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| **Bulletin No. 161**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).[Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/161%20January%202011.htm#h1) [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/161%20January%202011.htm#h2) [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/161%20January%202011.htm#h3) [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/161%20January%202011.htm#h4) [Contributions](http://www.law.unimelb.edu.au/bulletins/161%20January%202011.htm#5) [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)  |

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

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| **1.1 Consultation paper on investor protection threshold** On 24 January 2011, the Australian Assistant Treasurer and Minister for Financial Services and Superannuation, the Hon Bill Shorten MP, released an options paper reviewing the distinction between retail and wholesale clients in the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). According to the Assistant Treasurer, during the global financial crisis, consumers without the necessary investment experience were exposed to complex financial products on the wholesale market.  Individual investors, as well as bodies such as local councils, can be classed as wholesale clients. Wholesale clients do not receive the same level of protection as retail clients, as they are considered to be better informed and better able to assess the risks involved. The options paper discusses the rationale for the review as well as requirements in comparable foreign jurisdictions before presenting a number of options for reform including:Retaining and updating the current system to recognise and account for problems experienced during the global financial crisis; Removing the distinction between retail and wholesale clients so that all clients receive protections and disclosures currently only afforded to retail clients; and Introducing a subjective 'sophisticated investor' test based on the client's experience and ability to understand the product as the sole distinction.The options paper is available on the 'Future of Financial Advice' section of the [Treasury website](http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=home.htm" \t "_new).etailed Contents**1.2 Consultation paper on national not-for-profit regulator** On 21 January 2011, the Australian Assistant Treasurer and Minister for Financial Services and Superannuation, the Hon Bill Shorten MP and the Australian Minister for Social Inclusion, the Hon Tanya Plibersek MP, released a consultation paper on the design of a new national regulator for the not-for-profit sector.  The paper is titled 'Scoping Study for a National Not-for-Profit Regulator'. The paper seeks comments on the goals of national regulation, the scope of national regulation and the functions and form of a national regulator. The matters dealt with in the paper include previous reviews and inquiries, the current regulatory environment, the role and responsibilities of a national regulator, sector specific regulation, funding implications and definitional issues. The paper also examines not-for-profit regulation in a number of other countries. The consultation paper is available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1934" \t "_new).etailed Contents**1.3 SEC adopts new rules regulating asset-backed securities** On 20 January 2011, the United States Securities and Exchange Commission (SEC) adopted two sets of new rules designed to help revitalise the important asset-backed securities (ABS) market by encouraging better disclosure for investors. The SEC approved one set of rules that requires issuers of asset-backed securities to disclose the history of the requests they received and repurchases they made related to their outstanding asset-backed securities. The SEC also approved a second set of rules that would require issuers of asset-backed securities to conduct a review of the assets underlying those securities.  Asset-backed securities (ABS) are created by buying and bundling loans - such as residential mortgage loans, commercial loans or student loans - and creating securities backed by those assets that are then sold to investors. In the transaction agreements that govern a securitisation, ABS issuers or originators of those loans typically make 'representations and warranties' about the characteristics and the quality of those loans. If a loan does not comply with the representation or warranty, an ABS issuer or lender can be required to repurchase the loan from the pool or replace it with a substitute asset. Since the financial crisis, many investors and other transaction parties have questioned whether the loans in the bundle meet the characteristics specified by the representations and warranties, and have been seeking to enforce repurchase provisions. The Dodd-Frank Wall Street Reform and Consumer Protection Act imposes new disclosure obligations about the representations, warranties and repurchase history so that investors may identify originators with clear underwriting deficiencies. Section 943 of the Dodd-Frank Act requires the SEC to prescribe regulations on the use of representations and warranties in the market for asset-backed securities. The final rules issued by the SEC implement section 943. The final rules require ABS issuers to file with the SEC, in tabular format, the history of the requests they received and repurchases they made relating to their outstanding ABS. The table will provide comparable disclosures so that investors may identify originators with clear underwriting deficiencies. Specifically, issuers are required to disclose the last three years of repurchase history in an initial filing on EDGAR due by 14 February 2012. After the initial filing, the ABS issuer is required to file updated information on a quarterly basis, including:Repurchase history for all outstanding ABS (regardless of whether the securities were offered in a transaction registered with the SEC) if the underlying transaction agreements include a covenant to repurchase or replace a pool asset. History of all fulfilled and unfulfilled repurchase requests, including investor demands upon a trustee and pending requests.  The disclosure requirements will apply to issuers of unregistered ABS, including municipal ABS. In relation to the new rules requiring issuers of ABS to conduct a review of the assets underlying those securities, issuers will be required to disclose the nature of the review performed, as well as the findings and conclusions of the review. Issuers will also be required to disclose:Information about how the loans in the pool differ from the loan underwriting criteria disclosed in the prospectus. Information about loans that did not meet the disclosed underwriting criteria but were nonetheless included in the pool. Information about the entity that made the determination that such loans should be included in the pool, despite not having met the disclosed underwriting standards.  The rules are available on the [SEC website](http://www.sec.gov/news/press/2011/2011-18.htm%22%20%5Ct%20%22_new).etailed Contents**1.4 APRA releases data on superannuation funds including asset exposures of superannuation funds and gender diversity of licensed trustee boards** On 19 January 2011, the Australian Prudential Regulation Authority (APRA) released its Annual Superannuation Bulletin for the financial year to 30 June 2010. Total superannuation assets increased during the year by $150.0 billion, or 13.9 per cent, to $1.23 trillion. Industry funds showed the largest growth during the year to 30 June 2010, with assets increasing by 17.9 per cent to $226.2 billion. Small funds, which include self managed super funds (SMSFs), single-member approved deposit funds and small APRA funds increased by 16.9 per cent to $392.9 billion, public sector funds by 13.8 per cent to $172.9 billion, retail funds by 11.2 per cent to $339.5 billion and corporate funds by 2.2 per cent to $56.6 billion. In the year to 30 June 2010, the average rate of return (ROR) for large funds (more than four members) was 8.9 per cent. Public sector funds recorded an ROR of 9.8 per cent, corporate funds 8.9 per cent, retail funds 8.7 per cent and industry funds recorded 8.5 per cent. In the ten years to 30 June 2010, the average ROR for large funds was 3.3 per cent per annum. Public sector funds recorded an ROR of 4.2 per cent per annum, corporate funds 3.9 per cent per annum, industry funds 3.9 per cent per annum and retail funds recorded 2.5 per cent per annum.  For the year to 30 June 2010, contributions to all superannuation entities totalled $107.7 billion, with employers contributing $72.0 billion and members contributing $34.3 billion. Contributions to large funds totalled $77.7 billion, of which retail funds received 34.0 per cent ($26.4 billion), industry funds 31.3 per cent ($24.4 billion), public sector funds 29.0 per cent ($22.5 billion) and corporate funds 5.7 per cent ($4.4 billion). Total accumulation retirement benefits are estimated to be 82.4 per cent of total assets, or $655.2 billion, at 30 June 2010 (excluding small funds), with 17.6 per cent or $139.9 billion in defined benefits.  The Bulletin also includes, for the first time, features on asset exposures of superannuation funds and on gender diversity of licensed trustee boards. The feature 'Asset exposures of superannuation funds' examines the placement of superannuation fund investment assets by analysing the most significant asset exposure in each fund, the size of all asset exposures and asset exposures to related parties. The analysis found that funds had many large asset exposures to related parties. Related party asset exposures create the potential for conflicts of interest, which may require additional management by trustees. The second Bulletin feature, 'Gender diversity of trustee boards', examines trends in gender diversity of licensed trustee boards. The analysis found there were significantly fewer women on the boards of licensed trustees than men, which is not dissimilar to the boards of the majority of entities in other APRA-regulated industries. The analysis also showed the number of licensed trustees that increased the proportion of women on their boards has risen over the past five years. Copies of the Annual Superannuation Bulletin are available on the [APRA website](http://www.apra.gov.au/Statistics/Annual-Superannuation-Publication.cfm%22%20%5Ct%20%22_new).etailed Contents**1.5 Report on oversight of carbon markets** On 18 January 2011, a US federal interagency working group led by the Commodity Futures Trading Commission (CFTC) released a report on the oversight of existing and prospective carbon markets.  In its report, the interagency group recommended that the following objectives guide the oversight of existing and prospective carbon markets.  **Objective 1 - Facilitate and protect price discovery in the carbon markets** Carbon market design and oversight should strive to ensure that carbon markets - including those for allowances, offsets and derivatives - reflect both supply and demand conditions, considering the present marginal cost of achieving emission reductions and market participants' expectations of future marginal costs of reductions. **Objective 2 - Ensure appropriate levels of carbon market transparency** Regulatory oversight must ensure that proper levels of transparency exist in carbon markets. Both pre-trade and post-trade market transparency measures should exist in order to provide timely and accurate information to carbon market participants. Transparency can generally increase the efficiency of markets by providing for more informed decision making by market participants. To encourage market participation, transparency provisions should preserve the confidentiality of traders and their positions consistent with commodities and securities laws and provide appropriate exceptions for large or 'block' trades. Regulatory oversight provisions also should ensure appropriate provision of fundamental market data relating to aggregate emissions of regulated entities and the supply of allowances and offset credits in the markets. **Objective 3 - Allow for appropriate, broad market participation** Regulatory oversight should ensure that rules regarding market participation allow entities with emission compliance obligations to efficiently meet their obligations and allow offset credit providers to bring those credits to market. More broadly, the rules and trading systems should be designed to encourage market liquidity, facilitate price discovery and allow those directly and indirectly impacted by the regulation of carbon emissions to efficiently hedge associated risks. Open market participation promotes the development of market liquidity and price discovery, which are essential to the efficient functioning of primary, secondary and derivative markets and could facilitate the ability of entities to hedge commercial risks associated with regulation of carbon emissions. **Objective 4 -  Prevent manipulation, fraud and other market abuses** Carbon markets should be free of manipulation, fraud and other market abuses. Measures should be in place to prevent price distortions, market fraud and other manipulative activities and to provide for sufficient transparency for regulators to monitor activity in the market. The report is available on the [CFTC website](http://www.cftc.gov/ucm/groups/public/%40swaps/documents/file/dfstudy_carbon_011811.pdf%22%20%5Ct%20%22_new).etailed Contents**1.6 Report on regulation of financial planners** On 18 January 2011, the US Government Accountability Office (GAO) published a report on the regulation of financial planners. The report notes that consumers are increasingly turning for help to financial planners - individuals who help clients meet their financial goals by providing assistance with such things as selecting investments and insurance products, and managing tax and estate planning. The Dodd-Frank Wall Street Reform and Consumer Protection Act mandated that the GAO study the oversight of financial planners. This report examines (1) how financial planners are regulated and overseen at the federal and state levels, (2) what is known about the effectiveness of this regulation, and (3) the advantages and disadvantages of alternative regulatory approaches.  The report is available on the [GAO website](http://www.gao.gov/new.items/d11235.pdf%22%20%5Ct%20%22_new).etailed Contents**1.7 Capital requirements for banks**  On 13 January 2011, the Basel Committee issued minimum requirements for international banks to ensure that all classes of capital instruments fully absorb losses at the point of non-viability before taxpayers are exposed to loss.  During the financial crisis a number of distressed banks were rescued by the public sector injecting funds in the form of common equity and other forms of Tier 1 capital. While this had the effect of supporting depositors it also meant that Tier 2 capital instruments (mainly subordinated debt), and in some cases Tier 1 instruments, did not absorb losses incurred by certain large internationally-active banks that would have failed had the public sector not provided support. The requirements are available on the [Bank for International Settlements website](http://www.bis.org/press/p110113.htm%22%20%5Ct%20%22_new).etailed Contents**1.8 Consultation on central securities depositories and harmonisation of securities settlement in Europe** On 13 January 2011, the European Commission launched a consultation on central securities depositories (CSDs) and the harmonisation of certain aspects of securities settlement in the European Union. CSDs perform crucial services that allow at a minimum the registration, safekeeping, settlement of securities in exchange for cash and efficient processing of securities transactions in financial markets.  **(a) Common regulatory framework for CSD**According to the consultation paper, CSDs in the European Union should operate under a common regulatory framework that ensures the robustness of their operation. Such a framework should include common definitions of CSD services, common rules on authorisation on ongoing supervision of CSDs, high prudential standards for CSDs and rules on access and interoperability. The consultation seeks stakeholders' comments on the proper design of such a common regulatory structure. **(b) Harmonisation of key aspects of securities settlement**The consultation also asks what measures could be taken to address concerns relating to the proper functioning of securities settlement. It seeks stakeholders' input on how to improve settlement discipline, i.e. that a transaction actually settles on the intended settlement date. Another important aspect of the consultation concerns the harmonisation of settlement periods, i.e. the time between the conclusion of a transaction and settlement. Currently, European securities markets do not follow a common settlement period (e.g. for equities, regulated markets either settle two days or three days after trade (T+2 or T+3)). The consultation paper is available on the [European Commission website](http://ec.europa.eu/internal_market/consultations/2011/csd_en.htm%22%20%5Ct%20%22_new).etailed Contents**1.9 Proposals to enhance company reporting and audit**  On 7 January 2011, the UK's Financial Reporting Council (FRC) published recommendations aimed at improving the dialogue between company boards and their shareholders. The FRC's report, 'Effective Company Stewardship: Enhancing Corporate Reporting and Audit', contains seven key recommendations. It responds to lessons of the financial crisis and builds on changes already made, such as the new UK Corporate Governance Code and the introduction of the Stewardship Code for institutional investors. The report proposes that the whole of the annual report and accounts should be balanced and fair, including the chairman and chief executive reports, rather than just specific parts of it as at present. While the best annual reports continue to improve, research by the FRC shows that some companies fall short of fulfilling their Companies Act requirements. Of 50 companies studied, a half to two thirds fell short in some areas, including in their reporting of principal risks. The FRC also proposes a more substantial communication role for audit committees so that they provide fuller reports to shareholders, particularly in relation to the risks faced by the business. The auditors' report should, in turn, include a new section on the completeness and reasonableness of the audit committee report, particularly in relation to the dialogue between them and the Committee. The key recommendations included in the report are: 1. Directors should take full responsibility for ensuring that an annual report, viewed as a whole, provides a fair and balanced report on their stewardship of the business.  2. Directors should describe in more detail the steps that they take to ensure: The reliability of the information on which the management of a company, and therefore directors' stewardship of the company, is based; and Transparency about the activities of the business and any associated risks.  3. The growing strength of audit committees in holding management and auditors to account should be reinforced by greater transparency through: Fuller reports by audit committees explaining, in particular, how they discharged their responsibilities for the integrity of the annual report and other aspects of their remit (such as their oversight of the external audit process and appointment of external auditors); and An expanded audit report that includes a separate new section on the completeness and reasonableness of the audit committee report and identifies any matters in the annual report that the auditors believe are incorrect or inconsistent with the information contained in the financial statements or obtained in the course of their audit.  4. Companies should take advantage of technological developments to increase the accessibility of the annual report and its components.  5. There should be greater investor involvement in the process by which auditors are appointed.  6. The FRC's responsibilities should be developed to enable it to support and oversee the effective implementation of its proposals.  7. The FRC should establish a market participants group to advise it on market developments and international initiatives in the area of corporate reporting and the role of assurance and on promoting best practice.  The report is available on the [FRC website.](http://www.frc.org.uk/images/uploaded/documents/Effective%20Company%20Stewardship%20Final3.pdf%22%20%5Ct%20%22_new)etailed Contents**1.10 Consultation on EU framework to deal with future bank failures** On 6 January 2011, the European Commission published a consultation paper on a European crisis management framework for the financial sector. Currently, there are very few rules at EU level which determine which actions can and should be taken by authorities when banks fail and, for reasons of financial stability, cannot be wound up under ordinary insolvency rules. This consultation seeks input on the technical details associated with the framework to deal with future bank failures. These include: 1. Common and effective tools and powers to deal with failing banks at an early stage, and to minimise costs for taxpayers, for example:preparatory and preventative measures such as a requirement for recovery and resolution plans ('living wills') and powers for authorities to require banks to make changes to their structure or business organisation where such changes are necessary to ensure that the institution can be resolved, under the regime. These powers would be an important element in tackling banks that have been deemed too big, complex or interconnected to fail. The objective is to ensure that the resolution tools can be used on all banks, irrespective of their size, complexity or systemic importance;powers for supervisors to take early action to remedy problems before they get out of hand such as the power to change the managers; and resolution tools which empower authorities to take the necessary action, where bank failure cannot be avoided, to manage that failure in an orderly way such as powers to transfer assets and liabilities of a failing bank to another institution or to a bridge bank, and to write down debt of a failing bank to strengthen its financial position and allow it to continue as a going concern subject to appropriate restructuring.  The overriding objective will be to ensure that banks can be resolved in ways which minimise the risks of contagion and ensure continuity of essential financial services, including continuous access to deposits for insured depositors. The framework should provide a credible alternative to the expensive bank bail-outs which have characterised the recent crisis.  2. Effective arrangements which ensure that authorities coordinate and cooperate as fully as possible in order to minimise any harmful effects of a cross-border bank failure. The suggestion is to build on existing supervisory colleges, expanding them to include resolution authorities for the purposes of crisis preparation and management. The Consultation seeks views from stakeholders on the most appropriate framework to ensure an effective resolution of cross border groups. 3. Fair burden sharing by means of financing mechanisms which avoid use of taxpayer funds. This might include possible mechanisms to write down appropriate classes of the debt of a failing bank to ensure that its creditors bear losses. Any such proposals would not apply to existing bank debt currently in issue. It also includes setting up resolution funds financed by bank contributions. In particular the consultation seeks views on how a mechanism for debt write down (or 'bail-in') might be best achieved, and on the feasibility of merging deposit guarantee funds with resolution funds.  The consultation paper is available on the [European Commission website](http://ec.europa.eu/internal_market/bank/crisis_management/index_en.htm%22%20%5Ct%20%22_new).etailed Contents**1.11 New European financial markets and systems supervisory authorities** The new European financial markets and systems supervisory authorities commenced operation on 1 January 2011. Each new authority has a new website: [The European Securities and Markets Authority (ESMA)](http://esma.europa.eu/%22%20%5Ct%20%22_new); [The European Insurance and Occupational Pensions Authority (EIOPA)](https://eiopa.europa.eu/%22%20%5Ct%20%22_new); and [The European Banking Authority (EBA)](http://eba.europa.eu/%22%20%5Ct%20%22_new). etailed Contents**1.12 Consolidated prudential standards - consultation package** On 22 December 2010, the Australian Prudential Regulation Authority (APRA) issued for consultation a discussion paper and four draft cross-industry prudential standards that consolidate and harmonise a number of prudential standards across APRA-regulated industries. The four draft standards will replace 12 current industry-specific standards and cover outsourcing, business continuity management, governance, and fitness and propriety.  The draft standards largely reflect the industry-specific prudential standards and APRA does not propose to revisit the substance of these standards. However, some amendments are proposed in order to harmonise and clarify the current requirements across the industries.  Subject to industry feedback, APRA will release the final prudential standards in mid 2011. APRA envisages that the final standards will be effective from 1 July 2011.  The discussion paper and draft prudential standards are available on the [APRA website](http://www.apra.gov.au/Policy/Consolidating-prudential-standards.cfm%22%20%5Ct%20%22_new).etailed Contents**1.13 Report on rights issues** In December 2010, the UK Rights Issue Fees Inquiry (RIFI) published its report on rights issues. The RIFI was commissioned by the Institutional Investor Council and undertaken in association with the Investment Management Association, the Association of British Insurers and the National Association of Pension Funds. According to the report, a significant portion of the fees UK listed companies pay for underwriting rights issues is not a good use of shareholders' money. The report reveals widespread concern amongst institutional investors about the high level of underwriting fees banks charge, and the lack of transparency around how much is actually paid, to whom it is paid and what is paid for. Fee levels have been increasing for many years and remain high, despite market participants' steps to reduce significantly the risks associated with rights issues. The report makes a number of recommendations, which include the following: **1. Disclosure and transparency:**Issuers should be required to disclose in more detail how much is paid in fees, who is paid and what exactly they are paid for. Issuers should be actively involved in compiling the list of sub-underwriters. Greater oversight of and improved governance of the capital raising process is required within the corporate environment. **2. Competition:**Companies without in-house expertise in equity capital raising should use non-conflicted, independent advice. Companies should consider putting underwriting out to competitive tender. Investors, issuers and banks should explore how to improve the market for sub-underwriting. **3. Shareholder involvement:**Institutional investors should develop guidance as to what they expect of their companies in a rights issue. Shareholders should be more willing to be taken 'off market' and engage with issuers and their advisers in an open manner.  The report is available on the [Institutional Investor Council website](http://www.iicouncil.org.uk/docs/rifireport.pdf%22%20%5Ct%20%22_new).etailed Contents**1.14 Financial literacy resources**Under an Australian Research Council (ARC) grant obtained in 2010, the Centre for Corporate Law and Securities Regulation at the University of Melbourne is currently researching financial literacy and its link with consumer protection law. Entitled 'Safeguarding the Financial Wellbeing of Australians by Improving Financial Literacy', the project is an in depth study of the financial literacy of Australians. The project's website has a database of resources including links to financial literacy surveys and relevant consumer protection laws, regulations and guidelines of 15 countries as well as the European Union and international organisations such as the World Bank, the Organization for Economic Co-operation and Development (OECD) and the International Organisation of Securities Commissions (IOSCO).  The links and resources can be accessed on the [Centre for Corporate Law website](http://cclsr.law.unimelb.edu.au/go/centre-activities/research/financial-literacy-project%22%20%5Ct%20%22_new).etailed Contents |

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| **2.1 Report on relief decisions**On 18 January 2011, ASIC released a report outlining decisions on relief applications between 1 June and 30 September 2010. The report, 'Overview of decisions on relief applications (June to September 2010)' aims to improve the level of transparency and the quality of publicly available information about decisions ASIC makes when asked to exercise its discretionary powers to grant relief from provisions of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act), the [National Consumer Credit Protection Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "Default) (National Credit Act) or the [National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111363" \t "Default) (Transitional Act).ASIC uses its discretion to vary or set aside certain requirements of the law where the burden of complying with the law significantly detracts from its overall benefit, or where ASIC can facilitate business without harming other stakeholders.Report 226 summarises situations where ASIC has exercised, or refused to exercise, its exemption and modification powers under the Corporations Act, the licensing and responsible lending provisions of the National Credit Act and the registration provisions of Schedule 2 to the Transitional Act. Decisions by ASIC to refuse to exercise its powers are described on an anonymous basis.The report also provides examples of decisions that demonstrate how ASIC has applied its policy in practice which should be of particular interest for participants in the capital markets and financial services industry.Report 226 also highlights instances where ASIC has decided to adopt a no-action position regarding specified non-compliance with statutory provisions. It includes an appendix detailing the relief instruments ASIC executed.ASIC can exempt or modify the Corporations Act under the provisions of Chapters 2D (officers and employees), 2J (share buy-backs), 2L (debentures), 2M (financial reporting and audit), 5C (managed investment schemes), 6 (takeovers), 6A (compulsory acquisitions and buy-outs), 6C (information about ownership of entities), 6D (fundraising) and 7 (financial services) of the Corporations Act.ASIC also has powers to grant relief under the National Credit Act from the licensing provisions under Chapter 2 and the responsible lending conduct provisions under Chapter 3. ASIC has powers to give relief from the registration provisions under Schedule 2 of the Transitional Act. Report 226 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \t "_new).etailed Contents**2.2 Market supervision report**On 17 January 2011, ASIC released a report (Report 227) outlining key operational statistics and outcomes of its market and participant supervisory functions for the reporting period 1 August to 31 December 2010 and markets-related deterrence outcomes from 1 January 2009 to 31 December 2010. ASIC assumed responsibility for market supervision and real-time surveillance of trading from ASX on 1 August 2010. ASIC also supervises compliance with market integrity rules, compliance with the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and ensures that Australian Financial Services Licence conditions are met by market participants.During the first quarter of market surveillance at ASIC, there were 28,512 trading alerts, with 91 matters requiring further consideration. This is consistent with the number of alerts and referrals received by ASX in previous quarters. Seventeen matters were referred for investigation and just over half of those investigations commenced within 30 days of a matter having been identified. Two of these matters were referred from the ASX. The matters referred for investigation involved potential insider trading (10), market manipulation (one) and possible breaches of the market integrity rules (four) and continuous disclosure obligations (two). In addition to the 17 markets matters, a further four participant matters were identified during ASIC's participant surveillance visits and referred for investigation - two of which relate to alleged unauthorised trading. Matters concerning problematic algorithms have also been identified during ASIC's work with participants. ASIC is continuing to work with market participants and their clients to reduce the risk of algorithms having a negative impact on market integrity. Report 227 is available on the [ASIC website](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Reports%22%20%5Ct%20%22_new).etailed Contents**2.3 ASIC standardises reporting of short positions**On 11 January 2011, ASIC issued a class order that clarifies and standardises reporting of short positions in the Australian securities market.Since 1 June 2010, short-sellers have been required to report to ASIC their short position in a listed security or other listed product. ASIC aggregates this data and publishes to the market the total of the reported short positions in these products. Since the implementation of short position reporting in June 2010, ASIC has observed different industry practices for calculating and reporting short positions, particularly among fund managers and investment banks.Following consultation with industry groups from August 2010, ASIC has clarified in class order CO 10/1037 that short-sellers will no longer be able to net-off long and short positions - where those positions are held in different capacities.For example, a fund manager who has 4,000 XYZ Ltd shares in its capacity as trustee of fund A and is short 1,000 XYZ Ltd shares in its capacity as trustee of fund B must not net-off these positions held in different capacities and must report to ASIC a short position in XYZ Ltd of 1,000 shares.ASIC's clarification of the short position reporting requirement will standardise reporting of short positions and ensure the markets have a more accurate representation of the overall short positions in section 1020B products. The class order commenced on 17 January 2011. The class order is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co10-1037.pdf/%24file/co10-1037.pdf%22%20%5Ct%20%22_new).etailed Contents**2.4 ASIC extends transitional period for compliance with breach reporting conditions in group purchasing bodies class order**On 24 December 2010, ASIC issued CO 10/1257 'Extension of period for compliance with breach reporting conditions in CO 08/1' ([CO 10/1257](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co10-1257-20101223.pdf/%24file/co10-1257-20101223.pdf%22%20%5Ct%20%22_new)).Group purchasing bodies arrange or hold cover under risk management products for others but do not issue risk management products or provide any financial product advice other than as a result of providing certain general information. Group purchasing bodies include sporting and other not-for-profit organisations which arrange insurance for third parties (e.g. players or volunteers). CO 08/1 'Group purchasing bodies' ([CO 08/1](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co08-1-20101223.pdf/%24file/co08-1-20101223.pdf%22%20%5Ct%20%22_new)) gives conditional relief from the Australian financial services licensing regime and Chapter 5C of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for certain group purchasing bodies who arrange or hold risk management products for the benefit of third parties on a non-commercial basis.The breach reporting condition in C0 08/1 provides that group purchasing bodies relying on the relief must notify ASIC in writing of matters that give the body reason to believe that it has failed, in a material respect, to comply with any of the other conditions in the relief. CO 10/1257 extends the transitional period for compliance with the breach reporting condition in CO 08/1 until 30 June 2011. The transitional period for compliance with the breach reporting conditions was otherwise due to expire on 31 December 2010.Treasury has indicated to ASIC that it may be appropriate for the regulation of group purchasing bodies and the terms of any exemption to be addressed by regulations. Treasury proposes consulting in early 2011.RG 195 'Group purchasing bodies for insurance and risk management products' ([RG 195](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RG195%20%28Final%29.pdf/%24file/RG195%20%28Final%29.pdf%22%20%5Ct%20%22_new)) explains ASIC's policy underlying the conditional relief granted in CO 08/1.etailed Contents**2.5 Access to financial advice report**On 23 December 2010, ASIC released a report titled 'Access to financial advice in Australia'.Between 2009 and 2010, ASIC conducted research into the demand and supply of financial advice in Australia. The report summarises the findings, identifies current gaps in the advice market and highlights some of the actions ASIC and the industry have undertaken to improve access to advice. The report identifies a number of issues that adversely impact access to advice:**Cost of advice:** A significant gap exists between what consumers are prepared to pay for financial advice and how much it costs industry to provide advice. **Scale of advice provided:** Many Australians, particularly those who have never previously accessed financial advice, want piece-by-piece simple advice rather than holistic advice. Many advice providers still provide holistic advice as the default option. **Consumer perceptions that advice is out of their reach:** Evidence suggests some people do not seek financial advice because they feel their financial circumstances do not warrant advice. **Consumer mistrust of financial planners:** A lack of trust in financial planners to provide unbiased, professional advice limits the number of consumers who seek advice and the value they place on financial advice.**Access to general advice and information:** The provision of general advice or factual information is less extensive than it could and should be. For many consumers general advice and factual information may be sufficient to meet their current advice needs. **Financial literacy:** Gaps in financial literacy, especially among certain demographics and in relation to certain financial topics, limits some consumers' engagement with financial matters and so stops them from seeking advice.Report 224 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \t "_new).etailed Contents**2.6 Review of 30 June 2010 financial reports and focuses for 31 December 2010**On 22 December 2010, ASIC released the results of its reviews of financial reports for the year ended 30 June 2010 and highlighted areas of focus for entities preparing their 31 December 2010 financial reports.At 30 June 2010, ASIC reviewed the financial reports of 250 listed entities and 100 unlisted entities which had a large number of users of their financial reports. In current economic conditions, these reviews continued to focus on areas including going concern assumptions, asset impairments and fair values of assets. A new area of focus for ASIC this year was the reporting of performance. ASIC reviewed the quality of the Operating and Financial Review section of the annual report and the use of non-statutory financial information for 50 of the top 200 listed companies. For the full 350 entities, ASIC reviewed the segment reporting disclosures and the classification of items within total comprehensive income. These will again be key focus areas for 31 December 2010 financial reports.ASIC intends to review the financial reports of 130 listed entities for years ending 31 December 2010.A more detailed summary of ASIC's 30 June 2010 reviews and areas of focus for the upcoming reporting period is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/10-282AD%2BASICs%2Breview%2Bof%2B30%2BJune%2B2010%2Bfinancial%2Breports%2Band%2Bfocuses%2Bfor%2B31%2BDecember%2B2010?openDocument" \t "_new).etailed Contents**2.7 Insolvency statistics from external administrator reports**On 21 December 2010, ASIC released statistics on corporate insolvencies obtained from statutory reports lodged by external administrators between 2007 and 2010, the second such report released by ASIC since external administrators' reports could be lodged electronically. ASIC's first report, Report 132 'External administrators: Schedule B statistics 1 July 2004 - 30 June 2007' ([REP 132](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_132.pdf/%24file/REP_132.pdf%22%20%5Ct%20%22_new)), was released in June 2008. ASIC's second report, Report 225 'Insolvency statistics: External administrators' reports 1 July 2007 - 30 June 2010' ([REP 225](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Reports%22%20%5Cl%20%22rep225%22%20%5Ct%20%22_new)) contains information that reflects estimates and opinions provided by external administrators in their statutory reports, including:estimated return to creditors; estimated value of a company's available assets; estimated number and value of a company's unsecured creditor debts; estimated external administrator fees; opinions about possible causes of failure; and opinions about possible misconduct by company officers. From 2011, ASIC intends to release statistics about external administrator statutory reports on an annual basis to provide more timely information for stakeholders.etailed Contents**2.8 Guidance on compensation and insurance requirements for AFS licensees**On 20 December 2010, ASIC released an updated version of Regulatory Guide 126 'Compensation and insurance arrangements for AFS licensees' ([RG 126](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg126" \t "_new)). RG 126 sets out ASIC's policy on the mandatory compensation requirements for Australian financial services (AFS) licensees, including minimum requirements for adequate professional indemnity (PI) insurance.ASIC has also updated its guidance to include new information for trustee companies providing traditional trustee company services (traditional services) to retail clients. As of 1 May 2011, all trustee companies will be required to hold an AFS licence to provide traditional services and meet certain obligations under the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). This includes having adequate arrangements in place to compensate retail clients.ASIC has also recently consulted on the dispute resolution requirements for trustee companies providing traditional services via Consultation Paper 138 'Dispute resolution requirements for trustee companies providing traditional services' ([CP 138](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp138" \t "_new)). ASIC's final policy on this issue is expected in early 2011.Trustee companies will need to take the dispute resolution requirements into account in assessing whether they have adequate PI insurance, including whether their insurance will adequately cover any claims awarded against them by external dispute resolution bodies. The revised version of RG 126 states that, to be adequate, a PI insurance policy must not have the effect of excluding claims relating to awards by state boards and specialist tribunals for claims against trustee companies in relation to their role as guardians and administrators of estates.etailed Contents |

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| **3.1 Listing rule amendments - new rules and timetables for common forms of capital raisings** On 17 January 2011, ASX released a consultation paper and exposure draft setting out proposed new listing rules and timetables to facilitate common forms of renounceable and non-renounceable capital raisings, being those capital raisings which are eligible for ASIC relief from prospectus disclosure under Class Order 08/35. ASX proposes among other things to introduce a new exception to listing rule 7.1 and new standard timetables to facilitate these capital raisings (such as 'Jumbo offers', 'RAPIDS offers' and 'SAREOs'). The Consultation Paper is available on the [ASX website](http://www.asxgroup.com.au/media/PDFs/20110117_asx_consultation_paper_capital_raising_timetables.pdf%22%20%5Ct%20%22_new).Comments are requested by Friday 25 February 2011.etailed Contents**3.2 Submission to ASIC consultation on equity market structure regulatory framework** In November 2010, ASIC released [Consultation Paper 145](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp-145.pdf/%24file/cp-145.pdf%22%20%5Ct%20%22_new) - Australian equity market structure: Proposals.  On 21 January 2011, ASX made a submission in response to the ASIC Consultation Paper. The ASX submission is available on the [ASX website](http://www.asxgroup.com.au/media/PDFs/110121ASX_Submission_to_ASIC_CP_145_%28final%29.pdf%22%20%5Ct%20%22_new).etailed Contents**3.3 Listing rules on trading policies** On 1 January 2011, new listing rules about the policies governing trading in a listed entity's securities by its directors and other key management personnel came into effect.  The requirements are set out in listing rules 12.9 to 12.12.  At the same time there were consequential amendments to Appendix 3Y - Change of Director's Interests Notice and a new Guidance Note 27 was issued to assist listed entities to understand and comply with their obligations under the new listing rules. [Companies Update 11/10](http://www.asx.com.au/resources/newsletters/companies_update/archive/CompaniesUpdate_20101209_1110_HTML.htm%22%20%5Ct%20%22_new) announced the amendments and included responses to queries ASX has received in relation to trading policies.  etailed Contents**3.4 Amendment to ASX listing rule 8.14** On 24 January 2011, an amendment to listing rule 8.14 came into effect that permits listed entities and their registries to charge a reasonable fee for registering paper-based off-market transfers.  Listed entities must notify ASX Listings of the amounts which they propose to charge, and sufficient evidence to enable ASX Listings to determine if the fee proposed is reasonable, before they may start charging the fee. A new Guidance Note 28 'Transfers and Registration: Fees for registering Paper-based Transfers in Registrable Form' has been issued to accompany the amended rule. The proposal to amend listing rule 8.14 was first exposed for public comment in the 2007 Omnibus Listing Rule Amendments Exposure Draft released on 20 June 2007. [Companies Update 01/11](http://www.asx.com.au/resources/newsletters/companies_update/archive/CompaniesUpdate_20110124_0111_HTML.htm%22%20%5Ct%20%22_new), announcing the amendment, is available on ASX.com.au.etailed Contents**3.5 Reports** On 7 January 2011 ASX released:the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/DEC_MA_MONTHLY_ACTIVITY.pdf%22%20%5Ct%20%22_new); the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2011/notice2011_002.pdf%22%20%5Ct%20%22_new); and the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/110107ASX_Compliance_MA_Report_Dec10.pdf%22%20%5Ct%20%22_new) for December 2010.etailed Contents |

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| **4.1 Northern Energy Corporation Limited - Panel decision** On 18 January 2011, the Takeovers Panel announced that it has accepted an undertaking from Northern Energy to make corrective disclosure and has declined to make a declaration of unacceptable circumstances in response to an application dated 10 December 2010 from Arkdale Pty Ltd, a wholly owned subsidiary of New Hope Corporation Limited, in relation to the affairs of Northern Energy Corporation Ltd. Northern Energy is the subject of an off-market cash takeover bid by Arkdale. Arkdale submitted that there were information deficiencies in the target's statement and accompanying independent expert report and technical report. Northern Energy has agreed to despatch a supplementary target's statement, expert report and technical report, dealing with the following issues (among other things): Clarifying that the independent expert considers it more appropriate that Northern Energy shareholders have greater regard to the lower valuation range previously included in the independent expert report, which is based on the expert's assumption that shareholders will be diluted by a capital raising to partially meet funding requirements for the Maryborough project. Stating that presentation of exploration targets in the target's statement as 'resources' was inappropriate and re-presenting Northern Energy's JORC compliant resources and reserves in a separate table. Providing further disclosure explaining how the independent expert and technical expert took into account non-company related factors in their valuation of Northern Energy. Providing further disclosure explaining how the independent expert derived the equity beta1 for the Discounted Cash Flow valuation of the Maryborough project and conducted a cross-check of that valuation. Northern Energy has provided a draft supplementary target's statement to the Panel to address the deficiencies. The Panel is satisfied with the corrective disclosure. Northern Energy has undertaken to lodge the supplementary target's statement with ASIC, release it to ASX and to despatch it to Northern Energy shareholders as soon as practicable. The Panel is satisfied with the undertaking and for this reason has declined to make a declaration of unacceptable circumstances. etailed Contents**4.2 Viento Group Limited - declaration of unacceptable circumstances** On 13 January 2011, the Takeovers Panel announced that it has made a declaration of unacceptable circumstances in relation to an application dated 14 December 2010 by Viento Group Limited in relation to its affairs. Viento Group Limited is a listed company. Viento applied to the Panel for a declaration of unacceptable circumstances and made submissions, including that: Mr Allen Caratti, Mr Michael Carter, Timebuild Pty Ltd, Delta Ace Pty Ltd, Mammoth Nominees Pty Ltd, Gucce Holdings Pty Ltd, Indian Ocean Capital (WA) Pty Ltd, Ms Tina Bazzo and Ms Samantha Ferguson-Smith are associates in relation to Viento; and the conduct of these parties, and structural links and relationships between them, evidence that they each have voting power in 30.60% of Viento. Viento submitted that the circumstances were unacceptable because they constituted breaches of section 6061 (20% prohibition) and section 671B (substantial holding provisions). It also submitted there were breaches of section 672B (tracing notice provisions). It submitted that the circumstances resulted in the acquisition of control of Viento not taking place in an efficient, competitive and informed market (section 602(a)) and the market not being fully informed (section 602(b)). The Panel considers that the persons referred to above (the Associated Parties) are associated:under section 12(2)(b) for the purposes of controlling or influencing the composition of Viento's board or the conduct of Viento's affairs; or under section12(2)(c) in relation to the affairs of Viento.  The Panel further considers that the Associated Parties' voting power in Viento increased beyond the 20% threshold in section 606 as a result of share acquisitions which occurred without using one of the exceptions in section 611. The Panel considers that the combined voting power of the Associated Parties with respect to Viento has not been disclosed in accordance with Chapter 6C of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  Further, the Panel considers that each of Mr Carter, Ms Ferguson-Smith, Ms Bazzo and Mr Caratti gave deficient responses to tracing notices under section 672A.  The factors taken into account by the Panel included:structural and financial links between the Associated Parties; the conduct of the Associated Parties; a common purpose in seeking the appointment to the Viento board of Mr Carter; and family and other relationships between the Associated Parties.  On 19 January 2011, the Panel announced its final orders, the effect of which includes:Shares acquired by Delta Ace Pty Ltd, Timebuild Pty Ltd, Mammoth Nominees Pty Ltd, Gucce Holdings Pty Ltd and Indian Ocean Capital (WA) Pty Ltd (IOCWA) which represent in excess of 20% of the total voting power which exists in Viento at present (Sale Shares) are to be vested in the Commonwealth on trust for ASIC to sell (using an investment bank or stock broker) and return the proceeds net of costs to the owners. Until the steps described in above are completed, the ability of the Associated Parties to vote their remaining Viento shares is scaled back such that the combined votes of IOCWA, Timebuild and Delta Ace do not exceed 20%. The Associated Parties may rely on the exception in Item 9 of section 611 of the Corporations Act (the '3% creep') to increase their combined holdings but based on a 20% holding and not taking into account the Sale Shares. Each of the Associated Parties must disclose their relevant interests and association in a substantial holder notice. etailed Contents**4.3 Revised guidance notes consultation** The Takeovers Panel has announced that it is consulting on the following revised guidance notes:Guidance Note 6 (Minimum bid price) Guidance Note 13 (Broker handling fees) Guidance Note 15 (Trust schemes)   Some of the more important changes are identified below.  **(a) Guidance Note 6 (Minimum Bid Price)**  Guidance Note 6 deals with the Panel's approach to the requirements of section 621(3) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). That section requires that the consideration offered for securities under a bid must be at least as much as was provided, or agreed, by the bidder or an associate for such securities in the four months before the date of the bid. Guidance Note 6 pre-dates ASIC's regulatory guide RG 163, so one option is to withdraw it. The consultation paper also asks whether GN 6 should address whether foreign cash is 'non-cash consideration' for chapter 6 purposes and whether GN 6 should specifically apply to schemes of arrangement.  **(b) Guidance Note 13 (Broker Handling Fees)**  Guidance Note 13 deals with the Panel's approach to bidders offering handling fees to brokers for soliciting acceptances. The Panel has clarified that all aspects of a fee will be considered when it is deciding whether unacceptable circumstances exist. The consultation paper asks whether the limits on fees set out in GN 13 should be changed. **(c) Guidance Note 15 (Trust Schemes)**Guidance Note 15 provides guidance on funding arrangements for the cash component of bid consideration. Merging listed managed investment schemes achieves a financial, structural and business effect similar to a takeover. The Panel introduced GN 15 because of a concern that the mechanism for merging them was not directly regulated by any administrative body or tribunal. The rewrite reduces areas of duplication and updates the note. The consultation draft asked for comments on whether:a responsible entity of a target (or a related body) giving up management rights over the target only needs to get approval if it is a related party transaction; and the practice of getting an expert's report on both the 'fair and reasonable' test and the 'best interests' test, which is not uncommon, should continue.  The draft revised guidance notes are available on [Takeovers Panel website](http://www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=CP" \t "_new).etailed Contents |

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