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[Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm#h1)  [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm#h2)  [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm#h3)  [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm#h4)  [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm#h5)  [Contributions](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm#h7)  [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new) | | [eview my Newsfeed selections](http://my.lawlex.com.au/default.asp?goto=news_sub) [iew past editions of Newsfeeds](http://my.lawlex.com.au/default.asp?goto=news) [iew a list of related Standards](http://infostore.saiglobal.com/store/results2.aspx?searchType=subject&publisher=All&doctype=All&status=Current&sfld1=ICS%20Code&sval1=03.160) [earch all Australian legislation from one website](http://my.lawlex.com.au/default.asp?goto=search_leg) [ree trial our Lawlex Legislative Alerts](http://www.saiglobal.com/Compliance/regulatory-news/asiapac/lawlex-legislative-alert.htm) [ree trial our other regulatory products and services](http://www.saiglobal.com/compliance/regulatory-news/default.htm) [overnance, risk and compliance solutions](http://www.saiglobal.com/compliance/about/) | | |  | | --- | | COPYRIGHT WARNING Use of this product must be in accordance with our licence agreement and the relevant licence fee paid by your organisation. We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | |  | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%231) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1 Report on reform of financial services regulation in Europe**  On 11 February 2011, the European Commission published a report titled "Regulating Financial Services for Sustainable Growth". The report summarises the reforms that have been undertaken and are proposed to deal with regulatory reform of financial services in Europe following the financial crisis. The matters dealt with in the report include:  Lessons from the crisis;  Regulatory reform in Europe (financial institutions: improved stability and governance; markets: improved efficiency, integrity, liquidity and transparency);  Consumers: better protection, confidence and inclusion;  The reform of financial supervision in Europe;  A crisis management framework for Europe; and  Deepening the single market.  The report is available on the [European Commission website](http://ec.europa.eu/commission_2010-2014/barnier/docs/110209_progress_report_financial_issues_en.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.2 IOSCO report on internal controls relating to structured financial products**  On 11 February 2011, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a report titled "Intermediary Internal Controls Associated with Price Verification of Structured Finance Products and Regulatory Approaches to Liquidity Risk Management".  In an earlier report on the subprime crisis, IOSCO noted that, among other things, many institutional investors and investment banking firms had inadequate risk modelling and internal controls in place to understand and address the risks they were assuming when buying many types of structured finance products. As a result of its findings, IOSCO recommended that its Standing Committee on the Regulation of Market Intermediaries undertake a study of the internal control systems of financial firms, including asset managers, in different IOSCO jurisdictions and develop principles to address any concerns identified.  The report presents the findings of that study and is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD344.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.3 SEC proposes rule amendments to remove references to credit ratings**  On 9 February 2011, the United States Securities and Exchange Commission (SEC) voted unanimously to propose amendments to its rules that would remove credit ratings as one of the conditions for companies seeking to use short-form registration when registering securities for public sale.   Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 requires US federal agencies to review how existing regulations rely on credit ratings and remove such references from their rules as appropriate.  This marks the first in a series of upcoming SEC proposals in accordance with Dodd-Frank to remove references to credit ratings contained within existing SEC rules and replace them with alternative criteria.   In issuing the proposed rule amendment, the SEC Chair Mary Schapiro stated that "over-reliance on credit ratings has been one of the factors cited as contributing to the financial crisis".  The SEC's proposal focuses on the use of credit ratings as a condition of so-called "short-form" eligibility. Companies that are "short-form eligible" also are allowed to register securities "on the shelf". Shelf registration provides companies considerable flexibility in deciding when to access the public securities markets.   The SEC's proposed rule amendment would remove the NRSRO investment grade ratings condition included in SEC forms S-3 and F-3 for offerings of non-convertible securities, such as debt securities. Instead of ratings, the new short-form test for shelf-offering eligibility of companies would be tied to the amount of debt and other non-convertible securities they have sold in the past three years  The proposed rule amendment is available on the [SEC website](http://www.sec.gov/rules/proposed/2011/33-9186.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.4 Global pension asset study**  On 8 February 2011, Towers Watson published its Global Pension Asset Study 2011, which indicates the assets of Australian superannuation funds rose to 103% of Australia's GDP last year, up from 93% a year earlier. Over the year, Australian superannuation assets (measured in US dollar terms) moved up from fifth place to become the fourth largest pension asset pool in the world. The study examines the world's 13 largest pension markets - which account for more than 85% of global pension assets.  Australia's pension assets comprise 4.8% of global pension assets and this is a substantial increase from ten years ago, when the Australian market made up only 1.7% of global pension assets and ranked seventh in size. No other country in the top 13 has had a larger increase in the total global pension assets pie over the past ten years or a greater rise through the ranks than Australia.  Like other Anglo-American democracies, Australian superannuation funds have also continued to have a higher asset allocation in equities than other countries in the study with around 49% of funds invested in equities in 2010. At the same time, Australian funds invested 25% in alternative assets, making Australia the second highest investor of alternatives in the world behind Switzerland.  Globally, institutional pension fund assets in the study rose by 12% during 2010 to reach a new high of US$26 trillion. The growth is the continuation of a trend which started in 2009 when assets grew 17%, but in sharp contrast to a 21% fall during 2008 which took assets back to 2006 levels. Global pension fund assets have grown 66% since 2000, when they were valued at US$16 trillion.  The study also reveals that pension fund balance sheets globally continued to strengthen during 2010, although the global asset/liability ratio is still well down from its 1998 level. According to the study, pension assets now amount to 76% (71% in 2009) of the global GDP, substantially higher than the equivalent figure of 61% in 2008.  Other highlights from the report include:  On average global pension assets (measured in local currency) grew by over 9% in 2010, taking the ten-year average growth rate to almost 6%;  The US, Japan and the UK remain the largest pension markets in the world, accounting for 58%, 13% and 9% respectively of total pension fund assets globally. All markets saw growth in pension assets in 2010 (measured in local currency), and all markets in the study have positive ten-year compound annual growth rate figures; and  The Netherlands now has the largest proportion of pension assets to GDP (134%), followed by Switzerland (126%), US (104%), Australia (103%) and the UK (101%). In the past ten years Canada, Ireland and France have seen the greatest fall in the ratio of pension assets to GDP of -19%, -3% and -1% respectively. Australia has had the highest growth in the pension assets to GDP ratio than any other country in the study over the past ten years.  Further information about the study is available on the [Towers Watson website](http://www.towerswatson.com/australia/press/3764" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.5 SEC proposes rules for security-based swap execution facilities**  On 2 February 2011, the United States Securities and Exchange Commission (SEC) published proposed rules defining security-based swap execution facilities (SEFs) and establishing their registration requirements, as well as their duties and core principles.  The US Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 authorised the SEC to implement a regulatory framework for security-based swaps, which currently trade exclusively in the over-the-counter markets with little transparency or oversight. The Dodd-Frank Act sought to move the trading of security-based swaps onto regulated trading markets, and therefore created security-based SEFs as a new category of market intended to provide more transparency and reduce systemic risk.   The SEC's proposed rules:  Interpret the definition of "security-based SEFs" as set out in the Dodd-Frank Act;  Set out the registration requirements for security-based SEFs;  Implement the 14 core principles for security-based SEFs that the legislation outlined;  Establish the process for security-based SEFs to file rule changes and new products with the SEC; and  Exempt security-based SEFs from the definition of "exchange" and from most regulation as a broker.  The proposed rules are available on the [SEC website](http://www.sec.gov/news/press/2011/2011-35.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.6 Concern expressed about how companies report principal risks and uncertainties**  On 1 February 2011, the UK Financial Reporting Review Panel (part of the Financial Reporting Council) issued a media release in which it expressed concern about how companies are reporting the principal risks and uncertainties facing their business.  The Companies Act 2006 (UK) requires directors' reports to contain a business review which must itself contain a description of the principal risks and uncertainties facing the company. The Act states that the purpose of the business review is to inform members of the company and help them assess how the directors have performed their statutory duty to promote the success of the company.  The Panel has challenged a number of companies where:  The directors' report does not clearly identify which risks and uncertainties the directors believe to be the principal ones facing the business.  A long list of principal risks and uncertainties is given and the list raises a question as to whether all the risks and uncertainties on the list are actually principal ones.  The description given of a risk or uncertainty is in generic terms and it is not clear how that risk or uncertainty applies to the company's circumstances.  The disclosure is of a risk framework rather than of the risks or uncertainties themselves.  The principal risks and uncertainties disclosed are not consistent with other information given in the report and accounts.  The directors' report does not state how the company manages its principal risks and uncertainties.  The Panel encourages boards of directors to consider their disclosure of the principal risks and uncertainties facing their businesses by considering the following questions:  Do the disclosures state clearly which are the principal risks and uncertainties facing the business?  Are those risks and uncertainties described as principal the main risks and uncertainties that currently face the business? For example, have the risks and uncertainties listed as principal been the subject of recent discussions at board or audit committee meetings? Are there risks which have been the subject of such discussions which should be considered as principal?  Is the description of each principal risk and uncertainty sufficient for shareholders to understand the nature of that risk or uncertainty and how it might affect the company?  Are the principal risks and uncertainties described in a manner consistent with the way in which they are discussed within the company?  Are the principal risks and uncertainties shown consistent with the rest of the report and accounts? Are there risks and uncertainties on the list which are not referred to elsewhere or are there significant risks and uncertainties discussed elsewhere which do not appear on the list?  Is there a description, in the directors' report, or elsewhere in the report and accounts and explicitly cross-referenced from the directors' report, of how the company manages each of the principal risks and uncertainties?  The media release is available on the Financial Reporting Review Panel's [website](http://www.frc.org.uk/frrp/press/pub2503.html" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.7 Report on point of sale disclosure**  On 1 February 2011, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a report titled "Principles on Point of Sale Disclosure".  The report analyses issues relating to requiring key information disclosures to retail investors prior to the point of sale. It also sets out principles to guide possible regulatory responses. The chapters in the report include:  Research: the main findings (the need for effective disclosure for retail investors, views on effective disclosure, research on retail investor preferences, research on investor behaviour);  Existing disclosure requirements and modes of delivery in IOSCO member jurisdictions;  Components of effective disclosure (content, language, timing, types and purposes of consumer testing available);  Special challenges for regulators (the tensions between product disclosure and intermediary disclosure, consistency of product disclosure requirements, cost benefit analysis of new point of disclosure requirements);  Disclosure requirements being proposed in IOSCO member jurisdictions; and  Principles for disclosure of key information prior to the point of sale.  The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD343.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.8 Report on Canadian securities class actions**  On 31 January 2011, NERA Economic Consulting published a report which finds that outstanding securities class actions reached a new record in Canada in 2010. As of the end of 2010 there were a record 28 active securities class actions in Canada, representing approximately Can$15.9 billion in outstanding claims. In 2010, eight new securities class actions were filed during the course of the year, with claims of more than Can$870 million. Filings in 2010 dropped slightly compared to the nine securities class actions filed in 2009 and the record ten cases filed in 2008.  The study also notes that five securities class actions settled in 2010 for payments by defendants of Can$67.6 million. The average settlement for these cases was Can$13.5 million and the median settlement was Can$10 million-compared to the average and median settlement of Can$9 million in 2009. A total of 25 cases have now been brought under the recent secondary market liability provisions of the provincial securities acts (commonly referred to as "Bill 198 cases"). Of these cases, nine have been settled and 16 are still active. The average settlement defendants have paid was Can$10.7 million. Seven of the new class actions filed in 2010 include claims under these secondary market provisions.  Many Canadian-domiciled firms also face the risk of class action litigation in the US, and several of these cases correspond to similar cases in Canada. As of 31 December 2010, there are 13 active US securities class actions against Canadian-domiciled companies, three of which also have parallel Canadian class actions. Between 1996 and 2010, Canadian-domiciled companies were named as defendants in 71 securities class action filings in the US -17 of which of had parallel class actions in Canada. However, these risks may be somewhat reduced going forward in light of the recent decision of the US Supreme Court in Morrison v National Australia Bank, which places limits on US private securities litigation relating to trading of securities outside the US. There is a summary of Morrison v National Australia Bank in item 4.4 of Corporate Law Bulletin No 155 (July 2010).  The report is available on the [NERA website](http://www.nera.com/nera-files/PUB_Recent_Trends_Canada_0111.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.9 Report of the US Financial Crisis Inquiry Commission**  On 27 January 2011, the US Financial Crisis Inquiry Commission published its report into the causes of the financial and economic crisis. The Commission was created to "examine the causes, domestic and global, of the current financial and economic crisis in the United States". The Commission was established as part of the Fraud Enforcement and Recovery Act (Public Law 111-21) passed by the US Congress and signed by the President in May 2009.  The Commission concludes in its report that the crisis was avoidable and was caused by:  widespread failures in financial regulation, including the Federal Reserve's failure to stem the tide of toxic mortgages;  dramatic breakdowns in corporate governance including too many financial firms acting recklessly and taking on too much risk;  an explosive mix of excessive borrowing and risk by households and Wall Street that put the financial system on a collision course with crisis;  key policy makers ill prepared for the crisis, lacking a full understanding of the financial system they oversaw; and  systemic breaches in accountability and ethics at all levels.  The Commission's report also offers conclusions about specific components of the financial system that contributed significantly to the financial meltdown. The Commission concludes that collapsing mortgage-lending standards, mortgage securitization, over-the-counter derivatives, and the failures of credit rating agencies all contributed to the crisis.  The Commission also examined the role of government sponsored enterprises (GSEs), with Fannie Mae serving as the case study.  The Commission found that the GSEs contributed to the crisis but were not a primary cause. They had a deeply flawed business model and suffered from many of the same failures of corporate governance and risk management seen in other financial firms but ultimately followed rather than led Wall Street and other lenders in purchasing subprime and other risky mortgages.  The report is available on the [Commission website](http://fcic.gov/report" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.10 Companies and institutional shareholders urged to drive competition on equity underwriting fees**  On 27 January 2011, the UK Office of Fair Trading (OFT) published a report in which it urges companies and institutional shareholders to apply greater pressure on equity underwriting fees after finding that the market lacks effective competition on price. The OFT's equity underwriting market study found there had been a significant increase in the fees paid to investment banks since the onset of the financial crisis.  FTSE 350 companies raised an estimated £50 billion of equity capital in the UK in 2009, paying around £1.4 billion in fees, with average fees rising to more than 3% from around 2 to 2.5% in the period from 2003 to 2007. While such increases can be explained, in part, by stock market volatility during 2008 and early 2009, the OFT's report says fees and discounts have been slow to fall in line with subsequent reductions in risk.  The OFT found that companies are generally not focused on the cost of equity underwriting services, instead prioritising speed, confidentiality and a successful "take-up". Some may also lack regular experience of raising equity capital which makes it difficult to hold investment banks to account on costs. While institutional shareholders have expressed concerns about prices, they have yet to put sufficient pressure on companies to reduce the fees paid.  The OFT considers that concerns around the level of fees can be tackled most effectively and efficiently by companies and institutional shareholders rather than further intervention by the competition authorities. The options available to companies include:  requiring investment banks to provide a breakdown of their proposed equity underwriting fees, allowing greater scope to challenge the costs for individual elements;  using competitive tendering more frequently, extending the pool of potential providers to include other corporate brokers and lenders with whom the company has an existing relationship, or increasing the number of banks with whom such relationships exist;  awarding and agreeing fees for different aspects of the work at different times - for example, agreeing fees for the advisory, administrative and distributional work upfront, but for guaranteeing the proceeds of the share issue later, when the risks become clearer; and  reducing the knowledge gap by seeking advice from experienced institutional shareholders or non-executive directors, or taking independent advice.  Options available to institutional shareholders include:  applying much greater pressure on the companies in which they own shares to reduce the fees that they pay; and  committing to sub-underwriting a rights issue ahead of it being announced, in turn lowering the underwriter's risk and consequent fees.  The report is available on the [OFT website](http://www.oft.gov.uk/shared_oft/market-studies/OFT1303.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.11 APRA releases superannuation fund-level performance data**  On 27 January 2011, the Australian Prudential Regulation Authority (APRA) released performance data for individual superannuation funds, covering the seven-year period from 2004 to 2010. The performance data are for APRA-regulated funds - with the exception of small APRA funds, single-member approved deposit funds, exempt public sector superannuation schemes and pooled superannuation trusts - and are provided in the following two publications:  **Superannuation fund-level rates of return**, which contains performance data on the 200 largest funds by asset size as annualised five-year and seven-year average returns, as well as for each of the seven years. These 200 largest funds cover 97% of members and 99% of the assets of APRA-regulated (excluding small) funds, as well as eligible rollover funds. The performance data are provided on a consistent basis, irrespective of the funds' year-end, to improve comparability.  **Superannuation fund-level profiles and financial performance**, which contains detailed data for each year from 2004 to 2010. The detailed data allow observers to analyse APRA-regulated funds across a range of measures (subject to privacy considerations).  The superannuation fund-level data publications are available on the [APRA website](http://www.apra.gov.au/Statistics/Superannuation-Fund-Level-Publications.cfm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.12 SEC adopts "say on pay" rules**  On 25 January 2011, the United States Securities and Exchange Commission (SEC) adopted rules concerning shareholder approval of executive compensation and "golden parachute" compensation arrangements as required under the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010.  The SEC's new rules specify that say-on-pay votes required under the Dodd-Frank Act must occur at least once every three years beginning with the first annual shareholders' meeting taking place on or after 21 January 2011. Companies also are required to hold a "frequency" vote at least once every six years in order to allow shareholders to decide how often they would like to be presented with the say-on-pay vote. Following the frequency vote, a company must disclose on an SEC Form 8-K how often it will hold the say-on-pay vote.  Under the SEC's new rules, companies also are required to provide additional disclosure regarding "golden parachute" compensation arrangements with certain executive officers in connection with merger transactions.  The Commission also adopted a temporary exemption for smaller reporting companies (public float of less than US$75 million). These smaller companies are not required to conduct say-on-pay and frequency votes until annual meetings occurring on or after 21 January 2013.  **(a) Background**  The rule amendments implement section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which added section 14A to the Exchange Act. This statute requires public companies subject to the federal proxy rules to:  Provide their shareholders with an advisory vote on executive compensation, generally known as "say-on-pay" votes.  Provide their shareholders with an advisory vote on the desired frequency of say-on-pay votes.  Provide their shareholders with an advisory vote on compensation arrangements and understandings in connection with merger transactions, known as "golden parachute" arrangements. Such golden parachute arrangements would need to be disclosed in merger proxy statements.  **(b) Rule amendments - required say-on-pay votes and additional disclosure requirements**  **(i) Shareholder approval of executive compensation**  Under the final rules, companies subject to the federal proxy rules are required to provide shareholders with an advisory vote on executive compensation. In particular, the rule amendments, which implement the Dodd-Frank Act, specify that these say-on-pay votes are required at least once every three years beginning with the first annual shareholders' meeting taking place on or after 21 January 2011.  The rule amendments require companies to provide disclosure in the annual meeting proxy statement regarding the say-on-pay vote, including whether the vote is non-binding. The rules also require additional disclosure in the Compensation Discussion and Analysis (CD&A) regarding whether, and if so how, companies have considered the results of the most recent say-on-pay vote.  **(ii) Shareholder approval of the frequency of shareholder votes on executive compensation**  Under the new rules, companies are required to allow shareholders to vote on how often they would like to be presented with the say-on-pay vote: every year, every other year, or once every three years.  This "frequency" vote, which also is a non-binding advisory vote, is required at least once every six years beginning with the first annual shareholders' meeting taking place on or after 21 January 2011. The rules require companies to disclose the frequency vote in the annual meeting proxy statement, including whether the vote is non-binding.  In order to implement the requirement for such a "frequency" vote, the rules revise the proxy rules to permit these three choices on the proxy card. The rules also revise the shareholder proposal rule (Rule 14a-8) to provide guidance regarding the impact of these new requirements on shareholder proposals relating to say-on-pay votes or frequency of say-on-pay votes.  **(iii) Form 8-K disclosure of frequency determination**  In light of the non-binding nature of the vote and in order to allow shareholders to learn how often a company will provide the say-on-pay vote, the rule also revises the current report on Form 8-K. That form now requires disclosure following a shareholder advisory vote on frequency of the company's decision regarding how frequently it will conduct say-on-pay votes. This Form 8-K is required no later than 150 calendar days after the date of the annual meeting in which the vote took place, but in any event no later than 60 calendar days prior to the deadline for submission of Rule 14a-8 shareholder proposals for the subsequent annual meeting.  **(iv) Smaller reporting companies**  The Commission also adopted a temporary exemption so that smaller reporting companies are not required to conduct say-on-pay and frequency votes until annual meetings occurring on or after 21 January 2013. As with other issuers, smaller reporting companies are required to conduct the shareholder advisory vote on golden parachute compensation upon effectiveness of the rules.  The delayed compliance date for the say-on-pay and frequency votes for smaller reporting companies is designed to allow those companies to observe how the rules operate for other companies, and should allow them to better prepare for implementation of the rules. Delayed implementation for these companies will allow the Commission to evaluate the implementation of the adopted rules by larger companies and provide the Commission with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rule becomes applicable to them.  **(v) Shareholder approval and disclosure of golden parachute arrangements**  Under the rules, companies are required to provide additional disclosure regarding compensation arrangements with executive officers in connection with merger transactions, known as "golden parachute" arrangements. Disclosure is required of all agreements and understandings that the acquiring and target companies have with the named executive officers of both companies. The rule requires this disclosure in both narrative and tabular formats.  The "golden parachute" disclosure also is required in connection with other transactions, including going-private transactions and third-party tender offers, so that the information is available for shareholders no matter the structure of the transaction.  The rules require companies to provide a separate shareholder advisory vote to approve certain "golden parachute" compensation arrangements in connection with a merger, acquisition, consolidation, proposed sale or other disposition of all or substantially all assets. Companies are required to comply with the golden parachute compensation shareholder advisory vote and disclosure requirements in proxy statements and other schedules and forms initially filed on or after 25 April 2011.  The Rules are available on the [SEC website](http://sec.gov/rules/final/2011/33-9178.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.13 SEC proposes private fund systemic risk reporting rule**  On 25 January 2011, the United States Securities and Exchange Commission (SEC) proposed a rule to require advisers to hedge funds and other private funds to report information for use by the Financial Stability Oversight Council (FSOC) in monitoring risk to the US financial system.  The proposed rule would implement sections 404 and 406 of the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010. The proposal creates a new reporting form (Form PF) to be filed periodically by SEC-registered investment advisers who manage one or more private funds. Information reported on Form PF would remain confidential.  Under the proposal, larger private fund advisers managing hedge funds, "liquidity funds" (i.e., unregistered money market funds), and private equity funds would be subject to heightened reporting requirements. Large private fund advisers would include any adviser with US$1 billion or more in hedge fund, liquidity fund, or private equity fund assets under management. All other private fund advisers would be regarded as smaller private fund advisers and would not be subject to the heightened reporting requirements.  Although this heightened reporting threshold would apply to only about 200 US based hedge fund advisers, these advisers manage more than 80% of the assets under management.  The proposed rule is available on the [SEC website](http://sec.gov/rules/proposed/2011/ia-3145.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.14 Financial product intervention**  On 25 January 2011, the UK Financial Services Authority (FSA) published a discussion paper to open a public debate about how the FSA, and in future the proposed Consumer Protection and Markets Authority (CPMA), should pursue the objective of consumer protection and specifically the issue of product intervention.  As part of its new consumer protection strategy introduced last year, the FSA has already introduced a more interventionist approach with the aim of anticipating consumer detriment where possible and stopping it before it occurs. The approach aims to reduce consumer detriment by dealing with problems earlier, scrutinising the whole of the product lifecycle from start to finish rather than just focusing on the point-of-sale.  The paper outlines how the FSA has already begun to make a significant shift towards a more interventionist approach with tighter supervision of the governance of product development. But it also sets out a range of future interventions that could be introduced in areas where the potential for customer harm is greatest. These might include interventions such as banning products or prohibiting the sale of certain products to specific groups of customers.  The discussion paper is available on the [FSA website](http://www.fsa.gov.uk/pages/Library/Policy/DP/2011/11_01.shtml" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.15 Report on women in the boardroom**  On 24 January 2011, Deloitte published a report titled "Women in the boardroom: A global perspective". The report examines the legislative and other changes in this area across 12 countries and compares the current percentage of women on boards around the world. The countries profiled are Australia, Belgium, Canada, France, Germany, Italy, Netherlands, New Zealand, Norway, Spain, the United Kingdom, and the United States.  The report is available on the [Deloitte website](http://www.corpgov.deloitte.com/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/USEng/Documents/Nominating-Corporate%20Governance%20Committee/Board%20Composition%20and%20Recruitment/Women%20in%20the%20Boardroom_Deloitte_012011.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.16 OECD report on corporate governance in China**  In January 2011, the Organisation for Economic Co-operation and Development (OECD) published a report titled "China country study: self assessment against the OECD Principles of Corporate Governance". The report has six chapters which are: the corporate governance framework in China; shareholders' rights; the equitable treatment of shareholders; information disclosure; the board and supervisory board - responsibility and supervision; and stakeholders and corporate social responsibility.  The report is available on the [OECD website](http://www.oecd.org/dataoecd/43/52/46931890.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1)  **1.17 Investment objectives of sovereign wealth funds**  In January 2011, the International Monetary Fund (IMF) published a working paper titled "Investment Objectives of Sovereign Wealth Funds - A Shifting Paradigm". While sovereign wealth fund (SWF) investment objectives to some extent reflect inherent characteristics, notable differences in strategic asset allocation exist even amongst SWFs of similar types. Even so, this paper shows that the global crisis may have changed SWF's asset allocations in ways that may not be ideal or justified in all cases and that a review of investment objectives may be warranted. The paper also argues for regular macro-risk assessments for the sovereign, the continued importance of SWFs as a stabilizer in international capital markets, as well as the active role they could play in international regulatory reform.  The paper is available on the [IMF website](http://www.imf.org/external/pubs/ft/wp/2011/wp1119.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1 ASIC settles Westpoint compensation litigation**  On 1 February 2011, ASIC announced that it has reached agreements to settle the actions it has conducted on behalf of the Westpoint Group of companies against certain directors of the companies and KPMG.  The investors in Westpoint-related financial products had total capital invested of $388 million outstanding as at January 2006 when the group collapsed. The settlement of these actions will result in an additional recovery for the benefit of investors through the liquidation process of up to an additional $67.45 million.  The settlement will involve an amount of $57 million being made available in the next 30 days with the balance available to the liquidators of the relevant companies subject to a number of conditions which are confidential.  This follows the settlements announced previously as a result of ASIC's actions against State Trustees Limited and a number of financial planners which produced settlements in excess of $25.5 million. Another $49.2 million obtained through the liquidation process has also been distributed, a figure that is expected to reach $56 million. Returns from Westpoint companies not in liquidation are expected to reach $22.5 million. In all, investors are expected to see a return of around $160 to $170 million of the $388 million in losses following the settlement.  The settlement will bring to an end the current Federal Court proceedings which are being conducted by ASIC in the names of nine of the Westpoint mezzanine companies.  Further information about the settlement and other action ASIC has taken in relation to the Westpoint collapse is available on the [ASIC website](https://westpoint.asic.gov.au/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1 ASX Operating Rules amendment - wholesale client agreements**  Amendments have been made to section 3 of the ASX Operating Rules in relation to "Documents to be Given to a Client and Client Agreements" under Operating Rules 3803 and 3804, together with consequential amendments in the Definition of Wholesale Client Agreement in 7100, in respect of clients undertaking Option Market Transactions.  The purpose of the amendments is to remove duplication with the ASIC Market Integrity Rules.  The amendments include the deletion of Operating Rule 3804 and Procedure 3804.  Accordingly, the primary obligation to ensure that a Wholesale Client has executed a Wholesale Client Agreement is now only in the ASIC Market Integrity Rules.  The form of the Wholesale Client Agreement remains in Operating Rules Procedure Appendix 3803.  This amendment is described in [ASX Circular 007/11](http://www.asxonline.com/intradoc-cgi/groups/participant_services/documents/communications/asx_029304.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h3)  **3.2 First currency-based exchange traded fund launched in Australia**  On 1 February 2011, ASX announced the launch of the first exchange traded fund (ETF) over currency to be traded on the Australian Securities Exchange.  The currency ETF will track the US dollar against the Australian dollar, enabling Australian institutional, intermediary and individual investors to simply and cost-effectively obtain immediate exposure to the US dollar.  The currency ETF is issued by BetaShares and trades under the ASX code USD.  The fund is described in a [Media Release](http://www.asxgroup.com.au/media/MR_ETF_currency_Feb_2011_FINAL.pdf" \t "_new).  The ASX has additional information about [ETFs traded on ASX](http://www.asx.com.au/products/etfs_etcs/etfs_etcs_product_description.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h3)  **3.3 Reports**  On 3 February 2011 ASX released:  the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/Monthly_Activity_Report_Jan_2011_FINAL.pdf" \t "_new) (with an [Update](http://www.asxgroup.com.au/media/PDFs/20110208_ma_monthlyactivity_update_jan11.pdf" \t "_new) released on 8 February 2011);  the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2011/notice2011_002.pdf" \t "_new); and  the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/ASXC_Monthly_Activity_Report_-_Jan_2011_FINAL.pdf" \t "_new)  for January 2011.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h3)  **3.4 Revised ASX-SGX governance arrangements relating to merger proposal**  On 15 February 2011, ASX Limited (ASX) and Singapore Exchange Limited (SGX) announced they have agreed to make changes to the governance arrangements of, and provide further commitments in connection with, their merger proposal.  Key changes and commitments include:  **Governance**  1. There will be five Australian and five Singaporean citizens appointed to a 13 member Board of ASX-SGX Limited (ASX-SGX), which is reduced by two from the 25 October 2010 announcement. The Board will also include three international directors (initially, this will be those currently on the SGX Board, one of whom is the ASX-SGX Managing Director and CEO designate, Magnus Böcker). Subject to shareholder approval, the ASX-SGX Board will maintain these arrangements for five years.  2. ASX and all of its licensed subsidiaries, as well as ASX Compliance, will maintain Boards with a majority of Australian citizen directors and an Australian citizen as Chair.  3. Chew Choon Seng, current Chairman of SGX, will be Chairman of the combined group. David Gonski, current Chairman of ASX, will be the combined group's Deputy Chairman, as well as Chair of the ASX-SGX Integration Committee that will oversee a successful integration, with a focus on building centres of excellence in both Australia and Singapore.  4. ASX-SGX Limited will maintain a listing on both ASX and SGX exchanges, as previously announced.  **Existing Australian operations**  5. All physical assets required for the operation of ASX Group businesses, including listing, trade execution, clearing and settlement, and all dedicated data and data recovery centres will continue to be developed and located in Australia, and owned and operated by Australian incorporated entities.  6. Senior management, including the Australian business CEO role (designated as current ASX Deputy CEO, Peter Hiom), will continue to be based in Australia, accessible to customers and other stakeholders locally.  7. Companies and products listed and quoted on ASX exchanges will continue to be listed and quoted on these exchanges.  8. Clearing and settlement of trades conducted on any ASX operated licensed Australian market will occur in Australia.  **Fees and capital investment in Australia**  9. Fee structures in Australia will be responsive to the Australian commercial environment and will continue to be competitive. These fees will be set independently of, and without reference to, the fees charged by ASX-SGX Group for products and services in Singapore or any other jurisdiction in which the Group may operate.  10. To create and deliver growth in Australia, capital expenditure in Australia will be at least 5% of Australian operating revenue (excluding interest income) per annum with a minimum expenditure of A$30 million in the first five years, in keeping with investment levels of recent years.  **Future developments**  11. ASX will continue to meet the needs of the Australian market for a comprehensive range of listing, trade execution, clearing, settlement and market information products and services for Australia's primary, secondary and derivative markets.  12. ASX-SGX will work closely with regulators in both jurisdictions and, subject to regulatory approval, introduce a range of initiatives as soon as possible, leveraging the strengths of both ASX and SGX, including:  **An Australian dollar interest rate swaps clearing facility for over-the-counter financial products** - this will support the growth of Australia's capital markets by strengthening links with global OTC markets and reduce systemic risks and costs to market users;  **A passport listings service** - initially available for the top 200 stocks, this will enable streamlined admission arrangements for SGX issuers to join ASX (and vice versa) to expand their Australian and Asian investor base and improve their access to capital;  **Mutual offset arrangements** - to enable holders of ASX and SGX derivatives positions to consolidate their exposures and reduce their costs;  **Cross product listing and cross access arrangements** - to enable ASX and SGX participants to gain access to the full suite of products offered by the ASX-SGX Group. This will improve distribution, liquidity and widen the breadth of product offering for ASX participants; and  **Wholesale and retail fixed income platforms** - to enable companies to improve access to, and reduce the cost of, debt capital and to provide alternative debt investment instruments for investors on a transparent and contemporary platform.  13. ASX-SGX Group is committed, consistent with regulatory requirements, to invest in Australia in the:  **Number of companies** admitted to the official list of Australian licensed financial markets in the ASX Group;  **Breadth of products** and services quoted on ASX; and  **Network of ASX participants** facilitating access to ASX Group markets.  14. Centres of excellence will be based both in Australia and Singapore to drive product innovation, leverage relationships with intermediaries and liquidity providers, and to develop new international products and services that will be distributed to the Asia-Pacific marketplace.  15. Expansion will continue of the interest rate, equity, energy and environmental derivative product suite to meet the needs of market users for a wide range of trading and risk management instruments, with expertise and resources leveraged from both ASX and SGX.  **No change to existing protections of Australia's national interest**  16. Existing Australian regulatory oversight by Australian regulatory bodies, as well as Australian approval requirements for changes in the ownership of ASX-SGX, will continue following the merger of ASX and SGX.  17. The Australian operations will continue to be licensed under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and remain subject to oversight and annual assessment by the Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (RBA).  18. Changes to all ASX Operating Rules, including Listing Rules, will continue to be scrutinised by ASIC and be subject to Ministerial disallowance before becoming effective.  19. Changes to the capital structure of ASX clearing houses will continue to be regulated by the RBA.  20. Any proposed acquisition of a merged ASX-SGX will require approval under Australian law, including the approval processes of the Foreign Investment Review Board (FIRB), Treasurer and Corporations Act.  21. The ASX Corporate Governance Council will be maintained. The Chair of the Council will conduct a review as to how to work with regional counterparties to develop and harmonise corporate governance practices across the region.  Details of the revised governance arrangements are described in a [Media Release](http://www.asxgroup.com.au/media/PDFs/20110215_asxsgxjointnewsrelease.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1 Brockman Resources Limited - Panel declines to make declaration**  On 1 February 2011, the Takeovers Panel announced that it has declined to make a declaration of unacceptable circumstances in response to an application dated 10 January 2010 from Brockman Resources Limited. Wah Nam International Holdings Limited has made a takeover bid for Brockman. Brockman submitted that there were essentially three associations:  Wah Nam was associated with Leading Pride Limited;  Wah Nam was associated with Star Ray International Ltd; and  Mr Wong Sio Kuan and other Brockman shareholders with family, business and social connections to Mr Wong were associated among themselves and with Wah Nam.  Brockman submitted, among other things, that there were breaches of the takeovers prohibition and the substantial holding provisions by some of these Brockman shareholders.  The Panel noted business, family and social connections between certain Brockman shareholders and loans between some of them which funded the acquisition of Brockman shares, which concerned the Panel in considering whether or not there were unacceptable circumstances. However, the Panel was not satisfied on the material available to it that it could draw the necessary inferences and find the alleged associations. Accordingly, the Panel was not satisfied that the circumstances were unacceptable in this case.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%236) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **5.1 When opportunity knocks.can a director wearing multiple hats answer the door?**  (By Adrian Chai and Paul Walker, Blake Dawson)  Streeter v Western Areas Exploration Pty Ltd (No 2) [2011] WASCA 17, Supreme Court of Western Australia Court of Appeal, McLure P, Buss and Murphy JJA, 20 January 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/wa/WASCA/2011/17.html](http://www.austlii.edu.au/au/cases/wa/WASCA/2011/17.html" \t "_new)  **(a) Summary**  The decision in Streeter v Western Areas Exploration Pty Ltd (No 2) is a useful illustration of the scope and content of the duties owed by company directors when they occupy multiple capacities and pursue investment opportunities.  In this case, the WA Court of Appeal concluded that a director had not breached his fiduciary duty by failing to acquire an opportunity for a company of which he was a director, or by personally receiving shares and options in a separate company that was formed to exploit that opportunity.  The Court of Appeal found, however, that the director had breached his duty in a different context, by negotiating a sale between two companies of which he was a director and by diverting a further opportunity to his own benefit.  The court refused to make a declaration that shares obtained by the director were held on trust for the company because (among other things) the company had delayed too long in commencing proceedings  **(b) Facts**  **(i) Mr Streeter's relationship and dealings with Western Areas Exploration (WAE)**  Mr Streeter had a history of, and reputation for, investing in junior exploration companies, in particular nickel mining companies.  Western Areas Exploration Pty Ltd (WAE) was a dormant company with no capital, employees or income.  In early 1998, WAE approached Mr Streeter and offered an arrangement which involved Mr Streeter investing capital in WAE, being appointed to its board and obtaining a significant shareholding.  Between early 1998 and mid-2000, Mr Streeter was one of three directors of WAE.  **(ii) The ANPC Proposal**  In November 1998, a group of geologists called the Australian Nickel Project Consultants (ANPC) was seeking to promote a nickel project proposal.  The proposal involved, broadly, a number of project interests being placed into a listed vehicle to raise money for an exploration program.  Shares in the listed entity would be issued to various interested parties, including a seed capitalist and owners of the tenements to be placed into the listed entity.  One of the other directors of WAE had contact with ANPC about the proposal in November and December 1999, in his capacity as a stockbroker.  He regarded it as attractive and referred it to Mr Streeter.  **(iii) Arrangements between Streeter, WAE and ANPC**  Mr Streeter met with ANPC on a few occasions in December 1999, where a number of proposals were put forward.  One involved WAE becoming the listed entity for the project, but this was deemed unsuitable by ANPC for various commercial reasons.  The final proposal involved these key elements:  Mr Streeter would provide seed capital for the nickel project in return for a placement of shares in the initial public offering (IPO) for the listed vehicle.  WAE would receive a shareholding in the new company in exchange for its shareholder base, and some tenements held by WAE (the Cue tenements).  WAE held a 70% interest in the Cue tenements, and an unrelated company (Golden Granite Pty Ltd) held the remaining 30%.  **(iv) Formalisation of the ANPC arrangements**  On 29 December 1999, Western Areas NL (WANL) was incorporated as the listed entity for the project and Mr Streeter was appointed to its board. In February 2000 Mr Streeter became aware the remaining 30% interest in the Cue tenements was for sale.  Mr Streeter did not inform WAE, and a company controlled by Mr Streeter purchased that interest at the end of March 2000. Mr Streeter finalised the arrangements for WAE to take a parcel of shares in WANL, in exchange for its interest in the Cue tenements, at a significant overvalue.  **(v) Mr Streeter and WAE acquire shares in WANL**  Mr Streeter contributed seed capital for which he received WANL shares and options which were later exercised.  In addition, he subscribed for 2.5 million shares in WANL's IPO in early 2000. Mr Streeter also caused his company to sell the remaining 30% interest in the Cue tenements to WANL, in exchange for which his company was given shares in WANL. WAE received its parcel of shares in exchange for its 70% interest in the Cue tenements.  **(vi) WAE commences proceedings**  By the time the above events had occurred, WAE's former director, along with a shareholder, had taken legal advice on the conduct of Mr Streeter.  By May 2000, a majority of the shareholders of WAE were generally aware of Mr Streeter's activities.  None of these shareholders subscribed for shares in WANL's IPO, despite receiving the prospectus.  Between 2000 and 2002, WANL's share price held steady below the issue price.  Between 2002 and 2006 its fortunes improved markedly.  As a result of the success of a number of projects, WANL went from being a small exploration company with a total capital of approximately $7 million to a major miner with a market capitalisation of more than $900 million.  At a WAE general meeting in mid-2006, a resolution was passed to remove Mr Streeter from the Board of WAE.  Shortly after that, and under new management, WAE commenced proceedings against Mr Streeter almost six years after the conduct had taken place.  **(c) Decision**  **(i) Decision of the Trial Judge**  At first instance, Heenan J found that Mr Streeter had breached his fiduciary duty to WAE by:  taking an allotment of shares and options in WANL for his private benefit;  wrongfully diverting the opportunity to acquire the 30% interest in the Cue tenements; and  wrongfully taking up and exploiting the ANPC proposal.  Heenan J found that Mr Streeter, and his company, held shares in WANL on trust for the benefit of WAE.  **(ii) Decision of the Court of Appeal**  The Court of Appeal of WA overturned the decision of Heenan J.  By a 2:1 majority, the Court of Appeal held that Mr Streeter:  did not breach his fiduciary duty by receiving WANL shares and options in the initial issue, or in the exploitation of the ANPC proposal; and  did breach his fiduciary duty in negotiating the sale of WAE's 70% interest to WANL, and by diverting the opportunity to purchase the 30% interest in the Cue tenements for his own benefit.  The court made the following key observations:  The scope of a director's fiduciary duties will depend on the relationship between the director and the company, the course of dealing and the circumstances of the director's appointment.  The involvement of Mr Streeter personally in the implementation of the ANPC proposal was not prohibited.  Mr Streeter was approached by WAE in the first place because of his reputation as an investor.  The ANPC representatives met with Mr Streeter because they were seeking seed capital for the ANPC proposal, not because he was a director of WAE.  There was no positive duty on Mr Streeter to acquire the ANPC proposal for WAE and there was no opportunity for WAE to be the corporate vehicle.  As a creditor and shareholder of WAE, as well as a director, it was in Mr Streeter's best financial interests that WAE be the corporate vehicle for the project.  His interests were the same as WAE, and therefore no conflict of interest arose.  A conflict of interest did arise in connection with the sale of WAE's interest in the Cue tenements to WANL, because by the time the sale was finalised, Mr Streeter was acting as director on both sides of the transaction.  However, because WAE's interest was overvalued, WAE benefited from the breach and it could not claim the benefits obtained by Mr Streeter from the same activity unless it unwound the whole transaction.  The Court of Appeal also refused to declare that Mr Streeter's shares were held on trust for WAE.  The court observed that a majority of WAE shareholders knew enough of the circumstances surrounding the ANPC proposal and the conduct of Mr Streeter to have taken action much sooner on WAE's behalf.  There was no satisfactory explanation for the delay of six years, other than that the shareholders had no desire to risk their own capital and were content to see how the shares in WANL fared over time.  Were a trust to be imposed, the court reasoned that WAE would obtain an advantage that it would only have gained as a result of the lapse of time and the changes to economic circumstances.  **(iii) Conclusions**  The courts will carefully scrutinise the whole of the relationship and course of dealing between a director and company, including the context of the director's appointment, to evaluate the scope of a director's fiduciary duty.  That will also assist in identifying whether or not the director's interests are adverse to those of the company in the particular circumstances.  In determining where a company's interests lie in relation to a particular opportunity or proposal, it is relevant to consider how that opportunity came to be available, and whether that opportunity is realistically available to the company.  Once it is clear that a particular opportunity or activity is within a director's fiduciary duties, it will be a clear breach of duty for the director to divert it for his or her own benefit.  If a company is aware of circumstances that might suggest a breach of fiduciary duty has occurred, and shares (or other volatile assets) were acquired as a result, the company should take action promptly if it wishes to claim those assets.  Otherwise, the company risks losing its entitlement to appropriate remedies.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h5)  **5.2 Full Federal Court ruling provides clarity for syndicated loan and securitisation markets**  (By Paul Jenkins, Bruce Whittaker, Brenton Key and Keith Loke, Blake Dawson)  Leveraged Equities Limited v Goodridge [2011] FCAFC 3, Full Federal Court, Finkelstein, Stone and Jacobson JJ, 18 January 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/3.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/3.html" \t "_new)  **(a) Summary**  The Full Court of the Federal Court of Australia has recognised that a contracting party can prospectively authorise a novation to be made by another party unilaterally, reversing an earlier decision by Rares J of the Federal Court of Australia in the Goodridge case.  In the same decision, the Full Federal Court also reversed aspects of Rares J's decision relating to the assignment of rights under the margin lending agreement, the validity of the margin calls by the margin lender and unconscionability in respect of the margin lender's enforcement of its legal rights to protect itself against a fall in the value of its security.  Participants in syndicated loan and securitisation markets will be pleased with this decision, which alleviates market concerns arising from Rares J's decision as to:  whether a borrower can prospectively authorise a lender to novate its loan without any further involvement or knowledge of the borrower; and  whether the assignment of rights under a loan agreement is effective where an obligation remains on the lender to extend further credit to the borrower.  **(b) Facts**  A Sydney barrister, Ross Goodridge (Goodridge), became a customer of a margin lender in 2003.  In February 2009, he held a portfolio comprised entirely of units in the ASX Listed Macquarie Countrywide Trust (Trust) which were mortgaged as security for his margin loan. The loan balance was about $865,000 and the facility limit was $4.8 million. As the market fell, his margin loan account went into margin call.  In early January 2009, the margin lender had sold its $1.5 billion margin loan book to another margin lender, Leveraged Equities Ltd (LE). The parties to the sale intended that Goodridge's margin loan was one of the loans transferred to LE in the sale.  Notices were sent out to the margin lender's customers informing them of the sale, although Goodridge's evidence that he did not receive such notice was accepted by the court of first instance.  On 5 February 2009, LE made a margin call requiring Goodridge to pay about $160,000 into his margin loan account. Goodridge said he did not have cash available to pay the margin call within three days as required under his margin lending agreement. He asked for and was given a ten day extension to meet the call.  The market price of the units fell sharply on 23 February 2009. LE demanded that Goodridge pay another margin call of about $130,000 by 2pm the next day. When the unit price continued to fall, LE demanded that Goodridge meet a margin call of $190,000 by close of business on 24 February 2009.  Shortly before the market closed on 24 February, LE began selling down the portfolio to meet the margin call. It sold about 18% of the portfolio that day, which was the bottom of the market for the price of units in the Trust.  It sold off the remainder of the portfolio over the following week. The price of units in the Trust has since risen five-fold.  **(c) Decision**  **(i) Novation**  The Full Federal Court held that the primary judge had erred in coming to the view that it was impossible for a contracting party to prospectively authorise a novation to be made by another party unilaterally. Jacobson J found that the primary judge's proposition was contrary to the views expressed by Finn and Sundberg JJ in Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd (2006) 149 FCR 395 and to relevant English authority both before and after the primary judge's decision. It was particularly noted that in Pacific Brands the judges had observed that:  "Novation will, ordinarily, require the agreement of the original and the substituted party although the original contract may, on its proper construction, authorise a party to substitute a contracting party in its place without need for a further tri-partite agreement."  **(ii) Assignment**  The Full Federal Court held that, contrary to the findings of the primary judge, the rights in question in the present case were capable of assignment. In Jacobson J's opinion, the primary judge's reasons (i.e. that the rights purportedly assigned were "so interconnected with" the obligations that an assignment of rights could not have taken place) did not properly take account of the express language of the margin lending agreement, which specifically contemplated that the margin lender could assign its contractual rights and powers. The primary judge's approach was held to be a departure from the principle set out in Devefi Pty Limited v Mateffy Pearl Nagy Pty Limited (1993) 113 ALR 225 and other established authorities that even if contractual rights were not otherwise assignable, the contract may on its proper construction permit the assignment of those rights.  **(iii) Margin call**  The Full Federal Court rejected the primary judge's approach to the proper construction of clause 5.2 of the margin lending agreement, which had led the primary judge to determine that two of the margin calls were not authorised by the margin lending agreement because they purported to shorten the period for compliance to earlier than 2pm on the third business day following the call. Jacobson J found that clause 5.2 permitted the margin lender to reduce the time for compliance from three business days to one business day if it saw fit to do so. Clause 5.2 stated as follows:  "The Borrower shall comply with any Margin Call by 2pm on three (3) Business Days following the Margin call unless otherwise notified by [the margin lender] in its absolute discretion."  Jacobson J also noted that the original form of clause 5.2, as it stood when Goodridge entered into the margin lending agreement, had in fact obliged him to satisfy a margin call by 2pm on the next business day. It was only subsequently amended to its then-current form.  **(iv) Unconscionability**  The Full Federal Court found that there was nothing unconscionable in a margin lender enforcing its legal rights to protect itself against a fall in the value of its security. Since there had not been conduct on the part of the margin lender that could be characterised as taking improper advantage of Goodridge, it could not be held that the margin lender had acted unconscionably in its dealings with Goodridge.  **(d) Clarity for lenders and the securitisation market**  Lenders will be particularly appreciative of the decision by the Full Federal Court to recognise that a contracting party can prospectively authorise a novation to be made by another party unilaterally.  There had been some concerns in the lending industry following the primary judge's decision as to whether a borrower could prospectively authorise a lender to novate its loan without any further involvement or knowledge of the borrower. This arguably called into question the effectiveness of the novation mechanisms for bank selldowns that are found in many syndicated finance facilities (for example, using transfer certificates).  The earlier judgment also gave rise to concerns regarding the assignment of rights under loan agreements where an obligation remained on the lender to extend further credit to the borrower. The primary judge determined that the obligation to extend further credit under the margin lending agreement was so intertwined with the margin lender's rights under the margin lending agreement that it would have created an unworkable relationship to split them. This aspect of the judgment caused concern for the securitisation industry and various loan market participants because they were now potentially exposed to a risk that any loan transfers made by them may not have been legally effective. The Full Federal Court held however that the primary judge erred in coming to this view as this did not take account of specific provisions in the margin lending agreement that allowed for the assignment of all (or part) of the lender's rights under the margin lending agreement.  The Full Federal Court has, at least for the mean time pending any appeal, alleviated these concerns by its more commercially-orientated decision.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h5)  **5.3 Setting aside statutory demands: genuine disputes and substantial injustice**  (By Steven Grant, Minter Ellison)  Central City Pty Ltd v Montevento Holdings Pty Ltd [2011] WASCA 5, Court of Appeal of the Supreme Court of Western Australia, Buss JA and Murphy JA, 18 January 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/wa/WASCA/2011/5.html](http://www.austlii.edu.au/au/cases/wa/WASCA/2011/5.html" \t "_new)  **(a) Summary**  The case concerns an application for leave to appeal and an appeal from the decision of Master Sanderson in the Supreme Court of Western Australia to dismiss an application by the first appellant, Central City Pty Ltd (the Company) to set aside a statutory demand by the respondent, Montevento Holdings Pty Ltd as trustee of a trust for repayment of the sum of $1,439,010 and the award of indemnity costs against the Company and the second appellant, Mr Giuseppe Scaffidi (Mr Scaffidi).  **(b) Facts**  The statutory demand was supported by an affidavit sworn by Mr Scaffidi's brother, Mr Eugenio Scaffidi (Mr Scaffidi's brother).  Mr Scaffidi swore an affidavit dated 12 March 2009 in support of the application by the Company to set aside the demand which Murphy JA considered to be unclear.  At one point Mr Scaffidi appeared to claim that the money in dispute was not a receivable of the trust (i.e. a loan), but rather a payment by way of capital subscription by the respondent to the Company. In another part of the affidavit Mr Scaffidi claimed that the money in dispute was to "be repaid upon the realisation of the entire project or through the sale of the [respondent's] shares", thereby suggesting that the money was a loan.  Mr Scaffidi claimed that this was an aspect of a broader oral agreement between Ms Lisa Scaffidi, the respondent, and the Company, which he referred to as the "Equity Contribution Agreement", to the effect that Ms Lisa Scaffidi would lend money to the trust, and the trust would advance money to the Company.  He also said that the "entire project" had "not been realised" nor had the respondent's shares been sold.  In his second affidavit sworn on 9 February 2010, Mr Scaffidi gave evidence (which was not the subject of objection) as to the background circumstances which led to the creation of the alleged debt. There was evidence to the effect that, inter alia:  The trust was formed in 1977, effectively for the benefit of Mr Scaffidi, Mr Scaffidi's brother and their respective families.  The trustee was Scaffidi Nominees Pty Ltd and the father of Mr Scaffidi and Mr Scaffidi's brother, Mr Antonio Scaffidi, was the appointor in his lifetime and, failing any other appointment, their mother, Mrs Maria Scaffidi, was the appointor after Mr Antonio Scaffidi's death.  In 1995, Scaffidi Holdings Pty Ltd replaced Scaffidi Nominees Pty Ltd as the trustee of the trust, and in 2009 the respondent replaced Scaffidi Holding Pty Ltd as trustee.  Mr Antonio Scaffidi, Mr Scaffidi and Mr Scaffidi's brother were directors and shareholders of the respondent at the time that the alleged debt was incurred.  Prior to March 2002, the trust was the owner of a parcel of land in Barrack Street, Perth, known as the Railway Hotel site.  Mr Antonio Scaffidi and Mr Scaffidi, as directors of the respondent, some time prior to 2001, discussed the development of the Railway Hotel site owned by the trust and decided to set up a separate unlisted company "that people could invest in" in order to undertake the development.  The Company was then established for this purpose.  After the redesign of the hotel, its feasibility appeared to be marginal as the land area was too small, and Mr Antonio Scaffidi and Mr Scaffidi decided to acquire adjoining parcels of land on Barrack Street in order to facilitate the development of a larger area, later known as the Barrack Plaza project.  In 2001 the Company acquired the land adjacent to the hotel site owned by the trust.  On 18 March 2002 a transfer was executed, for the transfer of the Railway Hotel site for the stated consideration of $1.8 million to the Company.  The transfer showed that the property was encumbered by a mortgage for which, it might be inferred, the Company assumed the liability.  It was mutually known to the parties that the only asset of the Company was in substance the property to be developed, and that the "anticipated income or return to [the Company] was the long-term returns from managing the developed property".  The issue of the 50,000 $1.00 shares reduced the Company's liability to the respondent from $1.5 million to $1,450,000.  There were other minor transactions between the Company and the trustee in 2005 and 2006 by which the sum of $1,450,000 was reduced by small amounts, leaving a debt of $1,439,010.  The amount of $1.5 million and the reduced sum of $1,439,010 had been treated by each of the Company and the Respondent as a loan in its accounts.  In the Company's 2007 accounts the sum of $1,439,010 was treated as a non-current liability.  In essence, the appellants contended that:  the Master erred in failing to apply, in his consideration of the evidence, the correct test in relation to section 459H(1)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) as to whether there was a genuine dispute between the Company and the respondent about the existence or amount of a debt to which the demand relates; alternatively failed properly to apply section 459J(1) which enables the court to set aside a statutory demand if it considers that substantial injustice will be caused if the demand is not set aside; and  that upon the proper application of those provisions, the Master ought to have found that there was a genuine dispute concerning the date for repayment of the money which was the subject of the demand; and the Master erred in awarding indemnity costs without applying the correct principles to such an order, by failing to give reasons and by failing to give the appellants an opportunity to be heard on that issue.  In support of the first contention, the appellants contended that:  a contract for loan from the respondent to the Company could be inferred;  if so, there was an inferred or implied term of the contract to the effect that the loan was not repayable on demand, but was repayable out of cash flow from the management of the Barrack Plaza project, following completion of the project; and  the cash flow from the management of the project had not, at the time of the hearing before the Master, been sufficient to enable the loan to be repaid.  **(c) Decision**  The decision of the Court of Appeal of Western Australia was delivered by Murphy JA with whom Buss JA agreed.  Leave to appeal was granted and the appeal was allowed.  **(i) Whether there was a genuine dispute**  Murphy JA acknowledged the Master's finding that there was no term of any loan agreement which would preclude the respondent from recovering the debt.  Given that the subjective intentions and beliefs of Mr Scaffidi could be put to one side, Murphy JA considered the principal question to be whether, on the uncontested evidence, there was a plausible issue requiring investigation as to whether the monies were not repayable until "realisation" of the Barrack Street project and whether there was a contract for loan containing an implied or inferred term as alleged.  Murphy JA concluded that there was a plausible contention requiring investigation, namely that there was a loan contract, with an inferred or implied term having regard to the facts outlined above, including the following matters in, or which might arguably be inferred from, the evidence:  at the time of the transaction, the respondent and the Company were entities associated with the Scaffidi family;  there was no written contract and the arrangements appear to have been of an informal nature;  the respondent became a shareholder of the Company, holding approximately 25% of the equity in the Company;  the transfer of land was registered after the issue of the shares to the respondent and the debt arguably first arose at the time of registration of the transfer;  material contributions by shareholders to the Company for the funding of the development appear to have been in the form of loans, rather than capital; and  there were two tiers of debt, shareholder debt and bank debt, with, it may arguably be inferred, the former having recourse and repayment terms which differed from ordinary commercial 'arms-length' debt.  Accordingly, Murphy JA found that the evidence before the Master disclosed a genuine dispute and the statutory demand ought to have been set aside.  It was not open to the Master to reject those parts of Mr Scaffidi's evidence which were uncontested, not inherently improbable and not inconsistent with undisputed contemporary documents.  **(ii) Indemnity costs**  Although the court retains a wide discretion, Murphy JA noted that costs would ordinarily follow the event.  Nonetheless, the respondent contended that the Master properly awarded indemnity costs because there were three other issues raised by the Company at the hearing before the Master on which the Company did not succeed.  However, Murphy JA concluded that none of those matters, individually or collectively, would warrant an order for indemnity costs against the party which, overall, ought to have been successful on the application.  **(iii) Discretionary factors**  Murphy JA considered that if left unreversed the decision would cause substantial prejudice by virtue of its substantive effect on the Company's rights, namely that it would either have to pay a large sum to the respondent or become subject to the statutory presumption of insolvency under section 459C of the Corporations Act 2001 for failing to comply with a statutory demand and although the latter is a rebuttable presumption, it is a serious matter for a trading corporation.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h5)  **5.4 Employee entitlements in a receivership: are they the same as in a winding up?**  (By Alistair Fleming, Special Counsel, Clayton Utz)  Vickers, in the matter of Challenge Australian Dairy Pty Ltd (Administrators Appointed) (Receivers & Managers Appointed) [2011] FCA 10, Federal Court of Australia, Barker J, 13 January 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/10.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/10.html" \t "_new)  **(a) Summary**  His Honour Justice Barker of the Federal Court of Australia has attempted, 'although not without some hesitation', to shed some light on the uncertainty in the law surrounding the treatment of certain employee entitlements in a receivership, as compared to in a winding up.  Barker J determined that the protection afforded by section 558(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) to employees of a company being wound up, does not apply to employees of a company in receivership.  The uncertainty in the law had arisen by reason of two competing first instance decisions, the first in the Supreme Court of Queensland in Re Office-Co Furniture Pty Ltd [2000] 2 Qd R 49 and the second in the Federal Court of Australia in McEvoy v Incat Tasmania Pty Ltd (2003) 130 FCR 503, which differed on their respective construction of sections 433(3)(c) and 558(1) of the Corporations Act 2001.  Section 433(3)(c) provides employees of a company in receivership with priority for payment ahead of the debenture holder, as to certain entitlements due to them on or before the appointment of the receivers. Section 558(1) provides an entitlement to employees with contracts of employment with a company being wound up, to payment in accordance with the statutory priorities in section 556(1), as if their contract for employment had been terminated by the company on the date of the winding up.  The issue which arises is whether section 433(3)(c) should be read with section 558(1), on the basis that:  section 433(3)(c) imports certain winding up priorities under section 556(1), which are otherwise affected by section 558(1); and  section 558(1) uses the defined term "relevant date" which is arguably extended under section 433(9) to include the appointment of a receiver.  The effect of reading those sections together would be that certain entitlements which are accruing at the date of the appointment of the receivers but which are not yet due and payable, would become due and payable, for example, annual leave and long service leave.  **(b) Facts**  The issue arose in this case in the context of an application by the receivers for directions from the court as to their obligations and liabilities as receivers for payments to employees who remained employed by the company after the appointment of the receivers.  The company carried on a business of manufacturing and processing dairy products.  Receivers were appointed to the company on 28 October 2010, following the appointment of voluntary administrators to the company on that date.  After the appointment of the receivers, the company, by the receivers, attempted to carry on its operations and continued to employ many of its employees under their pre-existing contracts of employment.  The receivers had paid or demonstrated an intention to pay the employees for their wages and certain entitlements accruing prior to their appointment, such as superannuation, and where employees had been retrenched, for their notice period and redundancy. The receivers had not however, paid the employees for annual leave and long service leave accruing prior to their appointment and superannuation, annual leave and long service leave accruing since the date of their appointment.  In seeking directions, the receivers contended that only employee entitlements which are due and payable as at the date of their appointment as receivers, should be afforded statutory priority under section 433(3)(c).  **(c) Decision**  In considering the effect of section 558(1) on section 433(3)(c), Barker J considered and compared the reasoning of de Jersey CJ in Re Office-Co and Finkelstein J in McEvoy.  In Re Office-Co, de Jersey CJ held that an employee of a company in receivership was entitled to payment for annual leave and long service leave entitlements in respect of employment prior to the appointment of the receivers under section 433(3)(c) in priority to the debenture holder. In McEvoy, Finkelstein J, after a detailed consideration of the legislative history, held that section 558(1) did not apply to receiverships.  Barker J paid particular regard to the analysis of Finkelstein J in McEvoy, which compared the effect of receivership on employees, where employees did not necessarily lose their jobs and were often unaffected by the receivership, to that of liquidation where the employees would lose their jobs. Finkelstein J concluded that the legislative intention behind section 558(1) was to ensure that employees in a winding up would not lose priority for annual and long service leave which was still accruing but which had not fallen due at the commencement of the winding up. Finkelstein J could not discern a similar intention to protect employees in a receivership under that section, whose employment may survive the receivership and thus lead to such absurd consequences as employees both keeping their jobs and being paid out as if they had lost them (although Finkelstein J expressly acknowledged that the construction he preferred did not take into account the position of the employees whose employment had been terminated by the receivers).  Ultimately, Barker J favoured the construction of Finkelstein J, finding that the better view is that section 558(1) does not apply to receiverships. Having regard to the legislative history of the section, his Honour expressed real doubt that section 558(1) was intended to apply a similar rule in relation to the entitlements of an employee in a receivership as it creates for a winding up and that, in his view, Parliament was only ever focused on winding up and did not apply its legislative mind to the circumstances of a receivership.  However, he was not unsympathetic to the reasoning of de Jersey CJ, suggesting that, if Parliament was to consider the application of section 558(1) to receiverships for the first time, it may well side with the outcome in Re Office-Co.  Barker J held that:  section 433 does not require the receivers to make payments to employees for annual leave or long service leave entitlements after the appointment of the receivers and to whom such entitlements had accrued and/or continue to accrue after the appointment of the receivers but are not yet due and payable;  section 433 does not require the receivers to make payments to employees in respect of superannuation contributions or superannuation guarantee charges which become due and payable during the receiver's appointment; and  the receivers are not personally liable under section 419 to pay superannuation contributions, superannuation guarantee charges, annual leave or long service leave entitlements to employees to whom such entitlements accrue, but do not become due and payable or become due and payable during the receiver's appointment.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h5)  **5.5 Removal of an administrator who lacked capacity to carry out the administration**  (By James Russell, Mallesons Stephen Jaques)  Commonwealth Bank of Australia v Fernandez [2010] FCA 1487, Federal Court of Australia, Finkelstein J, 24 December 2010.  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2010/1487.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/1487.html" \t "_new)  **(a) Summary**  In this case, the court exercised its power to remove an administrator under section 449B of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  Finkelstein J found that the administrator appointed by the directors of the company in voluntary administration lacked the capacity to carry out the large and complex administration of the Willmott Forests group.  The court also needed to consider whether to appoint, as substitute administrators, insolvency practitioners nominated by the secured creditors (the banks). The nominated administrators (from PPB) had performed some work for one of the banks in connection with the administration, and were opposed by the unsecured creditors for a perceived lack of independence. As PPB had, however, prepared only an innocuous report for the bank, containing no substantive analysis on any issue, Finkelstein J was satisfied about their independence.  The case contains some valuable discussion about the "private ordering" of administrators under Pt 5.3A of the Corporations Act, and also about the need for both administrators and their solicitors to be independent. Most importantly, this case stands for the principle that an administrator should not engage solicitors who are on one of the secured creditor's panel of solicitors.  **(b) Facts**  The case involved the administration of Willmott Forests Ltd ('WFL'), the listed parent of the Willmott Forests group (the group). The group is Australia's largest softwood plantation developer, whose principal activities were to establish, manage, harvest, process and supply timber products from its plantations, located on over 56,000 hectares of land.  The group raised over $400 million from 6,300 investors, and then invested those funds in eight registered and 35 unregistered managed investment schemes.  The group also borrowed a large amount from banks. In particular, it entered into a $135 million debt syndication with the CBA and St George Bank, which was secured over the group's assets. When the group defaulted under the syndication arrangement, the banks appointed receivers over WFL's assets and the directors of WFL appointed Mr Fernandez as its voluntary administrator.  Mr Fernandez is a sole practitioner who employs four accountants and a small support staff. He had little knowledge of forestry operations and had never administered a managed investment scheme. Due to the size and scale of WFL's operations, and the structure of the managed investment schemes, the administration was going to be a very complicated affair. From an early stage, both the banks and ASIC expressed concerns about Mr Fernandez's ability to perform his duties. Therefore, the banks obtained the consent of two insolvency practitioners of PPB to act as alternative administrators.  Mr Fernandez convened the first meeting of creditors by notice, however many of the plantation growers, who were also unsecured investors, did not receive this notice.  The notice advised that creditors may "(a) remove the administrator from office; and (b) appoint an alternative administrator", and included a proxy form enabling creditors to appoint Mr Fernandez. However, the notice did not mention that alternative administrators had already consented to act. In any event, due to a lack of creditors present at the meeting, no business could be validly transacted. Mr Fernandez, as chairman, adjourned the meeting to a later date.  After the meeting, in an attempt to canvass broad investor support for Mr Fernandez, the CEO of WFL wrote to the financial advisers of many of the company's investors, stating that the board stood by its decision to appoint Mr Fernandez. At the adjourned meeting, which Mr Fernandez also convened, it was moved that Mr Fernandez be removed as administrator and that the banks' proposed administrators be appointed in his place. The motion was put to poll, the outcome of which was split, with a numerical majority of creditors (made up of mainly unsecured investors) voting against removal, and the majority in value of the creditors' debts (made up of mainly secured creditors, including the banks) voted for removal. As chairperson, Mr Fernandez used his casting vote to vote against his removal. The banks then sought to have Mr Fernandez removed by the court.  **(c) Decision**  **(i) Validity of the first creditors' meeting and its adjournment**  In relation to whether the first meeting was validly convened, Finkelstein J expressed concern as to whether Mr Fernandez had complied with his duties under section 436E of the Corporations Act. This is because he may not have given written notice to as many of the company's creditors as was reasonably practicable in the circumstances.  However, it was unnecessary for his Honour to express a concluded view on this point, because it was not argued, and so it was presumed that the meeting was validly constituted.  In relation to whether the first meeting was validly adjourned, Finkelstein J found that a Chairperson has no inherent power to adjourn a meeting in absence of the majority of the creditors who are present, subject to certain exceptions. As there were no impediments to creditors voting on an adjournment resolution at the meeting, Mr Fernandez had no power to adjourn the meeting as Chairperson.  **(ii) Removal of an administrator**  The banks sought to have the court remove Mr Fernandez as administrator on four grounds: (a) his failure to notify creditors that alternative administrators had been nominated by a creditor; (b) the way in which proxies were solicited and exercised; (c) the way in which he exercised his casting vote; and (d) his lack of expertise and resources to conduct an administration of the size and nature of the Willmott Forest administration.  In relation to the first ground, the banks argued that the notice of the first meeting was invalid because it should have stated that a creditor had put forward an alternative administrator. The banks' argument was based on two assumptions: (i) that an administrator convening a meeting owes the same fiduciary duty to creditors as do directors, being the duty to provide full information of all matters to be transacted, so that creditors may decide whether to attend; and (ii) that this duty arises whether or not the administrator is urging a particular approach.  Whilst Finkelstein J thought that these assumptions were likely to be incorrect, the defendants had not argued this point and so his Honour proceeded as if the assumptions were correct. However, his Honour found that a creditor's decision whether or not to attend the meeting would not have been affected if s/he had known that a secured creditor had appointed their own nominee.  In relation to the second ground, Finkelstein J said that the manner in which the CEO attempted to canvas support for Mr Fernandez was "neither surprising nor improper".  It would have been different if Mr Fernandez was involved in the solicitation, but evidence suggested he was not.  In relation to the third ground, Finkelstein J found (in obiter) that Mr Fernandez should have considered his own capacity to carry out the administration when called upon to cast the deciding vote. This is because a chairperson must cast his/her vote honestly and in accordance with what s/he believes to be in the best interests of those affected by the vote.  It was on the fourth ground, under section 449B of the Corporations Act, that Finkelstein J ordered Mr Fernandez be removed as administrator. His Honour found that Mr Fernandez did not appreciate the potentially enormous task confronting any administrator of the Willmott Forests group and that there was little to no possibility that Mr Fernandez and his small staff had the capacity to carry out the tasks that needed to be performed.  **(iii) Appointment of administrators**  Finkelstein J was satisfied that the interests of the banks and of the unsecured creditors were likely to be in conflict, and so it was possible that the banks' nominees would not be seen to be independent. Finkelstein J emphasized the importance not only that administrators are in fact independent and impartial, but are "manifestly seen to" be.  Finkelstein J discussed the selection of administrators by directors, or "private ordering", under Pt 5.3A of the Corporations Act. After some discussion of the alternative methods to the "private ordering" system, Finkelstein J found that the role of the court was not to conduct its own mini-tender process to determine the most appropriate administrator, but was to determine whether any nominated administrators should be appointed by the court. His Honour found that the nominated practitioners at PPB had the capacity and resources to carry out the administration. Whilst nominated by the banks, they were of "good standing and would not risk ruining their reputation by acting inappropriately". In relation to the work already performed for the CBA, all that PPB had done was identify topics for future examination in a report that contained no substantive analysis on any issue. Finkelstein J was therefore satisfied with the nominated administrators' independence and so appointed them, with their fees to be determined by the court.  **(iv) Independence of administrators' solicitors**  In his Honour's judgment, he considered the undesirability of an administrator engaging solicitors who also act for a secured creditor. Finkelstein took it one step further when he said that not only should an administrator not appoint solicitors retained by a secured creditor, "they should not appoint solicitors who are on the secured creditor's panel of solicitors". Solicitors regularly engaged by a creditor were, in his Honour's opinion, "just as likely to be perceived as loyal to the secured creditor as the solicitor who happens to be retained by the secured creditor".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h5)  **5.6 "Split" voting at scheme meetings**  (By Andrew James, Clayton Utz)  Spark Infrastructure Holdings No 1 Ltd [2010] NSWSC 1497, Supreme Court of New South Wales, Barrett J, 21 December 2010  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1497.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1497.html" \t "_new)  **(a) Summary**  His Honour Justice Barrett of the Supreme Court of New South Wales considered aspects of the way in which the outcome of voting should be determined under section 411(4)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  Barrett J held that section 411(4)(a)(i) does not permit a creditor voting at a scheme meeting between a body and a class of its creditors to vote:  in respect of only part of its voting entitlement; or  "for" in respect of one part of that voting entitlement and "against" in respect of the remainder.  Barrett J also held that while section 411(4)(a)(ii) may permit a member voting at a scheme meeting between the body and a class of its members to split its vote, the resolution cannot be held to be both "passed" and not "passed" by that member. In this case his Honour found that the member would be counted as having voted in deciding whether at least 75% of votes cast were positive for the purpose of section 411(4)(a)(ii)(B), but would be considered as being a person who has not "passed" the resolution for the purpose of section 411(4)(a)(ii)(A).  **(b) Facts**  In separate proceedings, Justice Barrett had made orders to facilitate a complex restructure of Spark Infrastructure stapled securities. Each stapled security consisted of a number of components none of which was transferable except in company with the others. The restructure machinery included a compromise or arrangement between each of:  Spark Infrastructure RE Ltd and the class of its creditors consisting of holders of unsecured notes;  Spark Infrastructure Holdings No 1 Ltd and the class of its members consisting of the holders of ordinary shares; and  Spark Infrastructure Holdings No 2 Ltd and the class of its members consisting of the holders of ordinary shares.  Section 411(4)(a)(i) of the Corporations Act prescribes voting thresholds with regard to a compromise or arrangement between a Part 5.1 body (which includes an Australian company) and a class of its creditors. In order to determine that the approval of creditors has been given in accordance with the section it must be found that the majority in number of the creditors included who agreed to the scheme was a majority whose debts and claims against the company amount to at least 75% of the total amount of debts and claims against the company.  Section 411(4)(a)(ii) of the Corporations Act prescribes voting thresholds with regard to a compromise or arrangement between a Part 5.1 body and a class of its members.  For the purposes of that provision, a resolution in favour of the compromise or arrangement must be passed by a majority in number of the members in that class present and voting at the meeting (under section 411(4)(a)(ii)(A)) and, in addition, passed by 75% of the votes cast on the resolution (under section 411(4)(a)(ii)(B)).  Each compromise or arrangement was overwhelmingly approved.  A very small number of persons who attended the meetings by proxy voted (or purported to vote) both for and against the motion for the approval of each scheme. Because the number of persons tendering "split" votes represented only a very small part of the total, the treatment of their votes was not something that had to be decided upon in the section 411(4)(b) application.  **(c) Decision**  **(i) Split voting at a creditors' meeting**  Barrett J held that a creditor's vote, for the purposes of determining whether a "majority in number" has approved the scheme, cannot be split. Because only a single amount of debt or claim is attributed to a particular creditor, the creditor can, by voting, deploy only that single amount in favour of the scheme or against it. The creditor cannot apportion part to support and the remainder to opposition, nor can the creditor vote part for or against and leave the balance uncommitted. His Honour held that section 411(4)(a)(i) does not recognise or accommodate any concept of split voting and that any vote purportedly cast in such a way must be disregarded.  **(ii) Split voting at a members' meeting**  Considering sections 250H and 411(4)(a)(ii) of the Corporations Act, his Honour further held that a split vote may be made by a member but the resolution cannot be held to be both "passed" and "not passed" by the particular member who split their vote.  Rather the member would be counted as having voted, but as being a person who has not "passed" the resolution.  Barrett J noted the application of section 250H of the Corporations Act to a meeting of a company's members. That section says that a person voting who is entitled to two or more votes need not cast all their votes and may cast their votes in different ways.  His Honour found therefore that it is necessary for any positive votes and any negative votes cast by the member to be taken into account in deciding whether at least 75% of the votes cast on the resolution were positive votes for the purpose of section 411(4)(a)(ii)(B).  His Honour further noted that judgment is also to be made according to how a member's votes were cast. It is necessary, under section 411(4)(a)(ii)(A), to say of every member voting that the member either is or is not a member by whom the resolution was "passed". The concept of a resolution being "passed" implies unequivocal support and a person cannot both support and oppose a resolution as the manifestation of opposition means that a person cannot be counted among those persons by whom the resolution was "passed".  His Honour observed that section 411(4)(a)(ii) accommodates the principle in section 250H to a limited extent only. While a split vote exercised upon a poll is effective under section 411(4)(a)(ii)(B), the split is not effective for the purposes of section 411(4)(a)(ii)(A) and in applying that provision, the member who casts both positive and negative votes is not one by whom the resolution is "passed".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h5)  **5.7 Corporation cannot recover fine imposed in relation to breaches of competition law from its directors and employees**  (By Jiayue Li, DLA Phillips Fox)  Safeway Stores Limited v Twigger [2010] EWCA Civ 1472, England and Wales Court of Appeal (Civil Division), Pill, Longmore and Lloyd LJJ, 21 December 2010  The full text of this judgment is available at:  [http://www.bailii.org/ew/cases/EWCA/Civ/2010/1472.html](http://www.bailii.org/ew/cases/EWCA/Civ/2010/1472.html" \t "_new)  **(a) Summary**  Safeway Stores Limited ('Safeway') and other supermarkets and dairy processors were the subject of an investigation by the UK Office of Fair Trading ('OFT') into alleged collusion in relation to the price of dairy products. Safeway and other claimant companies in the Safeway Group ('claimants') entered into a settlement with the OFT which provided for the claimants to pay a fine of up to £16.5 million, to be reduced by up to 35% provided that the claimants continued to cooperate with the OFT's investigation.  The claimants brought a claim against certain former directors and employees ('defendants') to recover the amount of the fine and other costs they had incurred in respect of the OFT's investigation.  The defendants applied for the claim to be struck out or for summary judgment in their favour, on the basis of the legal maxim ex turpi causa non oritur action which prevents a claimant recovering for damage arising from their own criminal act.  The England and Wales Court of Appeal, in separate judgments, unanimously reversed the decision of Flaux J at first instance and struck out the claimants' claim to recover the amount of the fine and costs from the defendant employees and directors.  **(b) Facts**  Safeway acting by the defendants exchanged sensitive pricing information with other supermarkets and dairy processors during 2002 and 2003. In January 2005, the OFT launched an investigation and subsequently alleged that the claimants had breached the UK Competition Act ('Competition Act').  The claimants entered into an "early resolution agreement" with the OFT and as part of the terms of the agreement, admitted that they had breached the relevant anti-competition provisions.  The claimants then brought a claim against the defendants to recover the amount of the fine and the costs, by alleging that the defendants, in participating in and facilitating the relevant initiatives, had breached their respective fiduciary duties and/or employment contracts, and/or had been negligent. The claimants claimed that as a result of these breaches, they had suffered loss and damage in the form of the penalty imposed by the OFT and related costs.  **(c) Decision**  The Court of Appeal held that the liability under the Competition Act was "personal" to the claimants. In other words, it was a primary and direct liability, and not a secondary or vicarious liability. Accordingly, the ex turpi causa principle applied and precluded the claimants from seeking to recover either the amount of the penalty or the claimants' other costs.  **(i) Longmore LJ**  Longmore LJ noted that the claimants had accepted that the ex turpi causa maxim was engaged, as the relevant infringements were sufficiently serious and a penalty under the Competition Act was akin to a fine.  His Honour considered earlier authorities and confirmed that the maxim expresses more a policy than a principle, and is a rule that can be stated in a "narrower" and a "wider" form. The rationale for the maxim was also noted, namely "the need for the criminal courts and the civil courts to speak with a consistent voice".  Longmore LJ observed that the novelty of this case was that the claimants were corporations and as such can only act through human agents. The question was then whether the maxim would apply to preclude the claimants' claim against the defendants, whose conduct had created the liability.  His Honour confirmed that the claimants' liability was not vicarious, as the Competition Act only permits such a liability to be imposed if the infringement has been committed intentionally or negligently by the undertaking. The claimants' submissions regarding the lack of "personal" fault on their part were rejected as a misapplication of the term in this context.  In particular, Longmore J held that questions as to whether the defendants were the "directing mind and will" of the claimants did not arise, as the claimants had accepted that they had infringed the Competition Act.  Similarly, the company's liability was not vicarious but a "personal" one, and hence its acts were "personal" for the purpose of applying the maxim. This in turn precluded the claimants from arguing that the In Re Hampshire Land Co [1896] 2 Ch. 743 principle applied, such that the claimants were not "truly" liable due to the defendants' acts being in breach of their duty to the claimants. This was because, as a matter of law, the statutory scheme attributed liability to the claimants, and so the Hampshire Land exception to the ordinary rule of attribution could have no import on the maxim's application.  Accordingly, Longmore LJ allowed the defendants' appeal.  **(ii) Lloyd LJ**  Lloyd LJ agreed with the judgment of Longmore LJ, noting that under the Competition Act the breaches were acts of the relevant claimant, and hence the consequent liability to a penalty was a personal liability of the claimant. Accordingly, the claimants' liability was "primary, personal and direct" and in no sense "secondary or vicarious".  The ex turpi causa principle therefore applied to preclude the claimants from seeking to recover the amount of the penalty or their related costs from the defendants.  **(iii) Pill LJ**  Pill LJ also agreed that the appeal should be allowed and that as the liability was personal to the claimants, they could not pass it on to their employees.  His Honour noted that the policy of the Competition Act was to protect the public by imposing obligations specifically on the undertaking. This policy would be undermined if such liability could be passed on to employees, or the employees' D&O insurers.  Pill LJ canvassed prior decisions regarding the application of the ex turpi causa principle and confirmed that the principle is one of law but its application will vary with the circumstances. In the present case the application of the principle was clear.  **(iv) Discontinuance**  Their Honours also considered the effect of the claimants' discontinuance against a particular defendant, and whether an earlier costs order should be overturned.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h5)  **5.8 Summary judgment entered against directors and officer for breach of their duties under the Corporations Act**  Australian Motor Finance Limited (Receivers and Mangers appointed) v Angeleri (No 3) [2010] FCA 1431, Federal Court of Australia, Tracey J, 20 December 2010  (By Morgan Spain, Blake Dawson)  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2010/1431.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/1431.html" \t "_new)  **(a) Summary**  The Federal Court entered summary judgment against directors and an officer as it was found that they had no reasonable prospect of successfully defending the allegation that they had breached sections 181(1) and 182(a) and (b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Corporations Act). The court found that the strength of the plaintiffs' case was overwhelming and that the defendants had failed to place exculpatory evidence before the court, especially given that they expressly or tacitly acknowledged that they had acted in breach of their duties.  **(b) Facts**  The plaintiffs, Australian Motor Finance Limited (AMFL) and Australian Motor Finance Corporate Pty Ltd (AMFC) carried on the business of providing finance to purchasers of second hand motor vehicles. Subject to strict eligibility requirements, AMFC sold the loans it entered into to ABL Nominees (ABL), who advanced the loan monies to the purchaser of the vehicle. If ABL found that a loan purchased from AMFC did not meet the eligibility criteria, AMFC had to repurchase the loan from ABL. AMFL guaranteed AMFC's obligations to ABL.  In January 2009, Receivers and Managers were appointed to both the plaintiffs when serious irregularities were discovered in the plaintiffs' financial records.  The plaintiffs alleged that Mr Denis Angeleri and Mr Ian Brindley (directors of AMFL and AMFC) and Mr Michael O'Brien (a director of AMFL and officer of AMFC), breached their duties imposed under sections 181 and 182 of the Corporations Act, which caused loss and damage to the plaintiffs.  Angeleri, Brindley and O'Brien were responsible for the making and administration of a scheme under which 212 fictitious loans were created. The proceeds of the loans provided by ABL were fraudulently obtained by AMFC and AMFL and then diverted by Angeleri, Brindley and O'Brien to the other defendants for their own personal benefit or for the benefit of others who were not entitled to those funds. Angeleri, Brindley and O'Brien each gave evidence by public examination that they were aware of the scheme, the manner in which the scheme was implemented and that the loans were fictitious. They did not challenge the evidence they had given in their public examination or the accuracy of the financial and other records produced by the plaintiffs relating to the fictitious transactions. Further, the directors did not deny that their activities had caused financial losses to AMFC and, potentially, AMFL.  The plaintiffs sought to recover monies from the defendants which they alleged the defendants had obtained from the scheme and sought summary judgment under section 31A of the [Federal Court of Australia Act (1976) (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "default) (FCA Act) in respect of part of the proceedings involving the contraventions of the Corporations Act.  The primary issue for determination relating to summary judgment was whether the court was satisfied that Angeleri, Brindley and O'Brien had no reasonable prospect of successfully defending the allegation that each of them had contravened section 181(1) and section 182(a) and (b) of the Corporations Act.  **(c) Decision**  The court entered summary judgment against Angeleri, Brindley and O'Brien and ordered the payment of $4,837,314.94 in respect of their contraventions of sections 181 and 182 of the Corporations Act. Declarations were also made pursuant to section 1317E of the Corporations Act.  The court summarised the relevant principles that have emerged from case law in relation to an application for summary judgment under section 31A of the FCA Act.  Section 31A of the FCA Act provides that:  (1)  The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:  (a)  the first party is prosecuting the proceeding or that part of the proceeding; and  (b)  the Court is satisfied that the other party has no reasonable prospect of successfully defending the proceeding or that part of the proceeding. .  (3)  For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:  (a)  hopeless; or  (b)  bound to fail; for it to have no reasonable prospect of success.  The court noted that the power conferred by section 31A is to be exercised with caution and "is not to be exercised lightly" (Spencer v The Commonwealth (2010) 241 CLR 118).  The court found that Angeleri, Brindley and O'Brien had no reasonable prospect of successfully defending the allegation that each of them had contravened section 181(1) and section 182(a) and (b) of the Corporations Act.  The court noted that the unchallenged evidence strongly suggested that they had acted dishonestly in their capacities as directors and officers of both AMFC and AMFL, in a successful effort to obtain large sums of money which were used for their personal benefit. The court noted that in the course of their public examinations, Angeleri, Brindley and O'Brien either expressly or tacitly acknowledged that they acted in breach of their statutory duties to the plaintiffs.  The court held that Angeleri, Brindley and O'Brien had failed to act in good faith and for a proper purpose and in doing so, rendered AMFC and AMFL liable to claims made by ABL which they knew AMFC and AMFL would be unable to meet. These actions subsequently caused the plaintiffs to become insolvent. The court observed that the strength of the plaintiffs' case was overwhelming and that the defendants had failed to place exculpatory evidence before the court.  In coming to this decision, the court considered whether Mr O'Brien was an officer of AMFC in order to determine whether summary judgment could be entered against him. Although Mr O'Brien denied he was an officer of AMFC, the court held that he was an officer within the meaning of the Corporations Act as he was actively involved in the making of significant decisions relating to the business of AMFC. The court found that had Mr O'Brien not engaged in certain conduct, AMFC would not have become a party to the 212 fictitious loans and ABL would not have advanced monies to support the loans.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h5)  **5.9 James Hardie - Court of Appeal decisions raise issues for ASIC and implications for directors and other corporate officers**  (By Caroline Wong, Mallesons Stephen Jaques)  James Hardie Industries NV v Australian Securities and Investments Commission [2010] NSWCA 332 and Morley v Australian Securities and Investments Commission [2010] NSWCA 331, New South Wales Court of Appeal, Spigelman CJ, Beazley JA and Giles JA, 17 December 2010.  The full text of these judgments is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/331.html](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/331.html" \t "_new); and [http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/332.html](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/332.html" \t "_new)  **(a) Summary**  The New South Wales Court of Appeal has handed down two joint judgments in related appeals from Supreme Court decisions on contraventions of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) by James Hardie Industries NV (JHINV) and then-present or former directors and officers of the James Hardie group.  The alleged contraventions related to false statements made by JHINV and the corporate officers that the Medical Research and Compensation Foundation (Foundation) had sufficient funds to meet all prospective asbestos related claims. The decisions concerned the factual findings of the judge at first instance, but also have implications for the scope of directors' and officers' duties, and touched upon disclosure requirements under the Corporations Act.  **(b) Facts and relevant findings at first instance**  In February 2001, the board of James Hardie Industries Limited (JHIL) published an announcement to the ASX, notifying it of the establishment of the Foundation. The announcement stated that "[t]he Foundation has sufficient funds to meet all legitimate compensation claims anticipated from people injured by asbestos products" and that the "fully-funded Foundation provided certainty for both claimants and shareholders". JHIL agreed to annually pay sums to its subsidiaries as funding to meet the asbestos claims against them. In June 2002, JHINV made statements at roadshow presentations in Edinburgh and London about the sufficiency of the Foundation's funding to meet all asbestos claims and the extent of the James Hardie group's potential liability to asbestos claims. The slides used at the roadshow presentations were lodged with the ASX and made publicly available. In March 2003, JHINV effectively transferred JHIL out of the group of companies, giving JHINV effective protection from the financial impact of asbestos claims made against JHIL.  Gzell J at first instance found that the non-executive directors had breached their obligation under section 180(1) of the Corporations Act to use reasonable care and diligence in the exercise of their powers and the discharge of their duties by voting in favour of a misleading draft ASX announcement.  Gzell J also found that JHINV had breached its continuous disclosure obligations under the Corporations Act and ASX Listing Rules and sections 1041E (a person must not knowingly or recklessly make false or misleading statements which are likely to affect share price) and 1041H (a person must not engage in conduct that is misleading or deceptive in relation to a financial product).  **(c) Decision in relation to directors' breach of their duty of care and diligence**  In Morley v ASIC, the Court of Appeal overturned the trial judge's factual finding that the draft ASX announcement had been approved by the board.  The court found that, as ASIC acts in the public interest, it owes an "obligation of fairness" and was therefore obliged to call a witness of significance to the issues. The decision not to call a key witness significantly undermined the cogency of ASIC's case and the court held that it could not find that the board had approved the ASX announcement on the material before it.  The court noted that, if it had not overturned that factual finding, it would have held that the directors had breached their duty of care and diligence.  Their Honours confirmed that, in determining reasonableness, the court is to consider what an ordinary person with the knowledge and experience of the defendants would have been expected to do in the circumstances. They acknowledged that a non-executive director may rely on management and other officers to a greater extent that an executive director. However, having regard to the significance of the announcement, the duration of the board's consideration of its communication strategy, the knowledge of the non-executive directors, and the centrality of the sufficiency of the Foundation's funding to the announcement, they could not rely on management and were instead required to consider the draft news release themselves.  At first instance, Gzell J rejected the argument that the non-executive directors could rely on an assumption that the draft ASX announcement had already been approved by management and senior executives before being provided to the board, as was the usual practice. Gzell J held that the "duty remained to consider the terms of the Draft ASX Announcement and any justification for them". The Court of Appeal did not expand upon this point to suggest that the consideration of certain news releases and ASX announcements must be undertaken by directors themselves and cannot be delegated to management or senior executives. However, where a question arises as to the veracity of an announcement, the decision suggests that a duty is incumbent upon directors to analyse the announcement carefully and consider the nature and truth of its representations.  The Court of Appeal also stated that, if it had found that the draft ASX announcement had been passed by board resolution, the non-executive directors Gilfillan and Koffel would have been in breach of their duty of care and diligence under section 180(1) by failing to request a copy of the draft ASX announcement, failing to familiarise themselves with it and failing to abstain from voting in favour of it. Their duty to consider the announcement was not affected by the fact that they had not been provided with a copy of it prior to the meeting, that it was not read out at the meeting, and that they participated in the meeting by telephone. Given that it was a significant announcement and they would have been aware that a question arose as to whether the Foundation had sufficient funding to meet all claims, they were required to familiarise themselves with the terms of the announcement proposed and could not rely on other directors to "craft an announcement".  This finding implies that the duty of care and diligence encompasses an onus on directors, regardless of whether they are physically present at the board meeting, to be fully aware of the resolutions passed and to familiarise themselves with significant matters and materials that form part of the resolutions. Given the number of resolutions which may be passed at a board meeting, as well as the potential complexity of related materials, this duty may have significant practical implications in relation to the information which a director should have before considering whether to vote in favour of proposed resolutions.  **(d) Decision in relation to JHINV's breach of the Corporations Act**  In JHINV v ASIC, the Court of Appeal confirmed the lower court's finding that James Hardie had contravened sections 1041E and 1041H of the Corporations Act, finding that "there could be no doubt about the misleading nature of the statements made or that they gave rise to the representations alleged", noting the importance of the information intended for release to the public and emphatic nature of the statements "fully funded" and "no future liability". The Court of Appeal also upheld Gzell J's findings that the statements made in the ASX announcement and the slides were likely to affect market behaviour by inducing people to acquire shares in JHINV, with the effect of maintaining or stabilising share price.  The court distinguished the characteristics of the audiences at the roadshows from the general public to whom the ASX announcement and slides were directed, finding that the audiences at the roadshows were "select and sophisticated" and people who, "as a matter of their own professional responsibilities to clients would analyse and further research information they received before acting upon it". Their "resilience to persuasion solely on the basis of a one hour presentation" tended against the finding that they would be likely to be misled and deceived. The Court of Appeal dismissed ASIC's cross-appeal that the statements made at the roadshows contravened section 1041E of the Corporations Act.  Finally, the Court of Appeal upheld Gzell J's finding that JHINV failed to comply with its continuous disclosure obligations under the Corporations Act and ASX Listing Rules. The continuous disclosure obligations require that a listed disclosing entity must, if it becomes aware of information that is not generally available, which a reasonable person would expect to have a material effect on the price of the securities if it became available, immediately disclose that information to the ASX. JHINV breached that obligation by not disclosing the steps that it had taken in March 2003 to transfer JHIL out of the James Hardie Group.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h5)  **5.10 Circumstances giving rise to a termination of a deed of company arrangement under sections 445D and 447A of the Corporations Act**  (By Laura Keily and Lauren Gore, Corrs Chambers Westgarth)  In the matter of Mustang Marine Australia Services Pty Ltd (admin apptd) - Perpetual Trustee Company Ltd v Mustang Marine Australia Services Pty Ltd [2010] NSWSC 1429, Ward J, New South Wales Supreme Court, 10 December 2010  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1429.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1429.html" \t "_new)  **(a) Summary**  This case provides guidance on the circumstances in which a court will make an order terminating a deed of company arrangement (DOCA) under section 445D(c), (f), (g) and section 477A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Act). Central to the decision of Ward J to make the order was that the fact that the date of insolvency was inaccurate and the information provided by the administrators in the section 439A Administrators Report (Report) was inadequate. The decision highlights that a full and thorough investigation and creditors report is required before creditors can make a fully informed decision when voting on a DOCA.  The decision also reinforces the statutory purpose of section 435A of the Act that underlies the provisions dealing with the administration of insolvent companies. In this case, Ward J considered that the DOCA could not achieve this purpose as a better return would result from a winding up.  **(b) Facts**  The defendant carried on a boat building business. The business ran at a loss almost from the time of incorporation. It was funded largely by the Standard Bank of Asia Limited (SBAL), which essentially operated as shadow director of the defendant. The defendant became insolvent and a DOCA was proposed by SBAL, who became, shortly before the date of insolvency, the defendant's largest secured creditor. The plaintiff was a creditor of the defendant, claiming outstanding monies due under a lease agreement. A meeting of the defendants' creditors, which the plaintiff did not attend, resolved to execute a DOCA. This decision was based on the administrators' recommendations in the Report that creditors would not receive a dividend in a winding up. The Report also dismissed any claims of insolvent trading by the defendant, its directors, or SBAL.  The plaintiff argued that the DOCA should be terminated under sections 445D(c), (f), and (g), and 447A of the Act, on the basis that the DOCA did not support the statutory purpose under section 435A of the Act because:  the defendant was insolvent at a much earlier date than calculated by the administrators;  the DOCA was oppressive, unfairly prejudicial to and unfairly discriminatory against the plaintiff or contrary to the interests of creditors as a whole, because the administrators failed to carry out a proper investigation of the company's affairs (including to give consideration to the benefit that may be received by creditors in a winding up), and accordingly, information which could reasonably be expected to have been material to creditors voting on the DOCA was omitted from the administrators' Report, in particular, the nature of the relationship and funding arrangement between the defendant and SBAL, and potential insolvent trading claims against the defendant, its directors, and SBAL; and  the DOCA was contrary to the public interest and commercial morality, because of the failure to investigate insolvent trading claims, and that insolvent companies should not be allowed to continue to trade on the completion of a DOCA.  The defendant argued that the DOCA should remain in force because:  there was no realistic prospect of any insolvent trading claims against the defendant, its directors or SBAL;  alternately, even if there was such a claim, there was no prospect of a better return to creditors in a winding up; and  the investigation carried out by the administrators was adequate.  **(c) Decision**  Section 435A of the Act provides that the administration of an insolvent company under a DOCA should maximise the chances of the company continuing to exist, or if this is not possible, to ensure that administration results in a better return for creditors, than in a winding up. Section 445D(c), (f) and (g) of the Act allows the court to make an order terminating a DOCA if it is satisfied that (amongst other things):  there was an omission from a report and the omission can reasonably be expected to have been material to the creditors decision to enter into a DOCA;  the DOCA would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more creditors or contrary to the interests of the creditors as a whole; or  the deed should be terminated for some other reason.  Section 447A of the Act also allows the court to make any order it deems appropriate in relation to the operation of Part 5.3A of the Act.  Ward J decided it was appropriate to terminate the DOCA, make an order to wind up the defendant, and appoint a new liquidator.  Although the exact date of insolvency was not a matter for determination in the case, Ward J found that the defendant may have been insolvent at a much earlier date than calculated by the administrators. This would have had the effect of unearthing possible insolvent trading claims against the defendant, its directors and SBAL, resulting in a potentially greater return for creditors in a winding up than under the proposed DOCA. Ward J held these were crucial matters that would have been relevant to the creditor's decision to enter into the DOCA.  Ward J stated that although she would not make adverse findings in relation to the administrators' conduct, the inadequacy of their investigations provided in the creditors' Report deprived creditors, including the plaintiff, of making an informed decision to enter into the DOCA.  Ward J reasoned that there is a balancing exercise required of administrators conducting an administration. Citing Barrett J in Re Diamond Press Australia Pty Ltd [2001] NSWSC 313, [10], Ward J stated that there should be a weighing between a "relatively speedy" administration, and, conversely, "sensible and constructive actions directed towards maximising the return for creditors". Ward J found that there was a reasonable prospect of an insolvent trading claim against the defendant, its directors and SBAL.  This was a matter that should have been fully investigated by the administrators and put to the creditors in the Report. The court, citing DCT v Portinex (2000) 156 FLR 453, [101], [126], stated that "as a matter of public policy, creditors are entitled to a proper investigation of such matters notwithstanding the practical constraints faced by an administrator". A more in depth investigation and Report by the administrators into potential insolvent trading claims would have allowed the creditors, particularly the plaintiff, to determine whether a better return would have been achieved in a winding up. The creditors were not given the opportunity to consider that information in their decision to vote for a DOCA.  Accordingly, Ward J was satisfied that the plaintiff established the grounds under section 445(D)(c),(f) and (g) so as to enliven the court's jurisdiction to set aside the DOCA. She then considered the question whether she should exercise her discretion to do so.  The plaintiff submitted that there could be significant returns to the creditors from a successful insolvent trading claims. The plaintiff argued that if claims based on insolvent trading were to succeed, unsecured creditors would share in the proceedings from those claims ahead of SBAL as a secured creditor pursuant to section 588Y of the Act. Ward J commented on the operation of section 588Y, which allows, if a claim of insolvent trading is made out, secured creditors to have priority in proceeds from those claims, ahead of unsecured creditors. This is to provide a pool of quarantined funds to which unsecured creditors can have some access in priority to secured creditors, to provide some protection against those most at risk from insolvent trading. Referring to the Act's Explanatory Memorandum and the Harmer Report, Ward J stated that there was nothing that prohibited a secured creditor from waiving their security to share the proceeds pursuant to this provision. Ultimately, Ward J concluded there was a not unrealistic prospect that there may be a return to creditors that is better than under the DOCA.  Ward J also considered questions of public interest and commercial morality.  Ward J did not comment on whether there was moral turpitude in this case. However, the public interest factor weighed in favour of terminating the DOCA, in light of the prospect of a better recovery for creditors in a winding up and the inadequacy of the administrators' investigation and Report.  Ward J exercised her discretion to terminate the DOCA on the basis that she was not satisfied that creditors were adequately informed as to the basis on which the comparison between the DOCA and the winding up was to be made or as to the prospect of a greater return from a winding up. The effect of the DOCA was to deprive creditors (in particular the plaintiff) from the opportunity for there to be a thorough investigation of the conduct of the company's affairs.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h5)  **5.11 Extension of freezing orders against persons under investigation by ASIC granted**  (By Kate Wald and Jiayue Li, DLA Phillips Fox)  Australian Securities and Investments Commission v Sigalla [2010] NSWSC 1423, New South Wales Supreme Court, Barrett J, 8 December 2010  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1423.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1423.html" \t "_new)  **(a) Summary**  This proceeding related to an application by the Australian Securities and Investments Commission ('ASIC') to extend freezing orders made against Mr John Falconer ("Mr Falconer") and Mr Falconer's private company Dunbar Associates Pty Ltd ("Dunbar") under section 1323(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Act").  ASIC sought a further extension until 7 February 2011. In earlier proceedings, freezing orders were awarded and on several occasions extended against several persons associated with TZ Limited ("TZL"), including Mr Falconer and Dunbar. In this instance, Mr Falconer and Dunbar opposed the extension sought by ASIC.  Barrett J extended the freezing orders until 11 February 2011, at which time proceedings would be before Pembroke J in relation to other matters, and the position of Mr Falconer and Dunbar could be reassessed. His Honour held that it was desirable and arguably necessary to do so for the purpose of protecting the interests of relevant aggrieved persons.  **(b) Facts**  Mr Falconer and Dunbar were under investigation by ASIC in relation to possible breaches of the Act in relation to their role in the activities of TZL. Mr Falconer was a former director of TZL.  Specifically, the investigation focused on the role of Mr Falconer (and through him Dunbar) in TZL's relevant announcement to the Australian Securities Exchange Ltd ("ASX") regarding cash flows in 2008 and 2009 and transfers of funds to Mr Sigalla and persons and entities controlled or associated with Mr Sigalla. There was evidence to suggest that both Mr Sigalla and Mr Falconer had been involved in a breach of the financial assistance provisions of the Act by TZL. In addition, the "mandate agreement" under which TZL had made substantial payments to Mr Sigalla's private company was not disclosed in the "related party" sections of TZL's relevant annual reports.  Barrett J observed that Mr Falconer's involvement in these matters gave rise to a plausible contention that Mr Falconer might be found to be someone who may become liable to pay money to TZL and (as yet unidentified) persons who dealt in TZL shares during the relevant period.  In August 2009, ASIC successfully applied (ex parte) for a freezing order against several persons associated with TZL. ASIC sought to extend the freezing orders until a decision was made as to whether to commence proceedings against Mr Falconer and Dunbar.  **(c) Decision**  Barrett J held that the freezing order extension was desirable and arguably necessary for the purpose of protecting the interests of "aggrieved persons" under section 1323(1) of the Act (being TZL and potentially certain persons who traded in TZL shares during the relevant period), and should be granted.  **(i) Threshold test satisfied**  Section 1323(1) of the Act relevantly provides that the court may extend a freezing order if:  an investigation is being carried out 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) or the Act in relation to an act or omission by a person (the "relevant person") that constitutes or may constitute a contravention of the Act; and  the court considers it "necessary or desirable to do so" for the purpose of protecting the interests of an "aggrieved person" to whom the relevant person is liable, or may be or become liable, to pay money or to account for financial products or other property.  Mr Falconer and Dunbar conceded the threshold condition was satisfied, as an investigation was being carried out by ASIC.  **(ii) Liability to repay TZL and persons who dealt in TZL shares**  Barrett J held that there was a plausible contention that Mr Falconer "may ... become liable" to make good sums of money to TZL as well as to relevant persons who dealt in TZL shares. His Honour noted that in addressing the "may ... become liable" question, both the theoretical bases of liability and the practical possibility of liability being alleged must be considered.  Barrett J observed that theoretically, Mr Falconer may become liable to TZL due to his involvement in transferring funds in TZL's bank account to Mr Sigalla and persons associated with Mr Sigalla, and may also become liable to persons who dealt with TZL shares during the relevant period.  TZL had indicated its intention to commence proceedings against Mr Falconer and Dunbar early in 2011, and ASIC submitted it would be making recommendations in March 2011 as to whether proceedings should commence. These factors were held to be sufficient for present purposes.  **(iii) Freezing orders necessary or desirable to protect the interests of aggrieved persons**  In considering whether the freezing order is "necessary or desirable", Barrett J noted that the court must balance the protection of the public against the private rights of Mr Falconer and Dunbar to deal freely with their assets.  After considering the purpose of this form of order, Barrett J confirmed that the court may take into account all relevant discretionary factors in performing the "balancing exercise", including the threat of dissipation, the period for which the freezing order has already been in place and the level of cooperation by Mr Falconer and Dunbar.  On balance, Barrett J was satisfied that the freedom of Mr Falconer and Dunbar from restraint continued to be outweighed, at this stage, by the desirability of providing some measure of assurance for TZL and other persons aggrieved.  His Honour noted that the allegations against Mr Falconer were serious and involved large sums, and there was a real possibility that he would be found liable to compensate TZL (and potentially other persons).  Accordingly, it was "at least desirable and arguably necessary" that the restraint continue for its protective purpose.  Barrett J further noted that the limited period of extension sought by ASIC was relevant to his Honour's decision, and confirmed that the fact TZL (as a person aggrieved) might itself be able to make a successful application for freezing orders against Mr Falconer and Dunbar in no way diminished ASIC's right or ability to seek section 1323 relief.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h5)  **5.12 Sale of shares by company at an undervalue not an unlawful capital return**  (By Harsha Kumar, Freehills)  Progress Property Company Limited (Appellant) v Moorgath Group Limited (Respondent) [2010] UKSC 55, United Kingdom Supreme Court, Lord Phillips, Lord Walker, Lord Mance, Lord Collins and Lord Clarke, 8 December 2010  The full text of this judgment is available at:  [http://www.bailii.org/uk/cases/UKSC/2010/55.html](http://www.bailii.org/uk/cases/UKSC/2010/55.html" \t "_new)  **(a) Summary**  The sole issue in this appeal was whether there may have been an unlawful distribution of capital when the Appellant sold the whole issued share capital of its wholly-owned subsidiary to the Respondent at an undervalue. Both the Appellant and Respondent were indirectly controlled by the same person (through a holding entity).  The court considered the "substance" of the transaction in coming to the conclusion that the transaction did not constitute an unlawful return of capital. This was because:  the objective facts pointed towards the sale of the issued share capital of the subsidiary being a genuine commercial sale with the director (Mr Moore) of the Appellant genuinely believing that the sale of shares in its subsidiary was at market value; and  the true value of the assets held by YMS was unclear and there was therefore a possibility that the valuation figures would be significantly lower had certain matters been taken into account. On alternative analyses, the sale of shares may not have been at an undervalue.  **(b) Facts**  Progress Property Company Ltd (Appellant) sold the whole issued share capital of YMS Properties (No1) Ltd (YMS) to Moorgath Group Ltd (Respondent) (the Transaction) as a preliminary step in a wider acquisition of shares in the Appellant. YMS (through its subsidiary) held freehold property interests that consisted primarily of retail premises. Both the Appellant and Respondent were indirectly controlled by the same person (through a holding entity, Tradegro (UK) Ltd).  The sale and purchase agreement relating to the Transaction was made at an agreed price of £63,225.72. The sale price was calculated on the basis of an open market value of properties owned by YMS, a subtraction of liabilities for creditors and a further subtraction in relation to an indemnity which was believed to ultimately fall on the Appellant. It was later apparent that the indemnity was non existent and, therefore, there was no justification for the reduction in the sale price.  The Transaction was therefore attacked on the ground that, being at gross undervalue, it was essentially an unlawful distribution of capital to shareholders. As the court noted, at common law, a distribution of assets to a shareholder, except in accordance with specific statutory procedures, is an unlawful distribution of capital.  **(c) Decision**  The court dismissed the appeal and concluded that there was no basis for characterising the Transaction as an unlawful distribution of capital.  Lord Wilson, rejecting various stringent objective tests put forward by the Appellant, stated that a court's real task was to inquire into the true purpose and substance of the impugned transaction which calls for an investigation of all relevant facts and sometimes includes the "state of mind of the human beings who are orchestrating the corporate activity".  His Honour also noted that mere arithmetical difference between value of the asset and consideration given will not be decisive if the transaction is genuinely conceived of, effected as an exchange for value and does not give rise to an exchange "at a gross undervalue".  His Honour upheld the deputy judge's finding that the Transaction was a genuine commercial sale. His Honour also noted that the valuation of YMS's assets explicitly refrained from considering or taking into account the covenant strength of YMS and the state or repair of YMS's properties. This affected the valuation of YMS's assets and therefore cast doubt on the characterisation of the Transaction as being at a gross undervalue.  Lord Mance, in a separate judgment, was of the view that the Transaction:  was not at an undervalue because it was the Appellant (and not YMS) who was seen as having the independent counter-indemnity obligation which fell to reduce the amount payable to the Appellant by the Respondent; and  may involve directors making mistakes as to the nature or extent of liabilities attaching to companies, which of itself, is not sufficient to re-categorise a transaction as an unlawful of capital.  On the facts, his Honour noted that the Appellant had no basis for recategorising the Transaction as other that an understandable commercial agreement, involving the giving of a counter-indemnity which the Respondents genuinely believed to have existed.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h5)  **5.13 Subrogated rights of secured creditors and distribution of preference action recoveries**  (By Bonnie Esposito, Freehills)  Cook (Liquidator), in the matter of Italiano Family Fruit Company Pty Ltd (in liq) v Italiano Family Fruit Company Pty Ltd (in liq) [2010] FCA 1355, Federal Court of Australia, Finkelstein J, 6 December 2010  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2010/1355.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/1355.html" \t "_new)  **(a) Summary**  The liquidators of a fruit and vegetable wholesaler sought to find out whether they should pay the balance of amounts recovered from settlements of unfair preference claims to the company's unsecured creditors, or to the bank which held a charge over the company's current and future assets. In finding that the liquidator had acted in breach of trust by misapplying the bank's funds when paying priority employee claims, the court directed that the bank was entitled to the funds.  **(b) Facts**  Prior to its administration in July 2007, the defendant had granted security to the National Australia Bank (NAB) in the form of a charge over its current and future assets. In winding up the company, the liquidators took control of the defendant's assets, and to the extent that those assets were not liquid, realised them. As part of that process, the liquidators sold certain assets the subject of NAB's floating charge. The proceeds from the realisation were applied to payment of claims of employees who enjoyed priority under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Corporations Act). Section 556(1)(e) of the Corporations Act requires that in the winding up of a company, all wages, superannuation contributions and superannuation guarantee charges payable by a company in respect of services rendered by employees must be paid in priority to all other unsecured debts and claims. Section 561 provides that if the property of a company is insufficient to meet debts referred to in section 556(1)(e), then payment of that debt must be made in priority over the claims of a chargee in relation to a floating charge created by the company, and may be made out of any property comprising or subject to that charge.  Around the time that the employees' claims were paid pursuant to section 561, the liquidators made demand on two former creditors for repayment of amounts that were alleged to be unfair preferences. The claims were settled almost a year later, with full proceeds received by December 2009. It was these proceeds that were the subject of the application. The liquidators were concerned that treating the proceeds of the preference actions as outside the terms of the NAB charge would result in an unintentionally unfair result. The precise legal issue raised for consideration was whether NAB was to rank pari passu with ordinary unsecured creditors in relation to the distribution of the preference recoveries or whether it had a higher claim which prevailed over the claims of ordinary unsecured creditors.  **(c) Decision**  The liquidators were directed to pay the balance of the amounts recovered from the settlements of unfair preference claims to the bank. In reaching this decision, Finkelstein J first considered whether the proceeds of the preference claims were subject to the NAB charge. His Honour queried the acceptance that money recovered in preference actions which can only be brought by a liquidator are not caught by a charge over the company's current and future assets. After tracing the history of the law in the UK and Australia, he concluded that the present position in Australia "rests on uncertain and, perhaps, unsound rules and distinctions" and that "the question whether a charge should attach to preference recoveries ought not depend on the nature of the property recovered ... Saying that money recoveries are held on some kind of trust for creditors explains the mechanism by which that money is excluded from the company's general assets, but does not explain why it should be excluded in the first place ... If the High Court does not do so, Parliament should resolve this matter. In any event it is preferable for Parliament to do so, because in no small measure, questions of policy rather than legal principle are involved."  Finkelstein J then went on to consider the alternative basis for the bank's claim to the preference recoveries being that the bank be subrogated to the employees' priority claims. The basis for this was that the employee priority claims had been paid out of floating charge assets on the belief that the property of the company was insufficient. However, if the employee claims had been paid after the preference actions had been settled, the employees would have been paid out of the settlement proceeds leaving the proceeds of the floating charge assets to be paid to the bank.  His Honour said that floating charge assets which may be required for payment of priority debts must be held until it is clear whether or not those debts can be paid out of the company's free assets. Until that time, the funds cannot be applied to meet priority debts, although it may be possible, if sufficient is known, to pay an interim dividend to the priority creditors.  It was held that the liquidator had acted in breach of trust by not following this process and misapplying the bank's funds when paying out the priority claims. To the extent that the bank suffered loss, it should be subrogated to the rights of priority creditors who had been paid out with the bank's funds. Absent subrogation, it would be unconscionable for the company (and its unsecured creditors) to benefit from a windfall produced by the breach of trust. The liquidators were therefore directed to pay the proceeds of the unfair preference claims to the bank.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h5)  **5.14 The imposition of a statutory trust over monies transferred to Opes Prime**  (by Katrina Sleiman and Emily McMullan, Corrs Chambers Westgarth)  Samuel Holdings Pty Ltd v Securities Exchange Guarantee Corp Ltd [2010] QSC 450, Supreme Court of Queensland, de Jersey CJ, 6 December 2010  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/qld/QSC/2010/450.html](http://www.austlii.edu.au/au/cases/qld/QSC/2010/450.html" \t "_new)  **(a) Summary**  On or about 20 March 2008, Samuel Holdings Pty Ltd ("the applicant") deposited $74,600 with Opes Prime Stockbroking Ltd ("Opes"), with the intention of using the money to buy shares. On 27 March 2008, Opes became insolvent before discharging any obligations to the applicant.  The applicant made a claim against the National Guarantee Fund, which is administered by the Securities Exchange Guarantee Corp Ltd ("the respondent") and intended to provide compensation for claims against dealers operating in the Australian Securities Exchange, pursuant to regulation 7.5.64 of the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "default). The respondent disallowed the claim. The applicant sought a declaration that its claim be allowed.  The court found that the applicant was entitled to the relief sought.  **(b) Facts**  Mr Mather, the sole director of the applicant, set up a margin lending facility with Opes.  He informed Mr Dean Boyle, Chief Operating Officer of Opes, that money would be deposited into that account as part of the purchase price of 100,000 Arrow Energy shares. Opes was to advance the rest on the basis of an agreed loan valuation ratio of 60%.  Boyle agreed.  Mather instructed stockbroker Wilson HTM to acquire the shares.  Pursuant to these discussions, on or about 20 March 2008, the applicant deposited $74,600 ("relevant monies") with Opes and Opes credited that amount to the applicant's account.  However, the share purchase transaction was not completed, following an administrative mistake on the part of the stockbroker.  On 27 March 2008, Opes became insolvent within the meaning of the regulation. The administrators and liquidators of Opes made distributions of dividends to the applicant, following its claim for repayment for the amount of $74,600, totalling $27,602.  The applicant made a claim against the National Guarantee Fund, which is administered by the respondent and intended to provide compensation for claims against dealers operating in the Australian Securities Exchange, pursuant to regulation 7.5.64 of the Corporations Regulations 2001 (Cth). A claim arises in respect of property if:  (i) a dealer has become insolvent; and  (ii) the property was, in connection with the dealer's securities business, "entrusted to, or received by" the dealer, and "was so entrusted or received on behalf of" the person who seeks to make the claim; and  (iii) at the time that the dealer became insolvent, the obligations of the dealer to that person have not been discharged.  The respondent disallowed the claim and the applicant sought a declaration that its claim be allowed. The applicant argued that the relevant monies were "entrusted to or received by" Opes, in connection with their securities business, "on behalf of" the applicant, or alternatively, that Opes held the relevant monies on trust for the applicant.  The respondent argued that the relevant monies were not received in connection with its "securities business", but in connection with its distinct securities lending business, bringing the transaction outside the scope of the regulation. Alternatively, the respondent argued that even if the relevant monies were received in connection with the securities business, the regulation would only apply in circumstances where Opes held the money on trust for the applicant. They characterised the relevant monies as a "deposit", the payment of which involved "an outright transfer of property" to Opes.  Opes, therefore, did not receive the money "on behalf of" the applicant or as "trustee" for the applicant, but merely acquired a debt which it was liable to repay.  Finally, the respondent submitted that Opes had no obligations in respect of the relevant monies, which were undischarged when it became insolvent; it was merely liable for a debt which had not been repaid. In any event, the respondent maintained the applicant was not entitled to make any claim in respect of the relevant monies because that money was, in fact, lent to Opes and the regulation does not permit a claim in those circumstances.  **(c) Decision**  The court dealt with each of the respondent's arguments in turn.  **(i) Were the relevant monies received in connection with the Opes "securities business"?**  The court considered that if Opes' role was limited to the provision of funds, this proposed transaction may not have formed part of its business of dealing in securities.  However, Opes was to acquire the shares, financing the acquisition, with the security of the applicant's "collateral". It was to hold the shares on terms which would benefit the applicant financially and pay the applicant any income derived from the shares.  The court determined that because of these, and other such entitlements, it could not be said that Opes would have held the shares on its own behalf. As such, it was found that the amount was received by Opes in connection with its securities business.  **(ii) Was the amount entrusted to or received by Opes on behalf of or as a trustee for the applicant?**  The court determined that it was necessary to construe the legislation as being capable of extending beyond circumstances where there is a trust in order to give effect to the inclusion of circumstances where money is received "on behalf of" a person. This situation can arise in circumstances where there is no trust. The court held that the monies were paid and received and retained as "collateral". This meant that Opes gained title to the relevant monies upon receipt, and they could not therefore be characterised as being received "on behalf of" the applicant, notwithstanding that Opus never acquired the shares. The court concluded that the relevant monies were not held on trust, as they were intended to become assets of Opes, were co-mingled with other funds and Opes did not have an obligation to account to the applicant for interest that accrued on the deposit.  **(iii) Was the relevant money a loan to Opes?**  The court reasoned that if the relevant monies vested in Opus upon receipt, as was found to be so, this was inconsistent with the view that they were lent. There was no agreement around repayment of the money and the characterisation of it as a "debt" in various documents was merely based on opinion, rather than assessment of objective circumstances.  **(iv) Was the relevant money subject to a statutory trust?**  Section 1017E of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) deems money to be held on "trust" if it is paid to the issuer or seller of a "financial product", and the issuer or seller does not immediately issue or transfer the product.  The applicant submitted that this provision was attracted because the applicant gave the money to Opes, intending that Opes would use it to generate financial return for the applicant, in circumstances where the applicant had no day to day control over the use of the money. The court accepted this submission, deciding that what was offered by Opus was a "financial product".  The respondent submitted that margin lending products should not be considered "financial products", as the client's aim of generating a financial return was "incidental" to the main intention of obtaining finance. However, the court found that when the facility was considered "as a whole", it was not reasonable to characterise one purpose as "main" and another as "incidental". The court therefore concluded that the provision did operate in relation to the relevant monies and that they were subject to a statutory trust.  Section 981 of the Corporations Act 2001 (Cth) deems money to be held on trust if it is paid "in connection with" a financial service or a financial product. The court determined that as the payment of the collateral was instrumental to the proposed transaction, this provision also operated to impress the relevant monies with a trust of which the applicant was beneficiary.  **(v) Conclusion**  For these reasons, the court was satisfied that the respondent should allow the applicant's claim and pay to the applicant the sum of $46,998, representing the difference between the relevant monies, and the $27,602 that was received as a distribution from the Opes liquidators.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/162%20February%202011.htm%23h5) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Contributions** |  |  | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  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