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We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 131 242. | |  | |      |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%231) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1****Supreme Court of Victoria Commercial Law Conference 2012**   On 10 December 2012, the Supreme Court of Victoria will hold its annual Commercial Law Conference. A program of eminent speakers will address topical and important commercial law issues. The Conference details are as follows:   **Date**     Monday 10 December 2012   **Venue**    Banco Court, Supreme Court of Victoria 210 Williams St, Melbourne   **Time**     2.00pm - 5.45pm   **Cost**      $220 (incl GST)    **Program:**  'Remedies for breach of fiduciary duties: Lessons from two recent mega-cases: Grimaldi and Bell Resources'  Speaker: The Hon Keith Mason AC QC, former President of the NSW Court of Appeal  Comment: The Hon Justice Neave AO   'Issues and Challenges in Resolving Class Actions'  Speaker: Mr Ken Adams, Partner, Freehills Comment: The Hon Justice Beach   'Western Export Services Inc v Jireh International Pty Ltd and the use of extrinsic material' Speaker: Mr Joseph Santamaria QC  Comment: Mr Stephen McLeish SC, Solicitor-General for Victoria   'How to assist the court in the efficient conduct of a large commercial trial'  Speaker: The Hon Justice Hargrave   To view the conference flyer and registration details, [click here](http://cclsr.law.unimelb.edu.au/files/Supreme_Court_Conference_2012_Flyer-Final_Draft.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.2** **Research report on the institutional proxy voting system**  On 19 October 2012, the Australian Council of Superannuation Investors (ACSI) released a research report on the institutional proxy voting system.  The research, titled 'Institutional Proxy Voting in Australia', examines in detail the voting experience of 23 major institutional investors in all 1,895 voting resolutions meetings considered at meetings of S&P/ASX300 companies during 2011.  The research approach was to compare the voting instructions initially lodged by these investors with the results eventually declared by the companies, and then to work back through the complex chain of intermediaries involved in the system to identify and explain any anomalies.   This process identified a total of 9 instances (in 7 companies) in which a significant disparity could be fully established from the sample data and subsequent validations. These instances are documented as case studies in the research report, with attributions as to the points where errors occurred.   Significantly, the research also notes:   * the likelihood that many further anomalies will have occurred, based on reasonable assumptions about the likely voting activities of institutional investors outside the specific survey sample; * a number of operational weaknesses in the systems used to cast institutional shareholders' votes; and * widespread issues with administration of voting exclusions for investors who have participated in share placements.   The report concludes with a series of recommended changes to existing market practices and potential regulatory reforms to improve Australia's proxy voting system. These recommendations include a separation of the cut-off dates for voting entitlements and vote lodgement, the ability for shareholders to appoint independent scrutineers to review tight results, and requirements for all listed company resolutions to be resolved by poll and not a show of hands.  The report is available on the [ACSI website](http://www.acsi.org.au/images/stories/ACSIDocuments/detailed_research_papers/12%20Institutional%20Proxy%20Voting%20in%20Australia.Oct%2012.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.3** **UK Government's response to the Wheatley Review's final report into LIBOR**   On 17 October 2012, the UK Government released its response to the final report of the Wheatley Review of the London Inter-Bank Offered Rate (LIBOR).   The Wheatley Review, released on 28 September 2012, had concluded that wholesale reform was required to restore credibility in the LIBOR benchmark. The Review set out a 10-point plan for reform of the LIBOR setting process.  The final report is available on the [UK Treasury website](http://cdn.hm-treasury.gov.uk/wheatley_review_libor_finalreport_280912.pdf" \t "_new).   The UK Government's response has been to accept Mr Wheatley's ten recommendations in full, namely:  1.     The new Financial Conduct Authority should regulate the submission to, and administration of, LIBOR - and that there should be criminal sanctions for any attempted manipulation.  2.     The British Bankers' Association should make an orderly transfer of responsibility for LIBOR to a new administrator, selected by an independent committee.  3.     The new administrator should scrutinise submissions and regularly review the effectiveness of LIBOR.  4.     There should be a new code of conduct for submitters, approved by the Financial Conduct Authority.  5.     LIBOR should, as far as possible, be corroborated by transaction data in line with the guidelines in the Review.  6.     To improve this ability to corroborate submissions, the number of currencies and maturities for which submissions are made should be cut substantially to achieve a sharper focus on the more heavily used benchmarks.  7.     Submissions should be published, but after 3 months to avoid the incentive for banks to try to flatter their perceived credit standing and reduce the opportunity for collusion.  8.     The Government should provide the Financial Services Authority with a reserve power to compel banks to submit to LIBOR.  9.     All market participants should consider whether LIBOR is the most appropriate rate for their needs and to ensure that their contracts have workable contingency provisions.  10.   The UK, European and International Authorities should establish clear principles for global benchmarks.  Various amendments are proposed to the Financial Services Bill, which is currently before the UK Parliament, in order to implement the recommendations.   The UK Government's response is available on the [UK Treasury website](http://www.hm-treasury.gov.uk/d/wms_fst_171012.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.4** **UK financial regulation reform - the approach of the new PRA and FCA**   On 16 October 2012, the UK's Financial Services Authority (FSA), in conjunction with the Bank of England, released papers setting out the approach to be taken by the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) under the new financial regulatory framework being introduced next year (and in relation to which legislation is currently before the UK Parliament).  In 'Journey to the FCA', information is provided about how the FCA will use its new powers and how its approach will differ from that of the FSA. The paper is available on the [FSA website](http://www.fsa.gov.uk/static/pubs/other/journey-to-the-fca-standard.pdf" \t "_new).   In addition, two papers have been published, setting out the approach to be taken by the PRA with regard to the supervision of banks, titled '[The PRA's approach to banking supervision](http://www.fsa.gov.uk/static/pubs/other/pra-approach-banking.pdf" \t "_new)', and the supervision of insurers, titled '[The PRA's approach to insurance supervision](http://www.fsa.gov.uk/static/pubs/other/pra-approach-insurance.pdf" \t "_new)'.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.5** **ICSA releases consultation paper on improving engagement practices between companies and institutional investors**  On 16 October 2012, the UK Institute of Chartered Secretaries and Administrators (ICSA), in conjunction with the Investor Stewardship Working Party (a group of six institutional investors), released a consultation paper titled 'Improving engagement practices between companies and institutional investors'.    The purpose of the consultation is to seek views on various matters in order to prepare guidance on good engagement practice.  Issues for consideration include:   * improved quality of meetings; * improved quality of information about the stewardship approaches of different asset managers; * resource limitations for stewardship; and * the need to build a critical mass of stewardship investors.   The consultation paper is available on the [ICSA website](http://www.icsaglobal.com/assets/files/pdfs/Policy2/01-Improving-Engagement-Practices-between-Companies-and-Institutional-Investors-Consultation-Oct-2012.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.6** **FRC releases disclosure framework discussion paper**   On 15 October 2012, the UK Financial Reporting Council released a discussion paper titled 'Thinking about financial reporting disclosures in a broader context.'  The paper sets out a 'road map' for a disclosure framework for financial reporting aimed at improving the quality of disclosure and their value to the users.  In particular, the paper covers the reduction of clutter in financial reports by avoiding duplication in disclosures and using tests of materiality more rigorously.  The paper is available on the [FRC website](http://www.frc.org.uk/getattachment/4e747c33-cc31-469b-9173-a07a3d8f0076/Thinking-about-disclosures-in-a-broader-context-A-road-map-for-a-disclosure-framework.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.7** **Dealing with domestic systemically important banks: framework issued by the Basel Committee**  On 11 October 2012, the Basel Committee on Banking Supervision issued its 'Framework for dealing with domestic systemically important banks'.  In November 2011, the Basel Committee issued final rules for global systemically important banks (G-SIBs). The G20 leaders endorsed these rules at their November 2011 meeting and asked the Basel Committee and the Financial Stability Board to work on extending the framework to domestic systemically important banks (D-SIBs).   While not all D-SIBs are significant from a global perspective, the failure of such a bank could have a much greater impact on its domestic financial system and economy than that of a non-systemic institution. Some of these banks may have cross-border externalities, even if the effects are not global in nature.   Against this backdrop, the Basel Committee developed a set of principles on the assessment methodology and the higher loss absorbency requirement for D-SIBs. (The framework was published for public consultation on 29 June 2012.) The framework takes a complementary perspective to the G-SIB framework by focusing on the impact that the distress or failure of banks will have on the domestic economy.   Given that the D-SIB framework complements the G-SIB framework, the Committee considers that it would be appropriate if banks identified as D-SIBs by their national authorities are required by those authorities to comply with the principles in line with the phase-in arrangements for the G-SIB framework; that is, from January 2016.  The Framework is available on the [BIS website](http://www.bis.org/publ/bcbs233.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.8** **Parliamentary Committee Report - Derivative Transactions Bill**   On 11 October 2012, the Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) released the report of its inquiry into the [Corporations Legislation Amendment (Derivative Transactions) Bill 2012 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=135858" \t "_default).   The PJCCFS makes the following recommendations:   * that the Treasury and ASIC 'publish guidance material outlining the consultation process for the development of [over-the-counter (OTC)] derivatives regulations and rules'; * that ASIC 'release a regulatory guide explaining the derivative transactions and trade repository rules'; * that ASIC 'provide regular updates on the development of OTC derivatives rules'; * that ASIC 'issue guidance material on the confidentiality of data and trade repositories'; and * 'that for matters relating to the energy sector, the Minister for Resources and Energy be consulted prior to the making of regulations, the mandating of derivatives or the consent to an ASIC rule'.   The PJCCFS recommends that the Bill be passed.  The report is available on the [Australian Parliament website](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=corporations_ctte/derivatives/report/index.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.9** **Release of IMF global financial stability report**   In October 2012, the IMF released its latest Global Financial Stability Report.    The report finds increased risks to the global financial system, with the euro area crisis the principal source of concern. The report urges policymakers to act now to restore confidence, reverse capital flight, and reintegrate the euro zone. In both Japan and the United States, it states that steps are needed toward medium-term fiscal adjustment.  Emerging market economies have successfully navigated global shocks thus far, but need to guard against future shocks while managing a slowdown in growth.   The report also examines whether regulatory reforms are moving the financial system in the right direction, and finds that progress has been limited, partly because many reforms are in the early stages of implementation and partly because crisis intervention methods are still in use in a number of economies, delaying the movement of the financial system onto a safer path.    The final chapter assesses whether certain aspects of financial structure enhance economic outcomes. Indeed, some structural features are associated with better outcomes. In particular, financial buffers made up of high-quality capital and truly liquid assets tend to be associated with better economic performance.   The report is available on the [IMF website](http://www.imf.org/external/pubs/ft/gfsr/2012/02/index.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.10** **APRA releases final package on review of capital standards for insurers**   On 10 October 2012, the Australian Prudential Regulation Authority (APRA) released a package containing a response paper and the final prudential standards that complete its review of life and general insurance capital requirements.   The aims of APRA's review have been to improve the risk-sensitivity of the capital standards for insurers and achieve better alignment of these standards across APRA-regulated industries. APRA commenced its review in 2010 and has been consulting extensively with industry and other stakeholders.   The paper outlines APRA's response to submissions on its proposals on the composition of the capital base and also sets out a small number of other minor refinements. It is accompanied by final versions of all the prudential standards that have been amended through the capital review.  The revised capital framework will take effect from 1 January 2013, with reporting commencing in 2013 for reporting periods ending on or after 1 January 2013.    The response paper and relevant prudential standards are available on the [APRA website](http://www.apra.gov.au/CrossIndustry/Pages/Life-and-General-Insurance-Capital-Review-October-2012.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.11** **Research on ASX200 board composition and non-executive pay**   On 10 October 2012, the Australian Council of Superannuation Investors (ACSI) released its latest research on board composition and non-executive pay in the ASX 200 companies.    Key findings include:   * in the past year, the number of women serving on Top 100 company boards rose to 15.4% of all board positions; * ASX101-200 companies are far behind on gender diversity; * the pool of non-executive directors is expanding significantly; and * a major increase in the fees paid to non-executive directors in Australia's largest companies.   **(a) Top 100 - women on boards**   According to the research, the 2011 year saw significant improvements in gender diversity on Top 100 boards, although this was not matched by smaller companies within the ASX200.  Improved diversity came with a substantial increase in the fees paid to chairman and non-executives in Top 100 companies.    The number of women serving on Top 100 company boards rose to its highest level in the 11 year history of ACSI's research, with women in 2011 accounting for 15.4% of all Top 100 directors (2010: 12.2%) and 17.7% of all board seats.   Despite this improvement, well over half of ASX 101 - 200 companies in the study had no women on their boards: 47 of 88, compared to just seven Top 100 sample entities (down from 21 in 2010).    **(b) Broadening the pool of non-executive directors**    There is also evidence that the director 'gene pool' is widening in Top100 boards. ACSI's research has found that in 2011:   * of the 21 executive director appointments, 18 went to new entrants to the Top 100 pool; * of the 71 non-executive director appointments, 45 went to new entrants; and * the 2011 year saw the largest number of new entrants to the Top 100 director pool for some years (totaling 63). Of these new entrants, 23 were women.   **(c) Non-executive director pay**    The average and median fees paid to chairpersons of Top 100 entities in ACSI's study rose by more than 15 percent in 2011, with the average chairperson fee rising 15.7% from $431,233 to $498,938.  The average chairperson fee in the ASX 101-200 sample was $253,886 and the median $215,199.  Top 100 non-executive director fees rose more modestly in 2011, with the average rising 3.6% from $208,181 to $215,721.   The research report is available on the [ACSI website](http://www.acsi.org.au/images/stories/ACSIDocuments/generalresearchpublic/Board%20Comp%20and%20Non-Exec%20Director%20Pay%20in%20Top%20100%20Companies%202011.Oct%2012.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.12** **BCBS releases progress report on Basel III implementation**   On 10 October 2012, the Basel Committee on Banking Supervision (BCBS) released an updated progress report on Basel III implementation.    The report provides a high-level view of Basel Committee members' progress in adopting Basel II, Basel 2.5 and Basel III, as of end September 2012.  It focuses on the status of domestic rule-making processes to ensure that the Committee's capital standards are transformed into national law or regulation according to the internationally agreed timeframes. The Committee believes that disclosure will provide additional incentive for members to fully comply with the international agreements.    The report updates the Committee's June 2012 report to G20 Leaders on Basel III implementation.   The report is available on the [BIS website](http://www.bis.org/publ/bcbs232.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.13** **IOSCO releases final report on policy recommendations for money market funds**   On 9 October 2012, the International Organization of Securities Commission (IOSCO) released a final report on 'Policy Recommendations for Money Market Funds'.    The report proposes recommendations to be the basis for common standards for the regulation and management of money market funds across jurisdictions. These are articulated around key principles for valuation, liquidity management, use of ratings, disclosure to investors, and repos.    The IOSCO Board approved the report on money market funds during its meeting on 3 - 4 October in Madrid. While it was noted that a majority of the Commissioners of the US Securities and Exchange Commission did not support its publication, there have been no other objection.    The MMF industry is significant in size, since it represents approximately US$4.7 trillion in assets under management at first quarter 2012 and around one fifth of the assets of Collective Investment Schemes (CIS) worldwide. Although money market funds, which provide a significant source of credit and liquidity, did not cause the crisis, their performance during the 2007-2008 financial turmoil highlighted their potential to spread or even amplify a crisis.   As requested by the FSB, the current 15 recommendations for MMFs seek to supplement the existing frameworks where IOSCO considers there is still room for further reforms and improvements, following reforms undertaken on MMFs both in the United States and in Europe in 2010. Other reforms were also adopted in countries such as Canada, China, India and South Africa.    Also, compared to the 2010 reforms, which mainly focused on the asset side of funds, the present recommendations address vulnerabilities arising from the liability side, as well as the crucial issue of valuation and the display of a constant net asset value (CNAV). In particular, the IOSCO recommendations seek to address the vulnerabilities around the risk of run and first mover advantage which could have broader consequences for the financial system.    The size, features and systemic relevance of money market funds differ significantly from country to country. Accordingly, the implementation of the recommendations may vary from jurisdiction to jurisdiction, depending on local conditions and circumstances, as well as according to the specificities of the existing domestic legal and regulatory structures.   IOSCO proposes to conduct a review of the application of these recommendations within two years with a view to assess whether the recommendations should be revised, complemented or strengthened. At this time, IOSCO will also consider other market or regulatory developments which may have impacted money market funds over this period.   Among the developments which IOSCO will consider when reviewing the implementation of the recommendations, the following factors will be relevant: the impact of new banking regulations and the evolution in the structure of bank funding, potential upcoming regulatory reforms in relation to the shadow banking system, the interest rate environment, changes in the industry of MMFs, changes in investor demand and the potential development of competing products.  The final report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD392.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.14** **Inauguration of the European Stability Mechanism**  On 8 October 2012, the European Stability Mechanism (ESM), a permanent crisis resolution mechanism for the Eurozone countries, was inaugurated following the signing of a Treaty by the 17 euro area Member States on 2 February 2012.   The purpose of the ESM is to provide stability support through a number of financial assistance instruments to ESM Member States which are experiencing, or are threatened by, severe financing problems. For this purpose, the ESM is entitled to raise funds by issuing financial instruments or by entering into financial or other agreements with ESM Members, financial institutions or other third parties.  Further information is available on the [ESM website](http://www.esm.europa.eu/index.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.15** **UK Competition Commission progress report on statutory audit services market investigation**  On 8 October 2012, the UK Competition Commission released a progress report on its statutory audit services market investigation.   Initial views, rather than conclusive findings, are offered by the Commission in this report, including:   * there is a distinct market for the supply of statutory audit services to FTSE350 companies, separate from the supply of the same services to private and smaller listed companies; * there are barriers to entry which limit the ability of Mid Tier firms to constrain the competitive offerings of the Big Four firms; and * there is a clear information asymmetry between shareholders (as principals) and auditors (as agents).   The Commission has also published further working papers, including:   * [Nature and strength of competition in the supply of FTSE 350 audits](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/nature_and_strength_of_competition.pdf" \t "_new); * [Profitability (part one)](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/profitability_part_one.pdf" \t "_new); * [Price concentration analysis](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/price_concentration_analysis_wp.pdf" \t "_new); * [Evidence relating to the selection process: tendering, annual renegotiations and switching](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/evidence_relating_to_the_selection_process_tendering_annual_renegotiations_and_switching.pdf" \t "_new); * [Evidence of tacit coordination](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/tacit_coordination.pdf" \t "_new); and * [Barriers to entry: international networks](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/barriers_to_entry_internationalnetworks.pdf" \t "_new).   The progress report is available on the [Competition Commission website](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/overview_wp.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.16** **Treasury releases consultation on ASIC takeover proposals**  On 5 October 2012, the Treasury released an initial scoping paper on policy issues raised by ASIC regarding takeovers law.  The Treasury scoping paper will form the basis of a series of targeted roundtables which Treasury will convene with key business, legal and markets stakeholders to discuss ASIC's concerns.  The outcome of the roundtable series will then inform a more comprehensive discussion paper on ASIC's recommendations and potential policy responses, as part of an engagement process with the business community, legal experts and other interested parties.  The Treasury scoping paper notes that Australia's takeovers laws have been largely successful in achieving their policy objectives since their introduction, however it is important to ensure that the law continues to operate effectively in response to market developments. In particular, ASIC has highlighted a number of areas where it is concerned that the current laws may need modernizing.  ASIC has highlighted the areas of creeping acquisitions, the use and disclosure of equity derivatives, clarity of takeover proposals, the issue of association, and the impact of new media as areas which may need to be addressed.  The Treasury will undertake an analysis of the issues involved, based on extended consultation with industry, before providing advice to the Government.  The scoping paper is available on the [Treasury website](http://www.treasury.gov.au/PublicationsAndMedia/Publications/2012/Takeovers-issues" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.17** **IOSCO Board reconfirms commitment to further global regulatory reform**   On 3-4 October 2012, the Board of the International Organization of Securities Commissions (IOSCO) met in Madrid to progress its current work agenda and set a path for future work. This was the Board's first meeting since its creation at IOSCO's Annual Conference in Beijing to give IOSCO a more efficient and inclusive structure.   The Board reconfirmed IOSCO's commitment to meet deadlines on work mandated by the G20 Leaders and the Financial Stability Board (FSB) on regulatory reform. The Board took a number of key decisions on work in a number of areas.  Recommendations on the regulation of Money Market Funds and Oil Price Reporting Agencies were approved, with progress made on recommendations on 'Global Developments in Securitization Regulation', which will be completed in a matter of weeks. Agreement was also reached on next steps regarding IOSCO's Report on the Credit Default Swap Market.   Further information is available on the [IOSCO website](http://www.iosco.org/news/pdf/IOSCONEWS254.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.18** **Reform of Singapore's Companies Act**   On 3 October 2012, Singapore's Ministry of Finance (MOF) announced the completion of the review of Singapore's Companies Act (1967).   In October 2007, the MOF appointed a steering committee to review Singapore's Companies Act. The committee's [final report](http://app.mof.gov.sg/data/cmsresource/public%20consultation/2011/Review%20of%20Companies%20Act%20and%20Foreign%20Entities%20Act/Annex%20A%20SC%20Report%20Complete.pdf" \t "_new) was published in April 2012 and contained 217 recommendations relating to directors, shareholder rights, capital maintenance, accounts, company administration and charges.   The Ministry of Finance consulted on these recommendations and earlier this month the outcome of this consultation was published  The majority of the committee's recommendations have been adopted. For example, the Ministry of Finance has accepted the committee's view that corporate directorships should not be introduced in Singapore and that the Act should contain an express provision providing that by ordinary resolution a private company director can be removed from office. MOF has also agreed with the committee's view that it would not be desirable to codify exhaustively directors' duties and that public companies should be able to issue non-voting shares and shares with multiple votes.    The wide ranging changes are expected to reduce regulatory burden and compliance costs, provide greater flexibility for companies, and improve corporate governance.    A draft of the Bill to amend the 1967 Act is planned for publication early next year.   The MOF's Responses to the Final Report is available on the [MOF website](http://app.mof.gov.sg/data/cmsresource/SC_RCA_Final/AnnexA_SC_RCA.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.19** **FSA consults on changes to the Listing Rules**    On 2 October 2012, the UK Financial Services Authority (FSA) released a consultation paper titled 'Enhancing the effectiveness of the listing regime'.    The FSA proposes a number of changes to the Listing Rules that aim to enhance the effectiveness of the Listing Regime.  The Listing Rules set out the requirements for companies listed in the UK and are the responsibility of the United Kingdom Listing Authority (UKLA), operating under the FSA.   The proposals fall under two headings:  **(a) Free float provisions**  The free float requirements are set at an EU level and allow the FSA to consider a free float of below 25% if there is sufficient liquidity. The amount of shares in public hands potentially plays a role in giving shareholders sufficient power to counterbalance a dominant shareholder. However, the FSA does not believe that an increase in the free float requirement is a proportionate way to address the governance issues that have been raised in this context.  The FSA proposes:   * detailing the circumstances where it might consider modifying the 25% free-float requirement for premium listings, indicating that any modification beneath 20% would be unlikely; and * removing the requirement for a minimum absolute percentage free float within the standard segment, provided that sufficient liquidity is present.   **(b) Corporate governance**  The FSA proposes to further strengthen the Listing Regime by adopting greater corporate governance requirements for companies with a dominant shareholder. The FSA will increase the tools available to independent shareholders to influence the governance of the companies in which they have invested.  These proposals include:   * introducing the concept of a 'controlling shareholder'; * requiring an agreement is put in place to regulate the relationship between such a shareholder and the listed company; and * ensuring that this agreement is complied with on an ongoing basis. This will ensure that the company is managed independently from that shareholder.   The FSA also recognizes the important role that the independent directors play in these circumstances. Therefore it will also insist on a majority of independent directors on the board where a controlling shareholder exists and introduce a new dual voting procedure to allow independent shareholders to have more say in their appointment.  At the same time the FSA is making clear that certain types of company are incompatible with a premium listing including those with voting arrangements that have the potential to subvert or circumvent the investor protections that the premium listing provides.  Following the January 2012 consultation, the FSA also confirms further changes to the Listing Rules in relation to reverse takeover, sponsor regime, externally managed companies, financial information requirements and transactions.  The consultation paper is available on the [FSA website](http://www.fsa.gov.uk/library/policy/cp/2012/12-25.shtml" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.20** **Release of report and recommendations on reforming the EU banking sector**   On 2 October 2012, the High Level Expert Group on reforming the structure of the EU banking sector released its final report and recommendations.   The High Level Expert Group was requested to consider whether there is a need for structural reforms of the EU banking sector or not and to make any relevant proposals as appropriate, with the objective of establishing a stable and efficient banking system serving the needs of citizens, the economy and the internal market.    The Group recommends a set of five measures that augment and complement the set of regulatory reforms already enacted or proposed by the EU, the Basel Committee and national governments:   * Proprietary trading and other significant trading activities should be assigned to a separate legal entity if the activities to be separated amount to a significant share of a bank's business. * The Group emphasises the need for banks to draw up and maintain effective and realistic recovery and resolution plans, as proposed in the Commission's Bank Recovery and Resolution Directive (BRR). * The Group strongly supports the use of designated bail-in instruments. * The Group proposes to apply more robust risk weights in the determination of minimum capital standards and more consistent treatment of risk in internal models. * The Group considers that it is necessary to augment existing corporate governance reforms by specific measures to:  (1) strengthen boards and management;  (2) promote the risk management function;  (3) rein in compensation for bank management and staff;  (4) improve risk disclosure; and  (5) strengthen sanctioning powers.   The final report is available on the [EU website](http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.21** **APRA releases final Basel III capital reform package**  On 28 September 2012, the Australian Prudential Regulation Authority (APRA) released a final set of prudential standards and reporting standards that give effect to major elements of the Basel III capital reforms in Australia.  As well as the final standards, the package includes a response to submissions on APRA's proposals for the four prudential standards, released in draft form in March 2012, and the two reporting standards, released in draft form in June 2012. APRA's consultations on the Basel III capital reforms began with the release of a discussion paper outlining its broad approach in September 2011.   The Basel III capital framework was introduced by the Basel Committee on Banking Supervision in December 2010 to raise the quality and level of capital in the global banking system.   The key features of the Basel III capital reforms that will apply to authorised deposit-taking institutions (ADIs) in Australia include:   * a new definition of regulatory capital under which common equity is the predominant form of Tier 1 capital; * a stricter approach to regulatory adjustments under which most deductions from capital are to be from Common Equity Tier 1 capital; * an increase in the minimum amounts of capital that ADIs must hold against the risks they face: Common Equity Tier 1 Capital must be at least 4.5 per cent of risk-weighted assets and the Tier 1 Capital ratio at least 6 per cent, an increase of 2.5 and 2.0 per cent, respectively, over the existing minima; * a new capital conservation buffer of 2.5 per cent that places increasing constraints on capital distributions where an ADI's capital level falls within the buffer range; * a countercyclical buffer of up to 2.5 per cent that will apply when excessive credit growth and other indicators point to a system-wide build up of risk; and * a simple, transparent leverage ratio to help contain the build up of leverage in the banking system.   Other prudential and reporting standards incorporating new counterparty credit risk requirements and other elements of the Basel III capital reforms will be released in November 2012.    The full suite of prudential standards, reporting requirements and prudential practice guides are to come into effect from 1 January 2013.    The package is available on the [APRA website](http://www.apra.gov.au/adi/PrudentialFramework/Pages/Implementing-Basel-III-capital-reforms-in-Australia-September-2012.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.22** **FRC releases revised codes and auditing standards**  On 28 September 2012, the UK Financial Reporting Council released updated editions of the UK Corporate Governance Code and the UK Stewardship Code, following a consultation on proposed changes in April 2012.   The FRC has announced limited changes to both Codes, intended to increase accountability and engagement through the investment chain. Both Codes will continue to apply on a 'comply or explain' basis. The revised codes apply from 1 October 2012.   Changes to the UK Corporate Governance Code include:   * FTSE 350 companies are to put the external audit contract out to tender at least every ten years with the aim of ensuring a high quality and effective audit, whether from the incumbent auditor or from a different firm. The FRC will be holding discussions with companies, auditors and investors to consider whether guidance on tendering would be useful; * Audit Committees are to provide to shareholders information on how they have carried out their responsibilities, including how they have assessed the effectiveness of the external audit process; * Boards are to confirm that the annual report and accounts taken as a whole are fair, balanced and understandable, to ensure that the narrative sections of the report are consistent with the financial statements and accurately reflect the company's performance; * Companies are to explain, and report on progress with, their policies on boardroom diversity. This change was first announced in October 2011, but its implementation was deferred to avoid piecemeal changes to the Code; and * Companies are to provide fuller explanations to shareholders as to why they choose not to follow a provision of the Code.   Changes to the Stewardship Code include:   * Clarification of the respective responsibilities of asset managers and asset owners for stewardship, and for stewardship activities that they have chosen to outsource; * Investors are to explain more clearly how they manage conflicts of interest, the circumstances in which they will take part in collective engagement, and the use they make of proxy voting agencies; and * Asset managers are encouraged to have the processes that support their stewardship activities independently verified, to provide greater assurance to their clients.   The FRC has also published an updated edition of its Guidance on Audit Committees to reflect the changes to the UK Corporate Governance Code, and set out on its website transitional arrangements with respect to the introduction of ten year retendering, to ensure it can be introduced without significant disruption.   The FRC has also published several revised International Standards on Auditing (UK and Ireland), in order to support the changes made to the UK Corporate Governance Code and audit committee guidance. These revised standards include:   * [260 Communication with those charged with governance](http://www.frc.org.uk/getattachment/351cd4ec-9266-49b9-aded-ca43b31f9f93/ISA-%28UK-and-Ireland%29-260-Revised-October-2012.aspx" \t "_new); * [700 The auditor's report on financial statements](http://www.frc.org.uk/getattachment/60e7565d-bd38-465a-885b-b25307a03cf7/ISA-%28UK-and-Ireland%29-700-Revised-October-2012.aspx" \t "_new); * [705 Modifications to the opinion in the independent auditor's report](http://www.frc.org.uk/getattachment/eaf4fa70-6861-4fde-a09e-c8be3d8637cf/ISA-%28UK-and-Ireland%29-705-Revised-October-2012.aspx" \t "_new); * [706 Emphasis of matter paragraphs and other matter paragraphs in the independent auditor's report](http://www.frc.org.uk/getattachment/8024d56c-2dd7-4ff6-a37d-819be99af179/ISA-%28UK-and-Ireland%29-706-Revised-October-2012.aspx" \t "_new); and * [720A The auditor's responsibilities relating to other information in documents containing audited financial statements](http://www.frc.org.uk/getattachment/f4d613fc-f44b-4061-9c86-9ed6eb30767d/ISA-%28UK-and-Ireland%29-720-Section-A-Revised-October-2012.aspx" \t "_new).   Further information is available on the [FRC website](http://www.frc.org.uk/News-and-Events/FRC-Press/Press/2012/September/FRC-publishes-updates-to-UK-Corporate-Governance-C.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.23** **Study on female board representation in the USA**  In September 2012, Deloitte released GMI Ratings' third study this year of gender diversity on corporate boards of directors.   The current study, titled 'Variation in female board representation within the United States', provides a quantitative state-by-state analysis of gender diversity on the boards of Russell 3000 companies headquartered in the 50 US states. Key findings include 36% of companies have no women directors on their boards and the Midwest leads the nation in gender diversity.   The study is available on the [Deloitte website](http://www.corpgov.deloitte.com/site/us/board-governance/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.24** **Update on Dodd-Frank executive compensation and corporate governance**  In September 2012, Deloitte released an update on the Dodd-Frank Wall Street Reform and Consumer Protection Act ('Dodd-Frank Act').  More than two years since President Barack Obama signed the Dodd-Frank Act into law, and over a hundred rules later, the US Securities Exchange Commission (SEC) is less than half way through to issuing final rules as required by the legislation.   Deloitte's report reviews where the legislation currently stands in terms of certain general rulemakings and, specifically, the executive compensation and corporate governance provisions.  The report is available on the [Deloitte website](http://www.corpgov.deloitte.com/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/USEng/Documents/Deloitte%20Periodicals/Hot%20Topics/Dodd-Frank%20Executive%20Compensation%20and%20Corporate%20Governance%20Update_Deloitte%20Hot%20Topics_September%202012.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.25** **WFE releases new study on global derivatives market**   On 26 September 2012, the World Federation of Exchanges (WFE) released a new study which examines the state of over-the-counter (OTC) and exchange-traded derivatives. The report, titled 'The New Global Risk Transfer Market: Transformation and the Status Quo', describes how regulatory reform is resulting in significant shifts in product selection across the global risk transfer market.   During and immediately following the global financial crisis in 2008, the WFE advocated for reform and regulation of the OTC derivatives markets, which were identified as having made significant contributions to financial turmoil. In 2010, the WFE commissioned a study to assess risk in the OTC derivatives markets.  This initial report was titled 'The Global Risk Transfer Market: Developments in OTC and Exchange-Traded Derivatives'.   The latest report provides an updated assessment on the changes in market structure and how new regulations address the issues with OTC and exchange-traded derivatives that were highlighted in the 2010 study. The report also aims to contribute to the current discussion by proposing international standards.   The executive summary and full report are available on the [WFE website](http://www.world-exchanges.org/files/statistics/pdf/V10-033%20GRTM2%20FINAL%20PUBLISHED_Execsum%20Extended.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.26** **IMF releases working paper on assessing the cost of financial regulation**  On 26 September 2012, the International Monetary Fund (IMF) released a working paper titled 'Assessing the Cost of Financial Regulation'.  The working paper assesses the overall impact on credit of the financial regulatory reforms in Europe, Japan, and the United States. Long-term cost estimates are provided for Basel III capital and liquidity requirements, derivatives reforms, and higher taxes and fees.  Overall, average lending rates in the base case would rise by 18 bps in Europe, 8 bps in Japan, and 28 bps in the United States.  These results are similar to the official BIS assessments of Basel III and an OECD analysis, but lower as a result of including expense cuts and reductions in the returns required by investors.    The working paper is available on the [IMF website](http://www.imf.org/external/pubs/cat/longres.aspx?sk=40021.0" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.27** **Joint Forum releases Principles for the Supervision of Financial Conglomerates**   On 24 September 2012, the Joint Forum, which comprises the Basel Committee on Banking Supervision, the International Organization of Securities Commissions and the International Association of Insurance Supervisors, released its final report on 'Principles for the Supervision of Financial Conglomerates'. The Joint Forum addresses issues common to the banking, securities and insurance sectors, including the regulation of financial conglomerates.  The updated Principles supersede the Compendium of documents produced by the Joint Forum in 2001.  In revising its principles, the Joint Forum's aim was to focus on closing regulatory gaps, eliminating supervisory 'blind spots' and ensuring effective supervision of risks arising from unregulated financial activities and entities. There are, for example, new high level principles concerning corporate governance (in particular, the responsibilities of the board and senior management, the treatment of conflicts of interest and remuneration policy).  The principles are organised into five sections and expand on and supplement the 2001 Compendium in a number of ways:   * supervisory powers and authority; * supervisory responsibility; * corporate governance; * capital adequacy and liquidity; and * risk management.   Further information is available on the [IOSCO website](http://www.iosco.org/news/pdf/IOSCONEWS252.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.28** **London Stock Exchange releases new guide on corporate governance for main market and AIM companies**   On 24 September 2012, the London Stock Exchange released a new guide titled 'Corporate Governance for Main Market and AIM Companies'.    The guide is wide-ranging in its reach, with chapters on the UK regulatory framework, structuring an effective board, managing directors' conflicts and board evaluation.  Several chapters, either wholly or in part, compare the UK framework with that in other jurisdictions.   The guide is available on the [London Stock Exchange website](http://www.londonstockexchange.com/companies-and-advisors/aim/publications/documents/corpgov.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.29** **Report on FTSE100 executive director remuneration**   On 21 September 2012, Deloitte released insights from its 2012 FTSE 100 Executive Directors' Remuneration report.  Key findings include:   * salary increases are lower in 2012; * bonus payouts for periods ending in 2011/12 were lower than those in the previous period; * nearly half of chief executives and a quarter of directors hold company shares with a value of at least five times salary.   Further information is available on the [Deloitte website](http://www.deloitte.com/view/en_GB/uk/42d7215f5d3e9310VgnVCM1000003156f70aRCRD.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.30** **Treasury proposes changes to financial regulation framework**  On 12 September 2012, the Treasury released a consultation paper concerning prudential supervision by the Australian Prudential Regulation Authority (APRA), which includes proposed legislative changes.   The paper, titled 'Strengthening APRA's Crisis Management Powers', seeks stakeholder views on a range of options directed primarily at strengthening Australia's framework for financial regulation.  The paper sets out options for consultation with a view to:   * strengthening APRA's crisis management powers; * simplifying APRA's regulatory powers across the various Acts it administers, given that many firms operate across sectors; * making a series of minor and technical amendments to enhance the effectiveness of legislation administered by APRA; and * aligning Australia's regulatory regime with international best practice following the GFC.   The paper is part of an ongoing review of the legislative framework administered by APRA and follows a series of reforms implemented by the Government since 2008.   The paper is available on the [Treasury website](http://www.treasury.gov.au/%7E/media/Treasury/Consultations%20and%20Reviews/2012/APRA/Key%20Docs/PDF/Discussion%20Paper.ashx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.31** **ESMA consults on proposed guidelines on remuneration policies and practices under MiFID**    On 17 September 2012, the European Securities and Markets Authority (ESMA) released a consultation paper on its proposed 'Guidelines on remuneration policies and practices under the Markets in Financial Instruments Directive (MiFID)'.  The key elements of the guidelines include:   * general obligations (for example, firms should ensure that remuneration is not paid in a manner that aims at circumventing the MiFID requirements and/or the ESMA guidelines and should design and monitor their remuneration policies and practices to take account of the conduct of business and conflicts of interest risks that may arise); * types of remuneration (for example, remuneration consists of all forms of payments or benefits provided directly or indirectly by firms to relevant persons involved in the provision of investment and/or ancillary services to clients); and * staff covered (the focus of the guidelines is on the remuneration of all staff involved in the provision of investment and/or ancillary services - in particular, staff who can have a material impact on the service provided, on the conduct of business risk profile, and who can influence corporate behaviour).   The consultation paper is available on the [ESMA website](http://www.esma.europa.eu/consultation/Consultation-Guidelines-remuneration-policies-and-practices-MiFID" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.32** **ACSI releases research on CEO pay in Top 100 Companies**   On 17 September 2012, the Australian Council of Superannuation Investors (ACSI) released its research on CEO pay in Australia's largest listed companies.   According to the research, the fixed pay of CEOs in Australia's ASX Top 100 listed companies held steady in 2011, but bonuses fell materially in the same period.  Overall, the average cash pay for Top 100 CEOs declined by 8.9% from 2010 levels to $3.055 million, reflecting the fall in bonus sizes. Average bonuses ($1.255 million in 2011) fell to their lowest levels since 2004. However, the overwhelming majority of CEOs in the sample - close to 90% - still received a bonus.   The research report is available on the [ACSI website](http://www.acsi.org.au/images/stories/ACSIDocuments/ceo_pay_in_the_top_200/CEO%20Pay%20in%20the%20Top%20200%20Companies%202011.Sept%2012.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.33** **BCBS updates its Core Principles for Effective Banking Supervision**  On 14 September 2012, the Basel Committee on Banking Supervision released an updated edition of its 'Core Principles for Effective Banking Supervision'.  Drawing on lessons learnt during the financial crisis that began in 2007, the revised Core Principles represent a significant step forward from the Basel Committee's 2006 'Core principles for effective banking supervision' and the associated 'Core principles methodology'. They also reflect key advances in regulatory thinking in recent years that, among other things, include:   * devoting supervisory attention on a proportionate basis, in line with the risk profile and systemic importance of banks; * applying a broad financial system perspective that considers both the macro and microprudential elements of effective supervision; * adopting effective crisis preparation and management strategies, together with orderly resolution frameworks and other measures to mitigate the impact of bank failures; and * fostering robust market discipline through sound supervisory practices in the areas of corporate governance, disclosure and transparency.   The Core Principles are available on the [BIS website](http://www.bis.org/publ/bcbs230.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.34** **Vale Professor Harold Ford AM**   Many readers of the Bulletin will be familiar with the work of Professor Harold Ford. Professor Ford passed away on 27 September 2012, aged 91. His academic career commenced in 1940 when he was appointed the fifth member of Melbourne Law School's full time academic staff. In 1960 he was appointed Robert Garran Professor of Law in the Australian National University and Foundation Dean of the Faculty of Law. He returned to the University of Melbourne in 1962 on appointment as Professor of Commercial Law where he continued to teach and research until his retirement in 1984. Professor Ford was Dean in 1964 (in Sir Zelman Cowen's absence) and from 1967-1973. Professor Ford was an extraordinarily influential scholar. He was the sole author of the first four editions of 'Principles of Company Law' (since renamed 'Ford's Principles of Corporations Law' and now in its 14th edition). He was also co-author of 'Principles of the Law of Trusts'. His many other publications included 'Unincorporated Non-Profit Associations' (Clarendon Press), 'Principles of the Law of Death Duty' (Law Book Co), 'An Introduction to the Securities Industry Acts' (co-authored, Butterworths), 'The Law of Wills' (co-authored, Law Book Co), 'Wills and Intestacy in Australia and New Zealand' (co-authored, Law Book Co) as well as many chapters in books and journal articles.  Professor Ford made substantial contributions to law reform. He served in 1963-1964 on the Manning Committee on Bills of Exchange. In 1974-1975 he was one of a small team which prepared the National Companies Bill. In 1976-1978 he chaired a Corporate Affairs/Stock Exchange joint working party which recommended establishment of a central clearing house system ultimately realised in the current CHESS system. In 1984-1990 he chaired the Companies and Securities Law Review Committee. In 1977 Professor Ford became a Fellow of the Academy of the Social Sciences in Australia. The University of Melbourne conferred on him the honorary degree of LLD in 1987. In 1994 he was made a Member of the Order of Australia for services to the law. In 2000 the Corporate Law Teachers Association conferred its first honorary life membership on Professor Ford in recognition of his outstanding achievements as a scholar, educator and reformer.    A paper titled 'Professor Harold Ford and the Development of Australian Corporate Law' is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699584" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1)  **1.35** **Melbourne Law Masters 2013**   The Melbourne Law Masters offers graduate diplomas and masters degrees across more than 20 specialist legal areas and is delighted to release the 2013 program.   In 2013, it will offer new degrees in Energy and Resources Law and Environment Law and more than 100 subjects in Commercial Law.   A key feature of the program is the teaching staff - along with Law School experts, there are almost 100 lecturers engaged in the practice and application of law, drawn from the Judiciary, the Bar, law firms, government agencies and business.   In addition, the program has 57 international visiting lecturers from leading institutions across the world including Cambridge, Harvard, Hong Kong, London, New York University, Singapore and Toronto.   All classes are small and interactive, giving participants the opportunity to network with teachers and other students. Most Melbourne Law Masters subjects are taught intensively over a week, making study practicable for students in full-time employment anywhere in Australia. The intensive format also enables the Law School to draw on experts from across the world to teach many of the cutting edge subjects in the program.  Programs in commercial law include:   * Master of Laws (LLM) * Master of Commercial Law * Graduate Diploma in Corporate and Securities Law   All subjects may also be undertaken individually, either with or without assessment. Subjects may meet Continuing Professional Development (CPD) requirements.  The general, core commercial law subjects are listed below, along with subjects offered as part of specialist groupings. For further information, visit [www.law.unimelb.edu.au/masters](http://www.law.unimelb.edu.au/masters" \t "_new)   **Commercial Private Law**   * [Commercial Conflict of Laws](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5524" \t "_new) * [Commercial Law: Principles and Policies](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5526" \t "_new) * [Contract Interpretation](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5537" \t "_new) * [Current Issues in Negligence](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5552" \t "_new) * [Equity and Commerce](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5568" \t "_new) * [Province and Function of Property](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5640" \t "_new) * [Remedies in Commercial Law](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5647" \t "_new) * [Restitution](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5649" \t "_new) * [Standards in Commercial Dealings](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5661" \t "_new)   **Corporate and Transnational Commercial Law**   * [Chinese Corporate Law and Securities Regulation](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5519" \t "_new) * [Company Takeovers](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5527" \t "_new) * [Corporate and White Collar Criminal Law](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5544" \t "_new) * [Corporate Governance and Directors' Duties](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5545" \t "_new) * [Corporate Law in a Global Financial Centre](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5546" \t "_new) * [Global Commercial Contract Law](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5576" \t "_new) * [International Securities Regulation](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5609" \t "_new) * [Schemes of Arrangement](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5652" \t "_new) * [Shareholders' Rights and Remedies](http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/5654" \t "_new)   **Asian Law**   * [Chinese Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5520" \t "_new) * [Chinese Tax and Investment Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5521" \t "_new) * [Commercial Law in Asia (Formerly Commercial Deals in Asia)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5525" \t "_new) * [Deals with China](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5554" \t "_new) * [Drugs and the Death Penalty in Asia](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5558" \t "_new) * [East Asian Competition Policy and Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5559" \t "_new) * [International Law and Development (Formerly Law and Development)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5602" \t "_new) * [Islamic Law and Politics in Asia](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5614" \t "_new) * [Rule of Law in Asia](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5650" \t "_new)   **Banking and Finance Law**   * [Derivatives Law and Practice](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5555" \t "_new) * [Financial Services Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5570" \t "_new) * [Hedge Funds and Private Equity Funds](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5579" \t "_new) * [International Financial System: Law and Practice](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5595" \t "_new) * [International Financial Transactions: Law and Practice](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5596" \t "_new) * [Managed Investments Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5621" \t "_new) * [Project Finance](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5639" \t "_new)   **Communications Law**   * [Copyright Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5538" \t "_new) * [Cybercrime](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5553" \t "_new) * [Entertainment Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5564" \t "_new) * [Free Speech, Contempt and the Media](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5572" \t "_new) * [Fundamentals of Regulation](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5574" \t "_new) * [Internet Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5612" \t "_new) * [Newsgathering](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5627" \t "_new) * [Privacy Law (Formerly Privacy and Data Protection)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5638" \t "_new) * [Regulation of Communications (Formerly Communications Law)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5645" \t "_new)   **Dispute Resolution**   * [Advanced Evidence](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5510" \t "_new) * [Alternative Dispute Resolution](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5511" \t "_new) * [Avoiding and Managing Construction Disputes](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5514" \t "_new) * [Class Actions](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5522" \t "_new) * [Commercial Conflict of Laws](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5524" \t "_new) * [Construction Dispute Resolution](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5533" \t "_new) * [Criminal Procedure and Human Rights: International and Australian Perspectives](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5550" \t "_new) * [Human Rights Litigation and Advocacy](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5586" \t "_new) * [International Commercial Arbitration](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5588" \t "_new) * [Litigating before International Courts and Tribunals](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5620" \t "_new) * [What is it that Judges Do?](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5678" \t "_new) * [Written Advocacy (Formerly Effective Written Advocacy)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5681" \t "_new) * [WTO Law and Dispute Settlement](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5682" \t "_new)   **Employment and Labour Relations Law**   * [Alternative Dispute Resolution](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5511" \t "_new) * [Bargaining at Work (Formerly Bargaining at Work and Industrial Action)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5515" \t "_new) * [Corporate Governance and Directors' Duties](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5545" \t "_new) * [Employment Contract Law (Formerly Employment Law)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5562" \t "_new) * [Equality and Discrimination at Work (Formerly Anti-Discrimination Law at Work)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5567" \t "_new) * [Fundamentals of Regulation](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5574" \t "_new) * [Human Rights at Work](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5583" \t "_new) * [International Employment Law (Formerly International and Comparative Labour Law)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5593" \t "_new) * [International Human Rights Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5598" \t "_new) * [International Law and Development (Formerly Law and Development)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5602" \t "_new) * [Labour Standards under the Fair Work Act (Formerly Regulating Working Conditions)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5616" \t "_new) * [Principles of Employment Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5636" \t "_new) * [Workplace Health and Safety](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5680" \t "_new)   **Energy and Resources Law**   * [Energy Regulation and the Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5563" \t "_new) * [Environmental Law (Formerly Environmental Law: Science and Regulation)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5565" \t "_new) * [International Environmental Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5594" \t "_new) * [International Mineral Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5605" \t "_new) * [International Petroleum Transactions](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5606" \t "_new) * [Mineral and Petroleum Tax](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5624" \t "_new) * [Mineral Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5625" \t "_new) * [Petroleum Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5632" \t "_new) * [Project Finance](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5639" \t "_new) * [Water Law and Natural Resources Management (Formerly Water Law)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5677" \t "_new)   **Environment Law**   * [Climate Change Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5523" \t "_new) * [Construction Risk: Allocation and Insurance](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5536" \t "_new) * [Energy Regulation and the Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5563" \t "_new) * [Environmental Law (Formerly Environmental Law: Science and Regulation)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5565" \t "_new) * [Environmental Rights](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5566" \t "_new) * [International Environmental Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5594" \t "_new) * [International Law and Development (Formerly Law and Development)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5602" \t "_new) * [International Mineral Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5605" \t "_new) * [Mineral Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5625" \t "_new) * [Payment Matters in Construction Projects](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5631" \t "_new) * [Petroleum Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5632" \t "_new) * [Principles of Construction Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5635" \t "_new) * [Project Finance](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5639" \t "_new) * [Water Law and Natural Resources Management (Formerly Water Law)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5677" \t "_new)   **Intellectual Property Law**   * [Copyright Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5538" \t "_new) * [Designs Law and Practice](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5556" \t "_new) * [Entertainment Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5564" \t "_new) * [European Intellectual Property Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5569" \t "_new) * [Fundamentals of Patent Drafting](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5573" \t "_new) * [International Issues in Intellectual Property](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5600" \t "_new) * [Internet Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5612" \t "_new) * [Interpretation and Validity of Patent Specifications](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5613" \t "_new) * [Patent Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5628" \t "_new) * [Patent Practice](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5629" \t "_new) * [Sports Marketing Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5660" \t "_new) * [Trade Mark Practice](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5672" \t "_new) * [Trade Marks and Unfair Competition](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5673" \t "_new)   **International Economic Law**   * [Developing Countries and the WTO](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5557" \t "_new) * [Global Commercial Contract Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5576" \t "_new) * [International Business Transactions](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5587" \t "_new) * [International Commercial Arbitration](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5588" \t "_new) * [International Economic Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5592" \t "_new) * [International Sale of Goods](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5608" \t "_new) * [International Trade Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5611" \t "_new) * [Principles of International Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5637" \t "_new) * [Regional Integration: The Case of the European Union](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5643" \t "_new) * [WTO Law and Dispute Settlement](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5682" \t "_new)   **Sports Law**   * [Event Management Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5179" \t "_new) * [Gambling, Policy and the Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5189" \t "_new) * [International Sports Employment Law (Formerly International Sports Labour Law)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5238" \t "_new) * [Sport, Commerce and the Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5233" \t "_new) * [Sports Dispute Resolution](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5239" \t "_new) * [Sports Health and Medical Law (Formerly Sports Medicine Law)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5241" \t "_new) * [Sports Law: Entities and Governance](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5243" \t "_new)   **Tax**   * [Capital Gains Tax: Problems in Practice](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5517" \t "_new) * [Chinese Tax and Investment Law](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5521" \t "_new) * [Comparative Corporate Tax](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5528" \t "_new) * [Comparative International Tax](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5529" \t "_new) * [Comparative Tax Avoidance](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5530" \t "_new) * [Corporate Tax A (Shareholders, Debt and Equity)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5547" \t "_new) * [Corporate Tax B (Consolidation and Losses) Formerly Corporate Tax B (Companies and Consolidation)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5548" \t "_new) * [Foundations of Tax Law (Formerly Australian Income Tax System)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5571" \t "_new) * [Goods and Services Tax Principles](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5578" \t "_new) * [International Tax: Principles and Structure](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5610" \t "_new) * [Mineral and Petroleum Tax](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5624" \t "_new) * [Sport and Taxation (Formerly Taxation of Sport)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5657" \t "_new) * [State Taxes and Duties](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5662" \t "_new) * [Tax Effective Writing: Written Advocacy](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5665" \t "_new) * [Tax Policy](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5667" \t "_new) * [Tax Treaties](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5668" \t "_new) * [Taxation of Business and Investment Income (Formerly Taxation of Business and Investment Income A)](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5669" \t "_new) * [Taxation of Small and Medium Enterprises](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5670" \t "_new) * [Taxation of Trusts](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5671" \t "_new) * [The Tax Commissioner as Administrator](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5664" \t "_new) * [Transfer Pricing: Practice and Problems](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5674" \t "_new) * [US Corporate and International Tax](http://www.law.unimelb.edu.au/index.cfm?objectid=2B184510-CD30-11E0-BF760050568D0140&sid=5675" \t "_new)   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1** **Consultation on code approval and relief powers under FOFA reforms**   On 23 October 2012, ASIC released a consultation paper on its approach to code approval and relief powers under the Future of Financial Advice (FOFA) reforms. ASIC also confirmed that it will be taking a facilitative approach to the implementation of FOFA.   **(a) Codes approval**   ASIC has existing power under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) to approve codes of conduct, with Regulatory Guide 183 'Approval of financial services sector codes of conduct' setting out ASIC's minimum expectations in this area.  Consultation Paper 191 'Future of Financial Advice: Approval of codes of conduct for exemption from opt-in requirement' seeks feedback on how RG 183 should be amended for FOFA. It is relevant to advisers and industry representatives who are considering submitting either a new or existing code for approval.  CP 191 covers matter such as:   * appropriate content of a code submitted for approval, including methods to obviate the need for opt-in; * administration, governance, monitoring and enforcement of codes; and * ASIC's approval and relief process.   ASIC will consider applications for approval of a FOFA code once final policy is published in RG 183. The code approval process will be rigorous and it will take months rather than weeks for ASIC to assess a code. ASIC notes that unless a licensee opts in to the FOFA regime before 1 July 2013, the earliest date an adviser would need to comply with the opt-in requirement, or join an approved code, is 1 July 2015.  Submissions to CP 191 close on 3 December 2012.   **(b) FOFA implementation**   More broadly, ASIC reaffirmed that it will take a facilitative approach during the first 12 months of the FOFA reforms from 1 July 2013.   ASIC will adopt a measured approach where inadvertent breaches arise or systems changes are underway, provided industry participants are making reasonable efforts to comply.   [Regulatory Guide 183](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg183" \t "_new) and [Consultation Paper 191](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp191" \t "_new) are available on the ASIC website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.2** **Release of findings of review into EDR scheme jurisdiction over debt recovery legal proceedings complaints**   On 19 October 2012, ASIC released the findings of a review examining the jurisdiction of EDR schemes, in relation to certain consumer complaints.   The review examined the jurisdiction of EDR schemes over consumer complaints in cases where scheme members have commenced legal proceedings to recover debts from consumers and was undertaken as part of a public consultation under Consultation Paper 172 'Review: EDR jurisdiction over complaints when members commence debt recovery proceedings' ([CP 172](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp172" \t "_new)). The findings of the review, including a report on the submissions received as part of the consultation process, are contained in Report 308 'Response to submissions on CP 172 Review of EDR jurisdiction (debt recovery legal proceedings)' ([REP 308](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep308" \t "_new)).  The review sought feedback on the policy settings outlined in Regulatory Guide 139 'Approval and oversight of external dispute resolution schemes' ([RG 139](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg139" \t "_new)), in particular, RG 139.77-RG 139.79, which require ASIC-approved EDR schemes to handle complaints under their Terms of Reference or Rules when members of the schemes commence legal proceedings to recover a debt from a consumer.  The review confirmed the appropriateness of the existing policy settings and reinforced the useful role ASIC-approved EDR schemes and their debt recovery legal proceedings jurisdiction play in assisting consumers and financial investors who may benefit by a hardship variation, need more time to sell their home, may have been granted loans in breach of responsible lending requirements or face debt collection issues (ie being pursued for statute-barred debts).   Opportunities for improvement include:   * licensees taking steps to better identify hardship in its earlier stages, and better resourcing and training their complaints handling teams to become more efficient and effective; * ASIC-approved EDR schemes (the Credit Ombudsman Service Limited and the Financial Ombudsman Service Ltd) improving their operations by working with scheme members and consumer representatives to improve scheme handling and processing of debt recovery legal proceedings complaints; and * enhanced consumer understanding of how an EDR scheme's debt recovery legal proceedings jurisdiction can assist as well as the continued obligation to make repayments where possible.   The review also found some relatively minor refinements could be made to ASIC's guidance for small business lending complaints. In conjunction with the release of its findings, ASIC is conducting a further consultation seeking feedback on how a scheme's debt recovery legal proceedings jurisdiction should apply to small business lending complaints (under Consultation Paper 190 'Small business lending complaints: Update to RG 139' ([CP 190](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp190" \t "_new))).   Comments on CP 190 are due by 10 December 2012.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.3** **Launch of online survey to hear from small businesses**   On 8 October 2012, ASIC announced the launch of an online survey to improve its communication with small businesses.   Small businesses are ASIC's largest customer base. They account for 96% of all registered businesses and collectively employ half the Australian workforce.   The survey will:   * give ASIC a better understanding of what small businesses know and do not know about their compliance obligations; * assess if small businesses know where to find information about their compliance obligations; and * provide feedback from small businesses about how ASIC can make compliance easier.   The survey is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-246MR+ASIC+launches+online+survey+to+hear+from+small+businesses?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.4** **Release of new information guides on reporting misconduct**   On 4 October 2012, ASIC released information about its approach to handling tip-offs, complaints, information of concern and reports of misconduct, to assist the public.   Each year, ASIC receives over 20,000 reports of misconduct from liquidators, auditors, financial service providers and the general public which are all received, acknowledged, analyzed, assessed and recorded by ASIC's national Misconduct and Breach Reporting Team.   ASIC weighs every report of misconduct against four key questions:   * What is the extent of harm or loss? * What are the benefits of pursuing the misconduct? * How do other issues, like the type and seriousness of the misconduct and the evidence available, affect the matter? * Is there an alternative course of action?   ASIC has released five information sheets covering:   * [How ASIC deals with reports of misconduct](http://www.asic.gov.au/asic/asic.nsf/byheadline/How-ASIC-deals-with-reports-of-misconduct?openDocument" \t "_new) (Information Sheet 153); * [Your investments: Frozen funds and hardship payments](http://www.asic.gov.au/asic/asic.nsf/byheadline/Your+investments:+Frozen+funds+and+hardship+payments?openDocument" \t "_new) (Information Sheet 159); * [Disputes about employee entitlements](http://www.asic.gov.au/asic/asic.nsf/byheadline/Disputes+about+employee+entitlements?openDocument" \t "_new) (Information Sheet 160); * [Disputes about goods and non-financial services](http://www.asic.gov.au/asic/asic.nsf/byheadline/Disputes+about+goods+and+services?openDocument" \t "_new) (Information Sheet 161); and * [Disputes between officeholders and/or members of small proprietary companies](http://www.asic.gov.au/asic/asic.nsf/byheadline/Disputes+between+officeholders+and/or+members+of+small+proprietary+companies?openDocument" \t "_new) (Information Sheet 162).   To coincide with the release of these publications, ASIC has also redesigned its online material that deals with reporting misconduct. The brochure, online material, information sheets and the recently updated online report form provide plainly stated information to guide people through the process of complaint resolution and, where indicated, reporting misconduct.   Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-245MR+ASIC+releases+new+information+guides+on+reporting+misconduct?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.5** **Release of consultation on conflicted remuneration provisions**   On 28 September 2012, as part of its commitment to consulting on the Future of Financial Advice (FOFA) reforms, ASIC released proposed guidance on the conflicted remuneration ban.   Consultation Paper 189 'Future of Financial Advice: Conflicted remuneration' (CP189) sets out proposals for guidance about complying with the conflicted remuneration provisions.   The ban on conflicted remuneration includes commissions and volume-based payments in relation to the distribution of and advice about retail investment products. Such products include managed investments, superannuation, platforms and margin loans. There is also a ban on asset-based fees for borrowed amounts.  The ban on conflicted remuneration operates alongside other FOFA reforms, including an obligation for advisers to act in the best interests of clients and a requirement for clients to opt-in to renew ongoing fee agreements. The FOFA reforms are intended to better align the interests of financial advisers and their retail clients, and improve the quality of financial advice retail clients receive.  Submissions to CP 189 close on 9 November 2012.   The Consultation Paper is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp189" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.6** **Extension of relief from regulation for all funded representative actions and funded proof of debt arrangements**   On 28 September 2012, ASIC announced that it had extended the interim class order relief granted to lawyers and funders involved in legal proceedings structured as funded representative proceedings and funding claims lodged with liquidators to prove in the winding up of an insolvent company.  Class Order 12/1301 extends the relief in Class Order 10/333 'Funded representative proceedings and funded proof of debt arrangements' until 13 January 2013.  ASIC first announced class order relief in May 2010 (refer [10-92AD](http://www.asic.gov.au/asic/asic.nsf/byheadline/10-92AD+ASIC+grants+interim+class+order+relief+from+regulation+for+all+funded+representative+actions+and+funded+proof+of+debt+arrangements?openDocument" \t "_new) 'ASIC grants interim class order relief from regulation for all funded representative actions and funded proof of debt arrangements').  The relief has been extended to allow time for the commencement of the [Corporations Amendment Regulations 2012 (No 6)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=134183" \t "_default), which will commence from 13 January 2013.  From that date:   * a litigation scheme and a proof of debt scheme will be exempt from the definition of a managed investment scheme in section 9 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act); and * funders and lawyers providing financial services for litigation schemes and proof of debt schemes will be exempt from the requirements that would otherwise apply under Chapter 7 of the Act, including the licensing, conduct and disclosure requirements, but they must have adequate arrangements to manage conflicts of interest.  ASIC released Consultation Paper 185 'Litigation schemes and proof of debt schemes: Managing conflicts of interest'outlining its proposals on how funders and lawyers can satisfy this conflicts management obligation in August 2012.   In the meantime, CO 10/333 has been extended to avoid any interim disruption that could adversely impact plaintiffs, or interfere with the timely and efficient running of litigation.   Amending class order CO 12/1301 and its explanatory statement are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/2012+Class+Orders?openDocument" \l "co12-1301" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.7** **Release of report on ASIC relief decisions: February to May 2012**   On 28 September 2012, ASIC released its latest report about decisions on applications to grant relief from the law, covering 1 February to 31 May 2012.  The report, titled 'Overview of decisions on relief applications (February to May 2012)' (REP303), aims to improve the level of transparency and the quality of publicly available information about decisions ASIC makes when asked to exercise its discretionary powers to grant relief from provisions of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act), the [National Consumer Credit Protection Act 2009 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "_default) or the [National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111363" \t "_default). The report also discusses the various relevant publications released during this period.  ASIC uses its discretion to vary or set aside certain requirements of the law where there is a net regulatory benefit or where ASIC can facilitate business without harming other stakeholders.  The report summarises examples of situations where ASIC has exercised, or refused to exercise, its exemption and modification powers under the Corporations Act. The report also highlights instances where ASIC has considered adopting a no-action position regarding specified non-compliance with statutory provisions.  Decisions by ASIC to refuse to exercise its powers are described on an anonymous basis.  The report provides examples of decisions that demonstrate how ASIC has applied its policy in practice which ASIC thinks will be of particular interest for capital market participants and for participants in the consumer credit and financial services industries. The report includes an appendix detailing the relief instruments referred to.   Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-241MR+ASIC+relief+decisions:+February+to+May+2012?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.8** **Commencement of licence authorisations for emissions units**   On 28 September 2012, ASIC announced that it has started to grant authorisations to Australian businesses intending to provide financial services in emissions units.  Earlier this year, 173 individuals and companies registered with ASIC to provide financial services in emissions units and related derivatives. These registrants include 110 current AFS licensees seeking to vary their authorisations to include emissions units. Registrants come from a variety of sectors and backgrounds, including corporate advisory, energy, and carbon farming.   Registrants have until 31 October 2012 to either apply for an AFS licence or seek a licence variation. If an application is not lodged, registrants must stop offering these services.  New entrants to the carbon markets can apply for an AFS licence or licence variation with an authorisation for emissions units at any time. ASIC must issue an AFS licence before services are provided.  ASIC has developed a range of resources to assist applicants. These resources include Information Sheet 156 'Regulated emissions units: Applying for or varying an AFS licence' ([INFO 156](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulated+emissions+units:+Applying+for+or+varying+an+AFS+licence?openDocument" \t "_new)) and general guidance on how the financial services regime applies to emissions units and carbon markets (refer to Regulatory Guide 236 'Do I need an AFS licence to participate in carbon markets?' ([RG 236](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg236" \t "_new))).  Further information is available on [ASIC's carbon webpage](http://www.asic.gov.au/carbon" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.9** **Release of report on GFC short selling restrictions**   On 24 September 2012, ASIC released a review of measures taken at the height of the global financial crisis to temporarily restrict short selling.  In September 2008 ASIC took steps to temporarily restrict covered short selling in the Australian market and to implement an interim reporting system for permitted short sales. As global financial markets experienced severe stress, countries around the world took steps to strengthen their financial systems. There was widespread concern that short selling was contributing to market volatility and putting enough pressure on market confidence to be systematically relevant to the global financial system and economy.   ASIC introduced the ban on short selling and a reporting system to maintain an orderly market and mitigate the risk of market abuse. ASIC's actions were also intended to enhance confidence and integrity in the market by providing greater transparency, and to avoid potential extreme share price movements in the local market. There was concern that, had Australia not acted as its international counterparts in the UK and USA, among others, were doing, this could have led to pressure on Australian markets.   The review found that these measures, taken in exceptional circumstances, broadly met their regulatory objectives by reducing the risks that might have occurred as a result of unrestricted short selling.  Report 302, titled 'Short selling: Post-implementation review', also acknowledges that the measures may have contributed to some adverse market characteristics, such as reduced liquidity and increased price volatility. The measures also imposed compliance costs on many firms.   The report notes that, if a situation arises in the future that involves disorderly markets and action by regulators in other jurisdictions to further restrict short selling, it is likely that ASIC and the Australian Government would again contemplate a ban on short selling to bolster investor confidence and limit the potential for international regulatory arbitrage.   The short selling disclosure regime will continue to provide detailed and timely information about short selling in the markets which will inform any future decisions about the need for a covered short selling ban in periods of market turmoil.   The temporary ban on covered short selling was lifted for non-financial stocks in November 2008 and the ban on covered short selling of financial stocks was lifted in May 2009. The interim reporting arrangements were superseded by the permanent disclosure framework established by the [Corporations Amendment (Short Selling) Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=105282" \t "_default) and the [Corporations Amendment Regulations 2009 (No 8)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=110735" \t "_default).    Report 302 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep302" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.10** **Release of guidance on hedge fund disclosure**   On 18 September 2012, ASIC released its guidance on new disclosure benchmarks and principles for hedge funds to improve investor awareness of the risks associated with these products.  ASIC's guide, Regulatory Guide 240 'Hedge funds: Improving disclosure', follows industry consultation earlier this year and the Parliamentary Joint Committee on Corporations and Financial Services (PJC) report into the Trio collapse, and is part of ASIC's forward plan of work to improve the conduct of gatekeepers for managed investment schemes and strengthen the regulatory requirements applying to hedge funds.  In the final version of the regulatory guide, there are a number of changes made as a result of submissions received during the consultation, including:   * defining 'hedge funds' as managed investment schemes which exhibit at least two out of five characteristics: complex investment strategy or structure; use of leverage; use of derivatives; use of short selling; charging a performance fee; * removal of an independent custody benchmark; * simpler fee disclosure more in line with prevailing industry practice; and * where a hedge fund has invested 35% or more of its assets in an underlying hedge fund or similar investment vehicle, the disclosure principles and benchmarks should be taken to apply to each such 'significant underlying fund'.   Responsible entities of hedge funds should disclose against the benchmarks and apply the disclosure principles in any PDS dated on or after 22 June 2013.   Regulatory Guide 240 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg240" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.11** **Release of report on review of early termination fees for residential loans entered into before 1 July 2011**   On 18 September 2012, ASIC released a report on early termination fees for residential loans entered into before 1 July 2011.    ASIC's review covered 20 lenders - including both authorised deposit taking institutions (ADIs) such as banks and credit unions, as well as non-ADIs. The review was conducted to assess industry's compliance with the law in this area following the publication of ASIC's guidance in Regulatory Guide 220 'Early termination fees for residential loans: unconscionable fees and unfair contract terms' (RG 220).  The 20 lenders reviewed charged an early termination fee on approximately 75,000 occasions between 1 July 2010 and 15 February 2011, and there were approximately 1.5 million loans on which an early termination fee would have been payable as at 15 February 2011.   ASIC's report identifies factors that increase the likelihood of an early termination fee being declared unconscionable, and makes recommendations for lenders on how they can reduce the likelihood of this happening. Fees identified as being at increased likelihood of being declared unconscionable included fees which:   * did not reduce over time; * were calculated by reference to the loan amount; and * did not account for lenders' recovery (or 'clawback') of commissions paid to mortgage brokers when a loan is terminated early.   As a result of the review, several lenders made changes to their fee structures. Some lenders also indicated they will be reviewing early termination fees to be charged in the future on a loan by loan basis to ensure that no individual consumer is overcharged.   ASIC also reviewed complaints data.  While less than 1% of consumers who were charged an early termination fee made a complaint, over half of consumers who complained ultimately had their early termination fee waived or reduced.  ASIC continues to follow up specific issues with some of the lenders involved with the review and encourages other lenders to review their early termination fees in light of the report's findings.   The report is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Report300-published-18-September-2012.pdf/$file/Report300-published-18-September-2012.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.12** **Consultation on the constitutions of registered managed investment schemes**   On 18 September 2012, ASIC released a consultation paper outlining proposals to update the guidance relating to the content requirements of constitutions of registered managed investment schemes.  Consultation Paper 188 'Managed investments: Constitutions - Updates to RG 134' contains proposals about ASIC's views on the requirements in sections 601GA and 601GB of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act), and how it will apply them in deciding to register a managed investment scheme.  ASIC's proposed guidance covers the following areas in relation to a registered managed investment scheme:   * implementation; * the consideration to acquire an interest in the scheme; * powers of the responsible entity of the scheme; * complaints handling for retail clients and wholesale clients; * winding up the scheme; * the payment of fees to a responsible entity and its rights of indemnity from scheme property; * withdrawal rights of members of the scheme; * the use of extrinsic material to the constitution; and * legal enforceability of the constitution.   The consultation paper seeks the views of responsible entities, their advisers, industry associations, financial consumer and investor advocacy groups and any other interested parties. Comments on the proposals in CP 188 are due by 13 November 2012.   CP 188 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp188" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.13** **Consultation on proposed guidance for operating and financial reviews**   On 17 September 2012, ASIC announced that it was proposing guidance to assist directors in ensuring that a key part of listed entity annual reports provides information and analysis useful to investors.  Consultation Paper 187, titled 'Effective disclosure in an operating and financial review', proposes guidance on the operating and financial review (OFR).  The OFR forms part of a listed entity's annual report and is required to contain information investors would reasonably require to make an informed assessment of the entity's operations, financial position, and business strategies and future prospects.  ASIC's proposed guidance is not intended to add unnecessary length to annual reports, but rather is intended to promote more meaningful information and analysis for investors.  CP 187 also includes proposed guidance on the use of an exemption from disclosing information on business strategies and prospects that is likely to cause unreasonable prejudice to the listed entity.  Submissions close 23 November 2012 with final guidance expected in time to assist directors for the 30 June 2013 reporting season.   CP 187 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp187" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.14** **Release of information sheet on financial reporting compliance of insolvent public companies**   On 12 September 2012, ASIC released an information sheet discussing its review of external administrators' and registered liquidators' compliance with the obligation to prepare audited financial reports for public companies and certain large proprietary companies and lodge them with ASIC.  This information sheet explains:   * the relief granted by ASIC to companies in external administration from some of the financial reporting obligations in the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default); * ASIC's review of lodgments of audited financial reports, which revealed an unacceptably high level of non-compliance with the financial reporting obligations by administrators of insolvent public companies; * the reports required to be prepared by external administrators, most of which are publicly available; and * the relief from the financial reporting requirements relating specifically to Ansett.   The information sheet is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/info163-published-12-9-2012.pdf/$file/info163-published-12-9-2012.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.15** **Release of surveillance snapshot and new service charter**   On 12 September 2012, ASIC published for the first time a snapshot of ASIC's surveillance work. An updated Service Charter, outlining the level of performance people can expect to receive from ASIC, has also been released.   **(a) Surveillance snapshot**  The surveillance chart for the 2011-12 financial year shows how often ASIC proactively analyses its regulated populations through both on-site visits and desk-based reviews that last for more than two days.   The surveillance chart shows the work each team undertakes and the population (by number) they regulate. It maps out the number of years it would theoretically take to conduct a surveillance on every member of the population. The priorities and objectives for each team are also included.   To take a few examples: ASIC's Insolvency Practitioners team undertakes a surveillance of Australia's 670 registered liquidators every four years on average. ASIC's Investment Banks team undertakes a surveillance of 25 investment banks every 1.3 years on average and 220 hedge funds investment managers/responsible entities every 6.6 years on average. Forty-four retail OTC derivative providers and six credit rating agencies are the subject of a surveillance every year.   The staff numbers shown account for all full-time equivalent positions in each team, (some of whom are not engaged in surveillance work) and represent a portion of ASIC's 1800-plus full-time and part-time staff.   ASIC intends to release an annual summary of its surveillance work in its Annual Report.   The release of this surveillance data follows the publication of ASIC's [first Enforcement Report](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-58MR+ASIC+releases+first+enforcement+report?openDocument" \t "_new) in March 2012, detailing ASIC enforcement actions between July and December 2011. A [second Enforcement Report](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-222MR+ASIC+enforcement+report+-+January+to+June+2012?openDocument" \t "_new), covering January - June 2012, was published on 11 September 2012.  The surveillance chart is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/ASIC%27s+surveillance+coverage+of+regulated+populations+in+2011-12?openDocument" \t "_new).  **(b) ASIC Service Charter**  The updated Service Charter reflects ASIC's new consumer credit responsibilities as well as clearer performance targets against all service standards.  It has also been updated to reflect ASIC's new values and strategic outcomes.   The Service Charter sets out:   * how ASIC serves the public; * what people can expect when they deal with ASIC; and * how people can help ASIC serve them better.   It explains how ASIC responds to requests - for example, when applying for licences or registering a company - and how ASIC responds when people report alleged misconduct by companies or individuals.   The Service Charter was first published in 2006 and continues to provide an outline of the values that guide ASIC's service and standards for the most common services.   ASIC will publish the Service Charter performance results for 2011-12 with the ASIC Annual Report .   ASIC's surveillance and enforcement activities are outside the scope of the Service Charter (refer to the [Surveillance and Enforcement Outcomes reports](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-224MR+ASIC+releases+surveillance+snapshot+and+new+service+charter?openDocument" \l "enforcement" \t "_new)).   The Service Charter is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Service+charter+results?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2)  **2.16** **Release of enforcement report - January to June 2012**    On 11 September 2012, ASIC released the second of its six-monthly enforcement reports, detailing enforcement outcomes achieved by ASIC in the period 1 January 2012 to 30 June 2012.  The report summarises ASIC's actions against a range of gatekeepers in the Australian financial system, such as financial advisers, auditors and directors.   Gatekeepers who breach the standards expected of them may face serious consequences, including disciplinary action, removal from the industry, monetary fines and in more serious cases, even imprisonment.  The report demonstrates the focus of ASIC on four key attributes of gatekeepers:   * act honestly; * be competent to advise; * be diligent; and * properly manage your conflicts of interest.   Report 299 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep299" \t "_new). The first enforcement report, Report 281 'ASIC enforcement outcomes: July to December 2011' is also available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument#rep281).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h2) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1** **Consultation on Continuous Disclosure**  On 17 October 2012, ASX released for public comment:   * a consultation paper entitled [Review of ASX Listing Rules Guidance Note 8 - Continuous Disclosure: Listing Rules 3.1 - 3.1B](http://www.asxgroup.com.au/media/GN_8_Consultation_Paper.pdf" \t "_new); * a proposed new version of [Guidance Note 8: Continuous Disclosure: Listing Rules 3.1 - 3.1B](http://www.asxgroup.com.au/media/Guidance_Note_8.pdf" \t "_new); * a shorter guide entitled [Continuous Disclosure: An Abridged Guide](http://www.asxgroup.com.au/media/Abridged_CD_Guide.pdf" \t "_new); and * proposed Listing Rule changes outlined in a document entitled [Proposed Disclosure Related Amendments to the ASX Listing Rules](http://www.asxgroup.com.au/media/CD_Listing_Rule_Amendments.pdf" \t "_new).   The focus of the consultation is the proposed new version of Guidance Note 8, which is intended to provide listed entities and their officers and advisers with clearer, more detailed information to assist them in understanding and complying with their continuous disclosure obligations under Listing Rules 3.1 - 3.1B.  The draft revisions to Guidance Note 8 reflect industry feedback that aspects of the continuous disclosure rules would benefit from updated guidance.  They also take into consideration recent legal and market developments.  The draft revisions to Guidance Note 8 seek to provide more information on a number of areas, including:   * the test for determining what constitutes material or 'market sensitive' information; * clarifying that 'immediately' does not mean 'instantaneously' but rather 'promptly and without delay'; * how to use trading halts to manage disclosure issues; * exceptions to the requirement to release information immediately; * the meaning of 'false market'; * managing 'earning surprises'; * responding to market and media speculation and analyst commentary * how the continuous disclosure requirements apply to confidential offers to enter into control transactions; and * ASX enforcement practices, including an explanation of the roles of 'price query' and 'aware' letters.   ASX is inviting comments from all interested stakeholders on the consultation materials. Submissions are due by 30 November 2012.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h3)  **3.2** **ASX Limited Annual General Meeting**   On 5 October 2012, ASX Limited held its Annual General Meeting.    The address by ASX Chairman Rick Holliday-Smith is available on [ASXGroup.com.au](http://www.asxgroup.com.au/media/PDFs/Final_Speeches%281%29.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h3)  **3.3** **Reports**   On 4 October 2012, ASX released:   * the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Group_Monthly_Activity_Report_-_September_2012.pdf" \t "_new); * the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2012/notice2012_233.pdf" \t "_new); and * the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Compliance_Monthly_Activity_Report_September_2012.pdf" \t "_new)   for September 2012.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h3)  **3.4** **Release of consultation paper ASX BookBuild®**   On 19 September 2012, ASX released a consultation paper titled 'ASX BookBuild®: Bringing efficiency, fairness and transparency to the primary equity market'.    This paper outlines a new capital raising service being offered by ASX that will allow ASX-listed companies to price and allocate new securities through an on-market, automated bookbuild mechanism called ASX BookBuild®. ASX BookBuild® will provide companies that are listed or seeking listing with an alternative to the current off-market bookbuild process when issuing new securities as part of a placement or Initial Public Offering (IPO).   The [Consultation Paper](http://www.asxgroup.com.au/media/consultation_paper_bookbuild.pdf" \t "_new) and [Media Release](http://www.asxgroup.com.au/media/PDFs/ASX_BookBuild_Media_Release__19_September.pdf" \t "_new) are available on ASXGroup.com.au.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h3)  **3.5** **Release of consultation paper on reserves and resources disclosure rules for mining and oil and gas companies**   On 18 September 2012, ASX released a consultation paper on rules to enhance disclosure of reserves and resources by ASX-listed mining and oil and gas exploration and production companies. The proposed new rules have been developed following extensive consultation over the last two years and are part of ASX's continuing plans to strengthen Australia's equity capital market.   Many of the proposed requirements focus on the reporting of material projects. ASX's objectives are to promote greater investor confidence and market integrity in the reporting of these important assets to support efficient capital formation for ASX-listed mining and oil and gas companies. These changes align Australia's reporting framework with other major mining and oil and gas markets.   The proposed new rules are the culmination of extensive consultation with ASX-listed mining and oil and gas companies, the Joint Ore Reserves Committee (JORC), industry and investor groups, the professionals responsible for estimating reserved and resources, and ASIC. In developing the new rules, ASX considered the feedback from 122 written submissions and 54 roundtable meetings held by ASX following the release of ASX's October 2011 [consultation paper](http://www.asxgroup.com.au/media/PDFs/ASX_LRs_Review_Issues_Paper_mining_and_oil_gas_reserve_and_resource_reporting_20111005.pdf" \t "_new). The responses were summarised in a [Report on Consultation Feedback](http://www.asxgroup.com.au/media/reserves_resources_disclosure_rules_report_consultation_feedback.pdf" \t "_new), released in April 2012.   The proposed new listing rules provide a more robust regime for reserves and resource reporting to investors. The new requirements also seek to provide for greater consistency and transparency in the reporting of reserves and resources information across both the mining and oil and gas industries.   In parallel to this initiative, JORC has released for consultation a revised and updated JORC code, which together with the Society of Petroleum Engineers - Petroleum Resources Management System for oil and gas companies, will underpin the new requirements in the ASX Listing Rules.   The [Consultation Paper](http://www.asxgroup.com.au/media/Reserves_and_Resources_Reporting_Mining_Oil_Gas_Coys.pdf" \t "_new) and [Media Release](http://www.asxgroup.com.au/media/PDFs/ASX_LRs_for_Mining_and_Oil__Gas_Companies_18_Sep.pdf" \t "_new) are available on ASXGroup.com.au.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h3)  **3.6** **Submission to ASIC consultation paper CP184 - Australian market structure: Draft market integrity rules and guidance on automated trading**   On 14 September 2012, ASX provided a submission to the ASIC consultation paper 'Australian market structure: Draft market integrity rules and guidance on automated trading' (CP184). ASX's submission supports ASIC's proposals for participants level risk controls which complement the controls that ASIC has imposed on market operators.   The ASX submission can be found on the [ASXGroup.com.au website](http://www.asxgroup.com.au/media/ASX_Submission_ASIC_CP184_Automated_Trading.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h3) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1** **Mission NewEnergy Limited**  On 3 October 2012, the Takeovers Panel announced that it had accepted an undertaking from Mission NewEnergy Limited and declined to conduct proceedings on an application dated 19 September 2012 from McDermott Industries Limited, in relation to the affairs of Mission.   The application primarily concerned an exclusivity provision in a financing term sheet entered into by Mission with SLW International, LLC.  McDermott submitted (among other things) that the provision amounted to a lock-up device that was anti-competitive and coercive.   The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances given Mission's compelling need for funds and the undertaking provided by Mission. Accordingly, the Panel declined to conduct proceedings.  The reasons of the Panel are available on the [Takeovers Panel website.](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=reasons_for_decisions/2012/019.htm&pageID=&Year=" \t "_new)  Subsequent to this decision, on 3 October 2012 the Panel received an application from McDermott Industries Limited seeking a review of the Panel's decision. On 18 October the review Panel announced that it had declined to conduct proceedings.  The reasons of the review Panel are available on the [Takeovers Panel website.](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=reasons_for_decisions/2012/020.htm&pageID=&Year=" \t "_new)  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h4) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Research Papers** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%236) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **5.1** **Accountability and the corporate governance framework: from Cadbury to the UK Corporate Governance Code**   At the heart of the UK's corporate governance framework for listed companies is the UK Corporate Governance Code, which is a voluntary code. The Code has developed over many years and its genesis can be found in the legendary Cadbury Report that was published in 1992. The Code very much depends on the comply or explain principle, namely a company must comply with the Code or explain why it does not do so. Arguably it was the need for the accountability of boards of directors that was a major factor that contributed to the development of the whole code movement in the UK. It is clear that generally speaking the accountability of boards has become an increasingly critical element in any assessment of corporate governance. But it has been asserted that one of the features of self-regulatory structures such as the Code is that they are low on accountability. This paper seeks to ascertain whether this is in fact correct as far as the code system in the UK is concerned, and particularly in the way that it has developed over the years.  Allied to this the paper also seeks to assess whether the system has adequately provided for accountability of boards in the UK. To this end the paper examines the reports of the corporate governance committees of the 1990s and 2000s, the various iterations of the Combined Code, and the UK Corporate Governance Code concerning what provision is in fact made for accountability of boards.   The paper concludes that while the various reports and codes that have been published in the UK from 1992 onwards say the right things and this appears to enhance accountability, the Codes have been relatively weak on accountability. Further, even though the comply or explain principle purports to foster accountability, it can prevent accountability as the decision whether to comply or how to explain is completely within the discretion of the board of directors. Hence, the board that is to be accountable is in fact the arbiter of what is accounted for and how.    The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2143171" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h5)  **5.2** **Comply or explain: In need of greater regulatory oversight?**   Having a voluntary code as the basis of a corporate governance regime is popular in countries around the world. Generally, at the heart of such an approach is the concept of 'comply or explain.' This concept originated in the UK with the Cadbury Report in 1992 and provides that a company is to comply with a set code of practice, but if it does not then it is to state that it does not and explain why it does not. The use of this concept is designed to permit flexibility in companies and it is in response to the fact that one size does not fit all as far as companies are concerned, as they are all different and should not be subject to rigid rules.   One of the critical aspects of many of the codes that embrace the comply or explain concept is that it is not the job of any regulatory body to assess what companies do or say in relation to the Code provisions. It is incumbent on the markets generally and the company's shareholders specifically to determine whether the response of the company to Code provisions does enough, and then to take some action in order to force companies either to conform with the provisions (if they have not) or to explain why they have failed to do so. The idea is that those who are really interested in conformity should examine company statements and respond appropriately. Hence, the aim of the comply or explain principle is to empower shareholders to make an informed evaluation as to whether non-compliance is justified, given the company's circumstances.    The aim of the paper is to assess whether the present scheme which relies on the stewardship of shareholders and the efficiency of the markets should continue, or whether a regulatory body should be empowered to determine whether companies are in fact complying with Code provisions or, if not, whether they are providing adequate explanations for not complying. To this end, the paper examines the comply or explain concept and ascertains how effective it is. It identifies and discusses the shortcomings that exist with shareholder and market scrutiny of company statements. Also it focuses on the nature of the explanations that are given by companies when they do not comply with a particular requirement in the Code. Next, the paper considers whether a regulatory body should be employed to enhance the corporate governance scheme and evaluates whether it would provide a better approach to that which exists at the moment. The paper touches on the kind of sanctions that might be implemented if a regulatory body was to oversee comply or explain.   The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144132" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h5)  **5.3** **Centro and the monitoring board - legal duties versus aspirational ideals in corporate governance**   Pothers about liability risks for company directors and officers are nothing new in corporate law. The global financial crisis, however, created a unique and unfamiliar commercial matrix in which such concerns were played out. Although Australia fared better than many jurisdictions during the global financial crisis, nonetheless, the crisis had some significant commercial and legal effects, including in the area of directors' liability.   One decision highlighting the potential dangers for directors in this regard is ASIC v Healey (2011) 196 FCR 291 ('Centro liability decision'), an Australian decision concerning financial disclosure and breach of directors' duties, which has been described in the US as a 'wake-up call from down under'. This article explores an apparent incongruity between the Centro liability decision, which has been criticized for its stringency, and the subsequent penalty decision, which some have considered far too lenient.   This article argues that, rather than signifying inconsistency, the Centro liability and penalty decisions form vital complementary parts, which reflect an underlying tension in the area of directors' duties between legal rules and aspirational standards. The same tension also underpins the law in this area in the United States. The article examines the Centro litigation through a comparative law lens, contrasting it with some leading US case law on directors' duties, including Smith v Van Gorkom, In re Caremark International Inc. Derivative Litigation, and the Disney litigation.   The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145717" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h5)  **5.4** **Between law and markets: Is there a role for culture and ethics in financial regulation?**     The limits of markets as mechanisms for constraining socially suboptimal behaviour are well documented. Simultaneously, conventional approaches toward the law and regulation are often crude and ineffective mechanisms for containing the social costs of market failure. So where do we turn when both law and markets fail to live up to their social promise? Two possible answers are culture and ethics. In theory, both can help constrain socially undesirable behaviour in the vacuum between law and markets. In practice, however, both exhibit manifest shortcomings.    To many, this analysis may portend the end of the story. From the authors' perspective, however, it represents a useful point of departure. While neither law nor markets may be particularly well suited to serving as 'the conscience of the Square Mile,' it may nevertheless be possible to harness the power of these institutions to carve out a space within which culture and ethics - or, combining the two, a more ethical culture - can play a meaningful role in constraining socially undesirable behaviour within the financial services industry. The objective of this article is to explore some of the ways this might be achieved.   The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2157588" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h5)  **5.5** **The intended and collateral effects of short-sale bans as a regulatory tool**   Short-sale bans have been frequently utilized globally as a regulatory tool during periods of financial crisis. This paper is a review of the observed intended and unintended effects. We see that short-sale bans have pervasive effects spanning many financial markets that include options, convertible bonds, CDS, and ETFs. Such implications should be of interest to regulators and policymakers when contemplating future bans.   The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159599" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h5) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%237) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **6.1** **High Court excludes litigation funding from financial services licensing regime**   (By Michael Legg and Nicholas Mavrakis, Clayton Utz)   International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed) [2012] HCA 45, High Court of Australia, French CJ, Gummow, Heydon, Crennan and Bell JJ, 5 October 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/HCA/2012/45.html](http://www.austlii.edu.au/au/cases/cth/HCA/2012/45.html" \t "_new)    **(a) Summary**   In this case, the High Court has determined that litigation funders do not require an Australian Financial Services Licence (AFSL).    While the [Corporations Amendment Regulation 2012 (No 6)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=134183" \t "_default) exempted litigation funders from the need to apply for and hold an Australian Financial Services Licence in relation to certain types of schemes (class actions or group litigation and claims against corporations that are in external administration, such as liquidation), it left open the possibility that funding in relation to other types of dispute was not exempt from needing an AFSL. The High Court's decision in Chameleon Mining was therefore eagerly expected by the litigation funding industry.    **(b) Facts**   The case before the High Court involved a dispute between Chameleon Mining NL (CHM) and International Litigation Partners Pte Ltd (the Funder), a company incorporated in Singapore, in relation to the parties' respective rights under a litigation funding agreement that had been entered into by CHM, to allow it to pursue litigation in the Federal Court of Australia against a third party for breach of director's duties.    Relevantly, the Funder sought the payment of an early termination fee because a change of control clause had been triggered, but CHM argued that it had a right to rescind the funding agreement pursuant to section 925A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act), as the funding agreement was a financial product and the Funder did not hold the necessary AFSL allowing it to issue or deal in such products.    However, an AFSL only arises for 'a person who carries on a financial services business in this jurisdiction'. The expression 'financial services business' means 'a business of providing financial services'. The term 'financial service' includes dealing in a 'financial product'.  Exactly when an AFSL is required is a convoluted statutory construction exercise due to the principles based regulatory approach adopted in Chapter 7 of the Corporations Act.  The regulation of financial products is accompanied by an overview, a broad general definition, specific inclusions, specific exclusions, exclusions based on a something only incidentally being a financial product, as well as inclusions and exclusions to be found in the regulations.    **(c) Decision**   The High Court focussed on one of the specific exclusions from a financial product, namely a credit facility. Regulation 7.1.06 specifies things that are not financial products because they are a credit facility, including 'the provision of credit' for any period, with or without prior agreement between the credit provider and the debtor; and whether or not both credit and debit facilities are available. Credit is defined broadly in regulation 7.1.06(3):   credit means a contract, arrangement or understanding:  (a) under which:  (i) payment of a debt owed by one person (a debtor ) to another person (a credit provider) is deferred; or  (ii) one person (a debtor) incurs a deferred debt to another person (a credit provider); and  (b)  including any of the following:  (i)  any form of financial accommodation; ...   The High Court observed that these provisions had the result that 'a contract, arrangement or understanding that is any form of financial accommodation is 'credit', and its provision 'for any period' will be a 'credit facility' (at [26])'.   The Funding Deed at issue in Chameleon Mining provided for the Funder to pay legal costs and if there was a resolution of the proceedings in CHM's favour, the Funder was entitled to repayment of the legal costs and payment of the funding fee (the higher of three times the legal costs and a percentage of the resolution sum that was structured to be between 25-40% depending on when resolution was achieved).   The High Court found that the Funding Deed was the provision for a period of a form of financial accommodation of CHM by the Funder.  This was so even though the Funder paid the legal fees directly to the lawyers rather than advancing moneys to CHM for it to pay the lawyers. As the Funding Deed answered the statutory description of a 'credit facility', the whole of Chapter 7, including the requirement to hold an AFSL and the rescission provision in section 925A upon which CHM relied, was not engaged.  CHM was therefore liable to pay the early termination fee in the amount of $8,381,144.30 plus interest.    Moreover, the width of the credit facility exclusion will mean that most, if not all, litigation funding arrangements are excluded from compliance with Chapter 7.   **(d) What next for litigation funding?**   The High Court's decision should not be taken as meaning that there are not important policy issues relating to litigation funding still to be resolved.    The lack of a licensing regime means anyone or any entity can fund litigation in Australia (except for lawyers). [Corporations Amendment Regulation 2012 (No. 6) (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=134183" \t "_default) has only imposed requirements to manage conflicts of interest in relation to schemes mentioned in para 5C.11.01(1)(b) or (c) of the regulations.  Funding arrangements for commercial litigation, of which Chameleon Mining is an example, and other types of litigation outside the scope of the regulations, are not subject to any licensing nor any conflict management requirements.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h6)  **6.2** **Liquidators to pool shares bought from tainted account by book entry**   (By Nicole Parlee, King & Wood Mallesons)   In the matter of Georges v Seaborn International Pty Ltd (Trustee), in the matter of Sonray Capital Markets Pty Ltd (in liq) [2012] FCAFC 140, Federal Court of Australia, Full Court, Jacobson, Besanko and Jagot JJ, 5 October 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCAFC/2012/140.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2012/140.html" \t "_new)   **(a) Summary**   This case arises from directions made by the primary judge under section 522 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). The case considered whether shares acquired by Sonray Capital Markets Pty Ltd (Sonray) (in liquidation) on behalf of its client Efax Pty Limited (Efax) could be pooled with the other assets that would be available for distribution among all of Sonray's clients in the liquidation.    The Full Court of the Federal Court looked to the nature of the relationship between Sonray and Efax, and how the money was appropriated. The majority held that a fiduciary relationship existed, but that the shares should nonetheless be pooled with the other assets because the money paid by Efax for the shares had ceased to be subject to any statutory trust when Sonray had dealt with the funds as a defaulting trustee.   **(b) Facts**   Sonray, until its collapse in June 2010, conducted a substantial financial services business providing access to overseas service providers through online trading platforms, allowing clients to trade in those financial products.  In April 2010, Efax instructed Sonray to purchase 78,000 shares in BHP Billiton Ltd (BHPB) which were acquired through Saxo Bank A/S (Saxo), an overseas banking institution.   Before the acquisition of the BHPB shares, Efax provided payments to Sonray (including a payment of $3 million) which were deposited into a segregated bank account held by Sonray. This account was 'tainted' in that it had been subject to a number of defalcations before the BHPB shares were acquired. The consideration for the BHPB shares was not paid out of this segregated account, but instead Saxo used its own money or credit arrangements between Saxo and another overseas bank.  Sonray then debited Efax's ledger account with the consideration amount (that is, by way of book entry).    The shares were registered in the name of a custodian.  Sonray provided Efax with a form of transfer, which would have allowed the shares to be transferred to Efax, however this transfer was not completed before Sonray went into voluntary administration.   At first instance, the court held that the BHPB shares were held on trust for Efax. The liquidators appealed and sought a direction that would allow them to pool the BHPB shares with the proceeds of funds from other Sonray clients, which would then be distributed among all of Sonray's clients.   **(c) Decision**   In deciding that the BHPB shares should be pooled with other assets, the Full Court considered two issues. First, what was the nature of the relationship between Efax and Sonray - was it merely contractual or was it fiduciary? Second, how should the payment for the BHPB shares be characterised - was it a legitimate appropriation of funds?   **(i) Nature of the relationship**   All three judges held that the relationship between Efax and Sonray was more than a mere contractual relationship. A mere contractual relationship would have only allowed Efax to claim as creditor for the balance of its account with Sonray. The following provisions in the Client Agreement between Sonray and Efax suggested that a creditor/debtor relationship existed:   * The Client Agreement extended to a variety of trading, which included other financial instruments such as contracts and options; * Acknowledgements by Efax of the 'speculative, high risk nature of dealing in this type of financial product'; and * On termination of the agreement, Sonray could provide Efax with payment of surplus in cash rather than in specie.   However, Jacobson J referred to the Court of Appeal decision in Walker v Corboy (1990) 19 NSWLR 382 which suggests that the terms of the contract do not solely determine the type of relationship between the parties. Walker v Corboy states that it is necessary to look at other factors in determining the type of relationship including the nature of the transaction.  Jacobson J found that in the present case the nature of the transaction also pointed towards a fiduciary relationship. Namely, that Sonray was acting as an agent for Efax.    The Full Court held the nature of the Client Agreement and the transaction meant that this relationship was one of fiduciary character, and therefore the funds that had been paid by Efax to Sonray's segregated account had been held on statutory trust. However, the segregated account was tainted and the majority therefore held that Efax could not avoid the claim for pooling.    **(ii) Appropriation**   Jacobson J with Jagot J agreeing formed the majority for this point. They held that because Efax paid the consideration for the BHPB shares into a bank account which had been subject to defalcations, the rules concerning deficient mixed trust funds must apply, as discussed by Campbell J in Sutherland Re; French Caledonia Travel Service Pty Ltd (in liq) [2003] NSWSC 1008; (2003) 59 NSWLR 361 at [61]- [64] and [127] and McLure J in Re Global Finance Group Pty Ltd (in liq); Ex Parte Read [2002] WASC 63; (2002) 26 WAR 385 at [189]- [194].    Jacobson J found that, although the BHPB shares were not paid for by money deposited into the segregated account, the source of the payment was the deposit into the account or dealings with those monies. This was the case even though the actual payment for the shares was made by book entry by Sonray representing its dealings on behalf of Efax with the funds Efax had deposited.   Clause 9(b) of the Client Agreement stated '[t]he Client authorises Sonray to appropriate, transfer, credit, apply or pay monies that may be received by Sonray or held by Sonray on the Client's behalf in payment of any amounts which may be outstanding by the Client to Sonray or Sonray's agent in a transaction effected on the Client's behalf'. The majority held that this provision entitled Sonray to appropriate funds in this manner, so long as payment by way of book entry is made in accordance with the parties' agreement (Manzi v Smith [1975] HCA 35; (1975) 132 CLR 671 at 674; Re York Street Mezzanine Pty Ltd (in liq) [2007] FCA 922; (2007) 162 FCR 358 at [26]).   Jacobson J held that 'a payment by way of a book entry can rise no higher than the facts which lie behind the entry which appears in the relevant books and records'. The Efax ledger which was debited to reflect the consideration price for the BHPB shares represented previous dealings between Sonray and Efax.  Therefore, what lay behind the book entry was the initial funds which Efax deposited into Sonray's account.   Jacobson J pointed out that the money Efax deposited into the account 'ceased to exist in its original form as soon as Sonray dealt with it'. While the majority found that a trust relationship did exist, the moneys ceased to be subject to any statutory trust when Sonray misued the funds which lead to defalcations in the segregated account. Therefore, when Sonray came to deal with the funds, it did so as defaulting trustee. Even though Efax provided the funds for the shares, payment was not made directly from that account. Given that the sole source of Efax's rights was the payment made into a tainted account, Sonray could not, as a defaulting trustee, 'cause detriment to some investors and benefit others merely because the payments did not come directly from the tainted.segregated account'.   Besanko J dissented on this point, finding that Efax's payment for the shares was payment by way of mutual extinguishment of Efax's chose in action against Sonray, and vice versa.    Accordingly, the appeal was allowed and the directions for pooling that were sought by the liquidators were ordered.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h6)  **6.3** **Constitutional amendment under section 601GC(1)(b) - the need to acknowledge and consider members' rights**   (By Nicholas Whittington, DLA Piper Australia)   360 Capital Re Limited v Watts [2012] VSCA 234, Supreme Court of Victoria Court of Appeal, Warren CJ, Buchanan and Nettle JJA, 4 October 2012    The full text of this judgment is available at:   [http://www.austlii.edu.au/au/cases/vic/VSCA/2012/234.html](http://www.austlii.edu.au/au/cases/vic/VSCA/2012/234.html" \t "_new)   **(a) Summary**   The Responsible Entity for a fund had attempted to make modifications to the Constitution to allow the issue of redeemable unsecured convertible notes.  The trial judge had found that the modifications to the constitution did not comply with section 601GC(1)(b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act).    At issue was whether the meaning of members' rights within section 601GC(1)(b) included the right to have a fund administered within the terms of the constitution. The Court of Appeal found that this came within the meaning of members' rights. Since the Responsible Entity had failed to consider the adverse effects of such amendments, the purported amendments to the constitution were invalid.    **(b) Facts**     The appellant, 360 Capital, was the Responsible Entity of the 360 Capital Industrial Fund (the Fund), a managed investment scheme. The constitution of the Fund provided that units could only be issued by the Trustee in accordance with the constitution. On 30 May 2012, the directors of 360 Capital resolved to execute a supplemental deed poll pursuant to section 601GC(1)(b) of the Corporations Act to amend the constitution of the fund.    Section 601GC(1) of the Corporations Act 2001 provides that:   (1) The Constitution of a registered scheme may be modified, or repealed and replaced with a new constitution:   (a) by special resolution of the members of the scheme; or (b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights.    The amendments allowed for the issue of redeemable unsecured convertible notes (360 Notes).  The Court of Appeal described the purported effect of these amendments as 'to change the provisions of the Constitution which would have precluded the issue of 360 Notes'.    The minutes of that meeting recorded that the directors had considered 'the current rights of unitholders . pursuant to the Constitution' and their belief that the amendments did not 'adversely affect the rights of unitholders of the Fund'.    As part of the literature disseminated to investors in the 360 Notes, a letter from the Chairman and Managing Director stated that 360 Capital intended to hold a meeting to consider a resolution to list the Fund, and that all holders of 360 Notes would be entitled to vote.    On 3 July 2012, a member of the Fund wrote to 360 Capital to request a copy of the register of members for the purpose of convening a meeting. Two days later, a further supplemental deed poll was executed by 360 Capital which purported to further amend the constitution. These purported amendments placed significant restrictions on the convening of meetings of members of the Fund.    Proceedings were instituted by a member of the fund alleging that the directors could not reasonably have considered that the changes effected by each supplemental deed poll did not adversely affect members' rights. On this basis, the directors had no power to bring about these changes, and therefore:   * changes to the constitution brought about by the supplemental deeds poll were of no force or effect; and * holders of 360 Notes were, in consequence, not members of the Fund.   An injunction was also sought to restrain the directors from putting to the members the resolution to list the fund.  The trial judge found that the directors had not undertaken the kind of 'reasonable consideration of the effect of the purported amendments on members' rights that was required by section 601GC(1)(b)'.  Thus, the modifications were contrary to section 601GC(1)(b) and therefore ineffective in modifying the constitution.  On this basis, the 360 Noteholders could not be considered members of the fund, and the notice of meeting in relation to the resolution to list was invalid.  In appealing the decision, 360 Capital advanced seven principal contentions.  Broadly, 360 Capital argued that:   * the rights of members to have a fund operated and administered according to a constitution are not members' rights within the meaning of section 601GC(1)(b); * the judge erred in finding that amendments made to the constitution adversely affected members' rights; * the judge erred in finding that the directors failed to undertake reasonable consideration of whether the amendments would affect members' rights; and * on these bases, the judge erred in finding that the 360 Noteholders were not members of the fund and that the notice of meeting in relation to the resolution to list was invalid.   **(c) Decision**    **(i) Members rights**   360 Capital advanced an argument, on the basis of the decision of Barrett J in Re Centro Retail Ltd (2011) 255 FLR 28 (Re Centro), that a member's right to have a fund managed and administered in accordance with the constitution of a fund is not a members' right within the meaning of section 601GC(1)(b).  Barrett J made this decision on the basis that it would deny all efficacy to the section.    However, the Court of Appeal relied upon the decision of Justice Gordon in Premium Income Fund Action Group Inc v Wellington Capital Ltd (2011) 84 ACSR 600.  The Court stated, 'the right of a member to have a managed investment scheme administered according to the constitution of the scheme is fundamentally the most important right of membership.'  On this basis, a member's right to have a scheme managed in accordance with its terms fell directly within the scope of section 601GC(1)(b).    **(ii) Proper consideration and reliance on legal advice**   In relation to the issue of whether the amendment would adversely affect members' rights, the Court of Appeal followed the decision of the trial judge in finding that there was no need to consider this question. The complete failure of the board to consider the adverse effects was 'sufficient to deny the responsible entity the modification power'.    360 Capital then argued that the power to amend afforded by section 601GC(1)(b) does not depend on whether the board is correct in its view, but that it is enough if the board has acted reasonably on the basis of legal advice.    The problem in this case, however, was that the legal advice was based upon the decision of Barrett J in Re Centro.  The advice, therefore, led the board to believe that the amendments to the constitution did not affect members' rights. On this basis, the board 'proceeded on the basis of a mistake of law and thereby failed to direct consideration to the question which section 601GC(1)(b) posed of whether the effect on members' rights would be adverse'. The reliance on the mistaken legal advice did not establish that the board should be taken to have considered any adverse effect on members' rights. The failure to consider, then, invalidated any purported amendments to the constitution.    **(iii) Fund membership of 360 Noteholders**    The Court of Appeal chose to remit the question as to whether the 360 Noteholders could be considered to be members of the Fund back to the Commercial and Equity Division.  Despite the trial judge having made observations on this point, it was found that this could be considered no more than dicta since it was expressed 'without the benefit of argument on behalf of 360 Noteholders'.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h6)  **6.4** **Fortescue decision: investors do not consider the legal enforceability of announced agreements**    (By Natasha Koravos, DLA Piper Australia)   Forrest v Australian Securities and Investments Commission [2012] HCA 39, High Court of Australia, French CJ, Gummow, Hayne, Heydon and Kiefel JJ, 2 October 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/HCA/2012/39.html](http://www.austlii.edu.au/au/cases/cth/HCA/2012/39.html" \t "_new)  **(a) Summary**   The High Court of Australia held that Fortescue had not engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive when it made announcements to the ASX regarding framework agreements it had made with Chinese entities. The High Court held that the announcements did not convey messages to investors about the legal enforceability of the agreements. The communications only conveyed messages of opinion and messages regarding what Fortescue had done and was intending to do.   **(b) Facts**   The Australian Securities and Investments Commission (ASIC) alleged that Fortescue and Mr Forrest (Fortescue's chairman and chief executive) had breached the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) when it gave information to the ASX in 2004 and 2005 regarding the Pilbara Iron Ore and Infrastructure Project.   Fortescue had made agreements with China Railway Engineering Corporation (CREC) and other foreign entities which Fortescue described as 'three of the largest state owned companies in China'. Each agreement with these entities was titled 'Framework Agreement'.  Fortescue later sent letters to the ASX and issued media releases about these agreements which stated that they were binding contracts to 'build, finance and transfer the railway, port and mine for the project'.  Fortescue also made other communications, however the letters were sufficient for ASIC to argue its case.   Specifically, the CREC framework agreement identified:   * what constituted 'the Works'; * that CREC had submitted an offer to execute 'the Works' and Fortescue had accepted; * that the 'Framework' provided for the parties to jointly develop an agreement on matters; * the 'Scope of Work'; * that payment terms were to be included in the General Conditions of Contract however Fortescue had to make a 10% down payment; * that the agreement would become binding on approval of the Boards; and * that the document was an agreement in itself.   ASIC complained that the following Fortescue announcements were misleading and deceptive or likely to mislead or deceive:   1) The statement that Fortescue had a binding contract with CREC to build and finance the railway component. 2) The statement that the agreement was to 'build and finance' the railway and that it was a 'Build and Transfer (BT) contract.'   At first instance ASIC's claims were dismissed. However on appeal, the Full Court of the Federal Court held that the Act had been contravened.  Fortescue appealed by special leave to the High Court.   **(c) Decision**   **(i) Build and finance**   The court firstly dealt with the second allegation regarding an agreement to 'build and finance'.  It stated that the type of payment arrangements in the agreement were able to be described in the announcement as CREC agreeing to 'build and finance' the railway. The court held that a 'Build Transfer (BT) contract' was an accurate general description of the agreement the parties had then made.  It therefore rejected ASIC's allegations about 'build and finance' and 'Build and Transfer'.   **(ii) Claims of dishonesty**   The court held that ASIC's allegations regarding Fortescue's dishonesty and misleading and deceptive conduct mixed two very different ideas.  ASIC alleged that Fortescue knew the impugned statements were false (ie it had no genuine basis for making them) and also that Fortescue should have known the statements were false (ie it had no reasonable basis for making them). The court held that the first idea was an allegation of fraud and the second was an allegation of negligence. ASIC had confused these matters in its statement of claim. Whether Fortescue had a 'genuine and reasonable basis' for making the relevant statement was not relevant to the question of misleading or deceptive conduct.  Fortescue's state of mind was not relevant; the effect on the intended audience was relevant.   ASIC sought to explain the claims that Fortescue did not have a genuine or reasonable basis for making the statements as a plea that anticipated Fortescue alleging that the statements were expressions of opinion. However, the court held that it was ASIC's responsibility to identify the case it sought to make and it could not use fraud as a 'fallback claim'.   **(iii) A 'binding contract': the majority judgment**   The court had to consider whether the statements:   1) conveyed a message about what the agreements said; or 2) conveyed some message about 'legal enforceability'; or  3) conveyed a message that was a mixture of the above two constructions.   ASIC argued that the impugned statements conveyed to their audience a view about the legal enforceability of the framework agreements. The Full Court had accepted that the impugned statements contained more than a message that the parties had made an agreement which was a 'binding contract' as it also conveyed a message as to the legal consequences of the agreement. The High Court noted that the Full Court did not conclude that the impugned statements did not accurately summarise the agreements. Instead, the Full Court had examined the legal consequences attached to what the parties had said and done.   The High Court said the relevant question is 'what would the audience have understood when it heard that Fortescue had made binding contracts with identified Chinese state-owned entities?'  The court held that the audience would most likely not have asked a lawyer's question of what could be enforced in a court.  It was more likely that they would have understood the statements as something that the parties had done and intended would happen in the future.    ASIC argued that the words 'agreement' conveyed that all essential elements constituting a contract under Australian law were satisfied.  ASIC proposed that this was misleading or deceptive or likely to mislead or deceive unless the agreement could withstand legal challenge in Australian court.    The High Court stated that this argument had problems for two reasons. Firstly, ASIC did not establish its allegation that Fortescue did not believe the agreements were binding.  Fortescue had conveyed what it had done and said it had done, however Fortescue's message did not go beyond that scope and convey any broader message. Secondly, ASIC's argument assumed the legal character or effect of the agreements was to be determined by Australian domestic law. This assumption was not justified considering the role of foreign-owned entities in the transaction.   The court noted that even though Fortescue was still willing to negotiate the terms of the agreement, this did not mean that a binding contract did not exist at the time the impugned statements were made.    **(iv) A statement of opinion: Heydon J's judgment**   Heydon J came to a similar conclusion in a separate judgment. He held that the impugned statement about the contract was a statement of opinion and not a statement of fact. Therefore, the question was whether the opinion was genuinely or reasonably held. ASIC did not establish that Fortescue did not believe the agreement was a binding contract. The reasons were that the agreement was intended to be binding, there was no basis for ASIC to allege dishonesty by Fortescue, Fortescue's minutes showed that it believed the agreement was binding, witness evidence supported the agreement being binding, and the Chinese entities believed the agreements were binding. Therefore, ASIC's allegations must fail.   **(v) Conclusion**   The court unanimously found that Fortescue had not engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive. This conclusion meant that ASIC's allegations regarding breach of the continuous disclosure provisions and breach of director duties necessarily failed.  The appeal was allowed with costs.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h6)  **6.5** **Summary of the legal principles relevant to an application by liquidators for approval of a funding agreement**   (By Jack Anstey, Ashurst)   Jones, Saker, Weaver and Stewart (Liquidators), in the matter of Great Southern Limited (in liq) (Receivers and Managers Appointed) [2012] FCA 1072, Federal Court of Australia, Gilmour J, 27 September 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/1072.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/1072.html" \t "_new)    **(a) Summary**   Gilmour J's judgment provides an illustration of the legal principles, and the key factors relevant to the exercise of the Court's discretion, in relation to an application by liquidators for approval of a funding agreement, made pursuant to section 477(2B) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act).   **(b) Facts**     The liquidators proposed to enter into a funding agreement with Riverrock Capital Limited (the Funder) to obtain the necessary funds to pursue certain investigations (the Funding Agreement). As the investigations and consequential proceedings were unlikely to be resolved within three months of the execution of the Funding Agreement, the liquidators were required to obtain the Court's approval to enter into the proposed Funding Agreement pursuant to section 477(2B) of the Corporations Act.  Accordingly, the liquidators brought an ex parte application seeking the Court's approval (the Application).   **(c) Decision**    Gilmour J approved the liquidators entry into the Funding Agreement and, in doing so, held that the principles to be applied by the Court in determining whether to grant approval to the liquidators to enter into the proposed Funding Agreement pursuant to section 477(2B), are well settled.  Gilmour J's reasoning focused on three points:   * The role of the court is to grant or deny approval to the liquidators' proposal. * The task of the court is not to reconsider the issues considered by the liquidators or to question the liquidators' judgment. * The court must review the liquidators' proposal to 'be satisfied that the liquidator is acting in good faith in the making of the commercial judgment in respect of which the Court is being asked to make an order'.   Gilmour J held that the Court's approval of the proposal is not an endorsement of the proposed agreement, but merely a permission to the liquidators to exercise their own commercial judgment and that wide latitude would be given to exercise that commercial judgment, if the liquidator had acted in good faith and for a proper purpose.   Gilmour J also held that a list of non-exhaustive factors were relevant to whether the Court would approve a liquidator's entry into a proposed funding agreement:   * The nature and complexity of the matter and the risks involved in pursuing a claim or claims. * The prospects of success of the proposed action. * The amount of costs likely to be incurred in the conduct of the action and the extent to which the funder is to contribute to those costs. * The extent to which the funder will contribute towards the opponent's costs in the event that the action is not successful or towards any order for security for costs. * The circumstances surrounding the making of the contract, including the ability of the funder to meet its obligations. * The level of the funder's premium. * The extent to which the liquidators have canvassed other funding options and consulted with the creditors of the company. * The interests of creditors and the effect that the funding agreement may have on creditors of the company. * Possible oppression to another party in the proceedings. * The extent to which the liquidators maintain control over the proceedings.   A number of these factors were dealt with in Gilmour J's decision to permit the liquidators entry into the purposed Funding Agreement, including:   * the proposed investigations had reasonable prospects of success; * budgets had been prepared by the liquidators and the lawyers that they proposed to retain, which would be covered by the Funding Agreement; * the Funder's premium was reasonable; * alternative funding inquiries were unsuccessful; and * the application was made in good faith and for a proper purpose and therefore, Gilmour J held that it was appropriate to give the liquidators considerable latitude in exercising their commercial judgment.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h6)  **6.6** **Synthetic collateralised debt obligations and public, unsophisticated investors**   (By Natasha Koravos, DLA Piper Australia)   Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) [2012] FCA 1028, Federal Court of Australia, Rares J, 21 September 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/1028.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/1028.html" \t "_new).   **(a) Summary**   In this case, three local Councils (the applicants) alleged breach of contract, negligence, misleading and deceptive conduct and breach of fiduciary duties by Lehman Brothers Australia Ltd (in Liq) (formerly 'Grange' at the time of the alleged breaches). The conduct in question came from the sale to the applicants by Grange of synthetic collateralised debt obligations (SCDOs) which caused the applicants to suffer substantial losses when the SCDOs suffered credit events. The applicants succeeded and were entitled to damages.   **(b) Facts**   Grange had sold many SCDOs to local Councils, charities, church groups and not-for-profits. The three applicants to these proceedings were local Councils being Parkes, Swan and Wingecarribee.    These Councils were typically risk-averse investors and normally invested in products such as bank bills, term deposits and bank-issued Floating Rate Notes (FRNs). The Councils were unsophisticated investors and their officers had little financial investment experience. Grange told the Councils in its dealings with them that SCDOs were a form of FRNs.   At the time of sale, the SCDOs had credit ratings between AAA (highest possible) and AA (equivalent to the four major Australia banks). The SCDOs offered higher interest rates than these banks.   Parkes and Swan bought SCDOs from Grange in 2003.  Over the next four years they bought and sold SCDOs whilst making interest and not losing any capital.   In late 2006, Wingecarribee asked for expressions of interest for investment advice to try to improve its investment returns.  Grange gave Wingecarribeee a presentation in which Wingecarribee stated that it did not want to invest in CDOs.  It entered into an individual managed portfolio (IMP) agreement with Grange in January 2007.  Grange also entered a similar agreement with Swan one month later.    Under the IMP agreements (which Grange drafted), Grange could invest in any products subject to:   1) The agreed investment guidelines; and 2) The Council's right to require Grange to remove any investment it chose at 'market price'.   Under the Wingecarribee agreement, Grange had permission to invest in CDOs, however it also had to ensure that the product invested in had an active secondary market and was not a derivative. Under the Swan agreement, Swan was required to have ready access to its funds for day to day requirements without penalty.   Until the GFC, Grange did have a secondary market for the SCDOs the Councils had purchased. However, when international credit markets tightened, the liquidity of SCDOs decreased and SCDOs could no longer be sold at or near face value on the secondary market.   After the 2007 GFC, many of the SCDOs suffered credit events and three SCDOs were wiped out entirely. Also, the money in another 11 products was frozen when proceedings involving other Lehman entities commenced in the United Kingdom and the United States of America.   The applicants made allegations against Grange for breach of contract, negligence, misleading and deceptive conduct and breach of fiduciary obligations.   **(c) Decision**   **(i) Breach of contract and negligence**   Rares J held that Grange had promised Parkes and Swan that they would have a high level of security for the invested capital and this was not true. Furthermore, Grange breached the contractual term that SCDOs were easily tradeable in a secondary market as Grange only provided the secondary market when the activity suited it, was controlled by it and was within its capital resources. For this reason, the SCDOs were not easily liquidated for cash. The high credit ratings of the SCDOs did not reveal their risks and Rares J noted that generally risk-averse people do not take bets with assets held for public purposes. Therefore the SCDOs were not appropriate investments for Councils. Finally, reasonable skill and care was not taken in making the investment recommendations.    Grange also breached its contractual obligations under the IMP agreements. It was negligent to use public money (ie a Council's money) to invest in products that had as much risk as SCDOs.  Specific to the Swan IMP agreement, Grange breached its duties because the SCDOs were not products which provided the Council with ready access to funds.  They were products which lacked liquidity.  Specific to the Wingecarribee IMP agreement, Grange again breached its obligations because the SCDOs had no active secondary market and were derivatives.   **(ii) Negligence**   Rares J held that Grange owed the Councils a duty of care as their financial advisor, despite Grange's claims that it did not act in that capacity. Grange asserted that it only offered the services it contracted to offer under the IMP agreements. It argued that it had provided disclaimers in its presentations to Swan and Parkes before entering agreements.  Rares J held that this was never communicated in oral dealings and any bystander would say that the Councils' financial advisers were Grange.   Rares J held that for the reasons given regarding the breaches of Grange's contractual duty to exercise reasonable care and skill, it had also breached its tortious duty of care.   **(iii) Misleading and deceptive conduct**   Rares J referred to the complexity of the law governing misleading and deceptive conduct. He stated that relevant provisions were contained in the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default) (the ASIC Act), the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) and the [Competition and Consumer Act 2010 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default). He found that the ASIC Act was sufficient to deal with the question of misleading and deceptive conduct because Grange had given financial product advice within the meaning of that Act.   Rares J held that false representations were made that SCDOs:   * were suitable for investors with a conservative investment strategy; * complied with statutory and Council policy requirements; * had maturity dates suitable to each Council's needs and complied with its investment policies; * were, or had, risk profiles equivalent to, traditional FRNs; * were equivalent as regards risk profile, to other types of financial products with the same rating; * were, or had risk profiles equivalent to or better than the four major Australian banks; * offered excellent liquidity; * were as liquid as traditional FRNs; and * were and would be readily redeemable in a secondary market.   Rares J held that false representations were also made that Grange:   * observed prudent, conservative income defensive, capital protection and pro-liquidity practices when investing on behalf of Councils; and * was active in the secondary market for SCDOs and was bound to buy back the SCDOs, if requested to do so, to provide liquidity in illiquid products.   **(iv) Breach of fiduciary duties**   Rares J referred to a 'no haircut repo' email written by a director of Grange that showed that Grange knew its business depended on winning and maintaining the trust and confidence of the financially unsophisticated and uninformed local government officers. Officers of the Councils had also made it clear they were relying on Grange's advice.   Rares J found that Grange acted as a financial advisor to the Councils and thus owed them fiduciary obligations. However, at the same time, the SCDOs offered Grange the opportunity to make large profits. Grange disclosed to the Councils that it had an interest in the sales however it did not disclose enough for the Councils to make a fully informed choice as to whether or not to deal with Grange.  In reality, Grange made a profit between $1-2 million for each new issue. Furthermore, it controlled the secondary market and set the purchase and sale prices and also the profit margins in its dealings with clients.   This was a clear breach of fiduciary duty as there was a conflict between Grange's duty to give sound financial advice and its pecuniary interest in making money for itself.    Grange was liable to compensate the applicants for losses resulting from the SCDO investments.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h6)  **6.7** **Liquidators pooling companies where just and equitable**   (By Nicholas Guenther, Herbert Smith Freehills)   Lofthouse v Environmental Consultants International Pty Ltd [2012] VSC 416, Supreme Court of Victoria, Ferguson J, 14 September 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2012/416.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/416.html" \t "_new)   **(a) Summary**   The defendant companies (Companies) carried on interconnected businesses relating to forestry prior to the appointment of the plaintiff as a liquidator in June 2008.  In his capacity as a liquidator, the plaintiff sought an order that the Companies be declared a pooled group for the purposes of section 579E of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) - an order to merge the assets of all Companies into one group for the purposes of distribution.  The plaintiff also sought an order entitling him to be paid his remuneration from the pooled group.   The Court made both of the orders sought by the plaintiff.  In making these orders the Court considered that:   * until December 2006, all of the Companies' business was conducted by one of the Companies, Environmental Consultants International Pty Ltd (ECI); * business operations were never effectively divided between the Companies when the new corporate structure was put into place and ECI effectively remained the primary entity of the Companies; * based on the estimated state of the Companies' finances, creditors would not have been likely to recover any money from the Companies absent an order to pool the group when the costs of attempting to reconcile the Companies' accounts were factored in; * in light of the plaintiff's proposal to cap his remuneration, an order to pool the assets of the group would result in creditors probably being entitled to a minimal return instead of no return; * the plaintiff's remuneration had previously been approved by the unsecured creditors of all of the Companies, with the exception of Environmental Consulting International (NSW) Pty Ltd (ECI NSW); and * the plaintiff is entitled to claim his approved remuneration from the pooled group as this debt forms a joint and several liability of the Companies which is admissible to proof against each Company by the combined effect of sections 556(1), 579E(2) and 579M of the Act.   **(b) Facts**   The Companies carried on interconnected businesses of forest harvesting, forest management and the provision of technology products for the forestry industry prior to the appointment of the plaintiff as a liquidator in June 2008.  In order to discharge his duties as a liquidator and make distributions to creditors, the plaintiff sought an order from the Court that the Companies be declared a pooled group for the purposes of section 579E of the Act. The effect of such an order being that each liability of an individual Company to creditors would be joint and several to all of the Companies for the purposes of distribution.   In the event of a pooling order being made, the plaintiff also sought an order entitling him to be paid remuneration from the assets of the pooled group. The plaintiff's remuneration had previously been approved by motions of creditors of all Companies except ECI NSW and so formed a debt payable by all but one member of the pooled group. Any action to recover the approved remuneration following the pooling order would therefore need to be made by recourse to the pooled group as a whole.   **(c) Decision**   **(i) Availability of a pooling order under section 579E of the Corporations Act**   The Court considered the grounds set out in section 579E under which the Court can make an order that companies be treated as members of a pooled group. This requires there to be two or more companies (section 579E(1)); that each company in the group is being wound up (section 579E(1)(a)); and that at least one of the conditions in section 579E(1)(b) is satisfied (in this case section 579E(1)(b)(i) - that each company in the group is a related body corporate of each other company in the group was relied upon).   In this case there was a strong link between the Companies - particularly between ECI and the other member Companies. The Court accepted evidence that, while ECI had technically split its operations, business operations were never effectively divided between the Companies which resulted in:   * an inconsistent approach as to who the contracting party was for contracting purposes; * the Companies finances being controlled almost exclusively by ECI (some of the Companies lacked bank accounts in their name); * all employment contracts, WorkCover policies, leases and insurance contracts were entered into by ECI; and * the general view at the time was that the Companies were conducting the businesses as a single enterprise.   The Court found that in this case there were multiple companies being wound up as required under sections 579E and 579E(1) and, due to the factors outlined above, deemed the Companies to be a related body corporate of each other for the purposes of section 579E(1)(b)(i).   **(ii) Pooling order is equitable and would not materially disadvantage a creditor**   Section 579E(1) requires the Court to consider whether it would be just and equitable for a pooling order to be made. Section 579E(12) sets out the considerations to which the Court must have regard when making this determination. When examining these considerations, the Court ascribed particular importance to the intermingled relationship between the Companies and the fact that the Companies shared common directors and management whose actions were seen as contributing to the downfall of the Companies collectively.   The only apparent factor which weighed against the granting of the order was that unsecured creditors of ECI NSW were, prima facie, entitled to a distribution of 15 cents on the dollar if a pooling order were not made and only about one cent on the dollar if the order were made (under section 579E(12)(e), the Court must consider the advantages and disadvantages to creditors by making the order).  However, the Court accepted evidence led by the plaintiff that, if a pooling order were not made, the cost of carrying out the work required to reconstruct the accounts to verify the true position of ECI NSW would erode the amount available for distribution to unsecured creditors and negate any advantage that they would have otherwise enjoyed.   For the reasons outlined above, the Court also found that the pooling order would not materially disadvantage an unsecured creditor of ECI NSW for the purposes of section 579E(10)(a).  The Court noted that 'if a pooling order would produce material disadvantage then [a court] could not be satisfied that it is just and equitable under section 579E(12) to make that order.'   **(iii) Paying remuneration from the pooled group**   Following the order to pool the assets of the Companies, the Court considered the appropriate manner for the plaintiff to be paid his remuneration as approved by the creditors of the pooled group (except ECI NSW). The Court was asked to interpret the applicable provisions of the Act to determine the plaintiff's entitlement to receive his remuneration.   In interpreting the applicable provisions, the Court found the following:   * section 579E(2)(a) provides that a debt payable by a Company in the pooled group is payable jointly and severally by all of the Companies in the group; * section 579E(4) provides that only debts admissible to proof against a Company can be paid under section 579E(2); * section 553(1) provides that, subject to Division 6, only debts incurred before the 'relevant date' (prior to the resolutions to wind up a Company - per sections 9 and 513B) are admissible to proof against a Company; * this apparently excludes the plaintiff's right to remuneration as this right was created after the resolutions to wind up the Companies; * however, the combined effect of sections 556(1)-(2), contained in Division 6, is such that the liquidator's right to remuneration is a relevant consideration when determining the priority of creditors in the winding up of a Company; * this right under section 556(1) should not to be displaced by section 553(1) since that section is expressly stated as being subject to Division 6; * the combined effect of sections 556(1)-(2) and 579E(2)(a) is that each debt payable by a Company is payable jointly and severally by the other Companies; * section 579M confirms that each joint and several liability payable by the Companies under section 579E(2)(a) is admissible to proof against each Company; and * therefore, the plaintiff's entire approved remuneration is a debt admissible to proof against each Company jointly and severally and must be paid in the manner approved by the resolutions previously passed by creditors of the Companies (except ECI NSW).   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h6)  **6.8** **Application to commence proceedings on behalf of a company not in the company's best interests**   (By Dylan Barber, Ashurst Australia)   Hackett v Nambucca Valley Quarries Pty Ltd [2012] NSWSC 1189, Supreme Court of New South Wales, Gzell J, 4 October 2012   The full text of this judgment is available at:  [http://www.caselaw.nsw.gov.au/action/PJUDG?s=1000,jgmtid=161093](http://www.caselaw.nsw.gov.au/action/PJUDG?s=1000,jgmtid=161093" \t "_new)   **(a) Summary**   The plaintiff, a shareholder of Nambucca Valley Quarries Pty Ltd (NVQ), sought leave under section 237(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) to commence proceedings in the name of NVQ against the directors of NVQ and their interests. It was alleged that the directors breached their duties by causing their own interests to take up benefits that could have been earned by NVQ, and it was also alleged that the directors were accessories to NVQ's breaches of trust to the beneficiaries (of which NVQ was the corporate trustee). The application was dismissed on the basis that the proposed proceedings were not in the best interests of NVQ. Other means were available to the plaintiff to pursue these allegations, the proposed proceedings would only bring about a duplication of alternative causes of action proposed by the plaintiff with no additional relief, and the parties were not in a financial position that supported the granting of the application for relief.   **(b) Facts**    The defendant, Nambucca Valley Quarries Pty Ltd (NVQ), was the corporate trustee for the Worrell Creek Unit Trust (Unit Trust). The Unit Trust operated a gravel quarry. Hackett Laboratory Services Pty Ltd (HLS) and Saltwater Developments Pty Ltd were the beneficiaries of the Unit Trust.   The plaintiff, Kenneth Hackett, and Robert Laut each held one share in NVQ (its entire issued share capital). Mr Laut and James Mainey were directors of NVQ. The plaintiff was a former director of NVQ. Mr Mainey also controlled Saltwater Developments Pty Ltd.   An application was made pursuant to section 237(1) of the Corporations Act seeking leave to commence proceedings in the name of NVQ against Mr Laut and Mr Mainey and their interests.   According to a proposed statement of claim prepared on behalf of HLS and relevant to the current application, it was alleged that Mr Laut and Mr Mainey breached the duties that they owed to NVQ by causing their own interests to take up benefits that could have been earned by NVQ. It was alleged that Mr Laut and Mr Mainey were liable as accessories to breaches of trust committed by NVQ to the beneficiaries. It was also alleged that the directors of NVQ failed to ensure that the assets of the Unit Trust, including leases for the quarry, were used exclusively for the business of the Unit Trust.   Section 236(1) of the Corporation Act provides that a person may bring proceedings on behalf of a company if the person is, amongst other things, a member of the company or former officer of the company if leave is granted by a court.   Section 237(2) provides five criteria that a court must be satisfied of in order to grant an application for leave to bring proceedings under section 236(1), being that:   (a) it is likely that the company will not itself bring the proceedings; (b) the applicant is acting in good faith; (c) granting leave is in the best interests of the company; (d) if leave is granted, there is a serious question to be tried; and (e) the applicant has given prior written notice of the intention to seek leave to the company (or it is appropriate to grant leave even if notice was not given).   **(c) Decision**   Justice Gzell considered the criteria set out in section 237(2) of the Corporations Act in the context of the application made by the plaintiff.   Justice Gzell found that the criteria set out in (a), (b) and (e) were satisfied. It was unlikely that NVQ would itself bring the proceedings, the applicant swore that he was acting in good faith and the appropriate prior written notice had been given by Mr Hackett to NVQ.   **(i) There was a serious question to be tried**   Justice Gzell also found that there was a serious question to the tried (section 237(2)(d)).   NVQ had granted third parties, including another company controlled by Mr Laut and Mr Mainey, the right to enter and use the quarry. It was alleged that NVQ sold rock from the quarry to a third party controlled by Mr Laut and Mr Mainey at a price that was less than its real value. Various entity controlled by Mr Laut and Mr Mainey had their principal place of business registered as the quarry site.   **(ii) The application was not in the best interests of NVQ**   However, Gzell J found that section 237(2)(c) was not established to the Court's satisfaction. In particular, there was evidence that relief may be available by other means, which would provide redress for the applicant without requiring the company to be brought into the litigation against its will.   The Court found that the allegations on behalf of the company raised exactly the same issues, and the same potential relief, as that which was available in relation to the allegations made on behalf of HLS. Justice Gzell agreed with counsel for the defendant that granting relief would simply bring about a duplication of the causes of action with no additional relief.   HLS itself could commence proceedings against Mr Laut and Mr Mainey being knowingly involved in the alleged breach of trust by NVQ under the principles established in Barnes v Addy.   Neither NVQ nor the Unit Trust were in a financial position to bear the costs of conducting the proposed proceedings or an adverse costs order.   Although HLS offered to pay the costs of the proposed proceedings the subject of this application at first instance, there was doubt as to whether HLS was in a financial position to bear any such costs.   Finally, Gzell J found that there was negligible prospect of recovery of any judgment in favour of NVQ.   The best interests criterion in relation to the application was not satisfied. Accordingly, the application for leave to bring proceedings under section 236(1) was dismissed with costs.   **(iii) Hearsay evidence was admitted**   In the process of hearing this application, objection was made to the use of hearsay evidence on the basis that the application under sections 236 and 237 of the Corporations Act was final. Contrary to earlier authority, Gzell J found that the application was interlocutory and hearsay evidence was admitted on this basis.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h6)  **6.9** **Unconscionable conduct and misleading or deceptive conduct under the general law and statute**    (By Stephanie De Vere, Minter Ellison)   Dowdle v Pay Now For Business Pty Ltd [2012] QSC 272, Supreme Court of Queensland, Mullins J, 13 September 2012   The full text of this judgment is available at:   [http://www.austlii.edu.au/au/cases/qld/QSC/2012/272.html](http://www.austlii.edu.au/au/cases/qld/QSC/2012/272.html" \t "_new)    **(a) Summary**   This case provides some useful guidance on the Court's considerations when determining whether conduct is unconscionable within the meaning of Garcia v National Australia Bank Ltd [1998] HCA 48, Bank of Australia Ltd v Amadio [1983] HCA 14 and under the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default) (the ASIC Act). This case also provides guidance on when a person will be considered to be involved in a contravention of a company under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).    **(b) Facts**     Mr and Mrs Dowdle were married, but at the time of the events which gave rise to the case, they were separated. In February 2003, Mr Dowdle asked Mrs Dowdle if she would take a second mortgage over her home for a facility of $50,000 advanced by the first defendant, Pay Now For Business Pty Ltd. The facility was to enable Mr Dowdle to continue with litigation in which he was involved. The first defendant sent Mrs Dowdle a letter that offered to advance her the sum of $50,000 for a term of one year on the basis of a guarantee from Mrs Dowdle and a supporting mortgage over her home. Mrs Dowdle accepted the terms of the offer by signing and returning the letter.    Subsequently, the first defendant changed the structure of the finance that it was prepared to provide to assist Mr Dowdle and sent Mr Dowdle a letter of offer reflecting the changed structure. The letter provided for the borrower to be Mr Dowdle and for Mrs Dowdle to give a guarantee and supporting mortgage, but it was otherwise in similar terms to the letter of offer addressed to Mrs Dowdle. Mrs Dowdle was not informed of the new arrangement.   Mr and Mrs Dowdle attended Cleary & Lee's office on 24 February 2003 to execute the documentation. A partner at Cleary & Lee signed a Queensland Law Society's Independent Solicitor's Certificate in relation to the explanations that he had given Mrs Dowdle about the guarantee and mortgage over the property. Mrs Dowdle was advised that the guarantee and the mortgage were not limited to the $50,000.00, but was for all money owing to the first defendant by her husband, either now or in the future. Unknown to Mrs Dowdle, her husband owed the first defendant between $500,000 and $600,000.   Mrs Dowdle commenced proceedings to set aside the guarantee and mortgage, relying on three grounds. Firstly, on the basis of trust and confidence between Mr and Mrs Dowdle, as husband and wife.  Mrs Dowdle claimed that because she was a volunteer and mistaken about the effect of the transactions, the first defendant should have appreciated that Mrs Dowdle may receive insufficient explanation from Mr Dowdle. Consequently, she argued that the first defendant was required to provide her an explanation. The second ground was that the first defendant knew (or ought to have known) that Mrs Dowdle was in a situation of special disadvantage in relation to the transactions, so that she could not make a judgement as to what was in her interests. The third ground was that the first defendant's conduct was misleading or deceptive or unconscionable under the [Trade Practices Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default) or the ASIC Act.   **(c) Decision**    The proceedings were adjourned to a date to be fixed to enable the parties to make further submissions on various aspects of the case. While no formal orders were made, Justice Mullins made the determinations set out below in respect of Mrs Dowdle's three grounds.   Justice Mullins found that the first defendant's conduct was unconscionable. Justice Mullins determined that the four elements of unconscionability, established in Garcia v National Australia Bank Ltd [1998] HCA 48, were established because:   * Mrs Dowdle did not understand the effect of the transaction at the time she signed the guarantee and the mortgage because she thought that the documents put into effect the transaction outlined in the letter of offer addressed to her; * the transaction was voluntary, as the purpose of the loan to Mr Dowdle was to fund his litigation and any funds deposited to Mrs Dowdle's account were for Mr Dowdle's purposes; * the first defendant knew that Mr and Mrs Dowdle were married. As a matter of inference, the first defendant understood that Mrs Dowdle had trust and confidence in her husband in relation to business matters and that Mr Dowdle might not have explained the transactions in full to Mrs Dowdle; and * the first defendant's solicitors' request of Mr Dowdle to arrange the independent legal advice to Mrs Dowdle was undermined by the failure of the first defendant to notify Mrs Dowdle of the change to the structure of the transaction.   In respect of the argument that the first defendant's conduct was unconscionable conduct within the meaning of section 12CB or section 12CC of the ASIC Act, Justice Mullins held that only section 12CC was relevant because as at February 2003, section 12CB applied to conduct in connection with the supply of financial services acquired for personal, domestic or household use. The parties failed to make submissions about the application of section 12CC of the ASIC Act. Justice Mullins held that, prima facie, a finding against the first defendant based on Garcia unconscionability is conduct that is also proscribed by section 12CC(1)(a) of the ASIC Act. Justice Mullins gave the parties an opportunity to make further submissions on the application of section 12CC(1) of the ASIC Act.   Justice Mullins also found that the conduct of the first defendant by which it, in effect, misrepresented the nature of the transaction at the time the guarantee and mortgage were signed, amounted to misleading or deceptive conduct within the meaning of section 12DA of the ASIC Act.   Her Honour held that because she found the first defendant's conduct to be unconscionable and misleading or deceptive, it was not necessary to answer the question about the need for, and the extent of any disclosure by the first defendant to Mrs Dowdle about Mr Dowdle's personal indebtedness to the first defendant.  Mrs Dowdle's argument to set aside the guarantee and mortgage on the basis of unconscionability within the meaning of Commercial Bank of Australia Ltd v Amadio [1983] HCA 14 was rejected. Justice Mullins determined that there were no facts alleged that enabled the threshold issue to be determined in Mrs Dowdle's favour, that she was in a position of special disadvantage by reason of condition or circumstance.    Justice Mullins held that the second defendant, Donald Cunnington, was knowingly concerned in the first defendant's contravention of section 12DA of the ASIC Act and therefore was liable under section 79(c) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). This finding was based on the reasoning that the second defendant knew:   * Mr and Mrs Dowdle were married; * that Mr Dowdle owed money to the first defendant; * that a letter of offer was sent to Mrs Dowdle which was accepted by her; * that the structure of the loan had been changed; and * that the first defendant had not informed Mrs Dowdle of the change in structure of the loan before she signed the guarantee and mortgage.   Justice Mullins determined that because Mrs Dowdle was willing to mortgage her home to secure the loan of $50,000 for the purposes of Mr Dowdle's litigation and the funds were provided for that purpose, the transaction should not be set aside in its entirety. Rather, it was held that the operation of the guarantee should be modified, so that it was subject to conditions that impose the limitation of liability that Mrs Dowdle anticipated would apply when she signed the document.   The first defendant made a claim for legal costs under the terms of the guarantee. Under the guarantee, the first defendant could claim for legal costs arising from the recovery or attempted recovery of moneys overdue for payment, or protection or enforcement of the first defendant's rights under the guarantee. Justice Mullins held that because the guarantee was not set aside, Mrs Dowdle's liability for legal costs incurred by the first defendant for attempted recovery of amounts should be limited to the amounts that are recoverable against her under the modified guarantee.   Justice Mullins invited the parties to make further submissions on the application of section 12CC(1) of the ASIC Act, what should happen with the first defendant's claim for legal costs, the form of the orders that should be made, and the costs of the proceedings.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h6)  **6.10** **Disclosure requirements for managed investment schemes and notices under sections 601MB and 925A of the Corporations Act**   (By John O'Grady and Shane Cooper, Corrs Chambers Westgarth)   Almonds Investors Ltd v Emanouel [2012] VSC 413, Supreme Court of Victoria, Sifris J, 12 September 2012   The full text of this judgement is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2012/413.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/413.html" \t "_new)    **(a) Summary**  This case involves the validity of a purported loan by ABL Nominees Pty Ltd (ABL) which was used by the defendant (Mr Emanouel) to fund investments in the AIL Grower Project - Swan Hill Managed Investment scheme (the Project) managed by Almond Investors Limited (AIL). On or about 15 June 2008, Mr Emanouel, through his attorney, entered into the Swan Hill Allotment Management Agreement (Management Agreement) and Allotment Sublease Agreement (Sublease). ABL, and AIL as Mr Emanouel's attorney, entered into the loan agreement (Loan Agreement) on 24 June 2008.    Mr Emanouel failed to make the required payments due under the Loan Agreement and the Management Agreement. AIL issued proceedings against Mr Emanouel claiming that Mr Emanouel failed to make payments pursuant to various Project documents including management and sublease fees and sought repayment of the amounts owing. Mr Emanouel filed a defence in the proceedings.   After filing the defence, Mr Emanouel's lawyers served notices (Notices) on ABL and AIL pursuant to sections 601MB and 925A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) seeking to suspend any obligations of Mr Emanouel under the Loan Agreement and Sublease. The Notices contended that either or both ABL and AIL failed to comply with the disclosure requirements under Division 2 of Part 7.9 of the Act, amongst other things. AIL alleged that the Notices were ineffective and invalid and should be declared void.   The Court found that the documentation supplied regarding the managed investment scheme did comply with all of the requisite disclosure requirements under the Act. Additionally, his Honour agreed with AIL's submissions that the Notices were ineffective and invalid and declared the Notices void.   **(b) Facts**   The plaintiff, AIL, is the Responsible Entity for the Project. During the period between 1 March 2008 to 15 June 2008, AIL offered interests in the Project to investors pursuant to a product disclosure statement (PDS).    On or about 13 June 2008, Mr Emanouel applied to AIL for allotments in the Project. On or about 15 June 2008, Mr Emanouel, through his attorney AIL, executed the Management Agreement (Management Agreement) and Sublease. On or about 24 June 2008, Mr Emanouel, through his attorney AIL, entered into a Loan Agreement with ABL to fund his initial investment in the Project and fund part of his annual growing, management and sublease fees.   Mr Emanouel failed to pay the growing, management and sublease fees for the year ended 30 June 2011 and for the year ended 30 June 2012 pursuant to the Management Agreement. Mr Emanouel also failed to make the monthly payments pursuant to the Loan Agreement.   On or about 30 August 2011, AIL issued proceedings against Emanouel seeking, amongst other things, repayment of the amounts owing. Included in the proceedings was a claim for breach by Mr Emanouel of the Loan Agreement entered into between Mr Emanouel and ABL. AIL was authorised to institute the claim on behalf of ABL.  On or about 5 March 2012, Mr Emanouel's solicitors sent a letter to AIL's solicitors enclosing Notices to be served on AIL and ABL purportedly pursuant to sections 601MB(1) and 915A of the Act, seeking to suspend any obligation of Mr Emanouel under the Loan Agreement, Management Agreement and the Sublease. The Notices contended that the Loan Agreement, the Management Agreement and the Sublease were void, amongst other grounds, on the grounds that either or both of ABL and AIL failed to comply with the disclosure requirements under Division 2 of Part 7.9 of the Corporations Act.  Specifically, Mr Emanouel alleged that there existed:   * undisclosed commission on the Loan Agreement; * undisclosed commission on the Management Agreement; * undisclosed commission on the Establishment Agreement; * undisclosed risk in the Establishment Agreement price setting mechanism; * undisclosed risk in the Management Agreement price setting mechanism; and * undisclosed conflict of interest of AIL.   In relation to the alleged undisclosed commissions pursuant to the Loan Agreement, Management Agreement, and the Establishment Agreement, Mr Emanouel further contended that:   * the commissions are not disclosed in the PDS; * the commissions are a mandatory disclosure item under sections 1013C(a) and/or 1013D(1)(e) and/or 1013E of the Act; and * the commissions are required to be disclosed in the PDS in dollars or in a formula readily calculated in dollars as required by section 1013D(l)(m) of the Act.   AIL contended that the Loan Agreement was not part of the Project and therefore did not require disclosure within the PDS. Further AIL contended that the commission under the Management Agreement and the Establishment Agreement was a management cost and one-off establishment cost respectively, which was, in any event, disclosed within the Management Agreement, and included by reference into the PDS by virtue of the operation of regulation 7.9.15DA of the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "_default) (Regulations). In response, Mr Emanouel submitted that section 7.9.15DA of the Regulations did not apply because the documents could only be inspected after the investment was made and not by a potential investor, that inspection required a confidentiality undertaking, and that the PDS did not say that inspection would be free.  In relation to the Establishment Agreement and Management Agreement price setting mechanism, Mr Emanouel alleged, amongst other things, that there existed no set mechanism on pricing or any independent pricing control or external competition process for a non related entity to provide the services and that these arrangements and provisions represented a significant risk which were required to be disclosed pursuant to section 1013D(1)(c) of the Act. Further, Mr Emanouel contended that these risks are the type of theoretical risks that are required to be fully disclosed to retail investors.   AIL argued, amongst other things, that there was no significant risk of collusion in price setting or in having a single supplier of services and that these were simply allegations made by Mr Emanouel unsupported by evidence. AIL further argued that a formal mechanism to set pricing did exist.   In relation to the alleged conflict of interest, Mr Emanouel alleged that AIL seriously and knowingly compromised its independence as a responsible entity and/or compromised the interest of scheme members to create significant risks. Further, Mr Emanouel alleged this information is of the type required by section 1013D(1)(c) and/or 1013E of the Act and was not provided to him in breach of Part 7.9 Division 2 of the Act.   AIL argued that there was no evidence to substantiate the allegation that there were actual conflicts of interest, which in turn, would have required disclosure pursuant to Part 7.9 Division 2 of the Act. Further, AIL submitted that these are not the type of theoretical risks that would be required to be disclosed to a retail investor.   **(c) Decision**   In regards to the alleged undisclosed commissions, Sifris J held that there was no obligation on the part of AIL to disclose the commission under the Loan Agreement in the PDS for the Project, as it does not relate to the product and subject of the PDS. Further, his Honour held that the commissions under the Management Agreement and the Establishment Agreement were not commissions, but rather a cost or fee and that, in any event, there had been adequate disclosure in the PDS or was otherwise publicly available.   In relation to the allegation of undisclosed risks, his Honour found that all matters including related party interests, costs, fees, charges and expenses were sufficiently disclosed in the PDS.    In regards to the Notices, his Honour held that given the importance of the Notices and their far reaching effect and consequences, they should be clear and precise and contain sufficient particulars of the alleged contravention, which they did not. The matters raised in the Notices should also have been more properly raised in the defence against AIL's action. His Honour found that the Notices were invalid, and service of them was also unjust, however this finding was not necessary as Mr Emanouel's claims had not been made out.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h6)  **6.11** **Head hunters think twice: poaching employees contains risks**   (By Ben Hutchinson, Herbert Smith Freehills)   Wilson HTM Investment Group Limited v Pagliaro [2012] NSWSC 1068, New South Wales Supreme Court, Bergin CJ, 10 September 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/1068.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/1068.html" \t "_new)   **(a) Summary**   The New South Wales Supreme Court has found that Ord Minnett Limited (Ord Minnett) induced a number of senior financial advisors to breach their employment contracts with Wilson HTM Investment Group Limited (Wilson HTM).  The Court held that offering positions to potential employees based on confidential information provided in breach of employment contracts acts to induce a breach of contract.    **(b) Facts**     In March 2012, a group of five senior financial advisors (Advisors) at Wilson HTM began discussions with reference to resigning from Wilson HTM, to be employed by Ord Minnett.  These discussions included suggestions of inducing employees of Wilson HTM to leave in order to be employed by Ord Minnett Limited, and being paid a 'finder's fee' for doing so.    A number of meetings with representatives from Ord Minnett were held, including a barbeque at the home of one of the Advisors. It was during these meetings that the Advisors provided Ord Minnett with commission statements, revenue information, and contact details for other Wilson HTM employees.    Wilson HTM settled the individual claims against the Advisors prior to the hearing. The Court was asked to consider whether Ord Minnett:   * induced a breach of contract by causing the Advisors to provide confidential information; * induced a breach of fiduciary duties of loyalty and fidelity in respect of certain Advisors; and * should be restrained from employing certain employees of Wilson HTM.   Late in the trial, matters were also raised in relation to breaches of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act), the Australian Consumer Law (Schedule 2 to the [Competition and Consumer Act 2010 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default)) and the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default) (the ASIC Act).    **(c) Decision**    **(i) The confidential information issue**   The relevant employment contracts provided that 'remuneration is a confidential matter' and that confidential information was 'any information relating to the strategic business plans, business affairs, accounts work, marketing plans, sales plans'.   Wilson HTM submitted that the remuneration of the individual employee was determined by, in part, revenue produced by the employee, and was therefore caught by the contract. Wilson HTM also submitted that there should be a 'businesslike' construction of the confidentiality clause in the contract, in accordance with McCann v Switzerland Insurance Australia Limited [2000] HCA 65. In a commercially competitive market, revenue information and remuneration of employees is something that competitors desire, and that businesses would prefer to keep confidential. Wilson HTM also submitted that revenue is clearly caught by 'information relating to', amongst other things, the plaintiffs' 'business affairs'.    Ord Minnett submitted that, in respect of whether remuneration derived from revenue was confidential, the information that was provided was based on revenue, and so was not caught by the contract.  In respect of the confidentiality clause, Ord Minnett submitted that whilst the confidentiality clause was cast in wide terms, it went to some trouble to identify specific information considered to be confidential. As there was no specific mention of revenue, the parties did not intend that information such as commission statements (based on revenue) and revenue information would be caught by the confidentiality clause in the contract.    The Court held that revenue information of the type sought by Ord Minnett was confidential information in respect of the employment contracts. The information provided enabled particular individuals to be identified and targeted as high earners, and was clearly intended to be caught by the definition of confidential information. This was supported by the fact that if a competitor knew the commissions and revenue information of a number of employees, they would be able to structure targeted offers over and above the revenues and/or commissions being paid by Wilson HTM. The Court also held that to include revenue in the definition of confidential information would not act as an unreasonable restraint on the ability of employees to obtain better employment.    **(ii) The inducement issue**   The Court held that Ord Minnett induced the disclosure of confidential information, and therefore the breach of contract. The fact that the Advisors may have already wanted to leave Wilson HTM, or that the Advisors had approached Ord Minnett, was irrelevant.  The Court considered that there was a difference between the desire to leave a particular employer, and actually taking the steps to do so, supported by Ord Minnett. A distinction should also be drawn between an individual employee deciding to leave an employer, and a group of employees plotting to transfer that group to a competitor. The inducement of the breach was Ord Minnett's offer to take the group as a team, and based on the confidential information, to make a competitive bid for the employees as a team by structuring salaries and sign-on bonuses at a higher level than the employees' present remuneration.    **(iii) The breach of fiduciary duties issue**   In accordance with Faccenda Chicken Limited v Fowler [1986] 1 All ER 617, an employment contract implies an obligation to serve the employer with 'good faith'. The Court held that the Advisors that were to receive a sign-on bonus as a result of obtaining the transfer of further employees of Wilson HTM were in breach of the obligation not to obtain a benefit for themselves by a breach of their duty of fidelity and loyalty, and that this was induced by Ord Minnett.    **(iv) The restraint issue**   The Court considered that it would be inappropriate to restrain Ord Minnett from employing other employees of Wilson HTM. The individuals named had not been joined in the proceedings and had not had the benefit of making any submissions. The Court was, however, willing to restrain Ord Minnett from using the confidential information that was provided by the Advisors. Whilst Ord Minnett may approach further employees of Wilson HTM, confidential information must not be used to do so.    **(v) Further issues**   The issues surrounding the Corporations Act, the Australian Consumer Law and the ASIC Act were introduced late in the conduct of the proceedings. The Court considered it inappropriate to consider those claims in the absence of detailed submissions, particularly considering the success of the plaintiff in the confidentiality and inducement issues. The Court did, however, make the following comments:   * If findings of contravention of sections 182 and 183 of the Corporations Act were made against Ord Minnett on the basis that it was involved in the contraventions of some of the Advisors, the appropriate measure of compensation would be the same amount as the liability for inducement of breach of contract. * Ord Minnett's conduct may be unconscionable under the Australian Consumer Law, as the definition of 'services' includes 'a contract for or in relation to the performance of work (including work of a professional nature)'. This accommodates a claim that Ord Minnett's conduct in acquiring services from the Advisors (for entering into contracts for the performance of work) was unconscionable because it used Wilson HTM's confidential information. * The claim under section 12CB of the ASIC Act is more challenging because the conduct must be in connection with the acquisition of or supply of financial services to a person. Ord Minnett was seeking to acquire professional, rather than financial services.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h6)  **6.12** **Responsible entities will not be able to claim client legal privilege against their scheme members**   (By Alex Roberts, King & Wood Mallesons)   Great Southern Managers Australia Limited (recs & mgrs apptd) (in liq) v Clarke [2012] VSCA 207, Supreme Court of Victoria, Court of Appeal, Buchanan and Osborn JJA and Beach AJA, 5 September 2012    The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSCA/2012/207.html](http://www.austlii.edu.au/au/cases/vic/VSCA/2012/207.html" \t "_new)   **(a) Summary**   This case considers the application of an exception to client legal privilege under the [Evidence Act 2008 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=103718" \t "_default) (the Act) in relation to joint holders of legal privilege. The Court held that, where a responsible entity retains a lawyer to obtain advice for the benefit of its scheme members, the responsible entity may not rely on client legal privilege to prevent the scheme members from using the relevant documents for evidentiary purposes in court.    **(b) Facts**     **(i) Background**   The appellant, Great Southern Managers Australia Limited (GSMAL), was the responsible entity for a number of managed investment schemes. The respondents were investors in those schemes. The main trial involved alleged deficiencies in the Product Disclosure Statements and other documentation issued by GSMAL in relation to the managed investment schemes. Prior to the trial, issues arose as to the proposed tendering of evidence.   **(ii) Directions hearing**   This case derives from one such argument in the pre-trial process. During a directions hearing, the question arose as to whether a claim for privilege could be maintained in respect of a particular document, described by the parties as 'the 2005 Board Paper'. The document was already in the hands of the respondents. It had been provided under subpoena to the Court in a previous proceeding involving directors of GSMAL, and was subsequently obtained when the respondents requested access to jointly privileged documents from GSMAL's liquidators. GSMAL argued that client legal privilege prevented the scheme members from using the '2005 Board Paper' as evidence in the trial. The scheme members argued that section 124 of the Act permitted use of the '2005 Board Paper'.   Section 124 of the Act excludes the operation of client legal privilege in civil proceedings where the parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the same matter.   GSMAL appealed the decision of the presiding judge at the directions hearing, who declared that 'Joint privilege . is lost pursuant to section 124 of the Evidence Act 2008 (Vic) and the plaintiffs may tender the June 2005 Board Paper at trial'.    **(iii) Arguments**   GSMAL submitted that client legal privilege had not been lost, arguing that:   * firstly, section 124 does not apply unless all of the parties have expressly and actively retained the lawyer; * secondly, section 124 does not operate 'where the adducing of evidence the subject of joint client legal privilege would disclose otherwise privileged material to persons other than the joint holders of the privilege in the proceeding'; and * thirdly, if section 131A of the Act were held not to apply, then section 124 would not operate until the 2005 Board Paper was adduced at trial, with the consequence that the judge had erred in making the particular declaration that he did.   Section 131A allows for parties to object to the pre-trial disclosure of, among other things, communications that would be protected by client legal privilege at trial. If not for the existence of section 131A, it would not be possible for parties to object until the actual trial occurred.   **(c) Decision**    **(i) Active participation in the retention of the lawyer is not required**   The Court of Appeal rejected the first submission of GSMAL in relation to section 124. GSMAL's argument turned on the interpretation of 'jointly retained'. It argued that, even though the legal advice obtained in the Board Paper had been obtained by it (as trustee) for the benefit of the scheme members (as beneficiaries), nonetheless the lawyer had not been 'jointly retained'. GSMAL submitted that each party would need to actively and expressly participate in the retention of the lawyer for the lawyer to be 'jointly retained'. The Court of Appeal rejected that argument, and found that section 124 'encompasses cases where one joint privilege holder retains the lawyer for its benefit and for the benefit of the other joint privilege holders'.   The Court of Appeal considered that there should not be a distinction drawn between 'the rights of those who actively participate in the retaining of the lawyer and those who take a passive role having the lawyer retained by a joint privilege holder for their benefit'.   Further, the Court of Appeal considered that, if GSMAL's construction was correct, this would have an unusual consequence. That is, even though GSMAL actively participated in retaining the lawyer, its own ability to rely on section 124 would depend on the extent to which the other parties had participated in retaining the lawyer. The Court of Appeal referred to common law principles and the requirements of the [Interpretation of Legislation Act 1984 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=439" \t "_default), to highlight that such a construction would not be accepted where the alternative approach was sensible and accorded with the context and purpose of the Act.   **(ii) Possible disclosure to other persons is not relevant**   GSMAL's second argument was that section 124 does not operate where the privileged information would be disclosed to persons other than the joint holders of the privilege. The Court of Appeal rejected his argument and held that section 124 operates whether or not there are other parties (who would not be joint holders of the privilege) in the proceedings. Therefore, section 124 can apply both where all of the parties to litigation are joint holders of the privilege (as in this case), and also where a joint holder to privilege is engaged in litigation against parties who are not joint holders of the privilege. The Court of Appeal explained that the possibility of other parties gaining 'access to material the subject of the joint privilege is a concomitant feature of litigation being conducted in open court'.   **(iii) The scope of section 131A was not considered**   GSMAL had argued at the directions hearing that section 131A did not apply for two reasons. First, GSMAL had supplied the document, and did not object to its being produced to the respondents. Second, section 131A does not encompass section 124, which only applies to the adducing of evidence at trial. The Court of Appeal found that, in the particular circumstances of the application, GSMAL's third submission in relation to section 131A did not need to be considered, as section 124 did apply.   **(iv) Client legal privilege is not 'lost' under section 124, but may cease to apply**   The Court of Appeal dismissed the appeal, except to a limited extent to deal with the scope of the declaration that had been made.  Although the respondents were successful in arguing that section 124 applied and that they would be able to gain access to the 2005 Board Paper, the Court of Appeal carefully considered the precise effect of section 124.   The Court of Appeal reformulated the declaration made at the directions hearing to provide that, rather than client legal privilege being 'lost' pursuant to section 124, the section 'does not prevent the plaintiffs from adducing evidence of the 2005 Board Paper at the trial of this proceeding'. Therefore client legal privilege remained, and could be relied on for other purposes such as litigation involving third parties, but would not prevent the use of the document at trial. The Court of Appeal considered that this reformulation more accurately reflected the operation of section 124.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h6)  **6.13** **Disclaimer of a lease by a landlord's liquidator will extinguish a tenant's leasehold interest**  (By Peter Bowden and Christina Koulias, Clayton Utz)   Re Willmott Forests Limited [2012] VSCA 202, Supreme Court of Victoria, Court of Appeal, Warren CJ, Redlich JA and Sifris AJA, 29 August 2012   The full text of this judgment is available at:   [http://www.austlii.edu.au/au/cases/vic/VSCA/2012/202.html](http://www.austlii.edu.au/au/cases/vic/VSCA/2012/202.html" \t "_new)    **(a) Summary**   The Supreme Court of Victoria Court of Appeal overturned the court's decision at first instance that a disclaimer of a lease by the liquidator of a landlord does not extinguish the tenant's leasehold interest.   The Court held that a disclaimer of a lease by the liquidator of a landlord necessarily extinguishes the tenant's leasehold interest (and naturally, any associated proprietary rights).    This is likely to have far-reaching consequences for liquidators and tenants alike. In particular, liquidators now appear to have less obstacles to overcome in order to sell freehold land free of leasehold interests. This will no doubt enable liquidators to effect land sales in a more expeditious manner and may ultimately enhance creditor returns. For tenants however, their rights on the insolvency of the landlord have unquestionably been restricted.   **(b) Facts**    Willmott Forests Ltd (WFL), the responsible entity of an agricultural managed investment scheme (MIS), went into liquidation. Under the MIS, the investors (Growers) leased land from WFL to grow and harvest trees.    The critical question on appeal was whether the leasehold interest in land could be extinguished by a disclaimer of the lease agreement by the liquidator of the landlord (being WFL) under sections 568(1) and 568D of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act).    Counsel for the liquidators of WFL contended that the word 'liability' in section 568D should be read widely to capture WFL's obligation to provide quiet enjoyment of the land by the Growers during their tenure.  By disclaiming the contract under sections 568(1)(f) and 568(1A) of the Act, WFL no longer had any contractual rights or liabilities under the lease (Re Willmott Forests Limited [2012] VSCA 202 at [6]).    The other issue before the court was, despite the termination of interests of the tenant arising from the disclaimed contract, whether there was a proprietary interest in the land that survived termination, given the nature of the contract was a leasehold interest to use and occupy the land.    **(c) Decision**    **(i) Is a leasehold interest in land extinguished by a disclaimer of the lease agreement by the liquidator?**    The Court held (at [37]):    'The context of the word 'liability' in section 568D(1) suggests that it should be given the widest possible meaning and include the obligation to provide possession and quiet enjoyment. The section is specifically designed to enable a liquidator 'to cease performing obligations . [and] to achieve a release of the company in liquidation from its obligations'. If WFL is to be relieved of its obligation to provide quiet enjoyment, clearly and in context a liability, the interest of the lessee so far as tenure is concerned is directly related to and underpins such liability. The tenure must go. It is necessary to affect the Growers rights (tenure) in order to release WFL from its liability (possession and quiet enjoyment). The cases where rights have been preserved usually involve claims against third parties unrelated to any liability of the company in liquidation.'   **(ii) Is there a proprietary interest in the land that survives termination given the nature of the contract is a leasehold interest to use and occupy the land?**   The Court, relying on the relevant authorities, took the view that the leasehold interest was governed by the lease agreement which is in turn governed by the law of contract.   The Court held (at [58]):    '[A]ny leasehold interest cannot survive the termination of the very contract that created it and regulated the tenure of the Grower. It is this tenure which creates, and is the basis of, the obligation or liability on the part of WFL to provide quiet enjoyment. Section 586D(1) allows the liquidator to terminate this obligation or liability despite its intrusion into the property rights of an innocent party. The evident policy is to permit the loss of these rights in order to enable the company in liquidation to be free of obligations so that it can be wound up without delay for the benefit of its creditors.'  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h6)  **6.14** **Breach of directors' duties under Companies Act 2006 (UK)**   (By Katrina Sleiman and Ben Williams, Corrs Chambers Westgarth)   Odyssey Entertainment Ltd (in liquidation) v Kamp [2012] EWHC 2316 (Ch), England and Wales High Court (Chancery Division), Simon Barker HHJ, 9 August 2012   The full text of this judgment is available at:  [http://www.bailii.org/ew/cases/EWHC/Ch/2012/2316.html](http://www.bailii.org/ew/cases/EWHC/Ch/2012/2316.html" \t "_new)   **(a) Summary**   The first defendant, Ralph Kamp (Kamp), was a director, CEO and shareholder of the claimant Odyssey Entertainment Limited (in liquidation) (Odyssey).  Odyssey was a film sales, finance and rights management business. Odyssey was wound up on 9 September 2009 with joint liquidators being appointed.    The second defendant, Timeless Films Limited (Timeless), was also in the business of film sales, finance and rights management. It was incorporated on 26 May 2009 and formally commenced trading on 1 September 2009 under Kamp's management.   Odyssey alleged that Kamp breached statutory and fiduciary duties under the Companies Act 2006 (UK) (Companies Act) and obligations under his employment contract, and that Timeless was liable as an accessory.    The court found that Kamp was in breach of his statutory and fiduciary duties by reason that he misled Odyssey's board as to his intentions for his future work in the industry, undertook work on his own account as a film sales agent whilst still a director and employee of Odyssey and kept that work secret from the board.   Timeless was found liable as an accessory.    **(b) Facts**   Odyssey was incorporated on 6 November 2001 and operated a film sales, finance and rights management business. It acquired film distribution rights from film producers and sold or licensed those rights to distributors. It was established by Kamp and Louise Goodsill (Goodsill), who were executive directors of Odyssey.   Kamp was the chief executive officer of Odyssey and holder of 50% of its issued ordinary shares. He is a well known, experienced and respected independent film sales agent.  Goodsill was the president and chief operating officer of Odyssey. There were two non-executive directors of Odyssey who represented investors.   From 2002 until 2008, Odyssey was built into a successful film sales agency.  Under the direction of Kamp and Goodsill, the company took on film projects, began to acquire rights from other sales agencies and gradually built up a library of films. Until 2006, Odyssey consistently reported net profits and a solid net asset balance.   Due to the state of global economy and industry-specific factors, Odyssey reported a loss of £1.56 million in 2007. However, the 2008 management accounts showed a profit of £242,000 and net assets of £1.34 million. While the subsequent audited accounts showed a small loss, it is the management accounts that bore on Kamp's state of mind as at the end of 2008 and early 2009.   As at the end of 2008, Odyssey's forecast budget for 2009 showed a profit of £79,000. While the budgets were formally Goodsill's responsibility, they were drafted by Kamp and the finance director, Sarah Simkin. The court found that at that time, Odyssey was a well-capitalised business capable of meeting its operating costs.  Kamp's reports to the board had been consistently optimistic. Odyssey had retained high quality staff, developed a strong reputation, practised good cost management and was able to survive in a difficult international economic environment.    Against that background, Kamp informed Goodsill in early January 2009 that he had reconsidered Odyssey's financial position over Christmas and now expected that it would run out of cash in 2009 without further fundraising or unless further films could be found.   The court found that Kamp's budget reappraisal was not, by itself, unreasonable. However, in the context of Kamp's further conduct in 2009, the court found that he had decided, by January 2009, to wind up Odyssey and to set up his own business as a film sales agent.  Kamp's conduct included, among other things, the following:   * Kamp informed Goodsill in early January 2009 that he was not interested in running the business for another year to find a buyer; rather, he wanted to work in his family real estate business. * Later in January 2009, Kamp privately reassured an employee of Odyssey, Sarah Arnott (Arnott), that if Odyssey closed, he would set up his own company when he was free to do so and would offer her a job. * At a board meeting held on 30 January 2009 to discuss Odyssey's future, Kamp stated that independent film sales agents were no longer viable unless they had capital to participate in financing or guaranteed distribution. He did not disclose that he intended to stay in the industry and pushed heavily for a quick liquidation. * At a board meeting on 7 May 2009, Kamp and Goodsill reported that they had resolved to make all staff (including themselves) redundant on three months' notice and that existing contracts would be wound down. * On 26 May 2009, Timeless was incorporated by Kamp's accountant with his wife appointed as director. * By May 2009, Kamp had started working on agreements in his own right with distributors, including negotiating his personal fee. Around nine films were offered to Kamp at that time. * Kamp and Goodsill attended the Cannes Film Festival in early June 2009, where they negotiated the termination of contracts and settled outstanding payments. In so doing, Odyssey surrendered its distribution rights. * On 2 June 2009, Kamp reported to the board about the winding down negotiations at Cannes. He did not disclose that he had been privately negotiating with distributors or that films had been offered to him, that Timeless had been incorporated or that he intended to stay in the industry. * At Kamp's direction, Arnott undertook script reading work for him personally in June, July and August 2009. For part of that time, Arnott was still employed by Odyssey. * On 31 July 2009, Kamp executed a services agreement on behalf of Timeless that recorded him as the CEO and that committed Timeless to a course of conduct from 1 September 2009. * Between May to August 2009, Kamp negotiated (partly through Timeless but for the benefit of himself) a number of sales agencies for films that had either previously been Odyssey's projects or would have been.  Kamp kept all such activity from coming to Odyssey's attention.   A board meeting and general meeting were held on 9 September 2009, with a resolution passed to voluntarily wind up Odyssey and appoint joint liquidators. Kamp ceased to be an employee of Odyssey on 1 September 2009 but remained a director until 18 September 2009.    **(c) Decision**   **(i) Duties owed by Kamp**   Section 172(1) of the Companies Act provides that a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. The section then provides a non-exhaustive list of matters to which a director must have regard in so acting.    Section 175(1) of the Companies Act provides that a director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.   The court noted that a duty not to profit from a fiduciary position was 'embraced by, though not comprehensively expressed in' section 175.   **(ii) Duties breached**   The strength of the court's factual findings against Kamp was such that legal findings of breaches of his statutory and fiduciary duties were almost inevitable. The court found that Kamp had breached his duty of good faith under section 172 of the Companies Act, citing the following conduct:   * in the circumstances, Kamp's 2009 budget revision was overly pessimistic; * Kamp worked behind Odyssey's back to develop opportunities for himself and, in so doing, disengaged himself from promoting Odyssey's best interests; and * Kamp intentionally misled the board and persuaded it to take a course of action that it may not have otherwise taken.   The court also found that Kamp had breached his duty not to profit from his fiduciary position as from January 2009 he was 'geared to maintaining and nurturing contacts and opportunities for his future advantage'.    Rather than taking steps to avoid a conflict of interest, as required by section 175, the court found that Kamp 'was instrumental in the creation of such conflicts'.  The formation of Timeless, by itself, did not create a conflict.  However, Kamp's efforts to develop projects and secure rights for himself rather than Odyssey plainly gave rise to the breach.   While the court explicitly rejected Odyssey's allegation that Timeless had induced Kamp to breach his fiduciary duties, it found that Timeless was liable to Odyssey as an accessory. Timeless was found to be '[Kamp] in a corporate guise', fixed with Kamp's knowledge and state of mind and therefore fixed with the mental element required to show dishonest assistance. The court found that it would be unconscionable for Timeless to retain the benefit of the assets and profits gained as a result of Kamp's breaches.   The hearing was confined to liability, with a hearing on quantum to follow.   **(iii) Co-directors' reliance on Kamp**   Finally, with respect to Kamp's co-directors, the Court commented that 'they all deferred to [Kamp's] long experience and expertise as a film sales agent (the expert witnesses were agreed that [Kamp] is a leading individual UK film sales agent) for guidance as to [Odyssey's] sales prospects and, more generally, the market for independent sales agencies.  In so doing, they were not simply accepting whatever [Kamp] might say in disregard of their own powers of thought, nor were they in dereliction of their duties as directors.  Rather, they were giving due weight to the one of their number who could speak with particular authority on the general market for sales agents and the specific position of [Odyssey]'.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h6) | |  |  | | --- | |  |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **7. Contributions** |  |  | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/182-October-2012.html%23h1) | | | http://my.lawlex.com.au/alert/pic/spacer.gif |

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