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We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | |  | |      |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](http://www.law.unimelb.edu.au/bulletins/167-July-2011.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/167-July-2011.htm%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1 UK shareholder voting trends**   On 15 July 2011, the UK proxy advisory firm PIRC published preliminary data analysing voting trends at UK companies in the first six months of 2011. The data is for 287 AGMs.   Remuneration is the issue over which companies can typically expect the most opposition. The average oppose vote on a remuneration report was 6.1%, with the average abstention 3.14%. This compares to equivalent figures for the whole of 2010 of 5.6% and 2.4%. For 2008, the average oppose was just 3.3% with an average abstention of 2.2%. In 2008, 82.6% of remuneration reports were passed with a vote against of less than 5%. By the first half of this year the figure had dropped to 66%.    The issue that is second to remuneration in terms of the average level of shareholder opposition is resolutions seeking authority to call meetings on 14 days notice. The average oppose vote so far this year has been 4.5%, with the average abstention at just under 1%. In comparison, the average vote against a director election in the first half of this year was 1.7%, and the average vote against an auditor appointment was just over 1%.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.2 Joint Forum releases report on securitisation incentives**  On 13 July 2011, the Joint Forum released its Report on Asset Securitisation Incentives. The Report analyses the incentives to engage in securitisation throughout the market before the financial crisis, the distortions created by misalignments and conflicts of interest which emerged, and the interplay of incentives in the aftermath of the crisis. It also examines some of the reasons why there has yet to be a meaningful recovery in securitisation activity. The report outlines three recommendations to authorities on the tools and approaches they can employ to promote a sustainable and responsible securitisation framework.  The key findings in the report are:  The report confirms funding diversification, risk transfer, revenue generation and regulatory capital benefits as the key drivers for originators and issuers before the crisis. Investors saw securitisation as a source of high credit quality assets, portfolio diversification and attractive risk-adjusted yields. The report also reflects the ways misaligned incentives and conflicts of interest - with parties focused on increasing volumes and short-term gains - contributed to the crisis and loss of investor confidence in securitisation.  The key incentives which drove participation in securitisation markets before the crisis remain today. Originators continue to view securitisation as a source of funding while investors are still generally willing to invest given the right assets and pricing.  The return of investor appetite is important for meaningful recovery, but according to market participants, it is being hampered by macroeconomic conditions, concerns regarding the credit quality of the securitised exposures and uncertainty about pending regulation.  In any case, market participants interviewed generally expect securitisation markets to recover to levels significantly below those prior to the crisis. This is mainly driven by significantly reduced demand for investments due to the withdrawal of various arbitrage vehicles, such as certain ABCP conduits and SIVs, from the market.  The report recognises regulators can play a role in establishing a framework for securitisation that ensures that it is conducted in a prudent manner, continues to be an alternative funding source for institutions, and contributes to the availability of credit to support the real economy. They can do this by building a regulatory and supervisory framework which addresses the misaligned incentives and conflicts of interest and which supports enhanced disclosure and transparency for investors.  The report encourages policy makers, regulators and supervisors to strive for internationally and cross-sectorally consistent supervisory frameworks, and to develop and implement regulations in a timely manner.  Key recommendations:  The report sets out three recommendations (some of which build on earlier work). These recommendations specify that:  Authorities should employ a broad suite of tools to address misaligned incentives, which may include measures to improve loan origination standards, and to align compensation arrangements with long-term performance and asset quality.  Authorities should encourage markets to improve transparency to ensure that investors, other market participants, and supervisors have access to relevant and reliable information.  Authorities should encourage greater document standardisation and less product complexity, which should assist in reducing information asymmetries and stimulating liquidity in secondary securitisation markets.  The Joint Forum consists of the Basel Committee on Banking Supervision, the International Organization of Securities Commissions, the International Association of Insurance Supervisors and the Bank for International Settlements.  The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD355.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.3 IOSCO consults on issues raised for market efficiency and integrity by technological developments**  On 6 July 2011, the Technical Committee of the International Organization of Securities Commissions published a Consultation Report titled 'Regulatory Issues Raised by the Impact of Technological Changes on Market Integrity and Efficiency'  which is aimed at developing recommendations to mitigate the risks posed to the financial system by the latest technological developments, such as high frequency trading. The work is being carried out in response to a G20 Leaders request during the Seoul Summit in 2010.  The report analyses the most significant technological developments and related micro-structural issues that have arisen in financial markets in recent years, notably high frequency trading, and their impact on market structure, participants' behaviour, price discovery and formation and also on the availability and accessibility of liquidity. It also considers other micro-structural related topics such as co-location, tick sizes, fee structures, indications of interest etc. and presents an analysis on trading control mechanisms.  The report discusses issues raised by technological developments including:  the impact of technological developments;  risk controls;  trading controls;  regulatory surveillance capabilities;  conflicts of interest;  fee structures; and  co-location.  Additionally the Report outlines recent standards and recommendations developed by IOSCO in relation to market integrity and efficiency issues, including its recent work on 'Principles for Dark Liquidity'.  In addition to the consultation on the impact of technological changes, IOSCO intends to undertake work designed to address questions linked to market surveillance and market structure.  The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD354.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.4 Proposed legislative amendments to deter phoenix company activity and protect employees' superannuation**  On 5 July 2011, the Australian Government released proposed amendments to the [Taxation Administration Act 1953](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6441" \t "Default) designed to protect employees' superannuation from so called 'phoenix' companies. Fraudulent phoenix activity involves the deliberate liquidation of a company to avoid paying liabilities - including employee entitlements, such as superannuation and taxes. The business then 'rises' and continues operations through another corporate entity, controlled by the same person or group of individuals, often with a very similar name and free of the debts.  The proposals amend the Taxation Administration Act 1953 by:  extending the director penalty regime beyond its current application to Pay As You Go (PAYG) withholding to make directors personally liable for their company's unpaid superannuation guarantee amounts;  allowing the Commissioner of Taxation (the Commissioner) to immediately commence recovery of all director penalties when the company's unpaid liability remains unpaid and unreported three months after the due day, regardless of the character of the company's underlying liability; and  providing the Commissioner with the discretion to prevent directors and, in some instances their associates, from obtaining PAYG withholding credits where the company has failed to pay amounts withheld to the Commissioner.  Submissions on the proposals close on 1 August 2011 to allow for the introduction of the measure in the Spring sittings of Parliament.  The draft legislation and explanatory materials are available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2073" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.5 Report on Australian not-for-profit regulator**   On 4 July 2011, the Australian Government released the 'Final Report - Scoping Study for a National Not-For-Profit Regulator' which was completed by the Australian Treasury in April 2011.   The government released a consultation paper on 21 January 2011 which sought stakeholder comment on the goals of national regulation, the scope of national regulation and the functions and form of a national regulator for the not-for-profit (NFP) sector. The report released on 4 July provides the government with a blueprint to implement a national NFP regulator.    Chapter one provides a background to the current regulatory environment of the NFP sector, including statistics on the sector as well as a discussion of its diversity. Chapter two discusses the goals of NFP regulation, noting the significant stakeholder support for the goals of harmonisation and simplification in relation to reporting requirements as well as proportionality of regulation.    Chapter three considers the scope of regulation of the NFP regulator, including the treatment of different legal forms of NFP entities as well as the role of existing regulators. It recommends that a principles-based regulatory framework be established, where the principles of regulation apply broadly across the NFP sector, regardless of entity type or industry. The chapter also recommends the introduction of a single regulator, with reporting to other regulators, such as ASIC, to be removed. The chapter notes that the role of sector specific regulators should be the subject of further review.    Chapter four discusses the registration function the regulator could perform, noting the potential efficiency gains that would result from a centralised registration process. It recommends that the regulator should determine the NFP status of entities with the determination being accepted by every Commonwealth agency.  Chapter five focuses on the statutory definition of charity. The chapter reveals general stakeholder support for the introduction of a statutory definition, consistent with the recommendation of a number of reviews and inquiries already informed by public consultation.  Chapter six considers educative functions, recommending that the role of the regulator should be to assist in educating the sector about governance and reporting standards and support understanding of the new regulatory arrangements. Chapter seven discusses fundraising, noting the high regulatory burden that results from inconsistent fundraising regulation and legislation across the states, territories and the Commonwealth.  Chapter eight provides an overview of the current reporting requirements applying to NFPs, noting their ad hoc, uncoordinated, complex and duplicative nature. The chapter discusses respondents' views on the 'report-once, use-often' framework concluding that such a framework would likely improve transparency and reduce compliance costs. It recommends that the regulator act as a central reporting coordinator of financial information. Given that there is currently no single source of public information on the activities of charities and other concessionally taxed NFP entities, chapter nine considers the desirability of a public information portal.  Chapter 10 discusses governance, disclosure and compliance requirements, noting that while some NFPs have effective policies in place, most NFPs do not. Chapter 11 discusses options for the form of a national regulator and examines three alternatives for its establishment, namely, a referral of powers by the states to the Commonwealth, a cooperative legislative regime based on model Commonwealth legislation, or a cooperative legislative regime based on model state legislation. Noting that most regulated entities in Australia currently pay regulatory charges to contribute to, or cover, the cost of regulation, chapter 12 considers funding options for the regulator.   The report is available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=035&ContentID=2054" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.6 Pillar 3 disclosure requirements on remuneration for banks issued by the Basel Committee on Banking Supervision**   On 1 July 2011, the Basel Committee on Banking Supervision issued final Pillar 3 disclosure requirements for remuneration. The Committee's Pillar 3 disclosure requirements add greater detail to the guidance on this topic that was included in the supplemental Pillar 2 guidance issued by the Committee in July 2009. The proposals cover the main components of sound remuneration practices for banks and take full account of the Financial Stability Board's Principles for Sound Compensation Practices and their related Implementation Standards.   The Basel Committee believes that these disclosure requirements, developed in consultation with the Financial Stability Board, will support effective market discipline by allowing market participants to assess the quality of a bank's compensation practices and the incentives towards risk taking they support.    Under the additional Pillar 3 disclosure requirements on remuneration, banks will be requested to disclose qualitative and quantitative information about their remuneration practices and policies covering the following areas:  governance/committee structures;  design/operation of remuneration structure, frequency of review;  independence of remuneration for risk/compliance staff;  risk adjustment methodologies;  link between remuneration and performance;  long-term performance measures (deferral, malus, clawback); and  types of remuneration (cash/equity, fixed/variable).  The Basel Committee expects banks to comply with these requirements from 1 January 2012.   The Pillar 3 disclosure requirements on remuneration for banks are available on the [Bank for International Settlements website](http://www.bis.org/publ/bcbs197.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.7 Discussion paper on managed investment schemes**  On 30 June 2011, the Corporations and Markets Advisory Committee (CAMAC) published an issues paper on managed investment schemes. The paper is a response to the request from the Australian Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP, for CAMAC to consider a range of matters concerning managed investment schemes (MISs).  In recent years, there has been substantial growth and change in the MIS industry, not contemplated when the legislation was originally introduced. These include greater use of contract based 'enterprise' schemes (such as agribusiness schemes), alongside trust based 'investment' schemes. There has also been an increase in the number of responsible entities (REs) that operate more than one MIS or have other business operations. These developments raise complex issues concerning the adequacy of the current law, including where an MIS or its RE experiences financial stress.  The matters raised in the paper, on which submissions are sought by 30 September 2011, include the following.  **(a) Proposed key legislative reforms**  Some of the problems encountered in the external administration of some MISs can be traced to a failure to ensure, from the outset, the adequate separation of the affairs of each MIS. Also, creditors can experience difficulty in enforcing their rights.  The paper invites submissions on a number of proposed key legislative reforms that seek to:  Identify the affairs of each MIS that an RE operates. The paper proposes that all agreements entered into by an RE as principal in operating an MIS be clearly identified and recorded. This would complement the obligation on an RE to keep separate the property of each MIS.  Place controls on the use of scheme property. The paper proposes that property of an MIS be used only for the purposes of that MIS. This would prevent an RE from using the property of one MIS to pay debts incurred by the RE in operating another MIS.  Set out the rights of creditors of each MIS. The paper puts forward a proposal to give creditors of an MIS direct rights against scheme property, similar to the rights of creditors of a company. This would represent a change from the current position, which requires creditors to go through the RE for payment (through a process known as subrogation). This enhanced position for creditors would realign the legislative balance between members and creditors.  **(b) Transfer of a viable MIS**   The paper looks at various ways to assist the process of replacing an RE of an ongoing MIS, particularly where this needs to be done on short notice. It proposes various amendments to overcome the disincentives for an entity to act as a temporary responsible entity in an interim period before a new RE can be found.  The paper also discusses other possible obstacles to replacing the RE of an ongoing MIS, including remuneration arrangements that favour an outgoing RE.  **(c) Restructuring a potentially viable MIS**  One of the principal obstacles in practice to restructuring a financially stressed MIS can be the difficulty in stabilising its affairs, at least temporarily, while the likelihood of its rehabilitation can be determined. The paper outlines a voluntary administration procedure specifically designed for MISs, which would involve a wide ranging moratorium to allow an independent assessment of the potential financial viability of an MIS and how its rehabilitation might be achieved.  **(d) Winding up a non viable MIS**  The paper raises various options that may assist in winding up the affairs of a non viable MIS, including the possibility of a liquidation procedure specifically designed for MISs.  **(e) Other matters**  The paper considers possible changes to the law governing the convening of scheme meetings and the regulation of cross guarantees entered into by the RE, as well as whether scheme members should have statutory limited liability.  The discussion paper is available on the [CAMAC website](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFDiscussion+Papers/$file/MIS_DP_Jun11.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.8 Bank for International Settlements annual report assesses the global economy**  On 26 June 2011, the Bank for International Settlements (BIS) published its annual report. According to the report, over the past year, the global economy has been moving towards self-sustaining growth, albeit in fits and starts. In emerging markets, growth has been strong, and advanced economies are recovering.  However, the numerous legacies and lessons of the financial crisis require attention. In many advanced economies, high debt levels still burden households as well as financial and non-financial institutions, and the consolidation of fiscal accounts has barely started. International financial imbalances are re-emerging. Highly accommodative monetary policies are becoming a threat to price stability. Financial reforms have yet to be completed and fully implemented.  On regulatory reform, progress has been impressive, the report notes, but critical steps remain. Among these are the full and timely implementation of Basel III; the adoption of measures to address the systemic risks associated with very large global financial institutions; and the design of regimes to ensure the orderly resolution of such institutions in the event of their failure. As a complement to these efforts, the report argues, the data frameworks that should serve as an early warning system for financial stress need to be improved.   The annual report is available on the [BIS website](http://www.bis.org/publ/arpdf/ar2011e.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.9 Consultation paper on financial crime**  On 22 June 2011, the UK Financial Services Authority (FSA) published a consultation paper titled 'Financial crime: a guide for firms' (CP11/12). The proposed financial crime guide aims to draw together existing guidance in a form that is easier for industry to digest in addition to setting out good and bad practice the FSA found in its latest thematic reviews into high risk customers and into mortgage fraud. It sets out guidance on anti-money laundering, terrorist financing, fraud, data security, bribery and corruption, sanctions, and weapons proliferation financing.  The consultation paper is available on the [FSA website](http://www.fsa.gov.uk/pubs/cp/cp11_12.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.10 PCAOB issues concept release on auditor's reporting model**  On 21 June 2011, the US Public Company Accounting Oversight Board (PCAOB) issued a concept release to discuss alternatives for changing the auditor's reporting model.  The Board is seeking comment on alternatives and other matters presented in the concept release regarding possible enhancements in the auditor's reporting model. The auditor's report is the primary means by which the auditor communicates to investors and other financial statement users about information regarding the audit of the financial statements.  The concept release presents several alternatives for changing the auditor's reporting model and is seeking specific comment on these or other alternatives that could provide investors with more transparency in the audit process and more insight into the company's financial statements or other information outside the financial statements. These alternatives include:  an auditor's discussion and analysis;  required and expanded use of emphasis paragraphs;  auditor assurance on other information outside the financial statements; and  clarification of language in the standard auditor's report.  The concept release is available on the [PCAOB website](http://pcaobus.org/Rules/Rulemaking/Pages/Docket034.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.11 Legislation granting shareholders additional power over executive remuneration passes Australian Parliament**  On 20 June 2011, the [Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=124604" \t "Default) was passed by the Senate without amendment which means that the Act has passed both Houses of Parliament.  As noted previously in the Corporate Law Bulletin, the Act implements the government's response to the recommendations made by the Productivity Commission in its inquiry into Australia's remuneration framework. For a summary of the Productivity Commission report on remuneration, see item 1.13 in [Corporate Law Bulletin No 149](http://my.lawlex.com.au/news.asp?id=7611&sp=1" \l "0113" \t "Default) (February 2010).  The Revised Explanatory Memorandum to the Act identifies the following key features contained in the Act:  strengthening the non-binding vote on the remuneration report, by requiring a vote for directors to stand for re-election if they do not adequately address shareholder concerns on remuneration issues over two consecutive years. Shareholders will have the opportunity to remove the directors if the company's remuneration report has received a "no" vote of 25% or more at two consecutive annual general meetings;  increasing transparency and accountability with respect to the use of remuneration consultants;  eliminating conflicts of interest by prohibiting directors, executives and their closely related parties from participating in the vote on the remuneration of key management personnel;  ensuring that remuneration remains linked to performance by prohibiting hedging of incentive remuneration by directors and executives;  requiring shareholder agreement for declarations of "no vacancy" at an annual general meeting, should the number of board positions filled be less than the maximum number specified in the company's constitution;  prohibiting proxy holders from "cherry picking" the proxies they exercise, by requiring that any directed proxies that are not voted default to the Chair, who is required to vote the proxies as directed; and  reducing the complexity of the remuneration report by confining disclosures in the report to the key management personnel.  Most of the reforms took effect from 1 July 2011 with the reforms dealing with proxies taking effect from 1 August 2011.  During the debate in the Senate, the Opposition introduced an amendment that would make the threshold for the vote on the remuneration report 25% of all voting shares on issue instead of 25% of the number of votes cast at the annual general meeting. The Greens party introduced an amendment during the Senate debates that would restrict companies from paying to any of their key management personnel remuneration that exceeds 30 times the average salary or wage of a full time employee of the company. Both of these proposed amendments were defeated.  The Act (as passed by both Houses of Parliament) and the Revised Explanatory Memorandum are available on the [Comlaw website](http://www.comlaw.gov.au/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.12 Review of the Singapore Companies Act**  On 20 June 2011, the Singapore Ministry of Finance (MOF) announced that it is seeking feedback on the 'Report of the Steering Committee for Review of the Companies Act'.  The Steering Committee was set up by the MOF in October 2007 to carry out a fundamental review of the Companies Act. The review is aimed at ensuring an efficient and transparent corporate regulatory framework that supports Singapore's growth as an international hub for both businesses and investors.  In its review, the Steering Committee considered existing legislation in jurisdictions such as Australia, New Zealand, the United Kingdom and the United States. The Steering Committee recommended that the Companies Act should contain core company law, while provisions relating to specific types of companies (e.g. foreign companies) should be in legislation specifically dealing with such entities.  The Steering Committee's Report comprises six chapters and 217 recommendations:  Chapter 1 - Directors;  Chapter 2 - Shareholders' Rights and Meetings;  Chapter 3 - Shares, Debentures, Capital Maintenance, Schemes, Compulsory Acquisitions and Amalgamations;  Chapter 4 - Accounts and Audit;  Chapter 5 - General Company Administration; and  Chapter 6 - Registration of Charges.  The report of the Steering Committee is available on the [Ministry of Finance website](http://app.mof.gov.sg/pc_coact_2011.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.13 Guiding principles on business and human rights endorsed by the UN Human Rights Council**   In the April 2011 issue of the [Corporate Law Bulletin](http://my.lawlex.com.au/news.asp?id=8869&sp=1" \t "Default) it was noted that in March 2011, the United Nations released a set of Guiding Principles for Business and Human Rights. The Guiding Principles seek to provide for the first time an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity.   On 16 June 2011, the United Nations Human Rights Council endorsed the Guiding Principles.   The Guiding Principles are the product of six years of research and extensive consultations, led by the Secretary-General's Special Representative for Business and Human Rights, Professor John Ruggie, involving governments, companies, business associations, civil society, affected individuals and groups, investors and others around the world.   The Guiding Principles outline how States and businesses should implement the UN 'Protect, Respect and Remedy' Framework in order to better manage business and human rights challenges. The Guiding Principles highlight what steps States should take to foster business respect for human rights; provide a blueprint for companies to know and show that they respect human rights, and reduce the risk of causing or contributing to human rights harm; and constitute a set of benchmarks for stakeholders to assess business respect for human rights.  The principles are organised under the UN Framework's three pillars:  The state duty to protect human rights;  The corporate responsibility to respect human rights; and  The need for greater access to remedies for victims of business-related abuse.  The Guiding Principles are available on the [Special Representative for Business and Human Rights website](http://www.business-humanrights.org/SpecialRepPortal/Home" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.14 Study of corporate governance practices related to shareholder democracy in Canadian listed companies**  On 15 June 2011, the Canadian Coalition for Good Governance released the results of a study focused on the adoption of corporate governance best practices related to shareholder democracy among Canadian issuers in the S&P/ TSX Composite Index (the "Index"). The practices included:  The appointment of a chair or lead director who is independent of management;  Holding annual director elections with individual director by director votes;  Implementation by the board of a "majority voting" policy;  Detailed disclosure of voting results for director elections; and  The holding of an annual 'Say on Pay' shareholder advisory vote.  The key findings are:  While slightly more than one third of Index issuers in 2003 had appointed an independent chair, by 2010 the majority of Index issuers had done so - representing 70% of the Index by market capitalization. By 2010, more than two thirds of the boards that did not have an independent chair had appointed an independent lead director, up from 25% in 2003. As a result, by 2010 approximately 88% of Index company boards (92% by market capitalization) had either an independent chair or a lead director.  Boards with directors having staggered or multi-year terms are now rare in Canada. Only six Index issuers, representing less than 1% of the market capitalization of the Index, still do not hold annual elections for each director.  By 2010, over 80% of Index issuers (94% by market capitalization) voluntarily permitted shareholders to vote "for" or to "withhold" their votes for each director individually, a dramatic change from 2003 when no issuer had this practice.  By 2010, more than half of all Index issuers (81% by market capitalization) had adopted a "majority voting" policy - while in 2003 no issuer had adopted majority voting.  In the 2010 proxy season, 62% of Index issuers (78% by market capitalization) disclosed detailed voting results for their director elections, up from none in 2003.  In 2010, 44 issuers (19% of Index issuers and 55% by market capitalization) of various sizes and from various industry sectors voluntarily held 'Say on Pay' advisory votes. The number of 'Say on Pay' adoptees has since grown in 2011 to 80.  Many leading Canadian companies have failed to allow shareholders to be able to effectively vote for or against each individual director nominee. As at 31 December 2010, 43% of the issuers in the Index had not adopted majority voting - with these companies representing about 20% of the market capitalization of the Index.  The report is available on the [Canadian Coalition for Good Corporate Governance website](http://www.ccgg.ca/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.15 Research report - why do employees participate in employee share plans?**  The Employee Share Ownership Project at Melbourne Law School has published its latest research report titled 'Why do employees participate in employee share ownership plans?'. Although empirical research has recently been undertaken into the current incidence and forms of broad-based employee share ownership plans (ESOPs) in Australia, and the motivations and objectives of employers in implementing them, the reasons why non-executive Australian employees elect or decline to participate in ESOPs remain unclear. Where shares or options are provided to employees as a 'gift', the answer may be considered comparatively straightforward but, in cases of contributory plans, do employees only participate when they perceive the company to be a good financial investment or do non-financial considerations such as the desire to take part in company decision-making also play a role? Are employees' decisions influenced by their degree of commitment to their employer or are attitudes towards employee share ownership in general more important? What, moreover, is the significance of demographic factors such as age, gender and income? The answers to these questions have implications for corporate governance, human resource practice and public policy.  This research report presents findings from a survey of employees at two major Australian companies with operating ESOPs. Part 2 of the report explains the background and methodology behind the survey. Parts 3 and 4 set out, respectively, the key characteristics of the sample and the basic results, while Part 5 directly tests the above questions.  The research report is available on the [Social Science Research Network website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1873802" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.16 Twilight seminars in Sydney and Melbourne on the Centro judgment**   The Centro judgment, in which the Federal Court found that eight Centro directors and executives failed in their duties when they approved the company's accounts, is one of the most important Australian judgments in recent years in the areas of corporate law and corporate governance. Some of the many issues raised in the judgment include:  The responsibility of directors for the financial accounts including, according to the court, the responsibility of all directors to read, understand and focus on their companies' financial statements.  What is required for directors to have what the court referred to as the necessary level of financial literacy and what are the implications for the appointment of directors?  What is necessary for directors to undertake what the court referred to as "proper diligence" in relation to the financial statements?  What is the right balance between relying on others for the accuracy of the financial statements (such as the chief financial officer, the auditors, the audit committee and directors with financial expertise) and the need for proper diligence by all directors?  What board processes (including deciding what information the board receives) can help in ensuring that the board focuses on what is important - including the financial statements - and not be swamped with information and documents?  Has this judgment set the standard too high for non-executive directors?  This twilight seminar, which is being held in both Sydney and Melbourne, brings together leading speakers to discuss these and other topics.  Dates:  Melbourne Wednesday 27 July 2011; Sydney Thursday 28 July 2011  Time:  5.30pm - 7.00pm  Speakers:  Sydney seminar: Dr Robert Austin; Tim Bednall and Alan Cameron AO Melbourne seminar: David Crawford AO; Diana Nicholson and Carolyn Reynolds   Further details and a registration form are available on the [Melbourne Law School website](http://cclsr.law.unimelb.edu.au/files/directorsdutiesandcentrojudgment.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1)  **1.17 Supreme Court of Victoria commercial law conference**   On 15 August 2011, the Supreme Court of Victoria commercial law conference is being held at the Banco Court, Supreme Court of Victoria, 210 Williams St, Melbourne (from 2pm to 5.45pm). The speakers and topics are:  'Director's Duties after James Hardie and Centro' - Dr Robert Austin, Senior Legal Consultant, Minter Ellison and former judge of the Supreme Court of New South Wales  'ASX Disclosure and Misleading Conduct' - Neil Young QC  'The Virtues and Vices of Class Actions: A View from the US' - Professor Deborah R Hensler, Stanford Law School  'Developments in Civil Procedure: Good and Bad' - The Hon Justice Judd  The conference is a joint initiative of the Supreme Court of Victoria, Melbourne Law School and the Centre for Corporate Law and Securities Regulation.   A registration form is available on the [Melbourne Law School website](http://cclsr.law.unimelb.edu.au/files/Supreme_Court_Commercial_Conference_flyer_2011-1.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h1) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1 ASIC releases second market supervision report**  On 13 July 2011, ASIC published its second report on the supervision of markets and participants. 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.  Report 243 'ASIC supervision of markets and participants: January to June 2011' identified that during the reporting period there were 23,494 trading alerts, with 121 matters requiring further consideration. Some 35 matters were referred for investigation. These matters involved potential insider trading (17), market manipulation (6), possible breaches of the market integrity rules (10) and possible contraventions of continuous disclosure obligations (2).  In addition to the 35 markets matters, a further eight participant matters were identified during ASIC's participant surveillance visits and referred for investigation - three of which relate to supervision of representatives.  Matters concerning order management including problematic algorithms and orders for some exchange-traded funds (ETFs) have been identified in 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 and to ensure that orders from retail clients for ETFs are not priced significantly from their intrinsic value taking into account the value of the underlying reference asset. For example, ASIC has identified a number of instances where index ETFs have traded well away from the price of the underlying index.  Analysis of potential insider trading matters has identified some instances where corporate advisers have not had appropriate controls in place to ensure that there is restricted access to price sensitive information.  The time taken to commence investigations from misconduct identification has continued to fall with approximately 40% of all referrals progressing to investigation in under 30 days from identification of the misconduct.  Report 243 is available on the [ASIC website](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Reports" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h2)  **2.2 Proposals to improve unlisted property schemes disclosure**  On 12 July 2011, ASIC released a consultation paper outlining proposals to improve disclosure for retail investors considering investing in unlisted property schemes. The proposals follow an ASIC review of disclosure documents issued by responsible entities in the $28 billion unlisted retail property sector.  ASIC found a number of key disclosures were not adequately addressed, including:  the risks associated with the borrowing maturity profile and the extent of hedging;  details about property development activities (primarily timetables and funding);  the basis of valuations and the risks associated with 'as if complete' valuations;  reasons for distributions being made from sources other than income and the sustainability of these distributions over the next 12 months; and  withdrawal rights and the risks associated with withdrawal arrangements promoted to investors.  The proposals are aimed at improving the level, comparability and consistency of disclosure provided to retail investors by extending ASIC's 'if not, why not' benchmark disclosure model to unlisted property schemes. The six benchmarks address key issues including:  gearing policy;  interest cover policy;  interest capitalisation;  valuation policy;  related party transactions; and  distribution practices.  The proposals also clarify the eight disclosure principles in Section C of Regulatory Guide 46 and provide further guidance on how responsible entities should apply the principles.  1 July 2012 is proposed as the start date for responsible entities to disclose against the benchmarks and amended disclosure principles.  Consultation Paper 163 'Unlisted property schemes: Update to RG 46' is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h2)  **2.3 Focus areas for 30 June 2011 financial reports**  On 7 July 2011, ASIC released the results of its reviews of financial reports for the year ended 31 December 2010 and highlighted a number of focus areas for directors in 30 June 2011 financial reports. ASIC states that segment reporting, consolidation of controlled entities and asset impairment are some of the continuing areas of focus following the review of 130 listed entities' annual financial reports and related disclosures.  ASIC's reviews centred on areas including:  segment reporting;  consolidation of controlled entities;  use of the going concern assumption;  asset impairment;  fair value of financial assets;  financial instrument disclosures;  disclosures of estimates and accounting policy judgements;  accounting for business combinations;  related party disclosures;  operating and financial review; and  alternative profits.  A summary of ASIC's findings from reviews of 31 December 2010 financial reports and areas of focus for the upcoming reporting period are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Attachment+to+11-139MR+ASIC+focuses+attention+on+30+June+2011+financial+reports?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h2)  **2.4 Further extension of relief - funded representative actions and funded proof of debt arrangements**  On 1 July 2011, ASIC announced its intention to extend the interim class order relief granted to lawyers and funders involved in legal proceedings structured as funded representative proceedings and funding claims lodged with liquidators to prove in the winding up of an insolvent company.  The extension of the relief in Class Order [CO 10/333] Funded representative proceedings and funded proof of debt arrangements until 30 September 2011 (provided under Class Order [CO 11/555]) will enable the temporary operation of a litigation funding scheme and a proof of debt funding scheme that is characterised as a managed investment scheme without having to comply with the requirements of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act). It will also exempt a litigation funding arrangement and a proof of debt funding arrangement that is otherwise characterised as a financial product, including an interest in a single member arrangement, from complying with the requirements in the Act. These requirements include:  holding an Australian financial services (AFS) licence covering the provision of financial services in relation to the arrangement;  the general obligations imposed on the holder of an AFS licence, for example the requirement to have in place adequate arrangements to manage conflicts of interest and to have internal and external dispute resolution procedures;  preparing a Product Disclosure Statement; and  providing ongoing disclosure.  The relief in [CO 10/333] has been extended to allow additional time for the federal government to implement the legislative reform it previously announced and avoid any interim disruption that could adversely impact plaintiffs, or interfere with the timely and efficient running of litigation.  Following any law reform in this area, ASIC will consider issuing further regulatory guidance about these schemes after public consultation.  ASIC's decision to extend its relief follows a decision by the Full Court of the Federal Court in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147. The Court held that a funded class action constituted a 'managed investment scheme' within the meaning of the Corporations Act. This decision may result in litigation funders being forced to comply with the requirements for a managed investment scheme under Chapter 5C and Chapter 7 of the Act.  On 4 May 2010, the federal government announced its plan to exempt representative proceedings and proof of debt arrangements from the definition of 'managed investment scheme' in section 9 and Chapter 7 of the Act provided appropriate arrangements are in place to manage conflicts of interest.  Subsequently, in *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50 the NSW Court of Appeal unanimously held that a litigation funding agreement was a financial product under section 763A of the Act because it was a facility thorough which financial risk was managed. This decision means that a funded class action that is not a managed investment scheme may still be characterised as a financial product and need to comply with the requirements under Chapter 7 of the Act.  Class Order [CO 10/333], Funded representative proceedings and funded proof of debt arrangements and Amending Class Order [CO 11/555] and explanatory statement are available on the [ASIC website](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Instruments" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h2)  **2.5 ASIC calls for better disclosure in remuneration reports**  As listed companies prepare for the release of the 30 June 2011 financial reports, ASIC called for companies to provide more clarity on the remuneration arrangements for their directors and executives. ASIC has identified a number of areas where disclosure to shareholders can be improved based on a review of 60 remuneration reports for listed companies for the year ended 30 June 2010. These areas are:  the board's policy on the nature and amount of remuneration of the key management personnel;  the non-financial performance conditions in short-term incentive plans;  why performance conditions have been chosen; and  the terms and conditions of incentive plans.  ASIC has compiled what it regards as some of the better examples of disclosure ASIC observed during its review. These examples are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Attachment+to+11-130AD:+ASIC+calls+for+better+disclosure+in+remuneration+reports?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h2)  **2.6 ASIC 2009-10 audit firm inspection report**  On 29 June 2011, ASIC released its report summarising the results of 21 audit firm inspections completed between 1 July 2009 and 31 December 2010.  ASIC found for large firms 17 per cent of engagement files reviewed did not contain sufficient appropriate audit evidence and for other firms the figure was 31 per cent. Risk-based methods are used by ASIC to select firms, engagement files and audit areas for review.  Overall, ASIC identified three broad areas where improvements need to be made:  the sufficiency and appropriateness of audit evidence on engagement files;  the level of professional scepticism exercised by auditors in key areas of judgment; and  evidence on audit engagement files about the nature, timing and extent of engagement quality control reviews.  ASIC has reported its detailed findings separately to each of the firms.  ASIC has recently commenced inspecting audit engagement files under the new clarity standards focusing on those standards that had substantial changes. To ensure that the profession is well informed on a timely basis, ASIC intends to issue a media release on the initial overall findings from these reviews by mid-2012.  The audit inspection program public report for 2009-10 (Report 242) is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep242-published-29-June-2011.pdf/$file/rep242-published-29-June-2011.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h2)  **2.7 Extension of transition period for shorter PDS regime**  On 21 June 2011, ASIC announced its intention to extend the transition period for the shorter product disclosure statement (PDS) regime for superannuation and simple managed investment schemes.  On 8 June 2011, the federal government announced its plan to make refinements to the shorter PDS regime. These proposed refinements will allow providers of these regulated products to:  remain in the old regime until 22 June 2012;  continue to issue supplementary PDSs until 22 June 2012; and  opt into the new regime from 22 June 2011 if they are ready to.  Class Order [CO 11/576] gives effect to this proposal on an interim basis. This is to allow time for the federal government to implement the refinements to the shorter PDS regime it previously announced, and to avoid any interim disruption that could adversely impact retail investors and providers of superannuation and simple managed investment scheme products.  The federal government's announcement also included a number of other changes to clarify or refine the operation of the shorter PDS regime. These refinements include:  changes to confirm that pure risk products are excluded from the regime (irrespective of whether they are provided through a superannuation fund or not);  changes to clarify that combined defined benefit and accumulation products are included in the regime; and  amending the regulations to allow for situations where applications are electronically lodged.  [CO 11/576] does not give effect to these proposed changes.  [CO 11/576] is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/2011+Class+Orders?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h2) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1 ASX approves Chi-X's application to utilise clearing and settlement arrangements**   On 20 June 2011, ASX announced its approval of an application by Chi-X Australia Pty Ltd (Chi-X) to utilise ASX's Trade Acceptance Service (TAS), which will enable participants to seamlessly clear and settle transactions from both ASX and Chi-X.   ASX developed the TAS for potential new market operators in preparation for competition for market services in Australia.  New entrants must have clearing and settlement arrangements in place that are approved by the Minister for Financial Services and Superannuation before they can begin operating alternative trade execution venues.  Clearing and settlement arrangements provided by ASX's clearing and settlement subsidiaries have been approved by the Minister for this purpose.   ASX's TAS will provide non-discriminatory access to clearing and settlement arrangements for Chi-X and any other new market operator.  The TAS enables trades in CHESS-eligible ASX-listed or quoted securities executed on any licensed trading platform to be cleared and settled by ASX Clear and ASX Settlement in an identical fashion to trades executed on ASX's own cash equity market.   On 27 June 2011, the Operating Rules of ASX Clear and ASX Settlement were amended to support the introduction of the TAS.   This is the [media release](http://www.asxgroup.com.au/media/PDFs/110620mrChi-X_to_Use_ASX_s_TAS_Final.pdf" \t "_new).  Complete details are available here about [ASX's TAS](http://www.asx.com.au/clearing/trade-acceptance-service.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h3)  **3.2 Consultation paper re change in Equity Index option contract tick value**   On 6 July 2011, ASX released a consultation paper to seek market views on changing the current Equity Index (XJO) option tick size from 1pt to 0.5pt.  This is intended to facilitate a further increase in trading activity and also provide participants with a more granulated pricing range.   ASX has recently made changes to the XJO Exchange Traded Options Market by increasing Market Makers obligations to facilitate a better quality market for participants.  XJO option trading activity has increased since this change.   If ASX decides to pursue these initiatives the market will be given at least a 3 month notice period.   This is the [Consultation Paper](http://www.asxgroup.com.au/media/asx_equity_index_xjo_option_tick_size.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h3)  **3.3 Russell/ASX Long-Term Investing Report 2011**   On 29 June 2011,  the 2011 Russell Investments/ASX Long-Term Investing Report was released.  Commissioned by the Australian Securities Exchange (ASX) and prepared by Russell's investment consulting team, the report investigates the performance of various types of investments over the 10, 20 and 25-year periods to 31 December 2010.  The report considers the real-life impact of tax, costs and borrowing on ultimate investment returns.  The aim is to provide investors with insight into how different investments have performed over the medium to long-term, in real terms.   A summary of the findings set out in the report can be found in the [media release](http://www.asxgroup.com.au/media/PDFs/110629mr1Russell_ASX_Long_Term_Investing_Report_2011_FINAL.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h3)  **3.4 Reports**   On 6 July ASX released:  the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ma110706ASX_Group_Monthly_Activity_Report_-_June_2011_-_final.pdf" \t "_new);  the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2011/notice2011_125.pdf" \t "_new); and  the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ma110706ASX_Compliance_Monthly_Activity_Report_-_June_2011_final.pdf" \t "_new)  for June 2011.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h3) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1 Bentley Capital Limited 01R - Review Panel accepts undertakings and declines to make a declaration of unacceptable circumstances**  On 6 July 2011, the Takeovers Panel announced that the review Panel has accepted undertakings from the Chairman of Bentley Capital Limited, Mr Farooq Khan, and Database Systems Limited (DBS) and Mrs Ambreen Chaudhri and has declined to make a declaration of unacceptable circumstances in response to an application dated 24 May 2011 by Bellwether Investments Pty Ltd and Mr Jim Craig in relation to the affairs of Bentley.  The applicants submitted that Mr Khan, his sister, Mrs Chaudhri and her husband, Mr Chaudhri, and their controlled entities were associated in relation to acquisitions of Bentley shares in 2009 and 2011. The initial Panel declined to make a declaration of unacceptable circumstances. The applicants sought a review of the initial Panel's decision.  The review Panel decided to consider only whether these parties were associated in relation to acquisitions in April 2011 and treated the acquisitions and circumstances in 2009 as part of the factual matrix. The review Panel did not consider whether the acquisitions and circumstances in 2009 constituted unacceptable circumstances, including because they occurred too long ago and noting the provisions in the legislation promoting prompt resolution of disputes before the Panel.  In light of the additional evidence provided to the review Panel, it considered that the acquisition of approximately 8% of the shares in Bentley by DBS in April 2011 resulted in a person's voting power in Bentley increasing otherwise than as permitted by Chapter 6 because:  Mr Khan, Mrs Chaudhri and DBS were associated in relation to the affairs of Bentley; and  Mr Chaudhri and Mrs Chaudhri were associated in relation to the affairs of Queste Communications Ltd.  However, in light of the undertakings submitted by Mr Khan, DBS and Mrs Chaudhri, the review Panel has declined to make a declaration of unacceptable circumstances in relation to the affairs of Bentley. The review Panel is satisfied that the terms of the undertakings adequately address the unacceptable circumstances. In essence, the terms of the undertakings:  require the associated parties to lodge substantial holder notices disclosing the nature of their association and their voting power;  allow Bentley shareholders (excluding the associated parties, Queste and Orion Equities Limited) to consider, and if thought appropriate, to approve the acquisition of shares in Bentley by DBS on or about 7 April 2011 (Breach Shares) pursuant to Item 7 of section 611;  if Bentley shareholders fail to approve the acquisition of the Breach Shares, require those shares to be offered to Bentley shareholders (excluding the associated parties, Queste and Orion); and  require any remaining Breach Shares to be sold under the supervision of ASIC.  The reasons for the decision are available on the [Takeovers Panel website](http://www.takeovers.gov.au/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h4)  **4.2 Viento Group Limited 02 - Panel declines to make declaration of unacceptable circumstances**  On 6 July 2011, the Takeovers Panel announced that it has declined to make a declaration of unacceptable circumstances in response to an application dated 10 June 2011 from Mariner Corporation Limited. On 29 April 2011, Mariner acquired Viento shares vested by the Panel for sale by ASIC in Viento Group Limited 01: [2011] ATP 1.  On 4 May 2011, Mariner requisitioned a meeting of Viento shareholders to replace directors. On 9 May 2011, Viento placed 11.96% of its capital to Hanscon Holdings Pty Ltd. On 23 June 2011, the requisitioned meeting was held and Mariner's resolutions to replace directors were defeated.  Mariner submitted (among other things) that there were four associations:  Mr Nichevich was associated with Bell Potter Nominees Limited, which holds approximately 5.34% of Viento, or the ultimate owners of the shares in Viento held by Bell Potter Nominees.  Mr Nichevich was associated with JP Morgan Nominees Australia Pty Limited, which holds approximately 4.1% of Viento, or the ultimate owners of the shares in Viento held by JP Morgan.  Mr Nichevich was associated with Hanscon Holdings Pty Ltd and its nominee on the Viento board, Mr John Farrell.  Mr Nichevich was associated with his wife Mrs Kerry Ann Nichevich, who holds approximately 0.01% in Viento.  The Panel noted that:  The ultimate beneficial owner of the shares held by Bell Potter Nominees, Mr Richard MacLellan, had not lodged a substantial holder notice in relation to approximately 5.34% held in the name of Bell Potter and approximately 1.02% held by his own company, Vernon Finance Limited (Vernon subsequently lodged a substantial holder notice on 5 July 2011). There were some business connections between Mr MacLellan and Mr Nichevich.  Mr Nichevich had assisted Hanscon and Mr Farrell in attempting to purchase the shares vested in ASIC, rather than subscribe for new shares in Viento.  Mr Nichevich and Mrs Nichevich are husband and wife and are co-directors of another shareholder in Viento.  However, the Panel was not satisfied on the material available to it that it could draw the necessary inferences and find the alleged associations. In addition, Mrs Nichevich's interest in Viento was not material. Accordingly, the Panel was not satisfied that the circumstances were unacceptable in this case.  The reasons for the decision are available on the [Takeovers Panel website](http://www.takeovers.gov.au/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h4) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%237) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **5.1 The Centro judgment - scrutiny of company accounts and other implications for directors**  Australian Securities and Investments Commission v Healey [2011] FCA 717, Federal Court of Australia, 27 June 2011, Middleton J  (By Karen Evans-Cullen, Partner, Clayton Utz)  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/717.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/717.html" \t "_new)   **(a) Summary**  The clear message emerging from this judgment is that directors must scrutinise company accounts, and this is the message headlined in all the media reports of the decision. What is equally significant for directors is what doesn't appear in the newspaper headlines - issues such as:  do directors have to be accounting standard gurus?  how do directors spot the ticking bomb buried deep in a massive board pack?  **(b) Facts**  ASIC argued that Centro's directors had breached their duties under sections 180 and 344 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), because its 2007 annual accounts had not complied with the Corporations Act and the accounting standards:  the accounts had misclassified a number of borrowings as non-current liabilities when they were actually current;  just after the end of the 2007 financial year, Centro had given some guarantees as part of a transaction. ASIC argued that this was a material post balance date event and so should have been disclosed in the annual report; and  the board had not ensured that the CEO and CFO had provided the declaration of compliance required by section 295A.  **(c) Decision**  **(i) Misclassification of current liabilities as non-current**  Centro's 2007 annual accounts had misclassified a number of borrowings as non-current liabilities when they were actually current. The directors argued that they could not be expected to know that the liabilities in question were current liabilities within the meaning of the relevant accounting standards. Among other things, they pointed out that:  there had just been a change in the relevant accounting standard and some greyness in its interpretation; and  the documentation relating to the borrowings was complex.  The Court dismissed the directors' argument for a number of reasons:  the accounting standard's meaning of non-current liability was "straightforward"; in this regard, the Court noted that it was clearly summarised in a note to the accounts - "Borrowings are classified as current liabilities unless the Group has an unconditional right to defer settlement of the liability for at least 12 months after the balance sheet date";  even if there had been greyness, the directors had not shown how that greyness resulted in their failure to notice the misclassification; and  the complexity of the documentation was irrelevant - the directors knew that the borrowings were maturing in the short term, and a basic understanding of the meaning of current liability should have led them to ask why the borrowings had not been classified as current liabilities.  **(ii) Post balance date events**  Just after the end of the 2007 financial year, Centro had given some guarantees as part of a transaction. ASIC argued that this was a material post balance date event and so should have been disclosed in the annual report. The directors argued that, even if the guarantees were material, they had not breached their duties by failing to ensure that the guarantees were disclosed in the annual report.  On this point, the directors' argument was that they could not be held to have breached their duty through failure to notice an omission that had escaped the attention of both management and the auditors. They also argued that reasonable directors would have formed the view that the guarantees did not need to be disclosed because the borrowings which had been guaranteed were already included in the financial statements of companies which had been equity accounted for in the accounts.  The Court dismissed these arguments. It said that:  the directors were aware of the need to disclose post balance date events; and  the directors were aware of the guarantees and of their magnitude.  It followed that the directors should therefore have turned their minds to the issue of whether disclosure of the guarantees was required. There was no evidence that they had done so. Relying on general assurances from management and the auditors about the accounts' compliance with the statutory requirements did not excuse failure to raise that specific issue.  The argument that a reasonable director could have formed the view that equity accounting for the guarantees meant that they did not have to be disclosed was also dismissed. There was no evidence that the directors had formed that view.  **(iii) The section 295A certificate**  Section 295A says that the directors of a listed company cannot make their section 295(4) declaration unless the CEO and CFO have declared that, in their opinion, the annual accounts comply with the accounting standards (among other things).  ASIC successfully argued that the document provided to the Centro board did not comply with this requirement. The Court then held that the directors had breached their duties by not taking all reasonable steps to ensure compliance with section 295A.  **(d) The bigger picture**  **(i) Accounting expertise of directors**  The Court appeared to say that it was not laying down a general financial literacy standard for directors. The Court found that what was involved was a very large liability which, on a basic understanding of the meaning of "current liability", should have been disclosed in the accounts. Nevertheless, it is clear that the Court did believe that a certain level of financial literacy is an essential qualification for directors:  "All that is being alleged is that where the accounts on their face refer, as here, to classification of debt and post balance date events, the director adopting and approving the accounts should have a knowledge of and apply the basic elements of the one or two standards relevant to this proceeding ... I do consider that all that was required of the directors in this proceeding was the financial literacy to understand basic accounting conventions and proper diligence in reading the financial statements."  In the long term, this is likely to be a significant issue for directors. Where does one draw the line between "basic accounting conventions" (which directors are expected to understand) and the more arcane aspects of the accounting standards?  **(ii) Reliance**  The Court said that the importance of the annual accounts and the fact that the Corporations Act places specific responsibilities upon directors in relation to the accounts means that directors cannot delegate those responsibilities:  "Directors cannot substitute reliance upon the advice of management for their own attention and examination of an important matter that falls specifically within the Board's responsibilities as with the reporting obligations. The Act places upon the Board and each director the specific task of approving the financial statements. Consequently, each member of the board was charged with the responsibility of attending to and focusing on these accounts and, under these circumstances, could not delegate or 'abdicate' that responsibility to others."  Again, this is a relatively simple concept when large current liabilities are incorrectly classified. The Court was not dealing with allegations of mistakes or omissions buried in line items or in notes to the accounts.  **(iii) Information overload**  One aspect of the case has importance beyond the issue of the directors' scrutiny of the financial reports. The Centro directors argued that the information about the borrowings was lost in a very large board pack.  One of the Court's comments on this argument may make unwelcome reading for most listed company directors:  "A board can control the information it receives. If there was an information overload, it could have been prevented. If there was a huge amount of information, then more time may need to be taken to read and understand it. The complexity and volume of information cannot be an excuse for failing to properly read and understand the financial statements. It may be for less significant documents, but not for financial statements. [T]he directors were in possession of the information. The information was provided to the directors by management for a reason."  If this is the new information oversight standard for board meetings, it could create problems for companies. Most obviously, it may create tension between management and the board. It is not quite true to say, as the Court did, that management provides information to the directors "for a reason". Management provides the information for two reasons:  to ensure that board decisions are made on a fully-informed basis; and  to ensure that members of management do not incur personal liability for failure to properly advise the board.  Given this, it is not necessarily easy for a board to control the information it receives in order to prevent an information overload. Any push-back by the board on this front may encounter resistance from management. However, this decision highlights the need for boards to carefully manage this process and focus on the manner in which information is provided to the board. Boards need to ensure that they receive meaningful information and not merely data.  Of course, it may be that the judge intended to restrict his comments to information about the financial statements: he does draw a distinction between financial statements and "less significant documents". However, that begs the question of what constitutes "less significant documents". In the context of the Centro decision, the looming current liabilities and the material post-balance date events may have made the accounts the most significant documents before the board. At other times and in other contexts, a board may be confronting other issues and different priorities.  Even if the Court's finding that a board paper overload is no excuse for failing to read and understand those papers is restricted to matters and documents on which the directors have specific statutory duties, it seems the finding would clearly apply to matters such as takeovers (where the directors' recommendation is at the heart of the target's statement) and dividends (for which the directors have a specific statutory responsibility).  **(iv) Where to now?**  It is too soon to say that Centro marks a new line in the sand for directors: there may be an appeal from the judgment. Even if there isn't an appeal, the facts may be so unusual that the decision is not really applicable to other boards not facing similar circumstances.  Those are the optimistic responses. Realistically speaking, it is unlikely that the trend of the last quarter century - in which the minimum standards expected of directors have continued to evolve - is suddenly going to stop. In the meantime, the Centro Court's comments about the responsibility of directors to look critically at financial statements and to understand basic accounting standards must be taken on board.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h5)  **5.2 Convening of a scheme meeting - was there more than one class of shareholders for the purpose of voting?**   (By Jeremy Herz, Freehills)   Re Cellestis Ltd [2011] VSC 284, Supreme Court of Victoria, Davies J, 24 June 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2011/284.html](http://www.austlii.edu.au/au/cases/vic/VSC/2011/284.html" \t "_new)    **(a) Summary**   Cellestis Limited ('Cellestis') made an application pursuant to section 411(1) of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for an order to convene a meeting of shareholders for the purpose of agreeing to a proposed scheme of arrangement between Cellestis and its shareholders. If implemented, the scheme would result in the acquisition for cash consideration of all of the ordinary shares in Cellestis by QIAGEN Australia Holding Pty Limited ('QIAGEN Australia'). Davies J granted the orders sought.   The primary issue considered by the Court was whether there was more than one class of shareholders for the purpose of voting in a scheme meeting. Potential additional classes consisted of:  option holders whose options were to be cancelled in return for consideration; and  two directors who had granted call options over their own shares, amounting to 19.9% of Cellestis' share capital.  Davies J concluded that these did not constitute separate share classes.    Davies J also found that a valuation conducted by a group seeking to prevent the implementation of the scheme was adequately counteracted by a supplementary report by Deloitte, which wrote the independent expert report for the scheme booklet.   **(b) Facts**    Cellestis sought an order for the convening of a meeting of its shareholders for the purpose of agreeing to a proposed scheme of arrangement.  Cellestis has on issue 96,151,778 ordinary shares held by 4,857 shareholders; and 2,420,000 unlisted employee options held by 20 option holders, 19 of whom are employees of Cellestis, the other being a director of Cellestis.  It is proposed that the options will be cancelled pursuant to a deed entered into between Cellestis, QIAGEN Australia and each option holder ('Option Cancellation Deed'), with effect from the date of implementation of the scheme.  Two directors holding 23.8% of shares in Cellestis have granted QIAGEN Australia two separate call option deeds over 19.9% of the share capital, where those options can only be exercised when a competing transaction has been announced.  The directors unanimously recommend that Cellestis shareholders vote in favour of the scheme, in the absence of a superior proposal.    **(c) Decision**    Davies J referred to her own judgment in *Re Orica Limited* [2010] VSC 231 [7]-[8] to note some general principles regarding the function of the courts in applications of this kind, concluding that the basic requirements for approval of this application had been met. These functions include:  considering whether the scheme booklet has sufficient disclosure and detail to enable shareholders to make an informed decision;  considering procedural matters relating to the calling and conduct of the meeting;  ascertaining whether ASIC has had reasonable opportunity to examine the proposed scheme; and  considering whether there are issues which may preclude the Court approving the scheme, even if shareholders approve it.  Davies J then dealt with the peculiarities of this application.   **(i) Option cancellation deed**   Though it was not proposed that there be separate scheme meetings for the option holders, Davies J said that the Court should nonetheless consider whether they constituted a separate class for the purposes of voting on the scheme of arrangement. Davies J followed the recent case of *Re Foster's Group Limited* [2011] VSC 93 at [15], stating that 'the question for the Court is whether the rights of the option holders are so dissimilar to the rights of the shareholders that they cannot sensibly consult together with a view to their common interest.' Davies J accepted the submissions against a finding of separate classes on the basis that:  the scheme relates to shares in Cellestis and any shares held by the option holders will participate on the same basis as shares held by all other Cellestis shareholders, such that all shareholders are treated equally under the scheme;  the proposed cancellation of options is not actually part of the scheme itself;  any difference in the consideration to be paid to the option holders for cancellation of the options and the shareholders under the scheme is merely a product of the Black-Scholes valuation methodology employed to value the options; and  not all options holders are shareholders in Cellestis.  **(ii) Call option deeds**   The issue raised here was whether the directors issuing the options might constitute a separate class. Davies J concluded that there was no separate class for the following reasons:  the event triggering the right to exercise is the emergence of a competing proposal;  the directors will receive the same scheme consideration for their share parcel which is the subject of the call options as other scheme shareholders will receive;  both directors have recommended the scheme to the shareholders and have stated their intention to vote their shareholding in favour of the scheme in the absence of a superior proposal;  the call option deeds expressly provide that nothing in the deed restricts the ability of the grantor of the option to exercise the votes attaching to the option shares in the grantor's discretion; and  the directors have another parcel of shares not covered by the call option which will be participating in the scheme.  **(iii) Unsolicited valuation of Cellestis by a third party**   A group describing itself as the Cellestis Shareholders Action Group ('CASG') wrote to Cellestis shareholders, inviting them to look at a website which contained an 'independently produced research report' and a 'private valuation of Cellestis'.    In response, Cellestis asked Deloitte, which had produced the independent expert report for the scheme booklet, to consider and respond to the documents by preparing a supplementary report for inclusion in the scheme booklet. Deloitte concluded that CASG's valuation was not reasonable as its methodology was flawed and some of its assumptions were overly optimistic and not supported by evidence. Deloitte maintained its own valuation in the independent expert report.    The Court found that Deloitte had adequately explained its reasons for rejecting CASG's valuation in the supplementary report.   **(iv) Other matters**   The Court noted that the scheme booklet had properly disclosed a deemed warranty to be given by the shareholders as to their capacity to transfer their shares free from encumbrance. Exclusivity and reimbursement fee provisions were also sufficiently disclosed, as were provisions designed to ensure QIAGEN Australia will perform its obligations and that these obligations are enforceable.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h5)  **5.3 Meaning of the words "change of control" and "following" in a superannuation agreement**   (By John O'Grady and Kerri Watson, Corrs Chambers Westgarth)   Cadbury Pty Ltd v Mercer Investment Nominees Ltd [2011] NSWSC 622, Supreme Court of New South Wales, Windeyer AJ, 23 June 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/622.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/622.html" \t "_new)   **(a) Summary**   Certain former employees of Cadbury Pty Limited (Cadbury) claimed an entitlement to additional benefits from the superannuation scheme of which they were members and Mercer Investment Nominees Limited (Mercer) is the trustee.  An annexure to the Participation Agreement (Participation Agreement) provided that additional benefits were available to employees who had left the business within twelve months following  a Change of Control.  The employees left Cadbury within twelve months of an internal restructuring undertaken as part of the de-merger of Cadbury's confectionary and beverage businesses.    Cadbury sought declarations that the internal restructure did not constitute a Change of Control within the meaning of the Participation Agreement, that the word "following" meant "as a result of" rather than "after" and that none of the former employees were entitled to be paid by Mercer.  Windeyer AJ held that an internal restructure brought about a Change of Control within the meaning of the Participation Agreement which, although unexpected, could not be challenged on the grounds of ambiguity or absurdity.  His Honour also concluded that "following", while inherently ambiguous, should be given a temporal meaning ("after") because other provisions of the contract explicitly adopted causative language where such language was intended.  This meant that no causal connection between an employee leaving Cadbury and a Change of Control was required and so the application for a declaration of non-entitlement was dismissed.    **(b) Background**   On 30 March 2006, Cadbury - now Kraft Foods Australia Pty Ltd - entered into a Participation Agreement with Mercer to establish the Cadbury Superannuation Fund within the Mercer Superannuation Fund.  An annexure to the Participation Agreement provided that a Senior Executive Member who left the service of Cadbury following a Change of Control before the Normal Retirement Date but not more than 12 months after the Relevant Date when control changed would be eligible for a lump sum benefit from the Fund.  On 2 May 2008, as part of a de-merger of the beverages and confectionary business operations of the Cadbury group, an internal restructure in the United Kingdom was executed by way of a scheme of arrangement under the Companies Act 1985 (UK). The shares in Cadbury Schweppes plc were cancelled and in exchange the former shareholders received shares in the same proportions in the new ultimate holding company, Cadbury plc. The name of Cadbury Schweppes Pty Ltd was changed to Cadbury Pty Ltd.  The second to eighth defendants were all senior executive members under the Mercer Participation Agreement who left the service of Cadbury within the twelve months after 2 May 2008.   **(c) Issues**   The first question for the court was whether the internal restructuring constituted a "Change of Control" within the meaning of the Participation Agreement.  Cadbury contended that the parties could not have intended the Change of Control definition to apply to an internal reconstruction, which had no real effect on shareholders or operations. Rather, they submitted, the clear intention to be gleaned from the words was to provide for a change of control by external happening, such as a takeover offer, but in any event involving an outsider to the group.    The second issue for the court was whether to define "following" as meaning "after" or "because of". The plaintiff argued for a causative meaning, saying first, that if a temporal meaning were intended, there would be no need for the words "following a Change of Control" and second, that it could not possibly be thought that the Participation Agreement was intended to make a windfall available to senior executive members leaving employment without a reason related to the Change of Control.    **(d) Decision**   To determine whether an internal restructure was within the meaning of "Change of Control" Windeyer AJ applied the tests of ambiguity and absurdity to the Participation Agreement. His Honour found that 'the ability of courts to give commercial agreements a commercial and business like interpretation is constrained by the language used by the parties' and that this was not a matter where there could be any doubt about the meaning of the words "Change of Control".  The court therefore concluded that the unambiguous language of the Participation Agreement could not be disregarded 'simply because the contract would have a more commercial and businesslike operation if an interpretation different to that dictated by the language were adopted'.     In circumstances where the language is unambiguous his Honour advised that the court 'must (then) give effect to that language unless to do so would give the contract an absurd operation'.  If absurdity is present, his Honour stated that a court may then conclude that the parties must have made a mistake in the language that they used and correct that mistake.  Windeyer AJ held that a change of control could be followed by de-merger or by sale of some parts of a business or by sale of shares in subsidiary companies and so a level of absurdity sufficient to disregard the Participation Agreement was absent.  The degree of absurdity required was particularly high given that third party rights were involved and members would have had no way of interpreting the contract independent of its contents.  The court concluded that Cadbury had not established that the plain meaning of the words was absurd or could not have been intended and so a change of control was effected here.  Second, his Honour examined the meaning of "following".  Windeyer AJ noted that there was definite ambiguity as to whether "following" meant "after" or "because of" but concluded that the temporal "after" was a more usual meaning of "following" than causative words such as "because of" or "as a result of".  His Honour found that while evidence of surrounding circumstances was admissible to aid construction, in this case it was of little assistance. The court concluded that as clear causative words such as "due" and "as a result of" had been used in closely related provisions, this pointed to "following" having the temporal meaning of "after" in this contract. Therefore, a causal connection between a senior executive member leaving Cadbury and a change of control was not required to give rise to an entitlement to the additional benefits.  On these grounds the court concluded that the application for a declaration that none of the former Cadbury employees were entitled to be paid by Mercer as a result of the UK internal restructure should be dismissed.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h5)  **5.4 Tracing into an overdrawn account: Exception considered but not made out**   (By Will Vann, Freehills)   Mark Anthony Conlan as Liquidator of Rowena Nominees Pty Ltd v Trevor Connolly as Trustee for the Connolly Family Trust [2011] WASC 160, Supreme Court of Western Australia, Simmonds J, 23 June 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/wa/WASC/2011/160.html](http://www.austlii.edu.au/au/cases/wa/WASC/2011/160.html" \t "_new)   **(a) Summary**   In this case, the Supreme Court of Western Australia affirmed the principle that equitable tracing is not permissible through a payment into an overdrawn bank account. In reaching his decision, Simmonds J considered whether an exception to this principle existed where an asset was acquired with the overdrawn funds and it was intended by the trustee that the loan should be repaid by the misappropriation of the trust money. His Honour ultimately refrained from determining whether the exception existed, as it was not made out on the facts of this case.    Additionally, Simmonds J dismissed an alternative proposition that tracing through the payment of debt should not require the wrongdoer to intend, at the time the debt was incurred, that the debt be repaid by the misappropriation of funds of another.    His Honour also affirmed the position that a liquidator who works on realised property has a right to receive remuneration out of the proceeds of the realisation in priority to secured creditors.     **(b) Facts**    Rowena Nominees Pty Ltd (Rowena) was a mortgage broker who was also involved in two projects, the Karri Oak Vineyard Project and the Ord River Sandalwood Project. These projects required a $25,000 investment from each investor who could raise their own funds or borrow them through loans arranged by Rowena. As insufficient funds were raised to meet the minimum subscription, Rowena engaged in a 'round robin' exercise in which St George Bank advanced $5,975,000 to Rowena's general bank account. From there the funds were paid to Charters Securities, from Charters Securities to Karri Oak and Ord River, from Karri Oak and Ord River to Rowena's Trust Account and from the Trust Account back to the now overdrawn general account. This round robin created the illusion that the minimum subscription had been met and that real funds had been paid to the management companies when no external money was actually involved.    Eventually, the projects failed and Rowena entered liquidation. These proceedings were part of Conlan, as liquidator, identifying the beneficial ownership of the assets of Rowena and in particular the Grower Loan Proceeds, which consisted of the money arising out of the loans made by Rowena to the investors. As a consequence of the round robin, Ord River and Karri Oak had claims against Rowena for the amounts they had deposited into Rowena's Trust Account, amounts which were used to repay the debt in Rowena's overdrawn general account.   **(c) Decision**    **(i) Availability of tracing**   The parties agreed that the only basis for the Claimants asserting a proprietary interest in the Grower Loan Proceeds was that the funds were the traceable proceeds of the payments made by Karri Oak and Ord River to Rowena's Trust Account. Simmonds J examined the extensive body of authority establishing the principle that tracing is not possible through an overdrawn bank account (summarised in *Re Global Finance Group Pty Ltd (in liq) (Supervisor Appointed)* [2002] WASC 63) ("Global Finance").   Simmonds J discussed a possible exception proposed by Dillon LJ in *Bishopgate Investment Management Ltd (in liq) v Homan* [1995] Ch 211. Dillon LJ considered that there may exist an arguable exception to this principle when an asset was acquired by the trustee with moneys borrowed from an overdrawn or loan account, and there was an inference that when the borrowing was incurred it was the intention that it should be repaid by misappropriation of the beneficiaries' money. Simmonds J was only able to find the following judicial support for this exception:  *Foskett v McKeown* [1998] Ch 265, in which Sir Richard Scott V-C considered that the exception was arguable; and  *Shalson v Russo* [2005] Ch 281, in which Rimer J expressed support for the exception but said it did not apply to the facts of that case.  Although he did not finally determine the issue, Simmonds J accepted for the sake of argument that Global Finance was authority against the exception. However, his Honour held that even if the exception did exist it could not apply in this case, as on the balance of probabilities there was insufficient evidence to find an inference that it was the intention of Rowena at the time of drawing the trust funds that they would be used to pay off the overdraft. Instead the evidence supported the inference that Rowena did not have the required intention.    Simmonds J dismissed the alternative argument that the money used to pay a debt can be traced into what was acquired in exchange for that debt, irrespective of whether the wrongdoer intended at the time the debt was incurred to repay the debt by the misappropriation of funds belonging to another. His Honour rejected this argument because:  it had not been considered by any of the authorities on tracing;  it might too readily give a form of security to the unsecured creditor whose monies were misappropriated; and  it leaves no room for the established principle that tracing is not possible through an overdrawn bank account.  Consequently, Simmonds J ordered that the Grower Loan Proceeds were assets of Rowena in its own right and formed part of the general fund for Rowena's creditors.   **(ii)  Equitable lien and costs**   Simmonds J readily found that the second plaintiff as trustee of the Fund was entitled to an equitable lien over the Grower Loans Proceeds to pay for the administrative and legal costs borne by the Fund in recovering the Grower Loans Proceeds. This decision was based on the body of authority establishing the right of a liquidator to an equitable lien in priority of secured creditors over property it has realised, so that the liquidator can be remunerated.   Costs of the first plaintiff and third defendant were to be paid out of the Fund, for reasons discussed in *Re Rowena Nominees Pty Ltd; Ex parte Conlan* [2006] WASC, at [46]-[49].  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h5)  **5.5 Summary dismissal of investors' cross claim against bank for breach of fiduciary duty**   (By Emily McMullan and Mark Cessario, Corrs Chambers Westgarth)   Bendigo and Adelaide Bank Ltd v Cairncross; Bendigo and Adelaide Bank Ltd v Elite Advertising Group Pty Ltd [2011] NSWSC 610, Supreme Court of New South Wales, Einstein J, 22 June 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/610.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/610.html" \t "_new)    **(a) Summary**   A group of 300 people who borrowed monies from the bank for the purpose of investing in a failed managed investment scheme sought to avoid repaying their loans on the basis that there was a breach of fiduciary duty and a breach of the [Contracts Review Act 1980 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=10771" \t "Default) ("the Act"). The bank sought summary judgment against these claims.   Einstein J found that the bank owed no fiduciary duty as it had not agreed to act for or on behalf of or in the interests of any other person. His Honour also found that the mere fact that a promoter wishes to obtain profits is not sufficient to place them in breach of their fiduciary duty.    The claim made pursuant to the Act asserted that the bank was aware that the managed investment scheme made misleading statements in the PDS. His Honour determined that this claim was without foundation.    His Honour found in favour of the bank and ordered summary dismissal of the claims for relief in the amended cross-claim summons in each of the proceedings.   **(b) Background**   The cross claimants in this matter, Mr Adam Cairncross and Elite Advertising Group Pty Ltd, were members of a group of approximately 300 people or entities who borrowed money for the purpose of investing in certain managed investment schemes (Great Southern Managers Australia Limited). Adelaide Bank Limited ("ABL") was the lender of the moneys borrowed. ABL's rights had in turn been assigned to Bendigo and Adelaide Bank Limited ("BABL"). The schemes failed and the borrowers sought to avoid repaying their loans on the basis that there was a breach of fiduciary duty and of the Act. The borrowers sought to set aside the loan deeds, and ABL and BABL sought summary judgment against those claims.   **(c) Issues**   The cross claimants argued that factual matters constituting ABL as a promoter of the scheme amounted to a fiduciary relationship. They asserted that ABL failed to disclose that it had a conflict of interest by virtue of the facts that it was aware that the scheme:  wished to obtain profits; and  had issued a PDS which was misleading or deceptive and which would induce potential investors to invest and potentially borrow money from ABL.  The cross claimants further contended that the loan deed was unjust within the meaning of section 9 of the Act and sought relief pursuant to section 7 of the Act, including an order declaring the deed void or an order that ABL or BABL not be permitted to enforce the deed.   Einstein J confirmed that in order for a statutory dismissal application to succeed, the absence of a reasonable cause of action must be clearly demonstrated (*General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 135 at 129. His Honour was therefore required to determine whether or not ABL and BABL discharged this burden of proof by clearly demonstrating that there was no relevant fiduciary relationship or breach of the Act.   **(d) Decision**   His Honour returned to the nature of fiduciary obligations, observing that "fiduciary obligations are proscriptive rather than prescriptive in nature" and that "fiduciary obligations arise because a person has come under an obligation to act in another's interests" (Breen v Williams (1994) 35 NSWLR 522). His Honour emphasised the view taken by Mason J in *Hospital Products Limited v United States Surgical Corporation* [1984] HCA 64 that the critical feature of the accepted fiduciary relationships is that:   "the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position."   It was found that the factual matters said to constitute ABL as a promoter of the scheme did not constitute an arguable fiduciary relationship.   In relation to the claims that ABL had a conflict of interest, it was found that no allegation was made that the scheme wished to obtain or did obtain profits which was not disclosed in the PDS. His Honour stated, "[t]he mere fact that a promoter wishes to obtain profits does not place the promoter in breach of fiduciary duty."    His Honour noted that no material facts were alleged from which a conclusion could be drawn that ABL knew, or ought to have known, that the representations made in the PDS were misleading or deceptive. As such, he concluded that the claim that the bank ought to have been aware that such representations were misleading "is pure speculation."   His Honour further noted that any claim made under section 9 of the Act fell away on the basis of his earlier findings that the allegation that ABL knew or ought to have known that the PDS was misleading or deceptive was "purely speculative and without sufficient particulars."    His Honour summarily dismissed claims for relief in the amended cross-claim summons in both proceedings.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h5)  **5.6 Court invalidates amendment to trust constitution issue price provisions**  (By David Eliakim and Daniel Natale, Mallesons Stephen Jaques)  Premium Income Fund Action Group Incorporated v Wellington Capital Ltd [2011] FCA 698, Federal Court of Australia, Gordon J, 20 June 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/698.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/698.html" \t "_new)   **(a) Summary**  In this case, the plaintiffs successfully challenged constitutional changes made unilaterally to the constitution of a listed registered managed investment scheme, the Premium Income Fund ("PIF"), without unitholder approval.  The court said that the changes were contrary to the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  Justice Gordon of the Federal Court handed down her judgment on 20 June 2011 with reasons published on 1 July 2011.  Her Honour found that changes to the PIF constitution made without unitholder approval by the responsible entity of PIF, Wellington Capital Limited ("Wellington"), were adverse to members' rights and therefore contrary to the Corporations Act.  The amendments were made to enable Wellington to undertake a capital raising at a price that was different to the price that would be arrived at under the pre-existing pricing provisions in the constitution.  This is an important judgment for two reasons:  it may impact on the ability of responsible entities to change the pricing provisions in their constitutions unilaterally; and  it highlights the need for responsible entities in seeking to unilaterally amend a constitution to meet the statutory requirements in doing so.  **(b) Facts**  PIF is a registered managed investment scheme listed on the National Stock Exchange ("NSX").  Its responsible entity is Wellington.  The existing pricing provisions in the constitution at the time the capital raising was announced required that units were issued at:  an issue price of $1; or  net asset value ("NAV") per unit (in certain circumstances, if the responsible entity considered that NAV per unit was less than $1).  Amendments were made to the constitution of PIF to insert a different price at which units could be issued to facilitate a placement and a rights issue at an offer price of $0.10 per share. The amendments were made without unitholder approval and in reliance on section 601GC(1)(b) of the Corporations Act.  That section allows responsible entities to amend constitutions without unitholder approval if  "the responsible entity reasonably considers the change will not adversely affect members' rights".  Changes that do adversely affect members' rights may be made, so long as unitholder approval is obtained (as a special resolution).  **(c) Decision**  **(i) Ability to change pricing provisions**  Her Honour found that, in the context of the PIF constitution, members had a right to have additional units issued in the scheme (to themselves or others) only at the fixed price specified in the constitution (ie $1 or NAV). In this context, a change to enable the responsible entity to issue units at a different price was a change in rights, and Wellington needed to be satisfied that that change was not adverse.  In her Honour's view, this was not a case where the responsible entity had a broad-ranging discretion to issue units at a particular price - and merely amended the constitution to record an exercise of its discretion.  Rather it was a change to the right to have units issued in accordance with pricing provisions in the constitution.  Her Honour made orders preventing the issue of units under the rights issue (which had not yet completed at the time proceedings were brought). However, she refused to exercise her discretion to order that units that had been issued under the placement were cancelled.  Doing so would impact on the rights of third parties (who had bought some of the newly issued units on market).  The central point in this case is that her Honour took the view that unitholders have a right to have units issued only in accordance with the pricing provisions specified in the constitution.  This is a conclusion that is likely to generate some debate given the approach by a number of issuers to amendments of this nature in the past.  The decision may lead to some responsible entities seeking member approval of changes to pricing provisions (including the insertion of a fixed price in a constitution) where there is any doubt as to whether the change may adversely affect members' rights.  Alternatively, responsible entities may consider approaching a court for directions that they would be justified in unilaterally amending their constitution to make the proposed change.  Both alternatives will involve some delays which may be less than ideal if the capital raising is pressing.  Moreover, under both alternatives, the potential capital raising will become public before it is formally launched or will need to be conditional on the successful outcome of whichever alternative is adopted.  Responsible entities may also consider reviewing their constitutions, in light of the decision, to determine whether any amendments to the issue price provisions can be made to accommodate the findings in this case and so avoid the need to seek member approval or court sanction at the time a capital raising is proposed.  The refusal of her Honour to cancel units already issued under the placement is significant and will provide comfort to responsible entities who have issued units in the past after unilateral amendments to pricing provisions.  **(ii) Process for considering unilateral amendments**  Her Honour also found, on the evidence, that Wellington's board did not consider the effect of the constitutional changes on the specific right in question (namely the right to have any new units issued in PIF on the terms that were fixed by the constitution and not otherwise).    Accordingly, her Honour also found that the manner in which Wellington exercised the discretion granted under section 601GC(1)(b) was invalid.  This means that even if the change had not been adverse to rights, the amendments would have been invalid on the basis that the responsible entity had not properly undertaken the decision-making process required by the amendment power.  This was a crucial failure to comply with the statutory requirements for unilateral amendment of a scheme constitution.  This aspect of the decision highlights that directors of responsible entities need to carefully consider the impact that proposed amendments to the constitutions of registered managed investment schemes have on members' rights before undertaking a unilateral amendment.  The key requirement to determine whether any change is adverse to members' rights is to compare the rights of members both before and after the change is made.  The board's consideration needs to be clearly recorded to provide evidence that it has occurred.  This decision follows other recent cases where the courts have emphasised the need for responsible entities to ensure that the statutory requirements for unilateral amendments are met:  *ING Funds Management Ltd v ANZ Nominees Ltd* (2009) 228 FLR 444 and *Re Timbercorp Securities Limited (in liq)* (2010) 77 ACSR 291.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h5)  **5.7 Validity of deed of release upheld and confidentiality obligations of banks**   (By Caroline Wong, Mallesons Stephen Jaques)   Brighton v Australia and New Zealand Banking Group Ltd [2011] NSWCA 152, New South Wales Court of Appeal, Giles, Hodgson and Campbell JJA, 20 June 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWCA/2011/152.html](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2011/152.html" \t "_new)   **(a) Summary**   This case concerned whether the appellants could avoid their obligations under a guarantee entered into between themselves and ANZ on the basis that ANZ failed to comply with an implied duty of confidentiality.  The Court also considered whether, if it had breached a duty of confidentiality, ANZ could rely on a deed of release which would release it from all liability related to the disclosure.     **(b) Facts**    A group of companies called the Sea Slip Marinas Group ('SSMG') were experiencing significant financial problems, culminating in winding up proceedings being brought against members of the group.  ANZ provided financial accommodation to a company which formed part of SSMG as an advance to fund legal costs related to those proceedings.  The cash advance was conditional on the parties entering into a deed of release which released ANZ from all liability which could arise in the circumstances ('the Deed').  Before entering into the Deed, ANZ disclosed confidential information related to SSMG's affairs to a commercial rival of SSMG.   The relevant clause of the Deed stated that "[t]he Non-ANZ Parties release ANZ and its servants, agents and employees from any Claim which they have now, may have had in the past or may have at any time in the future but for the execution of this deed, in respect of or arising directly or indirectly out of any Allegations; any Communication; the Conversation; the Disclosure; the Privacy Act; the Robinson Affidavit; and the Winding Up Proceedings".  The Deed also provided that it "may be pleaded as a bar to any proceedings between the parties in relation to the subject matter of this deed other than in respect of a breach of any provisions of this deed".   The issues on appeal were:  whether the breach of confidentiality by ANZ in making the disclosure discharged the appellants from their liability under various guarantees;  whether the Deed was enforceable as a matter of law; and  whether the appellants could claim relief under the [Contracts Review Act 1980 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=10771" \t "Default).  **(c) Decision**    **(i) Duty of confidentiality**   Campbell JA (Giles and Hodgson JJA agreeing) held that the guarantors were not discharged from their obligations as a result of ANZ's disclosure of confidential information.  His Honour noted that there was no express obligation of confidentiality in the guarantee entered into by two of the appellants.  He also held that, where there was a contractual obligation of confidentiality, the guarantee did not provide that confidentiality was a condition of the contract, breach of which would discharge the guarantors from their obligations.   Campbell JA noted that the law has long recognised a general obligation on bankers to observe secrecy with respect to a customer's account and any information about a customer obtained by a banker in that capacity.  However, the same obligation is not implied between a banker and a guarantor of debt because a guarantor is in a different relationship with the bank.     The applicants submitted that a term could be implied into the particular guarantee which would provide that ANZ would 'keep its customers' affairs confidential and would not disclose details of customers' affairs unless under compulsion of law'.  His Honour applied the principles governing implication of contractual terms into specific contracts and found that the term could not be implied in this case.  He found that the term failed two of the requirements for implication of contractual terms: the clause was not necessary to give the contract business efficacy and was not so obvious as to go without saying.  Campbell JA also found that, if there were an obligation to maintain confidentiality, breach of that duty did not discharge the guarantors from their obligations under the guarantee.    **(ii) Enforceability of the deed**   The appellants argued that the Deed should be set aside on the grounds of statutory unconscionability under the [Trade Practices Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default).  Campbell JA rejected each of the factors which the appellants argued indicated that ANZ had acted unconscionably.  His Honour found that the appellants understood the transaction and had negotiated the Deed with ANZ.  Further, although the transaction was entered into urgently, ANZ was not responsible for the urgency of the circumstances and did not take advantage of the appellants' pressing need for a cash advance.     His Honour also found that ANZ had not acted unconscionably by making the cash advance conditional on executing the Deed, as providing any cash advance at all was commercially risky and the appellant did not have any intention of suing ANZ because of their disclosure at the time of executing the Deed.   Campbell JA rejected the appellants' submission that they did not have independent legal advice because the solicitor advising them on the Deed would also represent them in the winding up proceedings and therefore had an interest in the company obtaining the $50,000 cash advance from ANZ.  He found that there was no indication that the legal advice provided was not competent and bona fide, nor that the solicitor had not acted independently.  He emphasised that the independence of the advice could not be impugned simply because the solicitor's firm could receive the $50,000 advanced as gross receipts, a 'comparatively small' amount compared to a solicitor's reputation and professional future, as giving advice that was not bona fide would be professional misconduct.     **(iii) Applicability of the Contracts Review Act**   The Contracts Review Act 1980 (NSW) provides that a court may refuse to enforce or vary a contract if it considers it just to do so in order to avoid an unjust consequence or result.  Unjust is defined to include unconscionable, harsh or oppressive.  Campbell JA rejected the arguments made on this ground for similar reasons that he rejected the arguments related to unconscionability set out above.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h5)  **5.8 Support for shareholder access to company books and internal documents**   (By Simon Truskett and Simon Hardwick, Clayton Utz)   London City Equities Ltd v Penrice Soda Holdings Ltd [2011] FCA 674, Federal Court of Australia, Robertson J, 17 June 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/674.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/674.html" \t "_new)   **(a) Summary**   London City Equities Limited ("LCE") had applied for orders to access certain categories of documents under section 247A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"). The judgment confirms that members are entitled to inspect company books and internal documents in order to assess the viability of commencing proceedings (either in the name of the member or as a derivative action on behalf of the company) against the directors of the company.    **(b) Facts**   LCE is an institutional investor in Penrice Soda Holdings Limited ("Penrice"), holding approximately 8% of its issued share capital.  Both companies are listed on the ASX.  LCE decided to investigate the viability of seeking compensation from the directors of Penrice for suspected deficiencies in the discharge of their statutory duties. The matters to be investigated related to:  the non-disclosure or misleading disclosure of certain financial information;  whether in 2008 Penrice had paid dividends other than from profits; and  whether Penrice unlawfully funded the defence by two Penrice directors of their positions on the Board.  LCE applied for orders to access certain categories of documents under section 247A of the Act.  Section 247A provides as follows:   "247A Order for inspection of books of company   (1) On application by a member of a company ..., the Court may make an order:  (a) authorising the applicant to inspect books of the company ... or  (b) authorising another person (whether a member or not) to inspect books of the company ... on the applicant's behalf.    The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose."   **(c) Decision**    Robertson J granted the orders sought by LCE for access to Penrice's documents.  His Honour drew on a line of authorities which considered the meaning of "proper purpose" in the context of section 247A of the Act.  Robertson J quoted from a passage in *Re Style Limited* (2009) 255 ALR 63, in which Goldberg J said:   "In granting an order for inspection under s 247A it is not appropriate to allow a wholesale and general inspection of Style's books.  This would cause unnecessary disruption to the company.  In any event the books to be inspected should be books that bear on, and be particularly relevant to, the purpose for which the inspection is sought."   Further, Robertson J referred to the judgment in *Praetorin Pty Ltd v TZ Limited* [2009] NSWSC 1237.  In that case, the court dismissed an application under section 247A holding that an applicant must do more than show dissatisfaction or disagreement with management decisions.  The requirement of good faith and proper purpose carries with it a need for the applicant to show a "case for investigation as regards past or future wrongful or other undesirable conduct".   Ultimately, his Honour found that LCE's aim in seeking the documents was to assess whether it was legally and economically viable to commence litigation.  He held that this was a proper purpose that would prevent the waste of public and private resources.  Robertson J did, however, significantly narrow the scope of most of the categories sought by LCE.   Penrice had submitted that the previous decisions referred to by LCE did not pay sufficient regard to competing considerations, including confidentiality, and the potential so-called "magnet" effect of a plaintiff having access to sensitive internal company documents including insurance policies.  His Honour expressed understanding of Penrice's position but came to the conclusion that, unless he was persuaded that the approach of the courts in the previous decisions was clearly wrong, he should follow it.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h5)  **5.9 Breach of duty under section 182 of the Corporations Act; plaintiff entitled to damages under section 1324(10) of the Corporations Act**   (By Lauren Huberman, Blake Dawson)   Phoenix Constructions Queensland Pty Ltd v Coastline Constructions Pty Ltd and McCracken [2011] QSC 167, Queensland Supreme Court, Cullinane J, 15 June 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/qld/QSC/2011/167.html](http://www.austlii.edu.au/au/cases/qld/QSC/2011/167.html" \t "_new)   **(a) Summary**   The Court held that Mr McCracken, the sole director of Coastline Constructions had breached his duty under section 182(1) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), as he acted improperly in using his position to gain an advantage for Mrs McCracken, his wife, and as a result, caused detriment to Coastline Constructions. Cullinane J found that the Court had the power to grant an injunction to restrain Mr McCracken under section 1324 of the Corporations Act and in accordance with section 1324(10) of the Corporations Act, ordered that Mr McCracken pay damages to Phoenix Constructions in the amount of $1,495,208.71 plus interest of $530,003.46.   **(b) Facts**   Mrs McCracken acquired land with the intention of developing it. In August 2004, Mrs McCracken entered into a joint venture agreement with Coastline Constructions (Joint Venture Agreement). Subsequently, Coastline Constructions entered into a construction management agreement with Phoenix Constructions (Construction Management Agreement).    Amongst other things, the Joint Venture Agreement provided that:  Mrs McCracken was to provide the joint venture land owned by her as security for funding the development of the land (the joint venture land was to be set out in Schedule 1);  Mrs McCracken would retain ownership of land which was to be set out in Schedule 2; and  the proceeds of the joint venture were partly to be used to satisfy all joint venture costs which were defined to include costs incurred or accrued by Coastline Constructions.  Under the Joint Venture Agreement, Coastline Constructions was provided with significant rights over and in relation to the joint venture land.   In July 2006, Phoenix Constructions instituted proceedings against Coastline Constructions for breaching the Construction Management Agreement.  The parties participated in mediation but the matter was not resolved.  Subsequent to the mediation, Robert Evennett, a director of Phoenix Constructions, alleged that Mr McCracken stated the following, "I will not be paying anything and I can close the company down if I need to".   Shortly thereafter, Coastline Constructions and Mrs McCracken entered into a deed of amendment to vary the Joint Venture Agreement (Deed of Amendment). The Deed of Amendment varied the description of land set out in both Schedule 1 and Schedule 2 of the Joint Venture Agreement, the effect of which deprived Coastline Constructions of any of the land now described in Schedule 2.   Phoenix Constructions argued that upon entering into the Deed of Amendment, Mr McCracken had procured the abandonment of Coastline Constructions contractual interest in the land described in Schedule 2 of the Deed of Amendment. In May 2007, Mr and Mrs McCracken were added as parties to the proceedings.     Coastline Constructions went into liquidation and Mrs McCracken went bankrupt.  The matter proceeded to trial against Mr McCracken for breach of duty as a director under section 182 of the Corporations Act.   **(c) Decision**   **(i) Director's duty and section 182 of the Corporations Act**   Section 182(1) of the Corporations Act provides that:   "(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to: (a) gain an advantage for themselves or someone else; or (b) cause detriment to the corporation."   Cullinane J held that the effect of the Deed of Amendment together with the threat made to Robert Evennett to "close the company down" fell within the description of "improper" in section 182(1) of the Corporations Act. Mr McCracken had breached his duty as he used his position to gain an advantage for Mrs McCracken and caused detriment to Coastline Constructions.   **(ii) Entitlement to damages**   Section 1324(10) of the Corporations Act provides that a court has the power to order a person to pay damages where the court would have the power to grant an injunction under section 1324 of the Corporations Act restraining that person from engaging in particular conduct.   Cullinane J noted that at the time Coastline Constructions entered into the Deed of Amendment, Phoenix Constructions lost any right of recourse to the assets of Coastline Constructions (as the Deed of Amendment deprived Coastline Constructions of the joint venture land). Therefore, as a creditor whose interests are affected by Mr McCracken's breach of duty under section 182 of the Corporations Act, Phoenix Constructions is entitled to seek an injunction under section 1324 of the Corporations Act.    It was held that when Phoenix Constructions added Mr McCracken as a party to the proceedings there was a claim for an injunction on foot and this is sufficient for the purposes of maintaining the claim for damages. The Court concluded that it had jurisdiction to grant an injunction under section 1324(6) of the Corporations Act and therefore was able to order that Mr McCracken pay damages to Phoenix Constructions for breaching the Construction Management Agreement.    Phoenix Constructions claimed an amount of $1,495,208.71, plus interest totalling $530,003.46 in accordance with the terms of the Construction Management Agreement. The onus was on Mr McCracken to displace these claims. No evidence was provided to displace the claims of Phoenix Constructions. The Court ordered Mr McCracken to pay the amounts claimed to Phoenix Constructions.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h5)  **5.10 Liquidation and the ability to sell trust property**   (By Nicholas Kefalianos, DLA Piper)   Caterpillar Financial Australia Ltd v Ovens Nominees Pty Ltd [2011] FCA 677, Federal Court of Australia, Gordon J, 14 June 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/677.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/677.html" \t "_new)   **(a) Summary**   This judgment considered the ability of a corporate trustee to deal with trust assets to satisfy liabilities it incurred as trustee in circumstances where the company has been wound up and removed as trustee as a result of a disqualification clause.   Ovens Nominees Pty Ltd ('the Company') was Trustee of the Ovens Trust ('the Trust') and, through its liquidator Ross Andrew Blakeley ('the Liquidator'), sold assets of the Trust, namely a BMW motor vehicle ('the Vehicle'). This sale was to satisfy liabilities incurred by the Company in the course of acting as trustee of the Trust. The Court had to consider whether the Company through its liquidator was permitted to sell the remaining assets of the Trust in these circumstances where the Company had been removed as trustee as a result of a disqualification provision in the trust deed, and when there was no intention of the appointor to replace the trustee.    The Court ordered that the Company be permitted to sell the Trust assets, and that the Liquidator had acted honestly and ought fairly to be excused for any breaches, failures or omissions, relating to the sale of the vehicle.   **(b) Facts**    The Company was trustee of the Trust (and acted in no other capacity). It was wound up on 10 February 2011 and the Liquidator was appointed. Clause 7.5(b)(i) of the Trust deed provided that the trustee would cease to be the trustee immediately if an official liquidator was appointed. Clause 7.2 of the Trust Deed provided that the appointor of the Trust may appoint a new trustee in the place of any trustee who resigns or ceases to be a trustee by operation of law. Donna Anne Mottek, as appointor of the Trust, had not exercised the power to appoint a replacement trustee under clause 7.2 and had no intention to exercise that power in the future.   The Trust's principal assets were real property and the Vehicle. The Liquidator had previously sold the Vehicle in order to satisfy the liabilities incurred by the Company in its capacity as trustee.   The Court had to consider whether the sale of the Vehicle by the Company through its Liquidator was permitted or a breach of the duties and obligations of the Company as trustee of the Trust, and also whether it was appropriate for the court to confer a power of sale upon the Company with respect to the remaining assets.   **(c) Decision**    Gordon J first considered the trustee's right of indemnity and/or exoneration, and noted the following key principles arising from the authorities:  Where a corporate trustee incurs a liability it has a right of indemnity out of trust assets and retains an equitable lien or equitable charge over trust assets to secure the right of indemnity.  Where a trustee is still to incur a liability, it has a right to exoneration out of trust assets in respect of any prospective liability. This is limited to circumstances where the trustee is properly acting in its capacity as trustee.  A corporate trustee has a right to deal with trust assets in accordance with the terms of the trust for the purposes of satisfying any liabilities in respect of which the right of indemnity or the right of exoneration attaches, and this includes the power to sell trust assets.  Gordon J then cited the decision of King CJ in *Re Suco Gold Pty Ltd (in liquidation)* (1983) 33 SASR 99 where it was held that the trustee retained this right to indemnity and exoneration even where a new trustee was appointed:   "[T]he right of possession of the trustee, until his right of indemnity is exercised, is superior to those of a new trustee or the cestuis que trust. The rights conferred by the lien passed to the liquidator. They would enable him to obtain and retain possession of the trust property until the right of indemnity has been exercised, and to realise the trust property in the course of exercising it."   However, Gordon J recognised this decision did not consider the situation where a disqualification clause removed the wound up company as trustee. She referred to the decision of *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* and *Ronori Pty Ltd v ACN 101 071 998 Pty Ltd* [2008] NSWSC 246, where is was held that:  The removed trustee was a bare trustee of the assets pending the appointment of a new trustee.  The removed trustee retained its right of indemnity and exoneration notwithstanding the winding up and appointment of a replacement trustee.  As bare trustee, it did not have the power to retain and sell those assets as against any new trustee.  The replacement trustee in these circumstances would be bound to deal with the trust assets in a manner consistent with these rights of indemnity and exoneration.  Gordon J confirmed that in the present case there was no present likelihood of a new trustee being appointed. Therefore the Court was left to consider how a removed company trustee could deal with trust assets in circumstances where no trustee was to be appointed.   Gordon J confirmed that the Court has the power under the [Trustee Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=312" \t "Default) to authorise the Company as a bare trustee to deal with trust assets and apply trust assets to meet claims under section 556 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (priority claims) in the course of the winding up of the Company. In circumstances where the appointor is unwilling for whatever reason to appoint a new trustee, it is appropriate for the Court to confer upon the Company the power of sale of the assets of the Trust pursuant to section 63 of the Trustee Act (and subject to the duties prescribed by that Act).    The Court then considered the liquidator's sale of the Vehicle in circumstances where there was no power of sale conferred.   In light of the Liquidator's evidence, Gordon J confirmed that the Liquidator had acted honestly and fairly, and considered it appropriate to grant the Liquidator a declaration pursuant to section 1318 of the Corporations Act and further or alternatively, section 67 of Trustee Act, both of which enable the Court to grant relief when the Court considers the Liquidator has acted honestly, and ought fairly to be excused for any breaches, failures or omissions relating to the administration of the Company.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h5)  **5.11 Examination of various grounds for transferring proceedings**   (By Claire Roberts, Blake Dawson)   Efax Pty Ltd v Sonray Capital Markets Pty Ltd (in liq) [2011] NSWSC 554, Supreme Court of New South Wales, Ward J, 9 June 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/554.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/554.html" \t "_new)  **(a) Summary**  In this judgment Ward J examined an application for an order that proceedings be transferred from the New South Wales Supreme Court to the Victorian Registry of the Federal Court of Australia.  The applicants sought to demonstrate that provisions in the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and the [Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=13022" \t "Default) ('cross-vesting legislation'), and the inherent jurisdiction of the Court, could all be invoked in this instance to enable the transfer of jurisdiction.  Ward J considered each of these in turn.  She concluded that each of the three could be invoked in this case, but that it was not appropriate to transfer the matter because the issue to be determined was discrete and largely unrelated to other proceedings and because there was a real risk of prejudice to the plaintiff if the determination was delayed.  **(b) Facts**  The second defendant ('the Sonray liquidators') brought an application by Interlocutory Process in the name of the first defendant ('Sonray'), seeking an order that the proceedings brought by Efax Pty Limited ('Efax'), a Sonray creditor ('proceedings'), be transferred to the Victorian Registry of the Federal Court of Australia.  The third defendant, Saxo Bank A/S ('Saxo') indicated that it did not seek to be heard on the question of whether the proceedings should be transferred and indicated that it would be prepared to consent to such an order if the Court were so minded.  A number of other proceedings against the defendants and a multi party mediation program (to which Efax was not a party) had already commenced in Victoria, and the Sonray liquidators were based in Victoria.  The relevant contract was governed by the laws of Victoria.  The plaintiffs and their representatives were based in New South Wales.  The proceedings related to Sonray's dealings with three parcels of shares in BHP Billiton ('BHP shares').  Sonray had been a financial services provider, and Efax was a former client.  Efax had deposited a sum of $3,176,000 into an account belonging to Sonray, and instructed Sonray to purchase the BHP shares.  Sonray arranged the purchase of the BHP shares, which were acquired in a manner that meant they were held by a custodian on behalf of Saxo Bank.  A form for the transfer of the BHP shares had not been executed by Efax at the time that Sonray was placed in liquidation, so the BHP shares remained held by that custodian.  Efax had obtained restraining orders, supplanted with inter partes undertakings, prohibiting certain dealings with the BHP shares.  Efax sought orders that the defendants be restrained from selling, converting or otherwise dealing with the BHP shares, and also sought a declaration that the BHP shares be held on trust for it.  **(c) Decision**  Ward J considered the applicability of the Corporations Act, the cross-vesting legislation and the inherent jurisdiction of the Court in turn.  **(i) Corporations Act 2001**  Section 1337H(2) of the Corporations Act provides that a court may transfer a 'relevant proceeding' where appropriate.  The term 'relevant proceeding' is defined in the section to include 'a civil matter arising under the Corporations legislation', and other matters which were not relevant in this case.  The respondents claimed that the present matter was not a 'relevant proceeding' because the proceedings were based on the acquisition of property and no Corporations Act issues would arise.  Ward J considered the scope of the word 'matter', and concluded that the proceedings would not necessarily be 'relevant proceedings' merely because the property that was subject of the alleged trust was comprised of shares.  The fact that leave was being sought to proceed against Sonray in liquidation, however, meant that it was likely that matters relating to the Corporations Act would arise, and so Ward J held that this was a 'relevant proceeding.'  **(ii) Cross-Vesting Legislation**  Section 5(1) of the cross-vesting legislation provides that a matter may be moved from the Supreme Court of a state or territory to a Federal court if the matter relates to another matter pending in that Federal Court and it is more appropriate that the matter be heard there, or if it is otherwise in the interests of justice that the relevant proceeding be moved.  Ward J stated that the Act is an independent head of power to cross-vest a matter in the interests of justice, regardless of whether there are other pending proceedings in the Federal Court.  **(iii) Inherent Jurisdiction**  Ward J held that the duty to exercise the inherent jurisdiction of the Court must be considered in the context of the jurisdiction to cross-vest matters where that is in the interests of justice.  **(iv) Application**  Ward J noted that the tests in the Corporations Act and the cross-vesting legislation are unlike the test for determining when local proceedings should be stayed in favour of another international forum, which gives greater precedence to the plaintiff's forum of choice by requiring an applicant to show that the matter has commenced in a 'clearly inappropriate forum.' The words 'more appropriate' suggest that considerations of a more general nature should be taken into account.  Ward J then examined the test of the 'interests of justice' in the cross-vesting legislation. She held that the reasons why a matter commences in a particular jurisdiction may be entirely unrelated to the interests of justice, but that the interests of justice were not 'disembodied, or divorced from practical reality.'  She also noted that there may be conflicting interests between the parties, such that the interests of justice gave preference to neither.    Ward J stated that it was 'by no means apparent' that the liquidators would need to physically attend the proceedings, and as the transactions predated their appointment it was 'difficult to see' how they could have any personal knowledge requiring lengthy attendance.  She also noted that it seemed unlikely that the issues in the proceedings would be mirrored elsewhere, and that Efax had given an undertaking as to damages and so there was a real risk of prejudice arising out of a delay in the determination of the claim.    Ward J dismissed the application, but noted that she may have decided differently if there had been a 'willingness by the Sonray parties to consent to a regime whereby the existence of the claimed beneficial interest was to be determined by the court in Victoria expeditiously, as a separate issue from the general investor claims.'  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h5)  **5.12 US Supreme Court rules that loss causation need not be established for certification of class in securities class actions**   Erica P Fund Inc v Halliburton Co (2011) 563 US, United States Supreme Court, Robert CJ, for the whole Court, 6 June 2011  The full text of the judgment is available at:  [http://www.supremecourt.gov/opinions/10pdf/09-1403.pdf](http://www.supremecourt.gov/opinions/10pdf/09-1403.pdf" \t "_new)  **(a) Summary**  In an unanimous decision authored by Chief Justice Roberts, the US Supreme Court has ruled that plaintiffs in securities fraud class actions need not prove loss causation in order to invoke the fraud-on-the-market presumption of reliance in actions under section 10(b) of the US Securities Exchange Act of 1934 ("Exchange Act") and SEC Rule 10b-5.  Class actions in the United States are facilitated by the fraud-on-the-market doctrine. Under this theory, plaintiffs are entitled to a rebuttable presumption that class members had relied on the integrity of the trading market in deciding to sell their shares.  The Court's decision represents a significant victory for securities class actions at a time when a number of recent Supreme Court decisions have imposed more stringent requirements on the scope of class actions in US courts in recognition of the perceived damaging effects of widespread securities class actions on the national economy and US international competitiveness.  **(b) Facts**  In 2002, the plaintiffs brought a putative securities fraud class action case against Halliburton Co and one of its executives, alleging that Halliburton violated section 10(b) and Rule 10b-5 by making various misrepresentations that artificially inflated its stock price. The alleged misrepresentations related to (1) Halliburton's potential liability in asbestos litigation, (2) Halliburton's expected revenue from certain construction contracts, and (3) the benefits from Halliburton's expected merger with another company. The plaintiffs contended that Haliburton later made a number of corrective disclosures that caused its stock price to drop and the plaintiffs to lose money.  The plaintiffs moved for class certification pursuant to applicable federal civil procedure rules. Under Fifth Circuit precedent, securities fraud plaintiffs were required to prove loss causation in order to obtain class certification. The district court found that the plaintiffs could not establish loss causation for any of their claims and denied the class certification motion for that reason. The district court stated that, but for the Fifth Circuit's loss causation requirement at class certification, it would have certified the class. A panel of the Fifth Circuit affirmed, reiterating that plaintiffs must prove loss causation in order to trigger the fraud-on-the-market presumption and obtain class certification.  **(c) Decision**  The Supreme Court reversed the decision, holding that securities fraud plaintiffs need not prove loss causation in order to obtain class certification. The Court emphasised the distinction between two separate elements that plaintiffs must prove in private securities fraud actions under Section 10(b) and Rule 10b-5: reliance and loss causation.  The Court stated that proof of reliance (also sometimes referred to as "transaction causation" in section 10(b) cases) ensures that there is a proper 'connection between a defendant's misrepresentation and a plaintiff's injury. The Court went on to explain that the traditional way for a plaintiff to demonstrate reliance is by showing that an investor was aware of a company's statement and engaged in a relevant transaction, such as purchasing stock, based on that specific misrepresentation.  In the landmark decision of *Basic Inc v Levinson* (1988) 485 US 224, however, the Supreme Court created a rebuttable presumption of reliance making it easier for plaintiffs to meet the burden in demonstrating reliance. Specifically, the Court in Basic adopted a "fraud-on-the-market" theory, under which reliance on the defendant's material misrepresentation is presumed if the plaintiff can show (1) that the alleged misrepresentation was publicly known, (2) that the securities traded on an efficient market, and (3) that the transaction in question occurred between the time the misrepresentations were made and the time the truth was revealed.  This presumption is rebuttable, however, and reliance will not be presumed if the defendant identifies matters severing the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff.  In contrast to reliance, the Court in Halliburton explained that loss causation requires plaintiffs to demonstrate that a misrepresentation that affected the integrity of the market price also caused a subsequent economic loss. Merely showing that the price of a security was inflated at the time of purchase is not sufficient to demonstrate loss causation. A plaintiff must also prove that the subsequent drop in price was caused by the defendant's alleged misrepresentation or omission.  A plaintiff would not be able to prove loss causation, for example, if a financial crisis or other supervening event unrelated to the alleged misstatement caused the drop in the stock price, even if the investor purchased the stock at a distorted price, and thereby presumptively relied on the misrepresentation reflected in that price.  The Court rejected the Fifth Circuit's requirement that plaintiffs must establish loss causation in order to invoke the fraud-on-the-market presumption of reliance at the class certification stage.  Under the Court's ruling, a plaintiff's inability to prove loss causation, at the class certification stage (as distinct from on the merits at trial), does not, by itself, prevent a plaintiff from invoking the class-wide rebuttable presumption of reliance under the "fraud-on-the-market" theory.  The Court reasoned that such a requirement is supported by neither the decision in Basic nor its logic.  Chief Justice Roberts concluded:  "Such a rule contravenes Basic's fundamental premise - that an investor presumptively relies on a misrepresentation so long as it was reflected in market price at the time of his transaction. The fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory. Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory."  The Chief Justice rejected the submission from Halliburton that loss causation was merely shorthand for the misrepresentation having no "price impact" on stock price. Loss causation is a familiar and distinct concept and requirement under securities law.  **(d) Observations**  The Court's ruling does not, of course, relieve the plaintiffs of the ultimate burden of proving loss causation on the merits, but by enabling class certification to proceed without proof of loss causation it fundamentally alters the dynamics of the litigation in favour of the plaintiffs and significantly circumscribes the ability of the defendant to negotiate an early settlement on favourable terms.  The decision reflects a structural feature of the legal environment that facilitates the bringing of securities class actions in the United States. Australian courts have not yet embraced the fraud-on-the-market theory. Were they to do so, and similarly hold that the theory can be relied upon to establish a class under applicable Australian rules of civil procedure, it would further promote the use of securities class actions in Australia.  At the same time, recent decisions of the Supreme Court have imposed limitations on the scope of securities class actions. And this trend is further reflected in another significant decision of the Supreme Court on 20 June 2011 in *Wal-Mart Stores, Inc v Dukes* (2011) 564 US. In that decision a majority of the Court (5-4), in an opinion authored by Justice Antonin Scalia, barred the largest class action in US legal history concerning alleged employment discrimination claims against Wal-Mart. The Court held that the commonality requirement for class actions was not established because there was insufficient proof that Wal-Mart operated under a "general policy" that discriminated against female employees. Although a decision in the employment context, the decision is the latest in a series of recent decisions curbing the availability of class actions in US courts.  As the Australian securities class action market continues to develop, the shifting currents in the more mature US securities class action market should be followed by practitioners, legislators and courts with interest.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h5)  **5.13 Proxies forwarded to director before being passed to the company still valid**   (By Andrew Nicholls, DLA Piper)   Carson v Dynasty Metals Australia Ltd [2011] FCA 621, Federal Court of Australia, Jagot J, 31 May 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/621.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/621.html" \t "_new)   **(a) Summary**   In the course of dismissing a motion for interlocutory relief, Jagot J of the Federal Court made several observations on the technical requirements for the granting of an interlocutory injunction, as well as the circumstances in which submission and receipt of proxy documents will not satisfy section 250B(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act').   **(b) Facts**    The plaintiff, Carson, brought a notice of motion on 31 May 2011 seeking an interlocutory order restraining the first respondent, Dynasty Metals Australia Pty Ltd ('Dynasty'), from a placement of 15% of its shares. The placement of shares was to be subject to a resolution for consideration at a meeting of Dynasty to be called on the following day (1 June 2011).   The purpose of the motion for interlocutory relief was to preserve the status quo pending the resolution of the substantive claims for relief by Carson. The relief sought from these claims included:  a declaration that certain resolutions at a meeting of Dynasty on 21 March 2011 were invalid because of the inclusion in the voting of proxy instruments alleged by the plaintiff to have breached section 250A and/or section 250B of the Act; and  a declaration that the plaintiff and two other persons remained directors of Dynasty despite their removal by resolution during the meeting on 21 March 2011.  The plaintiff alleged two grounds on which the proxies included in the voting on 21 March 2011 should not have been included. These were:  that a number of the proxies had first been sent by facsimile to Mr Lewis Tay, a director of Dynasty, before being forwarded on from Mr Tay to Dynasty by facsimile, allegedly breaching section 250B of the Act; and  another group of proxies were invalid because the signatures on the proxy forms did not match the signatures of the relevant shareholders on previous proxy forms.  During the hearing, the plaintiff only pursued the claim relating to the facsimiled proxies, rather than the proxies bearing potentially incorrect or fraudulent signatures.   **(c) Decision**    **(i) What were the requirements for the granting of an injunction?**   Jagot J discussed the requirements for the granting of an interlocutory injunction. These included that the Court must be satisfied that:  there is a serious question to be tried; and  the balance of convenience favours the grant of injunction.  Jagot J noted that in order to show that there is a serious question to be tried, the party seeking relief must demonstrate that there is "a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial" (*Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57).   **(ii) Did the balance of convenience favour the grant of an injunction?**   Jagot J held that the balance of convenience did not favour the grant of an injunction. This was because of the plaintiff's delay in bringing both the proceedings and the application for interlocutory relief, as well as the inadequacy of any rational explanation for that delay.   Jagot J noted that although the Dynasty meeting that deposed the plaintiff as a director occurred on 21 March 2011, no application was made to the Court until 30 May 2011, and there was no sufficient explanation for this delay. Jagot J also noted that other proceedings in relation to the 21 March 2011 meeting had been commenced (and discontinued) in Western Australia soon after the meeting, but nothing had been done in the plaintiff's case until the day before the upcoming Dynasty meeting was to be announced.   In holding that the balance of convenience did not favour the grant of an injunction Jagot J also took into account that there was insufficient evidence of the plaintiff's financial position to demonstrate his ability to meet an undertaking as to damages. There was also insufficient evidence to demonstrate that if the proposed meeting and placement of 15% of Dynasty's shares went ahead, any loss would be suffered by the plaintiff which would not (if appropriate) be compensable by an order for damages.    **(iii) Was there a serious question to be tried?**   Jagot J was not convinced there was a serious question to be tried on the grounds alleged by the plaintiff. This was in part because the number of proxies alleged to have been invalidated by first being facsimiled to Tay before being forwarded to Dynasty would not (on the evidence available) have had a material effect on the outcome of the 21 March 2011 meeting that ousted the plaintiff.   Jagot J also held that neither section 250A nor section 250B of the Act requires shareholders to send their proxy documents directly to a company. Section 250B merely requires that the proxy documents be received by the company. Dynasty had received the proxy documents from Tay, and as a result, no breach of section 250B had occurred. The authorities that the plaintiff sought to rely upon were not relevant in this context. Therefore, Jagot J held there was insufficient evidence to demonstrate there was a serious question to be tried.   Without evidence of a serious question to be tried, nor sufficient evidence that the balance of convenience favoured the granting of an injunction, Jagot J dismissed the plaintiff's motion for interlocutory relief.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/167-July-2011.htm%23h5)  **5.14 Commercial justifiability does not excuse wrongful exclusion from participation in management and may amount to oppression**   (By James Russell, Mallesons Stephen Jaques)   Harding Investments Pty Ltd v PMP Shareholdings Pty Ltd (No 2) [2011] FCA 567,  Federal Court of Australia, Gordon J, 27 May 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/567.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/567.html" \t "_new)   **(a) Summary**   In this case, Gordon J found that the conduct of two of a company's directors, who were also principals of two of the three shareholders of the company, was oppressive against the third shareholder.  The principal of the third shareholder, who was also a director, was excluded from the management of the company in a manner that was so unfair that no reasonable director could have considered it fair.  Therefore, Gordon J found that the two directors' conduct amounted to oppression and so they had contravened section 232 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  Her Honour also found that by terminating the third director's directorship and employment in the company, the directors had breached the express terms of a Business Succession Agreement.  Her Honour ordered that the two shareholders (whose principals were in breach of the Corporations Act and the Business Succession Agreement) purchase the oppressed member's shares in the company.   **(b) Facts**   Lotic Pty Ltd (formerly known as PMP Environmental Pty Ltd) ("Lotic") was incorporated on 19 January 2006 by the company's three shareholders: Harding Investments Pty Ltd (as trustee of the S&J Harding Family Trust); Gordon Services Pty Ltd (as trustee of the Gordon Family Trust); and Jashtra Holdings Pty Ltd (as trustee of the P&C Dick Family Trust).  The company was involved in the management of large-scale water and waste-water building and development projects.    Shortly after the company's incorporation, the shareholders executed a shareholders agreement (described as a Business Succession Agreement ("BSA")), under which Messers Harding, Gordon and Dick were defined as the principals of the respective shareholders, and also as the company's directors.  The BSA provided that the shareholders were to maintain the board comprising all of these principals, and also that the directors were all to be employed by Lotic in the business.  To this regard, Harding was employed as the managing director and CEO, Gordon as the estimator and Dick as construction manager.  Under the terms of the BSA, an absolute majority of not less than 75% of the shareholding was required to remove any of the three directors as either a director or employee of the company.  Whilst originally the three shareholdings differed in value, in July 2007 it was resolved that all shares in the company would be held by each of the shareholders in equal shares.   In about late 2009, the relationship between Harding, Dick and Gordon broke down.     In January 2010, Gordon and Dick held a directors' meeting without notice, which Harding did not attend, and resolved to: (a) terminate a lease in South Melbourne and relocate the business to Lilydale; and (b) terminate the employment of several staff.  Harding was not invited to participate in these decisions.     In February 2010, Gordon and Dick held another directors' meeting without due notice, and resolved to selectively reduce Harding's salary entitlements.     In March 2010, Gordon made the decision to unilaterally withdraw funds from Lotic's account, without any reference to Harding, at a time of serious cash flow difficulties.     In April 2010, Gordon called another meeting without notice, although this time Harding attended.  At the meeting, Gordon produced pre-prepared minutes of the meeting, to which Dick assented, removing Harding from his position as managing director and CEO.     In May 2010, Gordon and Dick resolved to terminate the engagement of Lotic's external accountants.  Whilst all three directors had discussed this possibility in the past, the actual decision was made only by Gordon and Dick.  Harding was only told about the decision after it had been made.  Again, no notice of the meeting under which the decision was made was ever given to Harding.   On 12 July 2010, Gordon and Dick decided to terminate Harding as a director and employee of Lotic, even though an absolute majority of 75% of the shareholding was required under the BSA to make that decision.  Harding was not present nor was he invited to attend the meeting.     At the time of the Court hearing, Lotic was in administration.   **(c) Decision**   Gordon J commenced her judgment by analysing the relevant legal principles in relation to oppression under section 232 of the Corporations Act, as summarised by Young J in *John J Starr (Real Estate) Pty Ltd v Robert R Andre (A'Asia) Pty Ltd* (191) 6 ACSR 63 at 65-67 and by the High Court in *Campbell v Backoffice* (2009) 238 CLR 304 at 360 ("Campbell").  In Campbell's case, the High Court noted that wrongful exclusion from participation in the management of a company is a recognised species of oppressive conduct.   Her Honour then analysed each of the events under which Harding was effectively excluded from the decision making process of Lotic.  Her Honour found that by excluding Harding from management of the company, Gordon and Dick's conduct was "oppressive to, unfairly prejudicial to, or unfairly discriminatory against" Harding Investments, as Harding was the Harding Investments' principal and representative on the board in accordance with the express terms of the BSA.     The fact that Gordon and Dick's decisions might themselves have had a commercially justifiable rationale did not have any bearing on Gordon J's finding.  Her Honour stated that it is "not to the point to examine Gordon and Dick's motives for acting as they did".  Rather, it was the wrongful exclusion of Harding from the decision making process that amounted to oppressive conduct against Harding Investments.     The Respondents submitted that, if oppression is established, it did not subsist at the time of the hearing because Lotic was in administration.  They argued that the Court should be prevented from making an order because, in their view, oppression must subsist at the time when the order is made.  In response to this, her Honour found that the Court may make orders even if the act, omission or conduct complained of has ceased.    Gordon J made declarations that the respondents had breached the terms of the BSA by terminating Harding as an employee and director without a 75% majority of the shareholding as required, and also that Gordon and Dick had contravened section 232 of the Corporations Act.    Her Honour ordered that the remaining two shareholding companies purchase Harding Investments shares in Lotic.  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