In accordance with a regime under clause 12.6 of the deeds of company arrangement, which effectively incorporated regulation 5.6.48 of the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default) (the Regulations), the deed administrators invited formal proofs of debt or claim.  Advertisements were also published in The Australian newspaper and on the deed administrators' website.  The deed administrators received around 3,300 proofs of debt from present and former shareholders of ION, who made a variety of allegations frequently based on misleading and deceptive conduct contrary to section 52 of the [Trade Practices Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) and on ION's contravention of its disclosure obligations as a publicly listed company under section 67A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) and ASX Listing Rule 3.1 over the period October 2003 to December 2004.   The majority of the shareholders' claimants, represented by DC Legal, alleged that they had taken action (such as acquiring and maintaining their shares) based on the alleged contravening conduct, causing them to suffer loss and damage.  Another large group of shareholders, represented by Slater & Gordon, claimed that causation of loss would be established if ION's share price was inflated due to the contravening conduct, whether or not they relied on it. The deed administrators undertook forensic investigations of the shareholders' allegations in accordance with the procedure set out in the High Court decision of *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160.  The conclusion of the deed administrators was that had ION complied with its legal obligations, it would probably have ceased trading and been placed into administration on 10 September 2004.  The deed administrators therefore decided to admit post 10 September 2004 shareholders to proof for 80 percent of the value of their shareholding without having to submit specific evidence of causation, because such shareholders were most likely to be able to successfully establish loss and damage as a result of ION's contravening conduct. Subsection 447D(1) of the Act provides "[t]he administrator of a company under administration, or of a deed of company arrangement, may apply to the Court for directions about a matter arising in connection with the performance or exercise of any of the administrator's functions and power."  Proofs lodged by over 3,300 current and former shareholders of ION, claiming approximately $122 million in loss and damage, constituted the only significant category of proofs of debt under the deeds of company arrangement that had not yet been determined.  All priority creditors had been paid in full. The deed administrators therefore applied to the Court seeking directions regarding the claims of the current and former shareholders of ION.  As far as the deed administrators were aware, the only people who might be creditors who had not yet lodged a proof of debt form were those shareholders who had purchased shares on or after 10 September 2004. The deed administrators therefore proposed to notify these post 10 September 2004 shareholders of their right to submit proofs of debt and to offer these new claimants the option of securing admission to their proof for 80 percent of the value of their shareholding.  They also proposed to provide other claimants who had already lodged proofs that had not been rejected in full with an updated report outlining the conclusions that the deed administrators reached in their forensic investigations and with the opportunity to revise their proofs. **(c) Decision** The two groups of shareholder claimants opposed the immediate determination of the application of the Plaintiff Companies.  The deed administrators had advised the shareholder claimants that claimants who purchased shares after 10 September 2004 had 21 days to elect to make the discount proof of election.  Shareholders who had already submitted proofs also had 21 days to submit revised proofs.  The claimant shareholders argued that this period was far too short given the complexity of the material to be considered and the unsettled nature of the law governing claims for shareholder losses, especially given the different nature and extent of evidence required to establish a connection between the company's conduct and the loss suffered.  It was also argued that the material the deed administrators had provided did not contain sufficiently detailed guidance as to what proofs of causation they would accept from new claimants or from claimants that had already submitted proofs of debt.   Counsel for the Plaintiff Companies argued that the application should be immediately determined as offering post 10 September 2004 shareholders the opportunity to submit a proof and to secure admission to proof at a discount, along with allowing other shareholder claimants the opportunity to revise proofs that had already been submitted exceeded any obligations imposed by the Act, the Regulations or the deeds of company arrangement.  Further, the shareholders had received the benefit of information in the form of a report sent in 2005 when the invitation for proofs of debt or claim were sent out to current and former shareholders, and the updated report would permit any appropriate revision. Dodds-Streeton J adjourned a hearing that took place on 17 August 2010 to allow shareholders time to consider the material provided by the deed administrators, given the complexity of the material to be assessed by the claimant shareholders. During the period of adjournment, discussions took place between the deed administrators and Slater & Gordon.  The significant changes that the deed administrators proposed were to:extend the time for lodgement of new or revised proofs of debt from 21 days to 45 days; amend the proof of debt form "to reduce the information required to be provided by shareholders to the extent that this information would otherwise overlap with information provided by shareholders in the shareholder claim form"; and send to current claimants a notice providing claimants or their professional advisors with an updated report on the forensic investigations of the deed administrators and the opportunity to revise their proofs of debt or claim (except in the case of shareholders represented by Slater & Gordon or DC Legal where the notice will be sent to the shareholder's legal adviser).   No application or material opposing the plaintiffs' application was filed.  The Court therefore determined that it was reasonable for the deed administrators to seek directions and appropriate for the Court to make them.  As clause 12.6 of the deeds of company arrangement effectively incorporated regulation 5.6.48 of the Regulations, the deed administrators were permitted to set a deadline for formal proofs by adopting a specified method.  More importantly, a deed administrator has an obligation to inquire into all claims under regulation 5.6.48 of the Regulations.  Citing *Harry Goudias Pty Ltd v Port Adelaide Freezers Pty Ltd* (1992) 7 ACSR 303 to support her ruling, Dodds-Streeton J found that the deed administrators could invite proofs from the new shareholder claimants and could offer the discounted proof election.  Further, while there is no obligation to provide an updated report to creditors nor to allow an opportunity for creditors to revise proofs of debt already submitted under the Act, the Regulations or the deeds of company arrangement, it was appropriate for the deed administrators to take this course of action in these circumstances.etailed Contents**5.7 Order for meeting of proposed scheme arrangements** (By Laura Glover, DLA Phillips Fox)Re Plantic Technologies Limited [2010] VSC 484, Supreme Court of Victoria, Davies J, 8 October 2010The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2010/484.html](http://www.austlii.edu.au/au/cases/vic/VSC/2010/484.html%22%20%5Ct%20%22_new)**(a) Summary**Plantic Technologies Limited ("Plantic") successfully applied to the Supreme Court of Victoria for orders pursuant to section 411 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the "Act") to convene meetings of its shareholders and option holders to vote on proposed schemes of arrangement.  Plantic also sought and was granted direction from the Court under section 1319 of the Act in relation to the intended manner for depositary interest holders to vote at the meeting.**(b) Facts**Gordon Merchant No 2 Pty Ltd ("Gordon Merchant") held approximately 18.4% of the issued shares in Plantic and its associates held approximately 0.5% of the ordinary shares in Plantic.  On 29 July 2010, Gordon Merchant entered into a merger implementation agreement to acquire all of Plantic's shares, including those held by Gordon merchant's associates. On 8 September 2010, Plantic announced a proposal that all options would be cancelled to take place by way of a scheme of arrangement between Plantic and its option holders.  Davies J summarised the Court's function on an application to convene a meeting under section 411.  The main issue in determining whether the Court should grant the order related to the voting rights of the depositary interest holders.In 2007, in order to facilitate the trading of Plantic's shares on the alternative investment market of the London Stock Exchange, Computershare Investor Services Plc (the "Depositary") issued depositary interests to Plantic shareholders in accordance with a "Deed in Respect of Plantic Technologies Limited Depositary Interests".  These depositary interests were held on trust by, and registered under the name of, Computershare Clearing Pty Ltd (the "Custodian") on Plantic's share registry.  However, the capacity in which the Custodian held the shares was not noted on Plantic's share registry.The proposed notice of the share scheme meeting provided that holders of the depositary interests could vote at the share scheme meeting by either:instructing the Custodian on how to vote using an enclosed personalised form of instruction; or by requesting the Custodian to appoint them or their representative to attend and vote at the share scheme meeting on behalf of the Custodian, again using an enclosed form of instruction. The Depositary and the Custodian raised concerns about the ability of the Custodian to allow the holders of depositary interests to attend and vote at the share scheme meeting on its behalf.  Accordingly, Plantic sought a direction under section 1319 of the Act that depositary interest holders may vote at the meeting by instructing the Custodian on how to vote or by requesting the Custodian to appoint them to attend and vote at the meeting on behalf of the Custodian as the Custodian's representative in relation to the shares held on trust for the particular depositary interest holder.**(c) Held**Davies J observed that if it were clear that depositary interest holders would be unable to vote in the manner contemplated, it would be futile to make such a direction as the invalidation of their votes may mean that the Court would not approve the scheme at the second court hearing.Her Honour then considered the concerns raised by the Depositary and the Custodian regarding the ability of the Custodian to allow the holders of the depositary interests to attend and vote at the share scheme meeting. In particular, the Depositary and the Custodian were concerned that section 250D(3) of the Act restricted the Custodian from appointing holders of depositary interests as its representative.  Section 250D(3) of the Act permits the Custodian to appoint more than one representative, however only one representative may exercise the Custodian's powers at any one time.  Consequently, the Depositary and the Custodian were concerned that only one representative would be able to vote at the share scheme meeting. Further, the Depositary and the Custodian were concerned that if the Custodian were to appoint both a proxy (to represent instructions from deposit holders) and corporate representative, then whilst a member was present at the meeting the proxy would be suspended from voting by virtue of section 249Y of the Act and clause 23.1(e) of the Plantic Constitution.Davies J was sufficiently persuaded that the depositary interest holders could vote in the manner contemplated and that the direction sought should be made, on the basis that:clause 5.1 of the Depositary Interest Deed provided that the Depositary itself or through the Custodian holds the Plantic shares as bare trustee for the benefit of the holders of the depositary interest as tenants in common and each of the holders of the depositary interest is entitled to rights in relation to the Plantic shares accordingly; the right to attend and to vote at general meetings was passed on to the depositary interest holders under clause 5.3.1 of the Depositary Interest Deed; and it was sufficiently clear for present purposes that the voting interests of the Custodian and the interests of the depositary interest holders would be the same (the Privy Council decision in *Coachcraft Ltd v SVP Fruit Co Ltd* (1980) 28 ALR 319 being distinguishable for present purposes). Accordingly, Davies J made the direction sought, noting that the making of the direction did not preclude further debate on this point at the second court hearing and did not foreclose the issue, as the submissions in support of making the direction under section 1319 of the Act were made without a contradictor.Her Honour confirmed that the following matters did not preclude the making of the order: the potential consequence of Plantic breaching the head count test imposed by section 411(4)(a)(ii) of the Act, as the shares held in Plantic by the Custodian represented 80% of the company's issued shares; and the existence of a deemed warranty provision, a break free payable by Plantic and performance risk. etailed Contents**5.8 When can a court wind up a company on just and equitable grounds?** (By David Saunders, Blake Dawson) Solinska v Fortuna Corporation Pty Ltd [2010] FCA 1085, Federal Court of Australia, McKerracher J, 5 October 2010 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2010/1085.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/1085.html%22%20%5Ct%20%22_new) **(a) Summary** This case examined the question of whether a director of a company could have the company wound up on just and equitable grounds and the circumstances under which the principles of equity could be applied in a commercial context.  The Court focused on the nature of the company, the number of registered members and their relationship and involvement in the operations of the company, and whether there were restrictions on the transfer of members' interests in the company. **(b) Facts**  The Plaintiff, Ilona Angela Solinska, was the sole director and shareholder in Fortuna Corporation (Company), which was incorporated in 2004.  The Company was formed to create a website, known as "Alfa X".  In 2005, following discussions with the Plaintiff, Mark James Hoddinott became registered as a shareholder in the Company, and later as a director. According to the Australian Securities and Investments Commission (ASIC) Ms Soliniska and Mr Hoddinott were equal shareholders in the company.  The Court concluded this meant the Company was effectively a two-person company operating as a partnership. In 2009, the company was failing and the two directors were in dispute about money Mr Hoddinott had invested in the Company.  The Court described the dispute as a "complete breakdown" in the relationship, which caused a deadlock.  Without further capital, the business would be unable to continue.  Neither director was prepared or able to invest any further funds in the business.  Their irreconcilable differences meant the Company had no future. The Plaintiff sought to have the Company wound up under s 461(1)(k) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  The section provides the Court with the discretion to wind up a company if "the Court is of the opinion that it is just and equitable" to do so. A liquidator was approached in early 2010 with a view to winding up the Company, a move to which Mr Hoddinott was initially opposed on the basis that he wished to protect funds he had advanced to the company.  He later brought an action against the Plaintiff personally to recover those funds.  Having later agreed to the winding up, Mr Hoddinott also expressed concerns about the liquidator's impartiality. **(c) Decision**  In determining whether it was within the Court's power to wind up the Company on just and equitable grounds, McKerracher J considered a number of relevant cases, citing in particular *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.  In that case, Lord Wilberforce discussed factors that a Court should take into account when deciding whether shareholders' legal rights may be subject to equitable considerations. They were that the organisation in question: was formed or continued on the basis of a personal relationship, involving mutual confidence; was formed on the basis of an agreement or understanding that all or most of the shareholders would participate in the conduct of the business; and imposed restrictions on the transfer of the members' interests in the company, meaning that if confidence was lost or a member was removed from management, that member could not take out his or her stake and go elsewhere.   Other cases cited, including *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, focused on situations in which the organisation in question had a relatively small number of members which meant the successful operation of the organisation was dependent on a close personal relationship between those members.  The situation in Campbell was similar to that of the present case.  The company's two shareholders, having operated effectively as a partnership, had fallen out and were at loggerheads.  The High Court of Australia in Campbell held that to be a clear case in which it was just and equitable that the company be wound up. The Court in *Solinska v Fortuna Corporation* concluded that the directors both regarded themselves as partners in the business, with an expectation that each would participate in the conduct of the business.  Furthermore, the shares of each director would pass to the other upon the death of either.  The complete breakdown in the relationship between the directors, along with the fact that neither was willing or able to provide further funding for the Company, meant that the company was unable to continue. McKerracher J held that this was an entirely appropriate case for exercising the Court's discretion to wind up the Company on just and equitable grounds. His Honour ordered that: the Company be wound up; a new liquidator be appointed; and the costs of the application be paid out of the assets of the Company. etailed Contents**5.9 How not to apply for an order terminating a winding up under section 482 of the Corporations Act** (By Will Frost, Clayton Utz) Pine Forests of Australia (Canberra) Pty Ltd [2010] NSWSC 1127, Supreme Court of New South Wales, Barrett J, 1 October 2010 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1127.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1127.html%22%20%5Ct%20%22_new) **(a) Summary** Pine Forests of Australia (Canberra) Pty Ltd (Pine Forests), the liquidator of Pine Forests, Synfid (Finances) Pty Ltd and Pine Forests of Australia Pty Ltd brought an application 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) for an order terminating the court-ordered winding up of Pine Forests. Section 482(1) of the Corporations Act states 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". The Court stated that a central question in relation to any application under section 482(1) is whether the company's financial health is such that it may safely be released from the form of external administration focused mainly on the interests of creditors and returned to the mainstream of commercial life where it may incur new debts that have to be paid as and when they fall due.  The plaintiffs sought orders that the winding up of Pine Forests be terminated upon:interest being paid to various creditors of Pine Forests under section 563B of the Corporations Act; and a direction from the Court under section 482(3) of the Corporations Act that the liquidator convene a general meeting of the members of Pine Forests to remove the existing directors of the company and to elect a new director to take office upon the termination of the winding up.  Section 482(3) of the Corporations Act states that: "Where the Court has made an order terminating the winding up, the Court may give such directions as it thinks fit for the resumption of the management and control of the company by its officers, including directions for the convening of a general meeting of members of the company to elect directors of the company to take office upon the termination of the winding up". **(b) Facts** The liquidator had realised all assets of Pine Forests, with the exception of a parcel of vacant land, and had paid all proved and admitted debts in full.  However, there were insufficient funds to allow the liquidator to pay interest to which creditors with admitted debts have a statutory entitlement under section 563B of the Corporations Act. Synfid (Finances) Pty Ltd and Pine Forests of Australia Pty Ltd wished to see the winding up terminated in order to enjoy, through their ownership of the whole of the issued share capital of Pine Forests, indirect ownership and effective control of the vacant land. To that end, the parties executed a deed contemplating that Synfid (Finances) Pty Ltd and Pine Forests of Australia Pty Ltd would forego their entitlements to interest under section 563B and pay a sum of money to Pine Forests to enable the liquidator to pay the section 563B interest to all other creditors in full.  The deed provided, however, that the funds were not to be applied by the liquidator until the Court had made the above orders. It was asserted by the plaintiffs that if the court order were made:  the liquidator would, by virtue of the deed, no longer need to have regard to the interest entitlements of Synfid (Finances) Pty Ltd and Pine Forests of Australia Pty Ltd; Pine Forests would have a single asset of substance and no liabilities; and the Court could terminate the winding up.  Before the court order could be obtained, the liquidator received the sum of money from Synfid (Finances) Pty Ltd and Pine Forests of Australia Pty Ltd and, inadvertently, satisfied the section 563B entitlements of all other creditors. **(c) Decision** Barrett J stated that the Court would not make an order requiring the liquidator to do something that had already been done, namely the making of specified interest payments to Synfid (Finances) Pty Ltd and Pine Forests of Australia Pty Ltd. In that regard, there was no basis on which the Court would exert compulsion on the liquidator by way of mandatory order as distinct from advising him by way of section 479(3) of the Corporations Act that he would be justified in making the payments.  That section enables the Court to give advice rather than "issue the kind of command" contemplated in the orders sought by the plaintiffs. The Court held that the releases under the deed of Synfid (Finances) Pty Ltd and Pine Forests of Australia Pty Ltd would not be operative, their entitlements to section 563B interest would remain and that it was not appropriate to terminate the winding up. Moreover, given the terms of section 482 of the Corporations Act (stated above), directions for the convening of a general meeting can only be made if an order terminating the winding up "on a day specified in the order" has already been made. As a result, any terminating order must specify the day on which the winding up is to terminate and any order directing the convening of a general meeting to elect directors must:be made after the terminating order itself has been made (that is, after the court has "specified" in the terminating order the day on which the termination is to be effective); and be framed so that any election of directors resolved upon by the general meeting results in persons elected to take office on the day on which the termination becomes effective being the day "specified" in the terminating order.  The Court thus held that given the nature of the orders sought, it could not be certain that a director would be elected at the general meeting (or that the contemplated meeting would actually occur) and, accordingly, it was not open to the Court to order that the winding up be terminated on the day on which any new director is elected since it is not "a day specified in the order" under section 482(1) of the Corporations Act. The Court further held that the liquidator would not have been the correct person to convene the general meeting of creditors.  A liquidator may, at the direction of the court, convene a meeting of contributories (section 547(1) of the Corporations Act) but not a general meeting of creditors. Moreover, given the terms of section 482(3) of the Corporations Act, the Court noted that the only purpose for which it can make a direction that a general meeting be convened is "to elect directors of the company to take office upon the termination of the winding up".  The purpose of considering the removal of directors (and secretaries) already in office is not one for which a general meeting directed by the court can be convened. The Court ordered that:  the plaintiffs be granted leave to amend the originating process and to adduce further evidence; and the proceedings be stood over to a future date. etailed Contents**5.10 Loan amount recoverable from virtual "guarantor" of loan** (By Jiayue Li, DLA Phillips Fox) Ventouris Enterprises Pty Ltd v Dib Group Pty Ltd [2010] NSWSC 963, New South Wales Supreme Court, Slattery J, 13 September 2010 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/963.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/963.html%22%20%5Ct%20%22_new) **(a) Summary** After being introduced to E-Style Marketing Pty Limited ('E-Style') by George Dib and the Dib Group, Ventouris Enterprises Pty Limited ('Enterprises') loaned $100,000 to E-Style which was secured by a charge and guarantees from the controllers of E-Style.   E-Style subsequently defaulted on this loan and Enterprises failed to recover the loan from E-Style and the guarantors.  Enterprises instituted the current proceedings against the Dib Group and its Chief Executive Officer George Dib alleging that the defendants induced Enterprises to make the loan through misleading and deceptive conduct.  Enterprises further alleged that the Dib Group engaged in misconduct in relation to dealing with the assets of E-Style which resulted in Enterprises being unable to enforce its rights under the charge against E-Style. Slattery J held that Enterprises was entitled to recover from the defendants for loss suffered in reliance on the conduct of the defendants which was misleading and deceptive. However, Slattery J held that the claim against the defendants in relation to its interference with Enterprises' rights under the charge was not established. **(b) Facts**  Betty Ventouris became acquainted with George Dib and the Dib Group through her role with St George Bank.  The Dib Group is a franchisor of service stations and was a customer of St George Bank. George Dib referred Betty Ventouris to E-Style, which operated three service stations owned by the Dib Group as Betty Ventouris was looking for investment opportunities for the proceeds from the sale of her mother's house.   Ultimately, Enterprises provided a loan to E-Style which was secured by a floating charge over the assets of the three service stations and guarantees from the controllers of E-Style which was also secured by a second mortgage of property owned by one of the controllers.   E-Style defaulted on the loan and was subsequently placed into receivership. The controllers of E-Style also defaulted on their guarantees of E-Style's obligations. Enterprises failed to recover any amounts from either E-Style or from the guarantors.  At about the same time, the Dib Group as the franchisor of E-Style's service stations also took steps in taking possession of the assets of E-Style. Enterprises claimed that George Dib and the Dib Group represented E-Style as reliable borrowers.  The defendants argue that George Dib merely introduced Betty Ventouris to E-Style without any recommendation of E-Style's suitability as a borrower. **(c) Decision**  Slattery J held that the defendants engaged in misleading and deceptive conduct as they represented to Betty Ventouris that E-Style would be able to repay the loan when it had no reasonable grounds for making such a representation.  However, Slattery J held that there should be an apportionment of damages as Betty Ventouris was a concurrent wrongdoer in providing the loan to E-Style. The plaintiff failed to establish that the defendants' actions in dealing with the assets of E-Style constituted interference with the plaintiff's rights under the charge. **(i) The defendants engaged in conduct that was misleading and deceptive** There was much contention as to what had occurred between George Dib and Betty Ventouris leading up to the loan to E-Style.  Slattery J generally accepted Betty Ventouris' version of events which suggested that George Dib went further than merely introducing Betty Ventouris to E-Style and provided assurances as to E-Style's suitability as a borrower and its capacity to repay the loan.  In effect, his Honour held that George Dib's statements to Betty Ventouris amounted to a guarantee that E-Style would be able to repay the loan. His Honour held that the representations that E-Style was a suitable borrower were not misleading or deceptive under section 52 of the [Trade Practices Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) ('TPA') as there was no evidence that E-Style was in financial difficulty at the time of the loan or that George Dib was aware of the financial status of E-Style.  For the same reasons, his Honour also held that any failure to disclose the financial status of E-Style was not misleading or deceptive. However, Slattery J held that the defendant's conduct was misleading and deceptive under section 51A of the TPA.  Under section 51A of the TPA, a representation as to a future matter is taken to be misleading or deceptive unless the representor is able to establish reasonable grounds for the making of such a representation.  Slattery J held that George Dib represented to Betty Ventouris that E-Style would be able to repay the loan which amounted to a representation as to a future matter.  George Dib failed to present any facts that proved E-Style's financial stability to support the representations. **(ii) Reliance on defendant's misleading and deceptive conduct** The defendants argued that Betty Ventouris merely relied on the introduction and reputation of the Dib Group, the securities given to Enterprises and her solicitor's competent legal advice in entering into the lending transaction.  However, Slattery J held that although these factors were important influences upon Betty Ventouris, they did not displace the pre-eminent effect of George Dib's statements to her. Slattery J also rejected the defendant's argument that Betty Ventouris' erroneous assumptions about the credit worthiness of E-Style and its controllers was the cause of her providing the loan to E-Style.  Slattery J stated that the erroneous assumptions were as a result of George Dib's statements and were not assumptions Betty Ventouris made independently. **(iii) Loss, damage and apportionment** In determining the amount of loss suffered, Slattery J held that it was irrelevant that the loan funds were received from Betty Ventouris' mother and Enterprises did not have to repay the sum to her mother.  The amount of the loan and the expenses involved in seeking recovery constituted loss and damage to Enterprises. However, his Honour held that Betty Ventouris who was not the mind of Enterprises, was a concurrent wrongdoer and was proportionately liable for the loss suffered.  Betty Ventouris' 'failure to get a reasonably detailed understanding of E-Style's business and its capacity to repay the loan...was a significant departure from the standard of care of a reasonable lender in Enterprises' circumstances'. Slattery J held that Enterprises was 20% liable for any loss or damage suffered. **(iv) No impairment of Enterprises' rights of enforcement** Enterprises argued that there was an alleged impairment of its rights of enforcement under the charge based upon the following grounds: the tort of interference with contractual relations; the conversion of Enterprises' equitable proprietary interest in the charged property; and unconscionable conduct in dealing with Enterprises' equitable proprietary interest in the charged property.   Slattery J held that the defendants did not commit the tort of interference with contractual relations.  The charged property was dealt with by third parties rather than the defendants.  Additionally, Slattery J held that any interference was not unjust as the defendants were entitled to exercise its rights under the franchise and lease agreements with E-Style. In relation to the equitable grounds of conversion, Slattery J held that there was no breach of fiduciary duty and the plaintiff overlooked the involvement of third parties in dealing with the charged property. Slattery J found that Betty Ventouris was not under any kind of special disability which would give rise to relief for unconscionable conduct and was not under any pressure from George Dib to make the loan to E-Style.etailed Contents**5.11 Legal professional privilege and the in-house counsel** (By Ari Rosenbaum, Mallesons Stephen Jaques) Dye v Commonwealth Securities Ltd (No 5) [2010] FCA 950, Federal Court of Australia, Katzmann J, 1 September 2010 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2010/950.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/950.html%22%20%5Ct%20%22_new) **(a) Summary** This decision of the Federal Court concerned an interlocutory dispute about whether the respondent was justified in objecting to the production of certain documents included in its list of documents on discovery.  The ground for the objection for each document was legal professional privilege ("LPP"). The Court held that:because this concerned pre-trial production rather than the adducing of evidence, the common law governed the determination of whether LPP applied; there is a question regarding the test of whether in-house counsel is "independent" but this was not resolved; and given that counsel was independent, whether each document attracted LPP turned on whether each document evidenced a dominant purpose of obtaining or providing legal advice or to conduct or aid in the conduct of litigation in reasonable prospect.  Many of the documents did not have the requisite evidence to enable a conclusion that it was more probable than not that the dominant purpose test could be met and, accordingly, a number of documents did not attract LPP. **(b) Facts** The proceedings arose from a complaint made to the Australian Human Rights Commission (at the time the Human Rights and Equal Opportunity Commission ("HREOC")).  Mr Glenn James Fredericks, Executive Legal Counsel in the Legal Services division of the Commonwealth Bank, the parent company of the respondent, described his particular legal functions as providing the Bank and the respondent with legal advice in relation to the applicant's claims, interviewing relevant witnesses about the complaint to the HREOC, representing the respondent at a mediation before HREOC, replying to correspondence from the applicant's representatives, and engaging and briefing external solicitors. Mr Fredericks was not the author of most of the documents in question but, in a majority of cases, they had been sent, or copied, to him.   **(c) Decision** **(i) Issue 1 - legal principles** As this was a question of pre-trial production rather than the adducing of evidence, the common law and not the [Evidence Act 1995 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6191" \t "Default) governed the determination of the issues. Justice Katzmann affirmed that the common law test of whether a communication or document is subject to LPP is whether the communication was made, or the document was prepared, for the dominant purpose of obtaining or providing legal advice or to conduct or aid in the conduct of litigation in reasonable prospect (found in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67).  Her Honour also affirmed that in its ordinary meaning, the dominant purpose is a reference to "the ruling, prevailing, or most influential purpose" (*Federal Commissioner of Taxation v Spotless Services Ltd* [1996] HCA 34) which will be determined objectively.  Her Honour stated that the party making the claim for LPP must establish the facts giving rise to the privilege and noted that the subjective purpose will also always be relevant and often decisive in establishing LPP. Her Honour noted the following list of classes of documents to which LPP may extend:communications between a party and the party's professional legal advisor if the communications are confidential and made to or by the adviser in his or her professional capacity with a view to obtaining or giving legal advice or assistance.  This applies even if the communications are made through agents of either party or are prepared with a view to being used this way but are not in fact so used; communications between various legal advisers of the client, with a view to the client obtaining legal advice or assistance; notes, memoranda, minutes or other documents of communications which are themselves privileged, or contain a record of those communications, or relate to information sought by the client's legal adviser to enable the adviser to advise the client or to conduct litigation on the client's behalf; communications and documents passing between the party's solicitor and a third party.  This applies if the communications are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to the litigation or evidence to be used in the litigation or information which may result in the obtaining of such evidence; knowledge, information or beliefs of the client derived from privileged communications made to the client by the client's solicitor or agent; and copies of documents made for the dominant purpose of obtaining or giving legal advice or professional legal services relating to actual, anticipated or pending proceedings, even if the originals are not privileged. Her Honour also noted that the mere fact that the document does not expressly seek legal advice does not mean that it must be produced.  Her Honour affirmed that where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.  Legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context. **(ii) The in-house lawyer** Although Mr Fredericks was not an employee of the respondent, but of its parent company, the parties approached the issues on the basis that he was an in-house lawyer, that is, a lawyer employed by his client.  Her Honour noted that in Australia, communications to and from such a lawyer may be protected from disclosure by LPP but whether in any particular case they will, depends on the circumstances.  Her Honour had reference to *Rich v Harrington* [2007] FCA 1987 ("Rich") in examining the criteria necessary for LPP to apply. In that case, in dealing with a requirement of independence, the Court considered the nature of Ms Rich's allegations and their significance for General Counsel.  The fact that the allegations affected both personal and professional reputation, that the General Counsel was likely to be a respondent in the litigation and that there was a high level of media interest, resulted in the relationship between the General Counsel and the respondents as being one that would not secure to the advice an objectively independent character. Katzmann J in the present case observed that the court in Rich may have overstated the content of the requirement that LPP will arise only where the advice has "an independent character".  Her Honour disagreed with the Court's application of *Waterford v Commonwealth* [1987] HCA 25 ("Waterford"), stating that it is doubtful that the decision in Waterford required anything more than that the legal adviser be professionally qualified and acting in a professional capacity.   In any event, Katzmann J did not have to resolve the question because the respondent was content that the matter be decided on the basis of the Rich formulation, arguing that it was satisfied here. Her Honour noted that the fact that Mr Fredericks had multiple responsibilities, some of which could have affected his independence, did not mean that his advice/the documents had to be produced.  It was necessary to analyse the capacity in which Mr Fredericks sent or received the communications, because it was only in his capacity as a lawyer that the communications could be privileged. Katzmann J noted that although there were some similarities between the present case and Rich (both involved allegations of sexual harassment and discrimination, and both attracted media interest), the present case may be distinguished for a number of reasons.  Here, the respondent's in-house lawyers were not partners of the respondent, they were not actual or potential parties to the litigation and Mr Fredericks had not met any of the individual employees whose conduct was impugned making it unlikely that his personal loyalties would be engaged.  Her Honour therefore held that the independence test had been satisfied. **(iii) The documents** Her Honour examined each document in detail and had regard to the context and the information in each document.  Whether the document was ultimately found to attract LPP turned on whether each document evidenced a dominant purpose of obtaining or providing legal advice or to conduct or aid in the conduct of litigation in reasonable prospect.  In general, her Honour found the following:where the documents sought advice or were copied to Mr Fredericks in his capacity as legal representative, the dominant, if not the sole, purpose was providing legal advice to the Bank and the respondent about the applicant's complaint and accordingly, the document did not have to be produced; where an email was copied to Mr Fredericks only for the purpose of keeping him informed of the status of the applicant's complaints, the evidence did not show that the dominant purpose was to seek legal advice or to conduct or aid in the conduct of litigation in reasonable prospect and the document had to be produced; where evidence was uncontested that solicitors were retained in connection with compensation claims, the most compelling inference to be drawn is that the documents were provided to the solicitors to enable them to advise the respondent (and the Bank) in relation to those claims and, therefore, LPP applied; and an email that forwarded an email containing privileged information was also privileged. Interestingly, her Honour held that emails containing confidential information which Mr Fredericks described as "canvassing possible settlement options", on the facts, had insufficient evidence to satisfy the test that the document contained or conveyed information from which the nature of any legal advice could be inferred. **(iv) Waiver** The applicant argued in the alternative that, where documents were communicated to third parties, privilege had been waived.   Her Honour had reference to *Mann v Carnell* [1999] HCA 66, holding that privilege will be waived if the asserting party engages in conduct that is inconsistent with the maintenance of the confidentiality protected by the privilege.  Accordingly, the applicant's argument was rejected because all of the so-called third parties were (or were at the relevant time) employees of the client or the same corporate group.  The applicant made no attempt to explain why a disclosure to them might amount to waiver and in the absence of any suggestion that there was an intention to publicise the content of the communications beyond the corporate group, Katzmann J held that there could be no waiver because there was no inconsistency.etailed Contents**5.12 English Court of Appeal upholds election of multiple jurisdictions** (By Anthony Sciuto, Mallesons Stephen Jaques) Sebastian Holdings Inc v Deutsche Bank AG [2010] EWCA Civ 998, England and Wales Court of Appeal (Civil Division), Lord Justice Thomas, Lord Justice Pitchford and Lord Justice Mummery, 20 August 2010 The full text of this judgment is available at: [http://www.bailii.org/ew/cases/EWCA/Civ/2010/998.html](http://www.bailii.org/ew/cases/EWCA/Civ/2010/998.html%22%20%5Ct%20%22_new) **(a) Summary** The principal issue in this case was the construction of jurisdiction clauses in a series of agreements between Deutsche Bank AG (the "Bank") and its customer, Sebastian Holdings Inc ("Sebastian").  The parties entered into a series of agreements with conflicting jurisdiction clauses.  Some agreements selected England as the forum for disputes and one agreement selected New York. Sebastian brought a claim against the Bank in New York.  The Bank brought subsequent proceedings to recover debts due under two agreements in England.  The agreements under which the debt was due included jurisdiction clauses in favour of English courts.  However, Sebastian claimed that the English Commercial Court did not have jurisdiction to hear the dispute. The Court of Appeal, in dismissing Sebastian's claim, held that the clear, unambiguous wording of the jurisdiction clauses included in the agreements under which the debt was due showed that the parties clearly intended the Bank to be able to bring a claim in England. **(b) Facts**  In 2006 Sebastian entered into a 1992 ISDA Master Agreement ("Master Agreement") with the Bank for the purpose of trading equities.  The terms of the Master Agreement included a non-exclusive jurisdiction clause which referred disputes to the courts of England.  Later that year, Sebastian entered into a series of foreign exchange ("FX") agreements with the Bank including a Agent Master Agreement and Prime Brokerage Agreement.  The Agent Master Agreement, which provided for off-setting transactions to be entered into between Sebastian and the Bank, contained a non-exclusive jurisdiction clause in favour of English courts.  The Prime Brokerage Agreement enabled Sebastian to enter into FX transactions with named counterparties as agent for the Bank and conferred non-exclusive jurisdiction on New York courts. In 2008, four further agreements were executed to facilitate equities trading including a Master Netting Agreement.  The Master Netting Agreement, which entitled the Bank to charge a termination payment on termination of the Prime Brokerage Agreement and the ISDA Agreement, referred disputes exclusively to the courts of England. Sebastian incurred FX trading losses in September 2008 following the financial crisis and during October the Bank made and Sebastian paid margin calls of approximately $436m.  Subsequently the Bank demanded from Sebastian: $120,650,166 under the Agent Master Agreement (for FX losses); and $125,523,086 under the Master Netting Agreement following termination of the Prime Brokerage Agreement (for equities losses).  In November 2008 Sebastian issued proceedings in New York claiming damages of at least $750m from the Bank.  Sebastian made a number of allegations against the Bank including that Sebastian had entered into an oral agreement with the Bank that limited Sebastian's maximum exposure to FX exchange trading to $35m and that the Bank had breached its obligations under the Prime Brokerage Agreement. In response, the Bank issued proceedings in England seeking to recover the amounts it was allegedly owed under the Agent Master Agreement and the Master Netting Agreement.  The Bank denied that it had agreed to limit Sebastian's exposure.  Sebastian subsequently sought a declaration from the Commercial Court that it did not have jurisdiction to hear the Bank's claim.  **(c) Decision**  Thomas LJ decided that the issue of where the Bank was entitled to bring proceedings against Sebastian was "one of construction of the jurisdiction clauses." The debts claimed by the Bank were due under the Master Netting Agreement and the Agent Master Agreement each of which contained an English jurisdiction clause. However, counsel for Sebastian argued that where there are multiple agreements with conflicting jurisdiction clauses, the court should be presume that the parties intended that disputes be subject to a single jurisdiction.  The parties did not contemplate disputes being heard in both New York and London.  Counsel argued that the jurisdiction clause included in the contract that was at the commercial centre of the dispute should be presumed to apply and all jurisdiction clauses should be interpreted to give effect to this presumed intention. Counsel further argued that as all claims and disputes arose from FX trading, it must be inferred that the parties agreed that the Bank's claim would be heard in the jurisdiction chosen under the Prime Brokerage Agreement, which was New York. The Court of Appeal affirmed the decision of the Commercial Court and unanimously rejected Sebastian's claim. The clear language of the jurisdiction clauses in each of the Master Netting Agreement and the Agent Master Agreement, under which the debts were due, permitted the Bank to bring its claims against Sebastian in the jurisdiction specified in the jurisdiction clauses.  Accordingly, the Bank preferred to give effect to unambiguous construction of the contract over the arguments advanced by Counsel for Sebastian.  In reaching its decision, the Court of Appeal held that the Bank was not required to analyse its claim and ascertain which agreement and corresponding jurisdiction clause was the centre of gravity for the dispute.  Lord Thomas LJ said: "The agreements under which the debts or other obligations to the Bank would actually become due (whatever its origins) gave the Bank the express right to bring proceedings for debts due under those agreements in named jurisdictions."   Both the Master Netting Agreement and the Agent Master Agreement contained an express right on the Bank to bring proceedings in England and accordingly the bank was entitled to choose England as the forum for the dispute.  Thomas LJ held that this clear intention of the parties would be frustrated if the agreements were to be construed according to the interpretation proposed by Sebastian. A less substantial issue in this case was whether the Bank's claim should be stayed on the basis of conflict of law principles.  If successful, the Bank would be unable to proceed with the claim brought in England.  The Court of Appeal refused to grant a stay and held that the New York Court was not the more appropriate forum.  The fact that Sebastian raised a defence based on the Prime Brokerage Agreement, which designated New York as the forum for disputes, did not change the court's position as the defence could be heard in the English court.etailed Contents |

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