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We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 131 242. | |  | |      |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%231) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1** **Remuneration and dividend reforms**  On 14 December 2012, the Government released for consultation exposure draft legislation and explanatory material regarding the disclosure of executive remuneration and the test for payment of dividends. The reforms are contained in the draft Corporations Legislation Amendment (Remuneration and Other Measures) Bill 2012.  The proposed reforms include:   * requiring listed companies who become aware in the financial year that their financial statements in any of their three previous financial years have been materially misstated, to disclose in the remuneration report, whether any overpaid remuneration has been 'clawed back', and if not, an explanation of why. Shareholders who are not satisfied with a company's claw-back policy can take action through the 'two-strikes' mechanism introduced by the Government last year; * improving disclosures contained in remuneration reports, by requiring more transparent disclosure of termination payments or 'golden handshake' payments. Unnecessary disclosure requirements will be removed to simplify remuneration reports and clearer categorisation of pay will be introduced to better enable shareholders to understand the company's remuneration arrangements; * relieving certain unlisted entities from the obligation to prepare a remuneration report, which will significantly reduce the regulatory burden on companies that are not subject to the 'two-strikes' mechanism; amending the payment of dividends test to allow companies to either declare or pay a dividend, link the dividends test more strongly with company solvency, and allow certain entities to calculate assets and liabilities with reference to financial records when applying the dividends test; * relieving some public companies, such as certain companies limited by guarantee, from the obligation to appoint auditors, as they are no longer required to have financial reports audited; and * transferring the remuneration setting responsibility for the offices of the Financial Reporting Council (FRC), Australian Accounting Standards Board (AASB), and the Auditing and Assurance Standards Board (AUASB) to the Remuneration Tribunal.   The draft legislation and explanatory material are available on the [Treasury website](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Improving-disclosure-requirements" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.2** **CPSS-IOSCO issue disclosure framework and assessment methodology for principles for financial market infrastructures**  On 14 December 2012, the Committee on Payment and Settlement Systems (CPSS) and the International Organization of Securities Commissions (IOSCO) published a disclosure framework and assessment methodology for their Principles for financial market infrastructures (PFMIs), the new international standards for financial market infrastructures (FMIs).  The disclosure framework is intended to promote consistent and comprehensive public disclosure by FMIs in line with the requirements of the PFMIs. The assessment methodology provides guidance for monitoring and assessing observance with the PFMIs.  The disclosure framework will be used by an FMI to provide transparency about its activities, risk profile and risk management practices and will thus support sound decision-making by FMIs and their stakeholders. The assessment methodology is primarily intended for use by external assessors at the international level, in particular the International Monetary Fund and the World Bank. It also provides a baseline for national authorities to assess observance of the principles by the FMIs under their oversight or supervision and to self-assess the way they discharge their own responsibilities as regulators, supervisors, and overseers. The assessment methodology may also serve as a useful tool for an FMI when, for example, carrying out self-assessments of its observance of the PFMIs or deciding whether the introduction of new services would hamper its ability to observe the PFMIs.  The Principles are available on the [IOSCO website](http://www.iosco.org/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.3** **UK report on 'comply or explain'**  On 13 December 2012, the Association of British Insurers (ABI) published a report titled 'Comply or explain: Investor expectations and current practices'.  The background to the report is that ABI members have increasingly conveyed concerns that, in too many cases, 'comply or explain' disclosures fail to meet investor requirements. The ABI reviewed a sample of Code explanations to understand the current quality of explanations and to highlight best practice and areas requiring improvement. According to the research, many company disclosures are failing to meet investor needs.  The ABI has developed six key criteria to assist companies in preparing Code explanations. These have been designed with the intention of providing investors with the information necessary to consider whether the alternative approach a company has chosen in particular circumstances remains aligned with their interests. The intention is to improve the operation of the UK principles-based system - underpinned by 'comply or explain' - for the mutual benefit of companies and investors.  The report is available on the [ABI website](http://www.abi.org.uk/content/contentfilemanager.aspx?contentid=65367" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.4** **Treasury seeks comment on implementation of Australia's G-20 over-the-counter derivatives commitments**  On 12 December 2012, Treasury released a consultation paper seeking stakeholder views on a proposed approach for implementing the Australian Government's G-20 Commitments in relation to over the counter (OTC) derivatives.  For this consultation, Treasury has published a [consultation website](http://financialmarkets.tspace.gov.au/" \t "_new) that will allow the posting of comments for each section of the paper.  These comments will be added to the website and made publicly available immediately. Treasury will moderate the comments after they are submitted on the website. Please refer to the moderation policy for more information.  Closing date for submissions is 15 February 2013. The Paper is also available to download from the [Treasury website](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/G20-OTC-derivatives-commitments" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.5** **Treasury paper seeks comment on amending ASIC market supervision cost recovery arrangements**  On 12 December 2012, Treasury released a consultation paper seeking comment on potential amendments to the ASIC market supervision cost recovery arrangements for the period from 1 July 2013 to 30 June 2015, which will enable the Government to recover over the 24 month period:   * costs incurred by ASIC in the performance of its market supervision functions and the implementation of market competition; and * costs associated with the Enhanced Market Supervision (EMS) measure announced in the 2012-13 Budget to replace its integrated market surveillance system (IMSS), enhance its market surveillance and supervision systems and tools and deliver improvements to those ASIC portals and registers accessed by market participants.   To do this, the federal government would impose levies on:   * 'operators of the domestic licensed financial markets outlined in section 1.1; * the market participants of domestic licensed financial markets within the cash equities segment; and * the market participants of the ASX24 futures market'.   Closing date for submissions is 1 February 2013. The paper is available on the [Treasury website](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Amending-the-ASIC-market-supervision-cost-recovery-arrangements" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.6** **APRA releases draft prudential practice guides for superannuation**  On 11 December 2012, the Australian Prudential Regulation Authority (APRA) released for consultation a discussion paper and ten draft prudential practice guides (PPGs) for the superannuation industry.   The ten draft PPGs include practical guidance on matters that a registrable superannuation entity licensee (RSE licensee) may consider to assist it in meeting the requirements in APRA's prudential standards. APRA has drafted the superannuation PPGs to align where appropriate with guidance in other APRA-regulated industries.  The draft PPGs are:   * Prudential Practice Guide SPG 114 Operational Risk Financial Requirement; * Prudential Practice Guide SPG 220 Risk Management; * Prudential Practice Guide SPG 231 Outsourcing; * Prudential Practice Guide SPG 232 Business Continuity Management; * Prudential Practice Guide SPG 250 Insurance in Superannuation; * Prudential Practice Guide SPG 510 Governance; * Prudential Practice Guide SPG 520 Fit and Proper; * Prudential Practice Guide SPG 521 Conflicts of Interest; * Prudential Practice Guide SPG 530 Investment Strategy - Formulation; and * Prudential Practice Guide SPG 531 Investment Strategy - Implementation.   A second set of draft PPGs will be released for consultation in the second quarter of 2013.  The discussion paper and draft PPGs are available on the [APRA website](http://www.apra.gov.au/Super/Pages/Prudential-Practice-Guides-for-Superannuation-December-2012.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.7** **2012 IMF financial sector assessment program's Australian review**  The International Monetary Fund's (IMF) Financial Sector Assessment Program (FSAP) evaluates the strength of a country's financial system and regulatory architecture. The IMF conducted its second review of Australia in 2012.  The IMF's assessment is contained in the following documents:   * [IMF - Financial System Stability Assessment](http://www.apra.gov.au/AboutAPRA/Publications/Documents/cr12308%5b1%5d.pdf" \t "_new); * [Report on the Observance of Standards and Codes (ROSC) - Summary Assessments](http://www.apra.gov.au/AboutAPRA/Publications/Documents/cr12307%5b1%5d.pdf" \t "_new); * [Addressing Systemic Risk Through Higher Loss Absorbancy - Technical Note](http://www.apra.gov.au/AboutAPRA/Publications/Documents/Addressing%20Systemic%20Risk%20Through%20Higher%20Loss%20Absorbancy%20%20-%20Technical%20Note%20-%20November%202012.pdf" \t "_new); * [Basel Core Principles for Effective Banking Supervision - Detailed Assessment of Observance](http://www.apra.gov.au/AboutAPRA/Publications/Documents/Basel%20Core%20Principles%20for%20Effective%20Banking%20Supervision%20-%20Detailed%20Assessment%20of%20Observance%20%20-%20November%202012.pdf" \t "_new); * [Financial Safety Net and Crisis Management Framework - Technical Note](http://www.apra.gov.au/AboutAPRA/Publications/Documents/Financial%20Safety%20Net%20and%20Crisis%20Management%20Framework%20-%20Technical%20Note%20-%20November%202012.pdf" \t "_new); and * [Insurance Core Principles - Detailed Assessment of Observance](http://www.apra.gov.au/AboutAPRA/Publications/Documents/Insurance%20Core%20Principles%20-%20Detailed%20Assessment%20of%20Observance%20-%20November%202012.pdf" \t "_new).   Further information is available on the [APRA website](http://www.apra.gov.au/AboutAPRA/Publications/Pages/default.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.8** **Release of UK/US joint paper on resolution strategies of large and complex firms**  On 10 December 2012, the Bank of England, in conjunction with the US Federal Deposit Insurance Corporation, released a joint paper outlining possible resolution strategies to be adopted by a single authority in a cross-border context with respect to the parent company of a financial group.   The financial crisis that began in 2007 has driven home the importance of an orderly resolution process for globally active, systemically important, financial institutions (G-SIFIs). Given that challenge, US and UK authorities have been working together to develop resolution strategies that could be applied to their largest financial institutions. These strategies have been designed to enable large and complex cross-border firms to be resolved without threatening financial stability and without putting public funds at risk. This work has taken place in connection with the implementation of the G20 Financial Stability Board's 'Key Attributes of Effective Resolution Regimes for Financial Institutions'.    The joint paper, titled 'Resolving Globally Active, Systemically Important, Financial Institutions', focuses on the application of 'top-down' resolution strategies that involve a single resolution authority applying its powers to the top of a financial group; that is, at the parent company level. The paper discusses how such a top-down strategy could be implemented for a US or a UK financial group in a cross-border context.   The paper is available on the [Bank of England website](http://www.bankofengland.co.uk/publications/Documents/news/2012/nr156.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.9** **European Commission releases action plan on company law and corporate governance**  On 12 December 2012, the European Commission released its Action Plan outlining future initiatives in the areas of company law and corporate governance.   The Commission's analysis and consultations over the last two years indicate that further improvements can be made by encouraging and facilitating long-term shareholder engagement, by increasing the level of transparency between companies and their shareholders and by simplifying cross-border operations of European undertakings.  The Commission has identified several lines of action in the area of company law and corporate governance that are fundamental to putting in place modern legislation for sustainable and competitive companies.  Key elements of the action plan include:  **1. Increasing the level of transparency between companies and their shareholders in order to improve corporate governance. This will include in particular:**   * Increasing companies' transparency as regards their board diversity and risk management policies; * Improving corporate governance reporting; * Better identification of shareholders by issuers; and * Strengthening transparency rules for institutional investors on their voting and engagement policies.   **2. Initiatives aimed at encouraging and facilitating long-term shareholder engagement, such as:**   * More transparency on remuneration policies and individual remuneration of directors, as well as a shareholders' right to vote on remuneration policy and the remuneration report; * Better shareholders' oversight on related party transactions, ie dealings between the company and its directors or controlling shareholders; * Creating appropriate operational rules for proxy advisors (ie firms providing services to shareholders, notably voting advice), especially as regards transparency and conflicts of interests; * Clarification of the 'acting in concert' concept to make shareholder cooperation on corporate governance issues easier; and * Investigating whether employee share ownership can be encouraged.   **3. Initiatives in the field of company law to support European businesses and encourage their growth and competitiveness:**   * Further investigation on a possible initiative on the cross-border transfer of seats for companies; * Facilitating cross-border mergers; * Clear EU rules for cross-border divisions; * Follow-up of the European Private Company statute proposal ([IP/08/1003](http://europa.eu/rapid/press-release_IP-08-1003_en.htm?locale=en" \t "_new)) with a view to enhancing cross-border opportunities for SMEs; * An information campaign on the European Company/European Cooperative Society Statute; and * Targeted measures on groups of companies, i.e. recognition of the concept of the interest of the group and more transparency regarding the group structure.   In addition, the action plan foresees merging all major company law directives into a single instrument. This would make EU company law more accessible and comprehensible and reduce the risk of future inconsistencies.  Further information is available on the [European Commission website](http://europa.eu/rapid/press-release_MEMO-12-972_en.htm?locale=en" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.10** **Release of NAPF's corporate governance policy and voting guidelines**   On 6 December 2012, the UK's National Association of Pension Funds (NAPF) released its updated [Corporate Governance Policy and Voting Guidelines](http://www.napf.co.uk/PolicyandResearch/DocumentLibrary/%7E/media/Policy/Documents/0277_Corporate_governance_policy_and_voting_guidelines_an_NAPF_document.ashx" \t "_new). The main purpose of the Guidelines is to assist investors and their proxy voting agents in their interpretation of the provisions of the UK Corporate Governance Code when assessing a company's compliance with it.  The NAPF has also updated its guidelines in respect of [smaller companies](http://www.napf.co.uk/PolicyandResearch/DocumentLibrary/%7E/media/Policy/Documents/0278_Corporate_governance_policy_and_voting_guidelines_for_smaller_companies_an_NAPF_document.ashx" \t "_new) and [investment companies](http://www.napf.co.uk/PolicyandResearch/DocumentLibrary/%7E/media/Policy/Documents/0279_%20Corporate_governance_policy_and_voting_guidelines_for_investment_companies_an_NAPF_document.ashx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.11****PCAOB issues auditor professional scepticism alert**  On 6 December 2012, the US Public Company Accounting Oversight Board (PCAOB) published a practice alert to remind auditors of the importance of professional scepticism.  Professional scepticism is essential to the performance of effective audits under PCAOB standards. PCAOB standards define professional scepticism as an attitude that includes a questioning mind and a critical assessment of audit evidence.  In the alert, the PCAOB notes that its oversight activities continue to raise concerns regarding auditors' consistent and diligent application of professional scepticism.  The practice alert is available on the [PCAOB website](http://pcaobus.org/Standards/QandA/12-04-2012_SAPA_10.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.12** **Corporations Legislation Amendment (Derivative Transactions) Act**  The [Corporations Legislation Amendment (Derivative Transactions) Act 2012 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=137871" \t "_default) received assent on 6 December 2012 and amends the legislation listed below. The Act was amended at Bill stage on its passage through Parliament. The summary below reflects the Act as assented and incorporates those changes.  According to the explanatory memorandum, the Act provides a legislative framework to implement Australia's 2009 Pittsburgh G-20 commitments in relation to over-the-counter derivatives reforms.  **(a)  Corporations Act 2001**  The Act amends the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the principal Act) by inserting new Part 7.5A (Regulation of derivative transactions and derivative trade repositories) to prescribe matters relating to derivatives, derivative transactions, facilities, persons, bodies and other matters, including to:   * provide that the responsible Minister will be empowered by the principal Act to prescribe a certain class of derivatives in relation to a mandatory obligation; * allow a derivatives transaction rule (DTR) to be issued by the Australian Securities and Investments Commission (ASIC) to establish one or more mandatory obligations such as reporting, clearing or execution, for participants transacting in this prescribed class of derivatives; * provide for the regulation of DTRs, including by prescribing process and compliance requirements; * require any rule to be consented to by the relevant Minister before taking effect; and * prescribe a new licensing regime for a new kind of financial infrastructure entity, being trade repositories.   The Act also makes other minor and miscellaneous amendments.  **(b)  Other amended legislation**  The Act makes a number of minor and consequential amendments to legislation, in relation to the sharing of information between regulators and the protection of information in possession of those regulators, including to:   * amend section 22 (Remuneration and allowances) of the [Mutual Assistance in Business Regulation Act 1992 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7798" \t "_default) to allow the relevant Minister to delegate his authorisation function to senior officers employed by the regulator or to employees who, whilst not having an APS classification, hold a position at one of the Australian business law regulators that is equivalent to an SES or EL2 officer; * amend section 79 (Taxation) of the [Reserve Bank Act 1959 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6651" \t "_default) to provide that a person may disclose protected information or produce a protected document to a financial sector supervisory agency or a foreign central bank if the person is satisfied that this disclosure will assist the agency or central bank to perform its functions or exercise its powers; and * make other minor and miscellaneous amendments.   This affects the following legislation:   * [Australian Prudential Regulation Authority Act 1998 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=5782" \t "_default); * [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default); * [Mutual Assistance in Business Regulation Act 1992 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7798" \t "_default); and * [Reserve Bank Act 1959 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6651" \t "_default).   Commencement details are contained in section 2 of the Act.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.13** **FSA consults on changes to the regulation and supervision of benchmarks**   On 5 December 2012, the UK Financial Services Authority (FSA) proposed new rules and regulations for financial benchmarks.  This follows the recommendations of the Wheatley Review of the London Interbank Offered Rate (LIBOR).   On 2 July 2012, the Chancellor of the Exchequer commissioned Martin Wheatley, managing director of the FSA and CEO designate of the Financial Conduct Authority (FCA), to undertake a review of the structure and governance of LIBOR and the corresponding criminal sanctions regime.   On 28 September 2012, 'The Wheatley Review of LIBOR' was published, which included a 10-point plan for comprehensive reform of LIBOR. One of its key recommendations was that while the setting of LIBOR should remain an industry-led activity; the submission to, and administration of, the rate should be regulated by the FCA. On 17 October 2012 the government accepted the Review's recommendations in full, and amended the upcoming Financial Services Bill (the Bill) accordingly.    The FSA has considered both the Wheatley Review recommendations and the UK Treasury's proposed legislative amendments in designing an approach to regulating the setting of benchmarks. At least initially, the only 'regulated benchmark' in the UK will be LIBOR. However, the new regime provides a framework for regulation that can be extended to cover additional benchmarks in the future, were the government to consider it appropriate to do so.  The proposals include:   * benchmark administrators will be required to corroborate submissions and monitor for any suspicious activity; * those submitting data to benchmarks will be required to have in place a clear conflicts of interest policy and appropriate systems and controls. This will result in clear, robust rules which will give firms and their employees comfort that the regulatory regime clarifies what is expected of them; and * two new significant influence controlled functions created under the FSA's Approved Persons Regime for the administrator and submitting firms.   The FSA also seeks comments on ensuring the continuity of LIBOR and broadening participation in the rate. The Wheatley Review concluded that global markets benefit from the continuing participation of major firms in the LIBOR panels and that market integrity could be undermined if submitting firms were to leave them. In addition the Review noted that larger panel sizes would benefit the accuracy and reliability of the benchmark.  As a consequence, the FSA has asked for feedback on how best to broaden the participation in LIBOR panels, including the use of the FCA's powers to require firms to contribute to the rate on a permanent basis which the government is proposing to grant.  The consultation paper is available on the [FCA website](http://www.fsa.gov.uk/library/policy/cp/2012/12-36.shtml" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.14** **Study shows rate of departures of Australian CEOs the highest in the world**  On 30 November 2012, global consulting firm Booz & Company released its Australian CEO Succession Study, indicating that Australia records the highest rate of CEO turnover globally, despite outgoing CEOs having delivered above-average shareholder returns since the GFC.  The study shows that 23.5% of CEOs of ASX 200 companies left their job last year, well above the global average of 14.2% and the 13% recorded for Australian CEOs in 2010.  The 2011 CEO turnover rate was the highest in the 12-year history of the Australian study.  Underpinning the 2011 Australian result were mergers and acquisition events in 2011, which accounted for 37% of all CEO departures.  9% of Australian CEOs left their jobs following an M&A event in 2011, compared to 5% who left for reasons of performance and 10% whose departures were planned.  Median tenure in the job for CEOs who departed in the years 2009-2011 was 4.4 years, down from a peak of 5.2 years for CEOs who left their roles in the three-year period 2006-2008.  Departing CEOs in 2011 presided over average total shareholder returns (TSR) of 17% during their tenure in the job, compared to the average 11% delivered by departing CEOs over the 12-year history of the study.  The study showed a consolidating trend in Australia in recent years toward 'outsiders' (people appointed from outside the company) occupying existing CEO roles and being recruited as incoming CEOs.  Australia's preference for outsider CEOs is in contrast to the preference globally for CEOs to be appointed from within the company.  In the period 2009-2011, outsider CEOs had a shorter median tenure than their insider counterparts (4.2 years versus 5.0) and they were more likely to be forced out.  However, they also delivered higher shareholder returns on average (12% versus 8%) during their tenure.  The study is available on the [Booz & Company website](http://www.booz.com/anzsea/home/40271005/40271249/display/51414102" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.15** **Government call for submissions on the use of standard business reporting for financial reports**   On 30 November 2012, the Government released a paper seeking stakeholder views on a range of options relating to the use of Standard Business Reporting (SBR) for the lodgment of financial reports with the Australian Securities and Investments Commission (ASIC), including whether its use should be mandatory.  The paper considers how SBR can be leveraged as a productivity tool to enhance the transparency of company financial information and also to support business efficiency.  SBR is a key initiative of the Australian Government and was delivered as part of the Council of Australian Governments' (COAG) National Partnership to Deliver a Seamless National Economy. SBR was launched in mid-2010 to reduce the regulatory reporting burden on business by providing standardised electronic reporting. It is based on the idea that information will be 'recorded once, reported to many'. SBR offers a quicker and easier way for businesses to complete their government reporting requirements. It works as a by‑product of day‑to‑day business systems, allowing businesses to report through a single online channel to government directly from those systems.  Currently, SBR is used for the provision of BAS statements, Tax File Number declarations, payroll tax returns and PAYG payment summaries. Once fully implemented, it is estimated that more than one million Australian businesses will be able to report through the Standard Business Reporting system. Already, more than 100,000 lodgments have been received since the beginning of July, about nine times the number of lodgments for the same period in 2011.  Submissions close on 15 March 2013. The options paper is available at the [Treasury website](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/SBR-Options-Paper" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.16** **Government releases consultation paper on Australia's financial market licensing regime**   On 30 November 2012, Treasury published a consultation paper titled 'Australia's Financial Market Licensing Regime: Addressing Market Evolution'. The paper presents options for reforming the licensing regime within Part 7.2 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act).  Two main options are discussed in the paper, although stakeholders are invited to give general comments on Australia's licensing regime.   * The first option would create flexibility in the Corporations Act, enabling the Government to tailor the licence obligations for each market type by deciding which obligations should and should not apply. * The second option would create multiple licence classes, with dark pools licensed in a different category to public exchanges, each with different obligations. This approach is similar to the arrangements already in place in the US and Europe.   The Options Paper and details on how to participate in the consultation process can be found on the [Treasury website](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Australias-financial-market-regime-Addressing-market-evolution" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.17** **European Commission audit reforms**  On 30 November 2012, the European Commission announced proposals to clarify the role of auditors and introduce more stringent rules for the audit sector aimed in particular at strengthening the independence of auditors, as well as providing greater diversity for the current highly-concentrated audit market.    The proposals regarding the statutory audit of public-interest entities, such as banks, insurance companies and listed companies, envisage measures to enhance auditor independence and to make the statutory audit market more dynamic. The key measures in this respect are:   * **Mandatory rotation of audit firms:** Audit firms will be required to rotate after a maximum engagement period of 6 years (with some exceptions). A cooling off period of 4 years is applicable before the audit firm can be engaged again by the same client. The period before which rotation is obligatory can be extended to 9 years if joint audits are performed; ie if the entity being audited appoints more than one audit firm to carry out its audit. Joint audits are not made obligatory but are thus encouraged. * **Mandatory tendering:** Public-interest entities will be obliged to have an open and transparent tender procedure when selecting a new auditor. The audit committee (of the audited entity) should be closely involved in the selection procedure. * **Non-audit services:** Audit firms will be prohibited from providing non-audit services to their audit clients. In addition, large audit firms will be obliged to separate audit activities from non-audit activities in order to avoid all risks of conflict of interest. * **European supervision of the audit sector:** The Commission proposes that the coordination of the auditor supervision activities is undertaken within the framework of the European Markets and Securities Authority (ESMA). * **Enabling auditors to exercise their profession across Europe:** The Commission proposes the creation of a Single Market for statutory audits by introducing a European passport for the audit profession.  The Commission proposals will allow audit firms to provide services across the EU and will require all statutory auditors and audit firms to comply with international auditing standards when carrying out statutory audits. * **Auditors of smaller companies:** The proposal also allows for a proportionate application of the standards in the case of small and medium-sized companies.   The proposals are available on the [EU website](http://ec.europa.eu/internal_market/auditing/reform/index_en.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.18** **Government releases draft regulations to expand access to financial advice**  On 28 November 2012, the Government released draft regulations for consultation aimed at expanding access to financial advice and better protecting investors by replacing the accountants' exemption with a new form of limited licence.  On 23 June 2012, the Government announced arrangements to replace the exemption which currently allows accountants to provide financial advice on self-managed superannuation funds (SMSFs) without an Australian Financial Services License (AFSL).  Under the new arrangements, accountants will be able to access a new form of limited licence from 1 July 2013 which will enable them to discuss a range of financial products with their clients. The range of products includes SMSFs, superannuation, securities, simple managed investment schemes, general insurance, life risk insurance and basic deposit products. Apart from SMSFs, holders of this licence will only be able to talk about these products at a class of product level, meaning they cannot recommend specific products to their clients. Holders of this licence will also be able to lodge an annual compliance certificate rather than an auditor's report.  While designed for accountants, this limited form of licence will be available to anyone who satisfies the licensing requirements. However, accountants with a public practice certificate from one of the professional accounting bodies will be deemed to have the necessary experience to provide advice under this new form of license.  The accountants' exemption will be repealed from 1 July 2016.  These arrangements will be implemented through amendments to the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "_default).  The draft amending regulations and draft explanatory statement can be found on the [Future of Financial Advice website](http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=consultation/exemption_replacement/default.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.19** **UK Government publishes consultation on regulation of LIBOR**  On 28 November 2012, the UK Government launched its public consultation on the regulation of the London Interbank Offered Rate (LIBOR). The consultation seeks the views of industry and the public on legislation to implement the key recommendations of the Wheatley Review of LIBOR, which the Government accepted in full last month.  The consultation paper invites comment on two pieces of secondary legislation:   * bringing LIBOR within the scope of regulation; and * making the manipulation of LIBOR a criminal offence.   The UK Government is committed to implementing the recommendations as soon as possible by amending the Financial Services Bill, which is currently before Parliament. The Bill is expected to receive Royal Assent by early 2013, subject to the Parliamentary timetable.  The final chapter of the consultation discusses the potential for other benchmarks to be covered by secondary legislation. Additional benchmarks could be included within the scope of regulation or the application of the criminal offence.  The consultation is available on the [UK Treasury website](http://www.hm-treasury.gov.uk/wheatley_review.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.20** **CFTC issues clearing determination for certain credit default swaps and interest rate swaps**   On 28 November 2012, the US Commodity Futures Trading Commission (CFTC) issued new rules to require certain credit default swaps (CDS) and interest rate swaps to be cleared by registered derivatives clearing organizations (DCOs). The rules establish the first clearing determination by the Commission under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).     Under the rules, market participants are required to submit a swap that is identified in the rule for clearing by a DCO as soon as technologically practicable and no later than the end of the day of execution.     The Dodd-Frank Act amended the Commodity Exchange Act (CEA) to prevent market participants from entering into a swap that the Commission has required to be cleared unless that person submits the swap for clearing to a DCO. The Dodd-Frank Act also requires the Commission to determine whether a swap is required to be cleared by either a Commission-initiated review or a submission from a DCO for the review of a swap, or group, category, type, or class of swap. The clearing requirement determination does not apply to those who are eligible to elect an exception from clearing, such as non-financial entities hedging commercial risk.   The rules codify statutory provisions that make clear that any swaps entered into prior to the enactment of the Dodd-Frank Act or prior to the application of the clearing requirement are not required to be cleared. The Commission also is issuing a regulation to prevent evasion of the clearing requirement and related provisions. This regulation aims to prevent evasion of the clearing requirement and prevent abuse of any exemption or exception to the clearing requirement under the Dodd-Frank Act.   Finally, pursuant to the clearing requirement determination, a DCO is required to post on its website a list of all swaps that it will accept for clearing and clearly indicate which of those swaps the Commission has determined are required to be cleared. The Commission is also posting on its website a list of the swap classes required to be cleared. The announced clearing requirement determination applies only to swaps currently cleared by four DCOs: CME; ICE Clear Credit; ICE Clear Europe; and LCH Clearnet Ltd.   The determinations require that swaps in four interest rate swap classes and two CDS classes be cleared under section 2(h) of the CEA. The determinations identify these classes by using basic specifications.  Therefore, counterparties contemplating entering into a swap will be able to determine quickly whether or not the particular swap is subject to the clearing requirement.   Further information is available on the [CFTC website](http://www.cftc.gov/PressRoom/PressReleases/pr6429-12" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.21** **IOSCO releases principles for ongoing disclosure for asset-backed securities**  On 27 November 2012, the Board of the International Organization of Securities Commissions (IOSCO) released the Final Report on Principles for Ongoing Disclosure for Asset Backed Securities (ABS Ongoing Disclosure Principles), which contains principles designed to provide guidance to securities regulators who are developing or reviewing their regulatory regimes for ongoing disclosure for asset-backed securities (ABS).   The objective of the ABS Ongoing Disclosure Principles is to enhance investor protection by facilitating a better understanding of the issues that should be considered by regulators in relation to ongoing disclosure regimes for ABS.   The 11 Principles for ABS Ongoing Disclosure were developed as a complement to IOSCO's 'Disclosure Principles for Public Offerings and Listings of Asset-Backed Securities', issued in 2010.  IOSCO also has issued disclosure principles that provide guidance for:   * cross-border offerings of equity securities (1998); * ongoing disclosure of material development reporting (2002); * management's discussion and analysis (2003); * cross-border offerings of debt securities (2007); and * periodic disclosure (2010).   The ABS Ongoing Disclosure Principles recommend disclosures for those securities that are primarily serviced by the cash flows of a discrete pool of receivables or other financial assets - either fixed or revolving - that by their terms convert into cash within a finite period of time. These principles would not apply to securities backed by asset pools that are actively managed, such as securities issued by investment companies or collateralized debt obligations, or that contain assets that do not by their terms convert to cash.   The Principles are available on the [IOSCO website](http://www.iosco.org/news/pdf/IOSCONEWS259.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.22** **The ABI's principles of executive remuneration**   On 26 November 2012, the Association of British Insurers published an updated edition of its 'Principles of Executive Remuneration'. The Principles reflect ABI members' views on the role of shareholders and directors in relation to remuneration and the manner in which remuneration should be determined and structured.  The document is designed with a format of over-arching Principles and general Guidance. This document is predominantly for companies with a main market listing but is relevant to companies on other public markets and other entities too.  Members expect that, as a minimum, companies will follow the requirements relating to Remuneration in the UK's Companies Act 2006, the UK Corporate Governance Code and the UK Listing Rules. Where companies are not subject to these regimes they should apply similar high standards.  The Principles are available on the [ABI website](http://www.ivis.co.uk/ExecutiveRemuneration.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.23** **Passage through Parliament of Personal Liability for Corporate Fault Reform Bill 2012**   On 22 November 2012, the Personal Liability for Corporate Fault Reform Bill 2012 (the Bill) passed through the Senate.  The Bill represents the Australian Government's commitment to implementing the Directors' Liability reform initiative as part of the Council of Australian Governments' (COAG) National Partnership Agreement to Deliver a Seamless National Economy.  The reform commits all jurisdictions to establishing a nationally consistent and principles-based approach to the imposition of personal criminal liability on directors for corporate fault.  The Bill amends a significant number of provisions across a range of Commonwealth legislation that imposes personal criminal liability for corporate fault. It will ensure that a person is only made criminally liable for the fault of a corporation where it is fair and reasonable in all circumstances to do so.  As part of the COAG reform, Commonwealth legislation was assessed against principles and guidelines endorsed by COAG for the imposition of personal liability. The Bill amends Commonwealth legislation to align it with these principles and guidelines.  Further information is available on the [Treasury website](http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/050.htm&pageID=003&min=bfr&Year=&DocType" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.24** **UK equity markets reforms**   On 22 November 2012, the UK Government's response to the Kay Review of UK Equity Markets and Long-Term Decision Making, and the individual recommendations made by Professor Kay in his final report, was published.   Overall, the Government accepts Professor Kay's analysis and his ten principles for equity markets, to which market practitioners, government and regulatory authorities should have regard. It supports the directions for market participants which follow from these principles. The Government will also work with relevant regulatory authorities to explore further the Kay Report's directions for regulatory policy.    Professor Kay also makes 17 more specific recommendations - aimed variously at market participants, government and regulatory authorities - which are the first steps towards ensuring that UK equity markets fulfil their core purposes. The Government provides a detailed response to each of the specific recommendations.   A number of measures are already in place which contribute to the delivery of Professor Kay's recommendations, including:   * progress with the Government's proposals to reform corporate narrative reporting to be higher quality, simpler, more relevant to users and more focussed on forward looking strategy - to come into force from 1 October 2013; * a renewed commitment to secure reforms to the EU Transparency Directive which will remove mandatory quarterly reporting; and * an updated edition of the Financial Reporting Council (FRC) Stewardship Code which emphasises that stewardship should encompass questions of company strategy - in line with Kay's recommendation.   The Government is also supportive of Professor Kay's Good Practice Statements for Company Directors, Asset Managers and Asset Holders, and believes they should prompt market participants to consider their current practice, such that industry-led standards of good practice emerge.    There is strong endorsement for the Good Practice Statement for Company Directors (included as an appendix in the Government's response) and, amongst other things, the Government has signalled that it will take a greater interest in mergers and acquisitions including greater engagement with companies and their investors.   The Government's response is available on the [BIS website](http://www.bis.gov.uk/assets/biscore/business-law/docs/e/12-1188-equity-markets-support-growth-response-to-kay-review" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.25** **UK Competition Commission publishes more working papers from its statutory audit market services inquiry**   On 21 November 2012, the UK's Competition Commission released more working papers as part of its statutory audit market services inquiry, including the following:   * [Characteristics of long audit tenure companies](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/characteristics_of_long_audit_tenure_companies.pdf" \t "_new); * [Econometric analysis of audit costs](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/econometric_analysis_of_audit_costs.pdf" \t "_new) * [Engagement level profitability analysis](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/engagement_level_profitability.pdf" \t "_new); * [The life cycle of FTSE350 companies](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/life_cycle_of_ftse_350_companies.pdf" \t "_new); and * [Views of investors and other stakeholders](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/views_of_investors_and_other_stakeholders.pdf" \t "_new).   In October 2011, the Competition Commission was asked to assess competition in the market for the provisions of statutory audits to large companies. The Competition Commission's role is to determine whether any feature or combination of features of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK.  Further information on the statutory audit market services inquiry is available on the [Competition Commission's website](http://www.competition-commission.org.uk/our-work/statutory-audit-services" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.26** **Government announces new rules on high frequency trading and dark pools**   On 20 November 2012, the Government announced a package of market integrity rules aimed at better protecting investors who use Australia's financial markets. The package includes the use of 'kill switches' over algorithmic trading. Algorithmic trading is the trading that results from a computerised, rule-based system responsible for generating orders to buy or sell a security.  The rules have been developed following extensive consultation by the Australian Securities and Investments Commission (ASIC).  The new rules provide for:   * direct control over trading algorithms, including 'kill switches' to immediately stop an algorithm if required; * new extreme trading rules in cases of large price movements; * a requirement that dark pools offer meaningful price improvement over the lit market, with exemptions for block trades; and * additional data reporting requirements to assist ASIC in performing market surveillance.   The market integrity rules will provide for an immediate obligation on the market operators, ASX and Chi X, to enforce an extreme trading range for trades in securities. There will also be new data reporting requirements on operators from 2013.  For market participants, the obligations from the market integrity rules will come into force over a 6 to 18 month period. Whilst these market integrity rules are a good start, stakeholders have advised that there are additional issues that need to be considered.  As a result, ASIC has also launched two task forces focusing on dark liquidity and high frequency trading which are due to report to the Government in March 2013.  Further details on these two task forces is available in the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byHeadline/12-290MR%20ASIC%20makes%20key%20announcements%20on%20market%20structure,%20dark%20liquidity%20and%20high%20frequency%20trading?opendocument" \l "attachment" \t "_new).  The Government also announced that the Treasury has been asked to conduct a review of Australia's financial market licensing regime. Whilst the review will examine the licensing of dark pools, it will also be directed at ensuring that the market licensing regime is generally fit for purpose. Stakeholders will have an opportunity to provide their views as part of this review.  The new market integrity rules can be found on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Market+integrity+rules?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.27** **Private equity professional standards handbook published**   On 19 November 2012, the European Private Equity and Venture Capital Association (EVCA) released a handbook of professional standards. EVCA is the pan-European industry association for investors and managers in the private equity and venture capital industry.    The handbook identifies the principles of governance, transparency and accountability expected of EVCA members. It is based on and replaces several existing standards including the EVCA Corporate Governance Guidelines (published in 2005 and last updated in 2010), the EVCA Governing Principles (published in 2003 and last updated in 2010) and the EVCA Code of Conduct (published in 2008, reprinted in 2011). The Handbook also includes the new IPEV Investor Reporting Guidelines.    The handbook is available on the [EVCA website](http://www.evca.eu/uploadedFiles/Home/Toolbox/Industry_Standards/EVCA_Handbook_November_2012.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.28** **FSB publishes recommendations to strengthen oversight and regulation of shadow banking**  On 18 November 2012, the UK's Financial Stability Board (FSB) released for public consultation an initial integrated set of policy recommendations to strengthen oversight and regulation of the shadow banking system.  The 'shadow banking system' can broadly be described as 'credit intermediation involving entities and activities (fully or partially) outside the regular banking system' or non-bank credit intermediation in short.  The FSB has focused on five specific areas in which the FSB believes policies are needed to mitigate the potential systemic risks associated with shadow banking:   * to mitigate the spill-over effect between the regular banking system and the shadow banking system; * to reduce the susceptibility of money market funds (MMFs) to 'runs'; * to assess and mitigate systemic risks posed by other shadow banking entities; * to assess and align the incentives associated with securitisation; and * to dampen risks and pro-cyclical incentives associated with secured financing contracts such as repos, and securities lending that may exacerbate funding strains in times of 'runs'.   The released consultative documents comprise:   * a report entitled 'An Integrated Overview of Policy Recommendations' which sets out the FSB's overall approach to shadow banking issues and provides an overview of its recommendations across the five specific areas; * a report entitled 'Policy Framework for Strengthening Oversight and Regulation of Shadow Banking Entities' which sets out a high-level policy framework to assess and mitigate bank-like systemic risks posed by shadow banking entities other than MMFs (other shadow banking entities); and * a report entitled 'Policy Recommendations to Address Shadow Banking Risks in Securities Lending and Repos' that sets out 13 recommendations to enhance transparency, strengthen regulation of securities financing transactions, and improve market structure.   Further information is available on the [FSB website](http://www.financialstabilityboard.org/press/pr_121118.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.29** **IOSCO releases recommendations for securitisation regulation**   On 16 November 2012, the International Organization of Securities Organizations (IOSCO) released a final report on 'Global Developments in Securitisation Regulation', which proposes a series of recommendations aimed at ensuring securitisation markets develop, but on a sound and sustainable basis.   The Financial Stability Board (FSB) is in the process of reviewing reforms of securitisation markets, as part of its ongoing work for the G20 on the shadow banking sector. In this context, the FSB requested that IOSCO conduct a stock-taking exercise on certain aspects of securitisation, including risk retention, transparency and standardisation, and develop policy recommendations as necessary.   The recommendations cover a roadmap toward convergence and implementation of approaches to incentive alignment, in particular regarding risk retention requirements. They build on recent developments in standardised templates for asset level disclosure and other disclosure-related initiatives to assist informed investment decisions. The report also sets out further issues for consideration to support sound regulation of sustainable securitisation markets.   The report:   * makes observations about the role sound securitisation markets can play in supporting economic growth and the role regulation can play in reducing systemic risk and restoring investor trust and confidence; * provides a snapshot of the global securitisation markets; * summarises key themes, observations and issues in relation to approaches to risk retention, transparency and standardisation; * makes recommendations in relation to risk retention, transparency and standardisation; and * identifies other medium or longer-term priorities for policy consideration.   Further information is available on the [IOSCO website](http://www.iosco.org/news/pdf/IOSCONEWS257.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1)  **1.30** **Women on Boards: European Commission proposes 40% objective**  On 14 November 2012, the European Commission announced proposed legislation to accelerate progress towards a better gender balance on the corporate boards of European companies. The proposed Directive sets an objective of a 40% representation of women in non-executive board-member positions in publicly listed companies, with the exception of small and medium enterprises.    Currently, 85% of non-executive board members and 91.1% of executive board members are men, while women make up 15% and 8.9% respectively. Despite an intense public debate and some voluntary initiatives at national and European level, the situation has not changed significantly in recent years: an incremental average increase of the number of women on boards of just 0.6 percentage points per year has been recorded since 2003.   Further information is available on the [EC website](http://europa.eu/rapid/press-release_IP-12-1205_en.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h1) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1** **Release of key FOFA guidance**   On 13 December 2012, ASIC released final guidance for two aspects of the Future of Financial Advice (FOFA) reforms - the best interests duty and scaled advice. ASIC also provided an update on its proposed guidance for the FOFA conflicted remuneration provisions.   **(a) Best interests duty**  ASIC's final guidance on the best interests duty covers:   * acting in the best interests of the client; * satisfying the 'safe harbour' for the best interests duty; * providing appropriate personal advice; and * prioritising the interests of the client.   The guidance is in an update to Regulatory Guide 175 '[Licensing: Financial product advisers - conduct and disclosure](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg175" \t "_new)'.  **(b) Scaled advice**  ASIC has provided specific and practical guidance and examples about giving scaled advice while complying with the best interests duty.  It includes worked examples of scaled advice by:   * banks; * general insurers; * superannuation funds; * financial planners; and * stockbrokers.   The guidance is in Regulatory Guide 244 '[Giving information, general advice and scaled advice](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg244" \t "_new)'.  **(c) Update on CP 189 - Conflicted Remuneration and Employee Remuneration**  In September 2012, ASIC proposed guidance on the conflicted remuneration ban in Consultation Paper 189 '[Future of Financial Advice: Conflicted remuneration](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp189" \t "_new)'.   CP 189 outlined when ASIC is more likely to scrutinise a performance benefit as part of employee remuneration for potential conflict. This included an indication of what percentage of performance benefits that relates to sales volumes may trigger closer scrutiny by ASIC. The aim of the proposal was to give industry more certainty about when ASIC may scrutinise performance benefits.   Submissions to CP 189 have raised difficulties with the identification of a single indicative percentage and have not supported ASIC providing indicative thresholds for when ASIC is more likely to scrutinise a benefit. In light of this feedback, ASIC proposes to remove indicative thresholds from its final guidance.  ASIC will release final guidance on conflicted remuneration in February 2013.   Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-317MR+ASIC+releases+key+FOFA+guidance?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h2)  **2.2** **Response to submissions on revised financial requirements for electricity derivative issuers**   On 13 December 2012, ASIC released a feedback report responding to submissions on its consultation on revised financial requirements for issuers of over-the-counter (OTC) electricity derivatives.  Consultation Paper 177 '[Electricity derivative market participants: Financial requirements](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp177" \t "_new)', released in May 2012, outlined proposals for replacing the current financial requirements applying to electricity derivative issuers with a simpler net tangible asset measure, and new liquidity and cash forecasting requirements.  Based on feedback ASIC received, and further consideration, ASIC does not intend to implement the changes to financial requirements it proposed in CP 177 at this time.  ASIC remains of the view that market participants could benefit from some enhanced risk management due to the highly concentrated nature of the OTC derivatives electricity market. However, ASIC does not wish to pre-empt the process of implementing the G20 reforms to OTC derivative markets in Australia and has decided to delay its review until this process is completed.  If electricity derivatives are ultimately not included in these reforms, ASIC will consult on applying similar new requirements through the Australian financial services (AFS) licensee financial requirements.   The feedback report (REP 320) is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep320" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h2)  **2.3** **Release of information sheet on legal professional privilege**   On 13 December 2012, ASIC released an information sheet outlining the approach it takes on claims of legal professional privilege (LPP).  ASIC has compulsory information gathering powers to require disclosure of information. This power may be exercised in respect of its regulatory work. However, information that attracts a valid claim of LPP does not have to be provided.  Issues, though, can arise on whether a claim of LPP has been properly established and whether LPP information can be provided to ASIC on a limited and confidential basis.  The information sheet covers:   * an explanation of when a claim of LPP might arise; * an explanation of who can make a claim of LPP; * an overview of a privilege holder's options if LPP applies; * a description of how to make an LPP claim; * the options available to a claimant if ASIC does not accept an LPP claim; * information about making a voluntary and confidential disclosure of privileged information to ASIC; and * a description of the situations where ASIC will not accept a claim of LPP.   The early disclosure of LPP information to ASIC (on a confidential and restrictive basis) can sometimes help in identifying the critical issues in an investigation and in producing an effective and efficient conclusion to the investigation. It will often be in the interests of ASIC and the holder of the LPP information for this to occur.  The information sheet (INFO 165) is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Legal-professional-privilege?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h2)  **2.4** **Focus on advertising disclosure requirements for super trustees**   On 11 December 2012, ASIC announced that it had written to superannuation trustees reminding them about disclosure requirements associated with advertising for superannuation products.  The types of issues ASIC has seen in advertising that may lead to misleading or deceptive concerns include:   * the statements do not give a balanced message about the returns, benefits and risks associated with an interest in the fund; * the warnings, disclaimers and qualifications in relation to the fund are not disclosed in a balanced manner and are not given sufficient prominence; and * the document does not give a realistic impression of the overall level of fees and costs that a consumer is likely to pay.   ASIC is also aware of superannuation trustees offering cash incentives to encourage members to consolidate their super money, or for new members to acquire an interest in the fund. While this is permitted, trustees need to ensure that their messages about their products and services remain balanced and that members are not distracted from making an informed financial decision.   ASIC encourages superannuation trustees to review their advertising and promotional material (including direct mailouts to members), and consider the guidance given in ASIC's Regulatory Guide 234 '[Advertising financial products and advice services (including credit): Good practice guidance](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg234" \t "_new)'.   The Australian Prudential Regulation Authority (APRA) has also written to Registrable Superannuation Entity (RSE) licensees reminding them of their ongoing obligation to meet the Outsourcing Standard, when outsourcing activities, for example, to fund promoters.   Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-311MR+ASIC+focuses+on+advertising+disclosure+requirements+for+super+trustees?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h2)  **2.5** **Release of SMSF auditor registration guidance and competency standards**   On 10 December 2012, ASIC released guidance to assist auditors of self managed superannuation funds (SMSF) register with ASIC.   The guidance has been issued ahead of a new registration scheme for auditors to commence on 31 January 2013 as part of the Federal Government's 'Stronger Super' reforms.  Regulatory Guide 243 '[Registration of self-managed superannuation fund auditors](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg243" \t "_new)' explains how to apply for registration as an approved SMSF auditor, the types of registers of SMSF auditors maintained by ASIC and the transitional arrangements for the registration of existing approved auditors of SMSFs.   Applications for registration can be made from 31 January 2013 and auditors will need to be registered with ASIC to conduct audits of SMSFs from 1 July 2013. ASIC advises prospective registrants to apply early, particularly as any transition concessions are only available for auditors who are registered by 30 June 2013.  ASIC has also released proposed competency standards: '[Competency standards for approved SMSF auditors](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co-12-1687-proposed-competency-standards-smsf-auditors-1.pdf/$file/co-12-1687-proposed-competency-standards-smsf-auditors-1.pdf" \t "_new)'.    The competency standards for auditors of self-managed superannuation funds detail ongoing requirements for registered SMSF auditors and will apply from 1 July 2013. These standards are based on pre-existing standards issued by The Institute of Chartered Accountants in Australia, CPA Australia and the Institute of Public Accountants, which also apply to members of the Superannuation Professionals' Association of Australia Limited, thus ensuring continuity in requirements for most SMSF auditors.   Further information, including key dates, is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-308MR+ASIC+releases+SMSF+auditor+registration+guidance+and+competency+standards?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h2)  **2.6** **Release of guidance to improve the quality and reliability of investment research**   On 10 December 2012, ASIC released updated policy guidance to improve the quality and reliability of research reports.  Regulatory Guide 79 '[Research report providers: Improving the quality of investment research](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg79" \t "_new)' has been updated to help research providers better comply with their legal obligations and to complement reforms under the Future of Financial Advice (FOFA) legislation aimed at improving the quality and accessibility of financial advice.  ASIC's guidance applies to a broad range of research providers on investment products, such as research analysts, securities analysts or research houses.   The guidance includes measures to address:   * management of conflicts of interest, particularly business model conflicts among research report providers; * quality and robustness of the research process including the need to allocate appropriate resources and expertise to the research task; * transparency of the research process including the way products are selected for research, what ratings mean and how they are applied; and * the ability of users of research to form a view about the quality and reliability of the research.   To assess industry's compliance with the guidance, ASIC will conduct targeted surveillance of research report providers.   ASIC expects research providers to give clients or subscribers information to help them understand the research service. This includes the:   * methodology applied and any limitations that apply to it; * process by which products are selected for coverage and filters applied; and * spread of ratings (how many products or what percentage each type of rating received over the past year, for example).   This information is designed to help users determine the quality of the service and therefore, the extent to which the research report can be relied upon.  RG 79 also sets out ASIC's expectations that research providers effectively manage conflicts of interest so as to limit their impact on the integrity of investment research.   Conflicts of interest that may affect investment research include:   * business model conflicts associated with, for example, an issuer pays business model; and * conflicts arising from research providers' other commercial activities. This includes non-research services provided to product issuers such as consultancy services, cross subsidisation arrangements, ancillary business units or funds management business arms.   In some cases, conflicts can be managed with robust processes and controls while in others, the conflict is so significant that it cannot be managed. In such circumstances, ASIC expects the conflict to be avoided entirely.   ASIC will conduct targeted surveillances of research report providers to assess compliance with this updated guidance, measuring both broad compliance as well discrete issues such as conflicts management.   Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-307MR+ASIC+releases+guidance+to+improve+the+quality+and+reliability+of+investment+research?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h2)  **2.7** **Extension of shorter PDS regime relief**   On 6 December 2012, ASIC announced that it had extended interim class order relief from the shorter PDS regime for multi-funds, superannuation platforms and hedge funds.  [Class Order 12/1592](http://www.asic.gov.au/asic/asic.nsf/byheadline/2012+Class+Orders?openDocument" \l "co12-1592" \t "_new) extends the relief in [Class Order 12/749](http://www.asic.gov.au/asic/asic.nsf/byheadline/2012+Class+Orders?openDocument" \l "co12-749" \t "_new) 'Relief from the Shorter PDS regime' for a further 12 months, to 22 June 2014. The relief was due to expire on 22 June 2013.   ASIC has extended the relief pending a future Government decision on the application of the shorter PDS regime to superannuation platforms, multi-funds and hedge funds.   A number of hedge funds had issued shorter PDSs when ASIC excluded hedge funds from the shorter PDS regime. Class Order 12/749 provides that a hedge fund that has issued a shorter PDS before 18 June 2012 may continue to use that shorter PDS until 31 January 2013.   ASIC has:   * extended this transitional relief to 22 June 2013; and * provided hedge funds who have prepared and given a shorter PDS between 18 June 2012 and 22 June 2012 with the benefit of the transitional period from the commencement of this class order.   From 22 June 2013, hedge funds must prepare and give a full PDS.  Extending the transitional period for hedge funds will align with the commencement of new disclosure obligations for hedge funds under ASIC Regulatory Guide 240 '[Hedge funds: Improving disclosure](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg240" \t "_new)'.   Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-306MR+ASIC+extends+shorter+PDS+regime+relief?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h2)  **2.8** **Warning to comparison websites**   On 5 December 2012, ASIC released a warning to operators of insurance and credit comparison websites of the need to ensure they comply with their obligations under consumer protection laws.  In light of the growth in comparison websites, ASIC is focused on ensuring they are providing accurate information and not misleading consumers. While comparison websites can play a valuable role and assist consumers in shopping around, one with misleading or inaccurate information can also cause detriment by steering consumers towards unsuitable or more expensive products.  ASIC has already identified a number of concerns with some comparison websites, including that some of the websites:   * only compare a limited number of brands/products from a limited number of providers. This may not be clearly disclosed which creates the impression that the extent of comparison is much broader than it actually is; * use 'ratings' and 'rankings' for products without a clear explanation of the basis for those ratings and rankings; and * refer to 'special offers' and 'featured products' without properly explaining the basis of selection of certain products.   ASIC's focus on insurance-specific comparison websites found that on some websites:   * there was insufficient disclosure relating to website operators who were related to the issuer of the insurance brands being compared; * comparisons were provided on the basis of price without any warning that different products may have different features and levels of coverage; and * the operators of websites are not appropriately licensed or authorised to provide financial services.   ASIC also reminded operators that websites that allow consumers to obtain and/or compare insurance quotes will generally be providing financial services. If so, these operators need to be licensed or be an authorised representative of a licensee.  For credit comparison websites that advertise loan products, it is important that comparison rates are disclosed as required under the National Credit Code. Given the nature of comparison sites, it is important that consumers are provided with accurate information so they can choose financial products that best suit their needs.   Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-304MR+ASIC+warns+comparison+websites?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h2)  **2.9** **Release of ASIC's audit inspection report for 2011-12**   On 4 December 2012, ASIC released the results of its audit inspection report for 2011-12 which shows a decline in audit quality.  The report for the 18 months to 30 June 2012 covered inspections of 20 Australian audit firms, and found 18% of the 602 audit areas reviewed did not perform all of the procedures necessary to obtain reasonable assurance that the audited financial report was not materially misstated. The figure for the previous 18 months was 14%.  While the financial reports audited may not have been materially misstated, the auditor had not obtained reasonable assurance that the financial report as a whole was free of material misstatement.  ASIC will work with firms and the audit profession more generally on how they can improve audit quality. It will monitor the implementation and execution of any plans to improve audit quality, and their effectiveness.  ASIC has identified three areas needing improvement:   * the sufficiency and appropriateness of audit evidence obtained by the auditor; * the level of professional scepticism exercised by auditors; and * the extent of reliance that can be placed on the work of other auditors and experts.   The audit inspection program report (REP 317) is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep317" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h2)  **2.10** **Call for improved compliance in CFD and margin FX client money handling practices**   On 3 December 2012, ASIC issued a warning to the contracts for difference (CFD) and margin foreign exchange (FX) sectors following the release of a report highlighting weaknesses in client money handling practices.  Report 316 'Review of client money handling practices in the CFD and margin FX sector' follows a risk-based surveillance of 40 issuers of OTC CFDs and margin FX contracts. The review focused on issuers' client money handling and reconciliation practices. It also gathered information about the amount of client money issuers hold and how they use this money. The 40 issuers ASIC reviewed represent the overwhelming majority of market share in the sector.  ASIC identified a number of contraventions of client money rules as part of its review, including:   * 18 issuers (45%) failed to properly designate client accounts as trust accounts; and * 11 issuers (28%) failed to pay client money into a compliant account by the next business day following receipt.   In addition, ASIC's review identified further weaknesses, including:   * six issuers (15%) did not perform client money reconciliations on a daily basis; * five issuers (13%) had inadequate segregation of duties in their back office; and * 19 issuers (48%) had no formal escalation process for resolving variances in the reconciliation.   The report also contains observations about how issuers use client money, industry size and scale as well as providing insights into emerging industry trends that were identified during the review.   The report is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep316" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h2)  **2.11** **Areas of focus for 31 December 2012 financial reports**   On 27 November 2012, ASIC released the results of its reviews of financial reports for years ended 30 June 2012 and announced its areas of focus for 31 December 2012 financial reports.  At 31 December 2012, directors and auditors should focus particularly on:   * revenue recognition and expense deferral policies; * asset values and the disclosure of associated assumptions; * off-balance sheet arrangements; and * going concern assessments.   Directors and auditors should also focus on disclosures of useful and meaningful information for investors and other users. This includes the disclosure of non-IFRS financial information (ie financial information determined other than in accordance with the International Financial Reporting Standards (IFRS) that have been adopted in Australia) in accordance with ASIC Regulatory Guide 230 '[Disclosing non-IFRS financial information](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg230" \t "_new)'.  ASIC's reviews at 30 June 2012 covered 320 financial reports of listed entities and those unlisted entities with larger numbers of users.  While financial reporting in Australia is generally of a high standard, ASIC continues to identify some deficiencies in key areas.  ASIC has made inquiries of a number of entities and a number of material adjustments have been made.  ASIC's surveillance focuses on material disclosures of information useful to investors and other users of financial reports. ASIC does not pursue immaterial disclosures that may add unnecessary clutter to financial reports.  More information about focuses for 31 December 2012 financial reports and the findings of ASIC's reviews of the financial reports for the periods ended 30 June 2012 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-292MR-Attachment+-+ASICs+focus+for+31+Decemver+2012?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h2)  **2.12** **Key announcements on market structure, dark liquidity and high frequency trading**   On 21 November 2012, ASIC announced new market integrity rules to address risks emerging from developments in market structure, including growth in automated trading and the changing nature of dark liquidity. The rules will be phased in over an 18-month period.  **(a) High-frequency trading**  Rules which respond to the growth in high frequency trading (HFT) include:   * volatility controls for extreme price movements - amending the existing anomalous order threshold and extreme cancellation range rules (applicable the day after registration of the rules), and extending the rules to the ASX SPI 200 index futures contract to minimise cross-product contagion (applicable in 18 months); and * automated trading - tightening rules to require direct and immediate control over filters and orders, and amending existing rules requiring annual review of systems (applicable 18 months after registration).   **(b) Dark liquidity**  ASIC's rules on pre-trade and post-trade transparency requires meaningful price improvement and a tiered threshold for block trades (both applicable six months from registration). A rule requires market operators and participants to have in place systems and controls ensuring validation and verification of trades relying on the pre-trade transparency exception and/or post-trade delayed publication (applicable the day after registration).  A rule of enhanced data for supervision goes to the heart of market integrity and requires additional data on orders and/or trades including identification of crossing systems, flagging whether a participant is acting as a principal or agent, a client identifier or reference, identification of intermediary of Australian financial services licence holders, and whether a trade for a wholesale client was done through direct market access. For market operators, this rule applies from 28 October 2013. For market participants, the rule applies from 10 March 2014.  **(c) Dark liquidity and HFT taskforces**  ASIC has established two taskforces to consider these key areas further.  They are both reviewing the impact of these activities on market quality. The dark liquidity taskforce will consider the delivery of efficient price formation, informing investors about how their orders are executed, and promoting confidence in the integrity of the market. The HFT taskforce will analyse the prevalence, nature and impact of HFT in the Australian market and abroad, and assess whether the current framework is adequate for HFT.  ASIC's updates include:   * updated Regulatory Guide 223 '[Guidance on ASIC market integrity rules for competition in exchange markets](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg223" \t "_new)', to give guidance on the draft new or amended market integrity rules for extreme price movements, enhanced data for market surveillance, pre-trade and post-trade transparency; * an addendum to Regulatory Guide 172 '[Australian market licences: Australian operators](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg172" \t "_new)' to give guidance on systems and controls for holders of an Australian market licence; * Regulatory Guide 241 '[Electronic trading](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg241" \t "_new)' on the new rules relating to automated order processing, consolidated with the updating of guidance which is currently contained in ASX guidance notes; and * Report 311 '[Response to submissions on CP 179 and CP 184 Australian market structure: Draft market integrity rules and guidance](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep311" \t "_new)'.   ASIC's consultation on the new rules included:   * Consultation Paper 145 '[Australian equity market structure: Proposals](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp145" \t "_new)'; * Consultation Paper 168 '[Australian market structure: Further proposals](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp168" \t "_new)'; * Consultation Paper 179 '[Australian market structure: Draft market integrity rules and guidance](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp179" \t "_new)'; and * Consultation Paper 184 '[Australian market structure: Draft market integrity rules and guidance on automated trading](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp184" \t "_new)'.   Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-290MR+ASIC+makes+key+announcements+on+market+structure,+dark+liquidity+and+high+frequency+trading?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h2) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1** **Reports**  On 5 December 2012, ASX released:   * the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Group_Monthly_Activity_Report_-_November_2012.pdf" \t "_new); * the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2012/notice2012_277.pdf" \t "_new); and * the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Compliance_Monthly_Activity_Report_November_2012.pdf" \t "_new)   for November 2012.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h3)  **3.2** **Enhanced disclosure rules for mining and oil and gas companies**   ASX has received regulatory approval to introduce new listing rules to enhance disclosure of reserves and resources by ASX-listed mining and oil and gas exploration and production companies.   The new reporting requirements are part of a series of initiatives by ASX that will modernise Australia's equity capital markets. The initiatives include:   * enhanced reserves and resources reporting; * improved flexibility for small to mid-cap companies to raise additional capital; * streamlined timetables for rights issues; * on-market bookbuild facility; * equity research scheme for small to mid-cap companies; and * revised and updated listing rule guidance notes, particularly for continuous disclosure.   The enhanced reserves and resources reporting requirements promote greater investor confidence and support efficient capital formation for ASX-listed mining and oil and gas companies. The new rules will improve the consistency and transparency in the reporting of reserves and resources information. They will also align Australia's reporting framework with other major mining and oil and gas markets.   ASX-listed mining and oil and gas companies will be provided with a 12-month transition period, with the new rules coming into effect on 1 December 2013.   The [media release](http://www.asxgroup.com.au/media/PDFs/ASX_finalises_enhanced_disclosure_rules_for_mining_and_oil_and_gas_companies.pdf" \t "_new) and the [updated ASX Listing Rules](http://www.asxgroup.com.au/compliance-downloads.htm" \t "_new) are available on [ASXGroup.com.au](http://www.law.unimelb.edu.au/bulletins/ASXGroup.com.au" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h3) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1** **Knights Capital Group Limited**   On 13 December 2012, the Panel accepted an undertaking from Australian Executor Trustees Limited and declined to conduct proceedings on an application dated 29 November 2012 from Knights Capital Group Limited in relation to its affairs.  The application concerned whether AET holds its shares in Knights as a bare trustee under section 609(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) and, if not, whether acquisitions of shares in Knights contravened section 606. The issue arose in the context of resolutions to be put at Knights' 2012 annual general meeting involving the replacement of two non-executive directors with three new directors.  The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances after accepting the undertaking offered by AET which resolved the immediate issue. The Panel also referred to ASIC the broader question of the bare trustee exemption in section 609(2). The Panel also considered that the application was not timely. Accordingly, the Panel declined to conduct proceedings.  The Panel's reasons can be found on the [Takeover Panel's website](http://www.takeovers.gov.au/content/Reasons_For_Decisions/2012/downloads/022_Knights.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h4)  **4.2** **CMI Limited - Federal Court decision**  On 16 November 2012, the Federal Court of Australia dismissed an application for judicial review of the decision of the Takeovers Panel in the CMI Ltd matter.  The background to the Federal Court decision is as follows. On 22 February 2011, the Panel made a declaration of unacceptable circumstances in relation to an application dated 6 January 2011 by Mr Gerry Pauley and Mr Gordon Elkington, in relation to the affairs of CMI Limited. On 25 February 2011, the Panel made final orders. The Panel considered that Ms Leanne Catelan and Mr Raymond Catelan were associated in respect of shares in CMI.  The Panel made final orders to the effect that:   * the 3,112,422 CMI shares (9.22%) acquired by Tinkerbell Enterprises Pty Ltd as trustee for The Leanne Catelan Trust on 23 November 2010 (Sale Shares) be vested in the Commonwealth on trust for Tinkerbell (order 1); * ASIC must sell the Sale Shares and return the proceeds net of costs to Tinkerbell (orders 2 and 3); * CMI and the associated parties must do all things necessary to give effect to the orders (order 4); * the associated parties must not otherwise dispose of, transfer, charge or vote the Sale Shares (order 5); * the Sale Shares are not counted for the purposes of the 3% creep exception in item 9 of section 611 unless the associated parties acquire some Sale Shares on market as part of the sell-down (if they have an existing capacity to 'creep' under item 9(b) of section 611) (order 6) and; * the associated parties must disclose their voting power in CMI and their association in a substantial holder notice (order 7).   On 10 March 2011, the review Panel declined to conduct proceedings on a review application by Tinkerbell and Leanne Catelan.  On 7 April 2011, the Panel announced that it had been served with a Federal Court application for judicial review.  At the request of Tinkerbell, the review Panel made interim orders staying the initial Panel's final orders 2, 3, 4 and 7 until the conclusion of the Federal Court proceedings.  On 16 November 2012, Tinkerbell's application to the Federal Court was dismissed with costs.  On 23 November 2012, the review Panel granted a further stay of the Panel's orders, at the request from Tinkerbell Enterprises Pty Ltd as trustee for the Leanne Catelan Trust, pending Tinkerbell's consideration of whether to appeal the decision of the Federal Court.  The Panel was informed on 29 November 2012 that Tinkerbell will not be appealing Justice Collier's decision. Accordingly, with effect from 4 December 2012, the stay was lifted.  A case note on Tinkerbell Enterprises Pty Ltd as Trustee for The Leanne Catelan Trust v Takeovers Panel [2012] FCA 1272 is included in Section 6.2 [below](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html#062).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h4) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Research Papers** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%236) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **5.1** **Shadow banking regulation**   Shadow banks conduct credit intermediation without direct, explicit access to public sources of liquidity and credit guarantees. Shadow banks contributed to the credit boom in the early 2000s and collapsed during the financial crisis of 2007-2009. The authors review the quickly growing literature on shadow banking and provide a conceptual framework of shadow banking regulation. Since the collapse, regulatory reform efforts have aimed at strengthening the stability of the shadow banking system. The authors review these reform efforts for shadow funding sources including asset-backed commercial paper, tri-party repurchase agreements (repos), money market mutual funds, and securitization. Despite significant effort by lawmakers, regulators, and accountants, there has been uneven progress in achieving a more stable shadow banking system.   The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2170929" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h5)  **5.2** **How does deposit insurance affect bank risk? Evidence from the recent crisis**   Deposit insurance is widely offered in a number of countries as part of a financial system safety net to promote stability. An unintended consequence of deposit insurance is the reduction in the incentive of depositors to monitor banks which leads to excessive risk-taking. The authors examine the relation between deposit insurance and bank risk and systemic fragility in the years leading to and during the recent financial crisis. They find that generous financial safety nets increased bank risk and systemic fragility in the years leading up to the global financial crisis. However, during the crisis, bank risk was lower and systemic stability greater in countries with deposit insurance coverage.  The findings suggest that the 'moral hazard effect' of deposit insurance dominates in good times while the 'stabilization effect' of deposit insurance dominates in turbulent times. Nevertheless, the overall effect of deposit insurance over the full sample studied remains negative since the destabilizing effect during normal times is greater in magnitude compared to the stabilizing effect during global turbulence. In addition, the authors find that good bank supervision can alleviate the unintended consequences of deposit insurance on bank systemic risk during good times, suggesting that fostering the appropriate incentive framework is very important for ensuring systemic stability.   The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2168168" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h5)  **5.3** **Do female CEOs and chairs constrain bank risk-taking? Evidence from the financial crisis**   This paper exploits a large panel of US commercial banks to examine the association between Chief Executive Officer (CEO) and Chairperson gender and bank risk-taking during the recent financial crisis. The results indicate that banks with female CEOs are more conservative and hold higher levels of equity capital. The positive relationship between female CEOs and capital ratios is strongest in smaller banks, and weak or non-existent in larger banks. Furthermore, the authors find strong evidence to suggest that smaller banks with female CEOs or board Chairs were less likely to fail during the financial crisis.   The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2136978" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h5)  **5.4** **Regulatory arbitrage, extraterritorial jurisdiction and Dodd-Frank: The implications of US global OTC derivative regulation**   A review of the Dodd-Frank rulemaking projects suggests that the US has entered into a 'race to the top' of over-the-counter derivative regulation. Many of the Dodd-Frank statutes and proposed rules go well beyond the relatively modest objectives agreed to by the G20 countries in 2009. These efforts in the US create a legal environment ripe for regulatory arbitrage and the isolation of US OTC derivative markets. Isolation results from participants simply abandoning US markets because of overly aggressive US regulation. Regulatory arbitrage occurs as both US and non-US persons attempt to structure their trading activities to avoid the extraterritorial reach of Dodd-Frank. This paper discusses the regulatory arbitrage implications triggered by the Dodd-Frank reforms and concerns surrounding the extraterritorial powers given to the CFTC to enforce these mandates.   The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169401" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h5)  **5.5** **SEC investigations and securities class actions: An empirical comparison**   The authors compare investigations by the SEC with securities fraud class action filings involving public companies. Using actions with both an SEC investigation and a class action as the baseline, they compare SEC-only investigations with class action-only lawsuits. They find evidence that the stock market reacts more negatively to the class actions relative to SEC investigations. They also find that institutional ownership and stock turnover decline more for class actions compared with SEC investigations. Lastly, the incidence and magnitude of settlements, as well as the incidence of top officer resignation, are greater for class actions relative to SEC investigations. This evidence is consistent with private class actions pursuing more egregious securities law violations than SEC investigations and imposing greater sanctions against companies. At least for the metrics employed here, the findings are consistent with private enforcement providing at least as much deterrent value, if not more, than public enforcement.   The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2109739" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h5)  **5.6** **Implications of the Dodd-Frank Act**   In this review, the authors provide an economic assessment of the US Dodd-Frank Act of 2010 in terms of the likely efficacy of the financial-sector regulation it proposes. They focus in particular on its ability to contain systemic risk, the risk that many financial firms may fail en masse, and discuss the tools it employs. Namely, they examine enhanced capital requirements for systemically important financial firms, the separation of proprietary trading from bank holding companies (the Volcker rule), the resolution authority for orderly management of large complex financial institution (LCFI) failure, and attempts to contain risks in the shadow banking system. They relate the Act to its most important predecessor, the Banking Act of 1933, and consider the desirability and implications of the Dodd-Frank Act's all-encompassing approach to the reform of financial-sector architecture and regulation.   The paper is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2170916" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h5) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%237) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **6.1** **The character of a transfer in a securities lending arrangement is to be determined by its legal rather than commercial effect**   (By Marissa Bendyk and Apoorva Suryaprakash, King & Wood Mallesons)   ABN Amro Clearing Sydney Pty Limited (formerly known as Fortis Clearing Sydney Pty Ltd) v Primebroker Securities Limited (receivers and managers appointed) (in liquidation) [2012] VSCA 287, Supreme Court of Victoria, Court of Appeal, Warren CJ, Harper JA and Davies AJA, 27 November 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSCA/2012/287.html](http://www.austlii.edu.au/au/cases/vic/VSCA/2012/287.html" \t "_new)    **(a)  Summary**   The parties entered into a securities lending arrangement. The respondent (PSL) 'loaned' securities to the appellant (Fortis) under the Australian Master Securities Lending Agreement (AMSLA). The securities loan was made in return for Fortis continuing to provide a line of credit under a loan facility.    Fortis, concerned about PSL's ability to repay the debt, caused the AMSLA to be amended by inserting a new clause which provided that Fortis' obligation to return 'equivalent securities' was conditional, and did not arise on PSL's default or insolvency.    On PSL's insolvency, Fortis sold the securities, discharged the debt, and paid the surplus to PSL, relying on its contractual power to liquidate PSL's assets to discharge outstanding debts.    The central question for the court to consider was whether the 'borrowed' securities were assets of PSL or assets of Fortis - that is whether beneficial title had passed to Fortis as a result of the lending arrangements.  If the securities were assets of Fortis, Fortis would not be able to rely on the liquidation provisions.  Instead, a netting provision in the AMLSA would apply, requiring Fortis to account for the market value of the securities, rather than realised sale value of the securities.  It was undisputed that the market value greatly exceeded the sale value.    Although the Court of Appeal accepted that the purpose of the securities loan was to secure debt under the facility, the Court held that the effect of the securities transfer was to convey beneficial title. The character of the transaction was determined by reference to its legal effect and not by the commercial effect the parties sought to achieve.    In contrast, Davies AJA (in dissent) found that, in light of the commercial intentions of the parties, the effect of the securities loan was to create a security interest, rather than transfer beneficial title.    **(b) Facts**     The appellant (Fortis) was a specialist securities broker. The respondent (PSL) was a client of Fortis.    The parties entered into two relevant transactions. Both were covered by an umbrella agreement, known as the Standard Client Agreement (SCA).    In the first transaction, Fortis provided PSL with a $50m line of credit under a loan facility (Facility).  The terms of the SCA and the Facility allowed Fortis to liquidate PSL's assets to discharge the debt upon PSL's default or insolvency.    The second transaction was a securities lending transaction, documented by the AMSLA. The AMSLA is a standard form contract, under which Fortis 'borrowed' securities from PSL. Under the AMSLA, Fortis had an obligation to deliver 'equivalent securities' to PSL on expiry of the loan, or at call.    Fortis, concerned about PSL's ability to repay the debt, caused the AMSLA to be amended by inserting a new clause which provided that Fortis' obligation to deliver 'equivalent securities' was conditional, and did not arise on PSL's default or insolvency.    In July 2008, receivers and managers were appointed to PSL, constituting an event of default under the SCA, Facility and the AMSLA. Relying on the liquidation provisions in the SCA and Facility, Fortis sold the securities, discharged the debt, and paid the surplus to PSL.    The central question for the court to consider was whether the 'borrowed' securities were assets of PSL or assets of Fortis.  If the securities were assets of Fortis, Fortis would not be able to rely on the liquidation provisions in the Facility. Instead, a netting provision in the AMLSA would apply, requiring Fortis to account for the market value of the securities at the time of default, rather than realised sale value of the securities.  It was undisputed that the market value greatly exceeded the sale value.    PSL applied to the court under section 424 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) for directions in relation to the construction of the contracts. PSL argued that in accordance with the netting provision in the AMSLA, Fortis was obliged to account for the market value of the securities, which was approximately $4 million higher than the sale value that was realised by Fortis.    **(c) Court of Appeal decision**    A majority of the Court of Appeal upheld the decision of the trial judge, finding that Fortis was required to account for the market value of the securities to PSL.     **(i) Decision of the majority**   The majority held that the liquidation provisions in the SCA and Facility did not apply as the 'borrowed securities' were not assets of PSL. The majority accepted that the commercial intention of the parties was to secure PSL's debt under the Facility. However, the court held that the character of a transfer is to be determined by reference to its legal effect and not by reference to the commercial effect intended by the parties. Under the express terms of the AMSLA, all rights, title and interest in the securities passed to Fortis, free of any other interests.  As a result, the majority found that the effect of the securities transfer was to convey beneficial title to Fortis.    The majority accepted that the express contractual provisions were not necessarily determinative of beneficial ownership.  However, their Honours noted that showing that contractual terms are a disguise for the parties' true intentions is particularly difficult where both parties are large commercial entities that have access to quality legal advice.   Accordingly, the netting provision in the AMSLA applied.  As a result, Fortis was required to account to PSL for the market value of the securities, rather than the sale value.    **(ii) Decision of Davies AJA (in dissent)**   Davies AJA, in dissent, construed the contracts as a single integrated suite of documents.  Her Honour held that it was settled law that the absolute transfer of ownership can be characterised as a security interest, if, on the proper construction of the contractual documents, this was the mutual intention of the parties.    Davies AJA found that the mutual intention of the parties was to create a security interest for two main reasons.  First, the AMSLA was amended to make Fortis' obligation to deliver 'equivalent securities' conditional on there being no outstanding debt by PSL. Secondly, the amendments to the AMSLA were made in consideration for Fortis continuing to provide the Facility.   In Davies AJA's view, a sensible commercial construction of the contractual arrangements was that the effect of securities loan was to secure PSL's debt under the Facility, rather than to transfer beneficial ownership of the securities.    Accordingly, as a matter of general law, and under the liquidation provisions, her Honour held that Fortis was entitled to sell the securities and pay the surplus proceeds to PSL.    For these reasons, Davies AJA held that Fortis was required to account to PSL for the sale value of the securities, rather than the market value.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h6)  **6.2** **Application for judicial review of the Takeovers Panel decisions on association dismissed**   (By Nicole Parlee, King & Wood Mallesons)   Tinkerbell Enterprises Pty Limited as Trustee for The Leanne Catelan Trust v Takeovers Panel [2012] FCA 1272, Federal Court of Australia, Collier J, 16 November 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/1272.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/1272.html" \t "_new)   **(a) Summary**   The applicant trustee company sought judicial review quashing two decisions of the Takeovers Panel (Panel).  The first decision involved sections 657A and 657D of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act), where the Panel made a declaration of unacceptable circumstances in respect of the purchase of shares by the applicant.  The second decision involved section 657EA of the Act, and a review Panel's decision to refuse to conduct a review of the first decision.  Alternatively, the applicant sought a declaration that the decisions were invalid and of no effect.    The court dismissed the application for judicial review of the two decisions.   **(b) Facts**     CMI Limited (CMI) is a company listed on the Australian Securities Exchange.   Raymond Catelan (Raymond) was the Managing Director of CMI, in which he held a 36.8% interest. Raymond's daughter, Leanne Catelan (Leanne) held a 2.16% interest in CMI. Leanne is also the sole director and shareholder of Tinkerbell Enterprises Pty Limited (Tinkerbell), a shareholder in CMI.    Richard Catelan (Richard), Raymond's nephew, was also a director of CMI.  Richard met with the person responsible for controlling Farallon Capital Pty Ltd (Farallon), a shareholder in CMI, and discussed the possibility of acquiring Farallon's 9.22% interest in CMI.  It turned out that Richard was not in a position to acquire the shares, but he told his cousin, Leanne, about the share sale price proposed by Farallon.    Raymond gifted Leanne with over $2.3 million, enabling Tinkerbell to purchase the shares as trustee for the Leanne Catelan Trust.  Leanne claimed that she decided to acquire these shares before approaching Raymond for money to assist in the purchase.   On 24 November 2010, Tinkerbell lodged a substantial shareholding notice showing the acquisition by Tinkerbell of 9.22% interest in ordinary shares of CMI on 23 November 2010. The notice did not list any associates.   Shareholders of CMI applied for a declaration of unacceptable circumstances in relation to the purchase of those shares in CMI by Tinkerbell.  The shareholders submitted that by a combination of measures which were unacceptable, Raymond and his family members had been increasing their holdings of shares in CMI, and that Leanne and Raymond were associates within the meaning of section 12(2)(b) and (c) of the Act which sets out relevant tests for whether an association exists.   Leanne and Raymond submitted that they acted independently of each other in their investment affairs.  The Panel found otherwise and declared that the circumstances in which the shares were purchased were unacceptable under section 657A of the Act. The Panel's decision focused on matters including:   * Leanne's lawyers were only engaged to undertake the mechanics of the transfer, which the Panel said was not consistent with arm's lengths transactions; * the information regarding the transaction was unusually vague from all parties; * the gift and other circumstances between Raymond and Leanne showed that Leanne was not independent and the two's affairs were inextricably linked; * it was unusual that other directors of CMI were participants in the discussions and negotiations on the sale if Leanne, who was not a director of CMI, had been acting independently; and * the $2.3 million gift from Raymond to Leanne which funded the purchase of shares cannot be ignored.   The initial Panel found that an association existed. The Panel made its decision on the basis of drawing inferences from the available facts and patterns of behaviour. The Panel ordered ASIC to compulsorily sell off Tinkerbell's 9.22% interest in CMI.   In the review decision, the review Panel declined to commence proceedings, as it found that there was no reasonable likelihood that the review application would result in a different outcome.  The main points in relation to this decision are discussed in more detail in the Decision section below.   Tinkerbell applied to the Federal Court for judicial review of the Panel's decisions on two grounds. First, Tinkerbell submitted that, in making its decision, the Panel had drawn an inference of association that was not reasonable, and therefore an error of law had occurred.  Secondly, Tinkerbell submitted that the Panel had denied Tinkerbell natural justice because the Panel did not provide the parties with an oral hearing.  Further, Tinkerbell submitted, the Panel relied on its professional experience in concluding that the behaviour of the parties was uncommercial in inferring there was an association from the evidence, again denying Tinkerbell natural justice.   **(c) Decision**    **(i) Inferences - an error of law?**   The court found that Tinkerbell erroneously based its arguments on principles that do not apply to a court reviewing a Takeovers Panel decision.  Instead, the principles that Tinkerbell aimed to rely upon only apply to an appellate court's review of a lower court's decision in civil proceedings.    Tinkerbell submitted that previous High Court decisions were relevant where it was held that 'to substantiate a civil claim based on circumstantial evidence on the balance of probabilities, the facts proved must form a reasonable basis for a definite conclusion.'  However, Collier J found that the present situation is much different.   The court held that 'as long as the particular inference is reasonably open to the administrative body making the factual findings, then even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.'   Collier J held that it was reasonable that the Panel found there to be an association between Raymond and Leanne, and therefore validly concluded that unacceptable circumstances were present.  There was no error of law under section 5(1)(f) of the [Administrative Decisions (Judicial Review) Act 1977](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7119" \t "_default).   **(ii) Natural justice**  **No oral hearing**   Collier J held that the Panel was entitled to make its determinations informally.  It can base its decisions on written submissions alone, and is not obliged to conduct an oral hearing.  The Court coupled this with the fact that the Panel repeatedly sought further clarification of evidence from witnesses, however the responses were not comprehensive.  Further to this, both Leanne and Raymond indicated to the Panel that this matter could be dealt with by submissions, and there was no need for oral examination.  The Court held that in light of these circumstances there was no denial of natural justice.   **Experience**   The Court found that the sitting Panel is entitled to draw on the members' skill, knowledge and experience when assessing evidence and drawing inferences.  As the Panel is comprised of experts in this area, to find that the Panel should not do this would 'strip the Panel in large part of its effectiveness as a specialist body established to resolve takeover disputes, as mandated by the legislation.'  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h6)  **6.3** **Applicants to unsuccessful derivative proceeding liable to pay solicitor/client and party/party costs under section 242**   (By Christjames Lakkis, Herbert Smith Freehills)   Links Golf Tasmania Pty Ltd v Sattler (No 2) [2012] FCA 1271, Federal Court of Australia, Jessup J, 16 November 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/1271.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/1271.html" \t "_new)   **(a) Summary**   Under section 237 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act), the Court may give leave to a person to bring proceedings on behalf of a company if it is probable that the company will not itself bring the proceedings, and if the action is in the best interests of the company.  In addition, section 242 allows the Court to make any cost order in relation to proceedings brought under section 237.   The court in Links Golf Tasmania v Sattler found that applicants bringing a derivative action under section 237 may be liable for all, or part of, the solicitor/client costs of a company under section 242 if the applicants pursue claims that they ought to have viewed at the time of litigation as not being in the best interests of the company.  Furthermore, applicants may be assigned all, or part of, the party/party costs to an unsuccessful proceeding under section 242 when 'appropriate'.  Jessup J held that applicants who pursue unsubstantiated claims and allegations outside the advice of their legal team will be liable to pay part, or all of, the company's solicitor/client and party/party cost under section 242.   **(b) Facts**   Peter Wood (Wood) and Justin Hetrel (Hetrel) were former officers of Links Golf Tasmania Pty Ltd (LGT).  On 16 March 2010, they were given leave under section 237 to bring a proceeding (main proceeding) in the name of LGT against Richard Sattler (Sattler) and RG Sattler Nominees Pty Ltd (Sattler Nominees), a majority shareholder in LGT, to pursue several causes of action against Sattler, including alleged breaches of fiduciary duty to the company.    The case before Jessup J concerned the apportionment of (i) Wood's and Hetrel's solicitor/client costs and (ii) Sattler and Sattler Nominees' party/party costs between LGT and Wood and Hetrel, following the substantial success of Sattler and Sattler Nominees in the main proceeding.    **(i) Wood's And Hetrel's solicitor/client costs**   On 8 June 2010, Wood and Hetrel successfully sought an order under section 242 of the Act requiring LGT to pay the reasonable solicitor costs of bringing proceedings on behalf of LGT against Sattler and Sattler Nominees pursuant to the leave granted on 16 March 2010 (an order consented to by LGT).    By March 2011, the matter required an estimated 14 days of trial and LGT's maximum exposure to solicitor/client was in the vicinity of $685,000. The trial ultimately ran for 47 days and as at 28 June 2011 the total solicitor/client fees rendered to LGT in the main proceeding had exceeded $3.3 million.    LGT sought to vary the 8 June 2010 order under section 242 to make Wood and Hetrel liable to pay all, or part of, the solicitor/client costs of the company arising from the main proceeding.  LGT argued that the company did not originally consent to paying such a substantial amount in solicitor/client fees and that the cost order should reflect Wood and Hetrel's unreasonable contributions to those fees.   **(ii) Sattler's and Sattler Nominees' party/party costs**   On 16 July 2012, LGT was ordered to pay 85% of the costs of Sattler and Sattler Nominees in the main proceeding in accordance with the significant success of the defendants in the main proceeding.  The question before Jessup J was whether Wood and Hetrel were liable to pay, in whole or in part, the 85% of the costs of Sattler and Sattler Nominees' party/party costs.   **(c) Decision**   **(i) Wood's And Hetrel's solicitor/client costs**   The power to make a variation of costs under section 242 was not disputed. Rather, the question before the Court was what change in circumstance is required to justify any alteration of a cost order.    Jessup J held that where a party brings proceedings under section 237 on behalf of a company and the solicitor/client costs are being paid by the company under a section 242 order, and the party continues litigation that they view as no longer being in the best interests of the company, they will be liable to pay all or part of the solicitor/client costs. His Honour emphasised that the inquiry:   * must be assessed by reference to circumstances existing from time to time, as they would reasonably have appeared to the applicants; * requires a robust approach acknowledging the pressures and dynamics of ongoing litigation; * is not a question of whether the claim was unmeritorious or not; and * should not view the appropriateness of the course adopted by the party through a 'retrospectoscope'.   Jessup J decided that the order of 8 June 2010 should be varied due to the extraordinary departure of the costs actually incurred from the original estimates.  Importantly, his Honour found that Woods and Hetrel and their legal advisers ought to have known from the outset, or from an early stage, that there were claims put forward in the main proceeding which would not be regarded as being in the interests of LGT and therefore not warranting expenditure of LGT's money.  In particular, Jessup J observed that:   * legal advice tendered as evidence showed that LGT pursued claims against Sattler that were highly theoretical, involving many discretionary aspects and were known by them at the time to be difficult, if not impossible, to make out; * several claims lacking any evidential basis were added to existing claims solely to mount a thoroughly comprehensive case against Sattler; * LGT made allegations against Sattler despite Wood being aware that they were not supported by any evidence; * allegations of breach of fiduciary were made where the breach was not apparent and was never fully explained; and * allegations were made where the benefits to the shareholders were evident but the potential benefit to LGT itself was obscure.   Accordingly, these claims did not warrant the expenditure of LGT's funds and therefore a variation to the 8 June 2010 costs order was ordered to require Wood and Hetrel to pay 40% of the solicitor/client costs incurred by LGT arising from the main proceeding.    **(ii) Sattler's and Sattler Nominees' party/party costs**   Jessup J held that the Court could order a non-party to pay party/party costs under section 242.  His Honour found that the statutory test to assign costs was 'appropriateness', leaving the Court with wide discretion on the matter.  Jessup J recognised that, whilst the proceeding was genuinely brought by Wood and Hetrel in the interests of the company and that the interests of the shareholders were substantial, there were certain arguments put forward in the main proceedings which were not completely substantiated or fully advised by their legal team.    In particular, Wood and Hetrel maintained throughout the proceeding several allegations that Sattler breached his fiduciary duty by using loans and infrastructure grants to establish operations outside LGT.  However, Jessup J found no evidence that LGT was advised to pursue these claims.  A letter of advice from LGT's legal team stated that the breach of fiduciary duty in this case 'would not be an inappropriate claim to make'; this advice was deemed insufficient to warrant its prosecution, and was considered merely as a 'consideration of convenience that a litigant taking his or her own risks might place on the scales'.   As a result of the substantial failure of LGT in the main proceeding, partly attributed to unsubstantiated claims pursued without the advice of their lawyers, Jessup J ordered that it was appropriate for Wood and Hetrel to contribute one half of the 85% of the party/party costs of the main proceeding, by way of indemnifying LGT for one half of the costs which it is obliged to pay to Sattler and Sattler Nominees.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h6)  **6.4** **A privileged existence? When receivers claim legal professional privilege, is it for themselves or the company in receivership?**    (By Adrian Chai and Paul Walker, Ashurst Australia)   Carey v Korda [2012] WASCA 228, Supreme Court of Western Australia, Court of Appeal, Martin CJ, Newnes and Murphy JJA, 15 November 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/wa/WASCA/2012/228.html](http://www.austlii.edu.au/au/cases/wa/WASCA/2012/228.html" \t "_new)   **(a) Summary**   The decision in Carey v Korda [2012] WASCA 228 clarifies the manner in which legal professional privilege operates in connection with company receivers and managers and their legal advisers.    In this case, the appellant, Mr Carey, was a director of a company in receivership.  He claimed a right to inspect documents related to the legal services provided to the receivers and managers of that company, arguing that the lawyers' true clients were the companies in receivership and not the receivers and managers themselves.  The receivers, Korda Mentha, contended that they had engaged the lawyers in their own right; that the documents were privileged to them, and that the director only had a right of access once the privileged parts were redacted.    The first instance judge, Edelman J, found that the receivers and managers were the true clients, and not the companies themselves.  As a result, they were entitled to maintain claims of privilege against the director.  Edelman J also found that all the claims of privilege were made out over the relevant documents.  On appeal, the Court of Appeal agreed that the receivers had engaged the lawyers in their own right.  However, the Court considered that the receivers' evidence was not sufficient to establish the privilege claims over all documents.    **(b) Facts**     In January 2006, Kordamentha were appointed as receivers and managers (Receivers) of the Westpoint group of companies. Soon after their appointment, the Receivers engaged lawyers to act for them in connection with the receivership.  The formal engagement letters named the clients of the lawyers, in relation to each company in receivership, as '[Westpoint entity] (Receivers and Managers appointed)'; but the letters were addressed to and signed by the Receivers themselves.   The work performed by the lawyers was considerable.  It included reviewing facility documents and considering priority issues; identifying assets and devising and implementing realisation strategies and; perhaps most notably, performing a large amount of work associated with managing an 'unusually high litigation risk' posed by ongoing threats by a former director of the companies in receivership, Mr Carey, against the Receivers and the companies.   The lawyers' work was charged to relevant companies in the Westpoint group and described, often with detailed narratives, in invoices rendered to those companies. The Receivers' own fees and expenses were accounted for in a similar manner and described in 'recharge schedules', and also charged to relevant companies in the Westpoint group. Neither the lawyers' or Receivers' invoices distinguished between work concerning the Receivers' obligations at law and under statute and work undertaken by the Receivers as agents of the Westpoint companies in conducting their business or disposing of assets.   In August 2010, Mr Carey commenced proceedings seeking orders, among others, that the Receivers grant him inspection of documents recording payments made by the Westpoint companies to the Receivers and their lawyers, including the lawyers' and Receivers' invoices and work narratives.    **(c) Decision**    **(i) The Court of Appeal decision**   The Court of Appeal (Murphy JA, with whom Martin CJ and Newnes JA agreed) noted that a privately appointed receiver is an agent of the company in receivership, but only in a very unusual sense.  The agency exists not for the benefit of the company in receivership, but for the benefit of the receiver's appointor and to assist in realising secured property.  Receivers and managers will not act as agents in all respects; instead, whether they are acting as agents in a given situation will depend on the powers they are exercising and the functions they are discharging.  The Court observed that this characteristic of receivership was important to an appreciation of how a retainer between receivers and their lawyers needs to be understood.   The Court then addressed the evidence about the lawyers' retainer and the work they performed.  The Court found that the correct conclusion from all the evidence was that the Receivers retained the lawyers to advise them in relation to their realisation of the assets of the Westpoint companies, and in the exercise of their powers and the performance of their duties, as receivers and managers and not as agents for the companies. The part of the evidence which referred to the Westpoint companies as the 'clients' was better understood as a reference to the entity that would pay the fees. These conclusions were supported by the legal character of private receivership referred to above.   The Court of Appeal then turned to the question of Mr Carey's right, as a director, to inspect financial records of the receivership under section 421 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) in un-redacted form. The Court accepted that, unless the Receivers could successfully claim legal professional privilege over redacted portions of the recharge schedules and their lawyers' invoices, Mr Carey would have a right to inspect those documents. The Court observed that the documents could be privileged if they revealed, or might tend to reveal, confidential communications made for the dominant purpose of giving or obtaining legal advice or receiving or providing legal services.  Lawyers' and accountants' bills and narratives would not necessarily be of that type.  It would depend on the circumstances in which the claim for privilege arose and the nature and details of the entries made in the bill.   The Court noted that, in this case, the evidence was that disclosure of particular redacted narratives from the lawyers' bills and Receivers' recharge schedules may reveal the 'subject matter' of legal advice or litigation matters.   The Court considered that this evidence was inadequate.  It was necessary for the evidence to address directly how disclosure of the bills would reveal the content or nature of a confidential communication with respect to legal advice or litigation.  The evidence in this case did not descend to this detail; and so the evidence was insufficient to sustain the claims of privilege over the lawyers' bills and the Receivers' recharge schedules.   Mr Carey also contended that the Receivers had waived any privilege that existed over the lawyers' bills and Receivers' recharge schedules by forwarding them to 'third parties' (the relevant Westpoint companies) for payment.  Further, Mr Carey said that since the Westpoint companies had paid the lawyers' bills, they had a statutory right under the [Legal Profession Act 2008 (WA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=101771" \t "_default) (the Legal Profession Act) to tax the lawyers' costs and that right extinguished legal professional privilege over the bills.   The Court of Appeal found that there was no waiver of privilege by the Receivers simply forwarding bills for payment to the companies of which they were receivers and managers.  That was not disclosure to a 'third party' given the unusual nature of private receivership; and the disclosure was not inconsistent with the Receivers maintaining confidentiality over any privileged communications contained in the bills.  Finally, the Legal Profession Act did not extinguish legal professional privilege because its provisions were not explicit enough to bring about the destruction of such a fundamental common law right.   **(ii) The significance of the case**   The decision in Carey v Korda should be welcomed by insolvency practitioners.  It provides important clarification of the unique character of the relationship between privately appointed receivers and managers and the companies in relation to which they are appointed, and the consequences this relationship has for legal representation obtained and paid for in connection with the receivership.   The case confirms that:   * Private receivers and managers are not true agents of the company in receivership and will only act as agents of the company in particular situations, such as in connection with the realisation of secured property.  Such receivers are entitled to their own independent legal representation in relation to the receivership, and are not taken to have obtained that representation as agents of the company. * The ability to claim privilege over confidential communications pertaining to legal advice or litigation applies for the benefit of the receivers and managers themselves, and not the companies in receivership. * The fact that receivers and managers charge the costs and expenses of the receivership (including the costs of securing legal representation) to the companies in receivership does not make the companies in receivership the clients of the lawyers retained by the receivers, or result in a waiver of privilege.   This decision should provide comfort to insolvency practitioners that legal advice and representation they obtain in connection with the conduct of private receiverships is appropriately recognised and protected.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h6)  **6.5** **Insider information need not be a 'factual reality'**   (By Steven Rice and Lauren Fong, Herbert Smith Freehills)   Mansfield v The Queen; Kizon v The Queen [2012] HCA 49, High Court of Australia, Hayne, Heydon, Crennan, Kiefel and Bell JJ, 14 November 2012   Full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/HCA/2012/49.html](http://www.austlii.edu.au/au/cases/cth/HCA/2012/49.html" \t "_new)   **(a) Summary**   The High Court held that 'information' under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act), as it arises under the insider trading provisions of Div 2A of Part 7.11 and the market misconduct provisions of Div 2 of Pt 7.11, includes information which is false or partly false.   **(b) Facts**   In January 2002, the Managing Director of AdultShop.com Limited (AdultShop), Malcolm Day, revealed to Nigel Mansfield that the expected profits and turnover of AdultShop for the year had risen from $3 million to $11 million, and from between $30 million and $50 million to $111 million respectively.  Mansfield relayed this communication to John Kizon.  Day told Kizon that 'Packer [a well-known businessman], had bought 4.9% of Adultshop' and gave further 'optimistic assessments' of the company's expected profits.   With this knowledge, Mansfield and Kizon procured Adultshop shares. These acts were allegedly performed in contravention of (amongst other things) the former Division 2 of Part 7 of the Corporations Act.  However, the information given by Day to the appellants was false. The expected profit and turnover for the stipulated period did not rise, and neither Packer nor any company associated with Packer bought 4.9% of the issued capital in Adultshop.    **(c) Decision**   At first instance, Wisbey J held that the appellant's knowledge at the time they purchased the shares did not constitute 'information' as prescribed by the Act, as it lacked 'factual reality'. Furthermore, his Honour did not consider that Day's representations constituted 'information that was not generally available'. The matter was appealed to the Court of Appeal of the Supreme Court of Western Australia, then to the High Court.   In the High Court, the appellants contended that the word 'information' used in the context of the Corporations Act in former Division 2A of Pt 7.11 and former Division 2 of Pt 7.11, was to be defined by way of its ordinary meaning as 'knowledge communicated concerning some particular fact, subject or event'. The appellants fixed on the term 'fact', deeming that since the communications received by Mansfield and Kizon were fictional, they did not satisfy the Act.    The majority (Hayne, Crennan, Kiefel and Bell JJ) held that the word 'information' should be interpreted with regard to its ordinary meaning and that it should not be 'confined to knowledge communicated which constitute[s] or concern[s] objective truths'.  Their Honours held that knowledge may properly be described as information whether it is 'wholly accurate, wholly false or a mixture of the two'. The majority dismissed the appellant's claim that this interpretation was inconsistent with the definition of 'information' as used in other sections of the Act. Their Honours held that it was irrelevant whether or not the person conveying that knowledge knew or believed that what they were conveying was accurate, and information that was 'not generally available' did not need to have come from within the corporation of which the securities were the subject of prohibition.  Additionally, the majority held that 'information' was not to be construed by reference to 'international practice'.   In a separate judgment, Heydon J cited the 'numerous authorities' which recognised that 'information' may be true or untrue, including the Federal Court decision of Win v Minister for Immigration and Multicultural Affairs (2001) 105 FCR 212, in which Whitlam, Tamberlin and Sackville JJ held that 'information' included material that was 'not reliable and lacked sound factual basis'.  Heydon J concurred with the majority in holding that the operation of the market would be adversely affected by trading that was founded on false information not generally available which, if generally available, would reasonably be expected materially to affect the price or value of the securities.    The appeal to the High Court was dismissed.  The matter was remitted to determine whether a reasonable person would have expected the 'information' to have a 'material effect' on the price or value of AdultShop's shares.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h6)  **6.6** **Court of Appeal reduces penalties for James Hardie directors**    (By Angela Pearsall and Sagar Thakur, Ashurst Australia\*)   Gillfillan v Australian Securities and Investments Commission [2012] NSWCA 370, New South Wales Court of Appeal, Beazley JA, Barrett JA and Sackville AJA, 12 November 2012   The full text of this judgment is available at:  [http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=161729](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=161729" \t "_new)   **(a) Summary**   On 12 November 2012, the NSW Court of Appeal delivered its judgment on penalties in the appeals of seven former non-executive directors (five Australian directors and two US directors) and the former general counsel and company secretary of James Hardie Industries Ltd (James Hardie).   The Court of Appeal held that the penalties for the non-executive directors should be reduced as follows:   * Australian non-executive directors: disqualification for approximately two years and three months, and a financial penalty of $25,000; and * US non-executive directors: disqualification for approximately two years, and a financial penalty of $20,000.   Mr Shafron agreed with ASIC that he be disqualified for seven years, and pay a financial penalty of $75,000.   The decision represents the final chapter of an 11 year saga, and comes six months after the High Court upheld ASIC's appeal, finding that the seven former non-executive directors committed a single contravention of their duty of care and diligence in approving a misleading draft ASX announcement.   **(b) Facts**     **(i) Background**   James Hardie had two wholly owned subsidiaries which manufactured products containing asbestos. On 15 February 2001, at a meeting of the board of directors, the board resolved that James Hardie would separate the subsidiaries from the James Hardie group by establishing the Medical Research and Compensation Foundation (the Foundation) to manage and pay out asbestos claims. The board also approved a draft ASX announcement stating that the Foundation had sufficient funds to meet all anticipated legitimate compensation claims.  This announcement was made on 16 February 2001.  It later became evident that the Foundation did not, in fact, have sufficient funds to cover claims.   **(ii) Prior proceedings**   ASIC commenced proceedings against the seven directors, Mr Shafron, Mr Morley (former CFO) and Mr Macdonald (former CEO) on 14 February 2007 for contraventions of section 180(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act); seeking relief, including disqualification orders and pecuniary penalties.  (ASIC v MacDonald (No 1) [2009] NSWSC 287; ASIC v MacDonald (No 12) [2009] NSWSC 714) Section 180(1) provides that a director or officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a corporation in the corporation's circumstances and occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.  The primary judge found that:   * each director had committed a single contravention of section 180(1), was disqualified from managing corporations for five years, and ordered to pay a financial penalty of $30,000; * Mr Shafron was disqualified for seven years, and ordered to pay a financial penalty of $75,000 in respect of 3 contraventions of section 180(1); * Mr Macdonald had committed 11 contraventions of section 180(1), was disqualified for 15 years and ordered to pay a financial penalty of $350,000; and * Mr Morley had committed a single contravention of section 180(1), was disqualified for 5 years and ordered to pay a financial penalty of $35,000.   The non-executive directors, Mr Shafron and Mr Morley, appealed to the NSW Court of Appeal against the findings of contravention and the penalties imposed. The Court of Appeal allowed the appeals of the non-executive directors on liability, finding that ASIC had not proved to the requisite standard that the directors had in fact approved the draft ASX announcement.  As against the executives, the Court of Appeal held that:   * Mr Shafron had committed two, not three, contraventions but upheld the disqualification order of seven years, and ordered him to pay a financial penalty of $50,000; and * Mr Morley's contravention was upheld, but the Court of Appeal reduced his disqualification to two years and his financial penalty to $20,000.  (See Morley v Australian Securities and Investments Commission [2010] NSWCA 331)   ASIC appealed to the High Court. The High Court upheld ASIC's appeal, finding the non-executive directors had in fact approved the draft ASX announcement, and that Mr Shafron had failed to advise the directors not to approve it:  Shafron v Australian Securities and Investments Commission [2012] HCA 18 and Australian Securities and Investments Commission v Hellicar [2012] HCA 17. The High Court remitted the matter to the Court of Appeal to consider penalties.   **(c) Decision**    **(i) Errors made by the trial judge in relation to penalties**   In considering the question of penalties, the Court of Appeal had regard to the principle of parity, stated in Postiglione v R [1997] HCA 26 at 301-302, which establishes that like cases should be treated alike but due weight must be given to any relevant differences.   The Court held that the primary judge incorrectly used the seven year disqualification imposed on Mr Macdonald in relation to the draft ASX announcement as the starting point for determining that five years was the appropriate disqualification period for the directors.  The Court further held that the trial judge failed to give due weight to the differences between Mr Macdonald and the directors, including that the declaration against Mr Macdonald recognised that he may have known the announcement was misleading.  In contrast, the declaration made against the directors - that they ought to have known the announcement was misleading - contained no such acknowledgment. The trial judge also failed to explain the factors he took into account in deciding that seven years was the appropriate penalty for Mr Macdonald in relation to the draft ASX announcement, and how this period related to the 15 year disqualification imposed on him for his 11 contraventions.   **(ii) Considerations in deciding penalties**   In deciding penalties for the directors, the Court of Appeal took into account a number of matters.  The first was that although the information available to the directors was incomplete, the information before them should have made it clear that an announcement to the effect that the Foundation had sufficient funds would be misleading.  Secondly, the separation proposal had been under consideration for over a year, and was of significant importance to James Hardie. The directors knew that the separation decision would be disclosed to the ASX and that the contents of the announcement were critical to the strategy being pursued by James Hardie.    Additionally, the terms of the draft announcement were calculated to, and did, influence the market. The Court of Appeal also had regard to the directors' failure to explain how people of their experience and capability could have approved the draft announcement without appreciating that it contained misleading statements, and considered that although the contraventions by Mr Macdonald, Mr Shafron and Mr Morley contributed to the circumstances leading to the directors' contraventions, the directors were not entitled to rely on management when voting to approve the release of a critical document presented to the board for its endorsement and imprimatur.  Finally, the Court of Appeal took into account that the contraventions, whilst not in the category of the most serious contraventions, were nevertheless a very serious departure from the standards expected of directors.   The Court of Appeal considered certain mitigating circumstances, including the absence of dishonesty in the directors' conduct; that they did not consciously appreciate the falsity of the statements in the draft announcement; and that the contravention was a single one and not one forming a pattern of conduct.  A further mitigating factor was the testimonial evidence adduced by the directors demonstrating that they were highly qualified, had impressive careers, had made contributions to the community and demonstrated skill, care and competence.  The Court of Appeal had regard to the threat of disqualification, adverse publicity and severe reputational damage as powerful deterrents but indicated that these factors should not be given too much weight. Ultimately, the Court of Appeal considered that the directors' contraventions justified a five year disqualification, with a reduction to three years once mitigating circumstances were taken into account.    The US directors were not present in person at the board meeting. Their breach arose by failing to obtain a copy of the draft ASX announcement, or asking that it be read out to them, before voting to approve it.  The Court of Appeal considered this contravention to be serious, but not as grave as the contraventions by the Australian directors.   In allowing a further reduction of the disqualification period to approximately 2 years and 3 months for the Australian directors (and approximately 2 years for the US directors), the Court of Appeal took into account the directors' 'de facto' disqualification in the period between ASIC filing its application for special leave in January 2011 and the High Court's judgment in May 2012.    The Court of Appeal considered that a financial penalty, in addition to a disqualification order, was justified for reasons of general deterrence.   **(iii) Conduct of board meetings**   In a separate judgment, Barrett JA made two observations concerning the conduct of board meetings with which Beazley JA concurred. The first was that the aim of board meetings is not for directors to consult together with a view to reaching some consensus.  Rather, the aim is for directors to consult together so that individual views may be formed.  Accordingly, the procedures adopted at board meetings must be such that each director may communicate his or her vote and have it taken into account. According to Barrett JA, practices such as the chair saying, after discussion of a proposal 'I think we are all agreed on that' are dangerous unless supplemented by appropriate formality.    Secondly, his Honour observed that, as set out in section 248D of the Corporations Act, participation in board meetings by telephone or video link must be consented to by all the directors (the consent may be a standing one, which is refreshed whenever a new director is appointed).  As a bare minimum, each participating director must hear and be heard by every other participating director for the duration of the meeting. Where a document is tabled, or the directors discuss a document's content, in the course of the meeting, and that document is not already in the possession of every director, the technology by which the meeting is held must enable each participating director to see the document's contents at the relevant point during the meeting.   \*Ashurst Australia acts for one of the former non-executive directors of James Hardie Industries Ltd.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h6)  **6.7** **Appeal of a decision of ASIC to refuse the removal of an auditor**    (By Stephanie De Vere, Minter Ellison)   Whitchurch and Australian Securities and Investments Commission [2012] AATA 784, Administrative Appeals Tribunal, Senior Member Dr K S Levy RFD, 12 November 2012   The full text of this decision is available at:  [http://www.austlii.edu.au/au/cases/cth/AATA/2012/784.html](http://www.austlii.edu.au/au/cases/cth/AATA/2012/784.html" \t "_new)   **(a) Summary**   This case provides some useful guidance on when the application for the removal of an authorised auditor should be approved.   **(b) Facts**     Mr Russell Whitchurch (Applicant) made an application on behalf of Benchmark Capital Limited as responsible entity for the Benchmark Capital Mortgage Fund (Fund), to seek the consent of the Australian Securities and Investments Commission (ASIC) for the removal of the auditor of a compliance plan which had been put in place in respect of the Fund. The original application was defective but it was resubmitted to ASIC. The application was rejected by an ASIC delegate. An appeal was made against that decision.   The Administrative Appeals Tribunal considered whether the application for the removal of the auditor of the compliance plan should be approved under section 601HH(1)(b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).   By way of background, the scheme undertook the development of a building using loan moneys. In 2008, funding for the project was not available and the directors were left in the position of having a half-completed project. The directors had the option to halt the project resulting in losses for investors or to proceed with the project which would result in exceeding the 70% loan to valuation ratio which was set out in the product disclosure statement. The directors determined to proceed with the project.    Subsequently, ASIC required a compliance plan to overcome the original breaches of the approval. On 16 June 2008, Mr Burgess was appointed as the auditor for the compliance plan of the Fund.    On 22 June 2011, Mr Burgess issued an independent audit report for the year ending 30 June 2010. Mr Burgess issued an adverse or qualified opinion which was based on a number of specific observations, including:   * the product disclosure statement required a 70% loan to valuation ratio and that ratio had been exceeded; * due to the expiry of financial arrangements in the following financial year, there was a material uncertainty about the ongoing viability of the scheme and this fact was not fully disclosed in the financial statement; * the compliance plan required half yearly financial reports to be produced. No reports were produced for the half year ending 31 December 2009; * adequate minutes had not been kept for all meetings of the board of directors, lending committee, the compliance committee and the due diligence committee; and * a director had entered into a written agreement to subordinate his loan to non-recourse loan status until the liquidity position of the scheme met the original licensing conditions.   The Applicant made the application on the basis that there had been a breakdown of communication with the auditor, the auditor fees were excessive, and the responsible entity wished to have one audit firm undertake the audit of Benchmark Capital Limited and its entities.    However, ASIC contended that these were not exceptional circumstances, the grounds were of a commercial nature and the Applicant should resolve these with the auditor. In addition, the third ground was not a justifiable reason to change the auditor. ASIC was concerned that the Applicant was 'opinion shopping'.   **(c) Decision**    The Senior Member affirmed the decision of ASIC by finding that ASIC's decision was correct and the preferable decision in the circumstances.   The Senior Member had some concern about the Applicant's claims. In respect of the extent of fees, the Senior Member noted that they may be explicable by the fact that an auditor's tasks becomes more lengthy and convoluted if it has to seek the production of documents in circumstances where the documents have not been maintained. The Applicant's claims about overcharging and an inability to get satisfactory answers were not tested by the evidence. Consequently, the Senior Member considered the evidence of the Applicant in relation to fees charged by the auditor was not sufficient to justify all claims made by him.   In respect of the submission about 'opinion shopping', the Senior Member noted the concerns of ASIC and accepted that they were well founded, based on the policies set out in the Regulatory Guides. The Senior Member determined that the possibility of opinion shopping was not adequately answered by the Applicant which raised doubt about the motives behind seeking the removal of the auditor.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h6)  **6.8** **Grounds for setting aside a statutory demand**    (By Stephanie De Vere, Minter Ellison)   Infratel Networks Pty Ltd v Gundry's Telco & Rigging Pty Ltd [2012] NSWCA 365, New South Wales Court of Appeal, Hoeben JA, Young AJA and Ward J, 9 November 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWCA/2012/365.html](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2012/365.html" \t "_new)   **(a) Summary**   This case provides useful guidance on the Court's considerations when determining whether a statutory demand should be set aside. This case also provides commentary on the application of the 'Graywinter principle'.    **(b) Facts**     The primary judge, Black J, dismissed an application brought by Infratel Networks Pty Ltd (Appellant) to set aside a statutory demand served on it by Gundry's Telco & Rigging Pty Ltd (Respondent). This was a concurrent hearing of an application for leave to appeal from the decision of Black J together with a hearing of the appeal.   The Appellant contended that the demand should be set aside because there was a genuine dispute over the alleged debt claimed (pursuant to section 459H(1)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act)), the Appellant had an offsetting claim (pursuant to section 459H(1)(a) of the Corporations Act) and the statutory demand should be set aside as unconscionable (pursuant to section 459J(1) of the Corporations Act).   The Respondent rejected each of these grounds and argued that the application needed to be dismissed because of the 'Graywinter Principle', that is, the grounds of challenge of a statutory demand should be sufficiently identified in the affidavit.    By way of background, the Appellant had numerous contracts with communication companies to erect communication towers. The Appellant subcontracted with the Respondent to perform some of that work. In respect of work the Respondent completed, the telecommunication company complained that there were defects in the work done on the towers. Consequently, the communication company refused to pay the Applicant. The Appellant informed the Respondent that as a result of the defective work, the Appellant was not going to pay the Respondent. The Appellant performed some of the rectification work and claimed $230,963,96 (which included $125,000 of loss of revenue due to the Appellant's personnel rectifying the sites).   The parties agreed that an 'Instrument of Agreement' governed the relationship between the parties in respect of the work. Importantly, clause 13.11 of the Instrument of Agreement provided that the Appellant could deduct from any moneys which were otherwise payable to the Respondent, any money which was payable by the Respondent to the Appellant under the terms of the agreement. Clause 14(1) of the Instrument of Agreement provided that all costs associated with revisits due to unacceptable works were to be borne by the Respondent.   On appeal, the court considered the following matters:   * whether there should be leave to appeal; * the application of the Graywinter principle; * did the primary judge apply the proper test as to whether there existed a genuine dispute? * did the primary judge err in determining that no genuine dispute existed? * did the primary judge err in determining there was no offsetting claim? * should the primary judge have set aside the statutory demand because it was unconscionable to allow it to stand? * what is the result of the appeal?   **(c) Decision**    The main judgment was given by Young AJA. Young AJA determined that the appeal should be dismissed with costs.   Young AJA granted leave for the appeal and noted that the grant of leave is in the general discretion of the court and if the court considers that there is sufficient injustice in permitting the decision below to stand, the court will be inclined to give leave. Here, Young AJA was concerned with whether the primary judge went too far in construing the underlying contract rather than merely determining whether the Appellant had plausible cause.   Young AJA noted that the Graywinter principle stems from the decision of Sunberg J in Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund [1996] FCA 822. Young AJA commented that the Graywinter principle has been modified in subsequent decisions from its original application. Young AJA considered a statement made by Ward J in Hopetown Kembla Investments Pty Ltd v JPR Legal Pty Ltd [2011] NSWSC 1343 was a summary of the principle in its present state. In this case Ward J stated that 'the vital question was whether, expressly or by reasonably available inference, the grounds of challenge of the statutory demand were sufficiently identified in the affidavit'.   Here, Young AJA held that the Graywinter principle was relevant to two aspects of the case; first, whether the genuine dispute was properly supported and secondly, whether the offsetting claim was properly supported. In respect of the first aspect, Young AJA agreed with the decision of the primary judge that the affidavit was sufficient. Young AJA also agreed with the primary judge's decision to uphold the Graywinter principle in respect of the offsetting claim because the affidavit neither contained a general statement that the quantum of any offsetting claim exceeded the debt nor did it provide any basis for calculation of the amount of the offsetting claim and the reason for the offsetting claim was not properly identified in the affidavit.   In respect of whether the primary judge applied the proper test as to whether there existed a genuine dispute, Young AJA noted that all the primary judge needed to do was to determine whether there was a genuine dispute; that is, one which a plausible contention has been raised by the company on which the statutory demand was served. However, the primary judge went further and determined the dispute.   Young AJA held that the primary judge misstated the principle regarding the court's role in determining a dispute that depends on the construction of a contract. Young AJA held that the court may determine questions of construction of a contract in an appropriate case but this is not the ordinary situation, it is what may occur on a few occasions. However, ultimately Young AJA determined that it was appropriate in this case for the primary judge to deal with the matter before him in the manner he did. Consequently, Young AJA determined that the primary judge did not err in determining that no genuine dispute existed.   In respect of whether the primary judge erred in determining there was no offsetting claim, Young AJA held that the offsetting claim was doomed to fail because of the Graywinter principle and that it also failed on its merits.   Young AJA referred to the primary judge's statement that 'a statutory demand may be set aside ... where it involves conduct which is unconscionable or an abuse of process'. The Appellant contended that the non-payment is the fault of the Respondent due to the defective work. Therefore, by issuing the statutory demand, the Respondent was seeking advantage of its wrongdoing. Young AJA held that it is not unconscionable conduct for a party to avail itself of one of the available courses for recovery of its demand rather than an alternative, at least unless it had made an election as to which course it will take.  Further, Young AJA determined that the notion of unconscionability traditionally has not comprehended the case where A says to B, 'I cannot pay you as C has not paid me'. Also, there was no material from which a court could hold that the defects were caused by the Respondent. It was held that due to the lack of detail and the fact that the Appellant had advised the Respondent that the Respondent would be paid in the future, there was no basis for the claim that the Respondent was acting unconscientiously or was involved in an abuse of process by issuing the statutory demand.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h6)  **6.9** **Revocation of an order granting leave to bring derivative proceedings on behalf of a company**    (By Laura Robb, Corrs Chambers Westgarth)   Ragless v IPA Holdings Pty Ltd (In Liquidation) & Carnie (Non Party) [2012] SASC 203, Supreme Court of South Australia, White J, 6 November 2012    The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/sa/SASC/2012/203.html](http://www.austlii.edu.au/au/cases/sa/SASC/2012/203.html" \t "_new)   (**a)  Summary**   Daron Carnie and Clive Ragless are shareholders of IPA Holdings Pty Ltd (In Liquidation) (Holdings). This case concerned an application by Mr Carnie for revocation of leave previously granted to Mr Ragless under section 237 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) to bring derivative proceedings on behalf of Holdings, against Mr Carnie and his company. Mr Carnie contended, amongst other things, that Mr Ragless had caused Holdings to make claims in the proceedings that were materially different to those foreshadowed when he sought leave; that he was not conducting the proceedings in pursuit of his interest as a shareholder of Holdings; and that he was conducting the proceedings for an ulterior motive based on malice. On the basis of those matters, it was asserted that Mr Ragless was not acting in the good faith nor in the best interests of the Holdings, as required by sections 237(2)(b) and (c) of the Act for the grant of leave. White J dismissed the application.    **(b) Facts**     In 1970, Mr Ragless and Mr Carnie formed a partnership to manufacture and sell pyrometers (devices used to measure and control temperature in an industrial environment). In 1982, the arrangement by which the business was conducted was restructured and Holdings was incorporated to conduct the business as trustee for the Industrial Pyrometers (Aust) Pty Ltd Unit Trust (the IPA Trust).  The IPA Trust issued two units:   * one held by IPA Manufacturing Pty Ltd (Manufacturing) as trustee of the Ragless Family Trust, controlled by Mr Ragless; and * the other held by Onetemp Pty Ltd (Onetemp) as trustee of the Carnie Family Trust, controlled by Mr Carnie.   Under the IPA Trust Deed, the IPA Trust was to terminate in June 2003 and the business wound up. Upon termination, it was intended that the assets and goodwill of the business be sold and the proceeds distributed to the unit holders.    Late in 1990, Mr Ragless and Mr Carnie agreed to divide the business: Mr Ragless and his company took over the manufacturing side, and Mr Carnie and his company the sales side. While the division was effective from 1991, the agreement was not reduced to writing until 25 June 1999 (the Deed). The Deed provided for a lease of the 'manufacturing assets' and of the 'sales assets' to Manufacturing and Onetemp respectively, and that the goodwill of the business remained in the possession of Holdings. The arrangement was to remain on foot for a period of two years from 1 July 1997. On the expiry of that term, Holdings, Manufacturing or Onetemp could terminate the agreement on three months' notice in writing. Notice was given by Onetemp and Mr Carnie on 8 December 1999. Regrettably, apart from making provision for the sale of one division to the other and for the sale of the combined business in certain circumstances, the Deed did not make provision for the consequences of termination.    The notice period expired on 8 March 2000, at which time, the options available to Messrs Carnie and Ragless were to combine the two divisions into one business to be conducted in partnership or sold, or to continue their separate businesses. They continued their separate businesses, and this led to disputes.     On 1 June 2003, the IPA Trust vested so that it was necessary for the business to be wound up pursuant to the terms of the Trust Deed. That did not occur and led to further disputes. On 28 November 2005, the Court made an order on the application of Mr Ragless winding up Holdings and appointing a liquidator.    Against that background, on 3 November 2006, Mr Ragless applied for leave under section 237 of the Act to bring proceedings in the name of Holdings against Onetemp in relation to breaches of the Deed and, in particular, its failure to return the sales assets to Holdings, and its failure to account for profits realised from the sales assets while it unlawfully retained possession of those assets. At that time, Mr Ragless accepted that Manufacturing would have to return the manufacturing assets to Holdings and account for profits which it had realised from its possession of those assets, in the same manner that he sought from Onetemp.   On 2 July 2007, a Master granted leave to Mr Ragless to bring proceedings on behalf of Holdings (Original Decision), which was confirmed on appeal (Ragless v IPA Holdings Pty Ltd (in liq) [2008] SASC 90). Thereafter, Mr Ragless commenced proceedings in the name of Holdings against Mr Carnie and Ontemp (the 2009 Action).    In support of his application for an order revoking the grant of leave to Mr Ragless, Mr Carnie submitted, amongst other things, that Mr Ragless:   * was conducting the 2009 Action in a partisan way in pursuit of the interests of the Ragless Family Trust, rather than in his capacity as a shareholder of Holdings; * had caused Holdings to make claims of a materially different kind from those contemplated by him when seeking leave; and * was conducting the 2009 Action for an ulterior motive based on malice.   On the basis of these submissions, Mr Carnie asserted that, contrary to sections 237(2)(b) and (c) of the Act, Mr Ragless was not acting in the good faith nor in the best interests of Holdings, and that the grant of leave should be revoked.    **(c) Decision**    At the outset, White J noted that Mr Carnie's submissions were made primarily on the basis that the Original Decision was an interlocutory decision. As his Honour dismissed Mr Carnie's application, it was not necessary for his Honour to reach a concluded view on that matter, but his Honour proceeded on the basis that the Original Decision was interlocutory in nature, without implying that that was the proper view.    White J considered the principles relevant to the Court's power to revoke an interlocutory order of a substantive kind and stated, amongst other things, that:   * an applicant must show some good reason for intervention (for example, a significant change of circumstances); and * the power should not be exercised where the real basis for the application is that the original order was wrongly made.   In considering Mr Carnie's submissions, White J reiterated that the application for revocation was not an occasion to re-agitate complaints about the Original Decision, nor to determine issues of construction of the Deed which are at the heart of issues to be determined in the 2009 Action. The real issue was whether there was any change of circumstances making the continuation of the grant of leave inappropriate.   **(i) Had the capacity in which Mr Ragless obtained leave changed?**   Any benefit to be obtained by an applicant for a grant of leave under section 237 must be obtained in the applicant's capacity as a person with standing under section 236(1)(a), and not some other capacity. Mr Carnie contended that the conduct of the 2009 Action involved a misconstruction of the Deed that favoured Mr Ragless' interests at the expense of his own and, consequently, that it was not being pursued by Mr Ragless in his capacity as a shareholder, but for the benefit of the Ragless Family Trust. White J held that the capacity in which Mr Ragless obtained leave had not changed, and that Mr Carnie's submission amounted, in effect, to an attempt to re-agitate an issue on which he had not succeeded previously.    **(ii) Did Mr Ragless' change of position warrant a revocation?**   Contrary to the position taken by him when seeking the grant of leave, White J noted that Mr Ragless now expressed the view that there were no manufacturing assets for which Manufacturing or he must account. Mr Carnie submitted this was a radical departure, which undermined the express basis upon which the Court acted when granting leave. While his Honour acknowledged the change of position, his Honour was satisfied that the potential liability of Mr Ragless and Manufacturing to Holdings would be heard and determined as a consequence of the grant of leave under section 237. That being so, his Honour concluded that Mr Ragless' changed view about the existence, and possible extent, of a liability of Manufacturing to Holdings did not warrant a revocation of the grant of leave.   **(iii) Did the presence of personal animus warrant revocation?**   White J acknowledged the possibility that Mr Ragless was prompted to bring the 2009 Action, at least in part, by some personal animus towards Mr Carnie, but concluded that where derivative proceedings are brought for proper purpose, the fact that the applicant for leave under section 237 may be motivated by some personal animus is not decisive. His Honour had no reason to suppose that the Supreme Court Masters with the management of the 2009 Action were not aware of the antipathy which was said to exist between Messrs Ragless and Carnie and, in those circumstances, concluded that it would be a very significant step for the Court to hold that such personal animus as Mr Ragless may have displayed warranted revocation of the grant of leave.    Accordingly, White J concluded Mr Carnie had not made good his claims that Mr Ragless was not acting in good faith or in the best interests of Holdings. The application was dismissed.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h6)  **6.10** **Federal Court holds ratings agency owes duty of care to potential investors**   (By Benjamin Nucci, DLA Piper Australia)   Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5) [2012] FCA 1200, Federal Court of Australia, Jagot J, 5 November 2012   The full text of the judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/1200.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/1200.html" \t "_new)   **(a) Summary**   The Federal Court has held that a ratings agency owes a duty of care to potential investors.  The court ruled that global ratings agency Standard & Poor (S&P) was liable for misrepresentations to 12 local councils in New South Wales (Councils) by negligently assigning its highest rating of AAA to a volatile structured finance product arranged by investment bank ABN Amro Bank NV (Amro).  Amro, in an effort to gain the highest financial rating for its investment product, calculated what inputs were required under S&P's model to achieve the rating and pressured S&P to adopt those numbers.   Amro then decided to replicate their product on the Australian market.  Despite S&P realising it used the wrong inputs to the first product, they did not recalculate the rating and assigned a AAA rating to the Australian version.  The product at issue, Constant Proportion Debt Obligations (CPDO) and nicknamed Rembrandt notes, became a deceptively attractive investment for municipal financial advisor Local Government Financial Services (LGFS) ,who wished to enter the CPDO market to improve its weak balance sheet. Acting for the Councils, LGFS pushed the unsuitable product to the Councils without identifying the risks involved.  After the global financial crisis in mid-2007, the value of the volatile CPDOs plummeted to less than 10% of the principal investment.    As a result of the decision, the Councils were able to recover from S&P for negligently assigning the AAA rating.   **(b) Facts**   LGFS invested funds on behalf of the Councils in negligently rated CPDOs, created by Amro and rated by S&P.  As a result of the global financial crisis of 2007, the Councils suffered substantial losses.    **(i) The CPDO**   The CPDO was a synthetic collaterised debt instrument created by ABN Amro in April 2006. The capacity for the CPDO to earn money depended on a complex interaction between market-to-market losses compared to higher premium income, measured against the global credit default swap contract index Globoxx ('Index'). Ultimately, the CPDO was a risky bet on future economic performance.    **(ii) Rating**   In order to determine what rating the CPDO warranted, it was necessary to model its performance using a method capable of simulating numerous modelled outcomes or runs.  Experts giving evidence concurred that a reasonably competent ratings agency had to model performance incorporating both reasonably anticipated or expected market conditions (non-stressed) and exceptional but plausible market conditions (stressed).    Amro, aware of S&P's performance analysis methodology, knew that in order for the CPDO to be rated AAA (the highest possible rating), the failure rate of the CPDO to meet its financial obligations had to be less than 0.728%.  Amro worked out a series of inputs based on the S&P method to achieve this, including a starting spread of 36 bps (the lower the starting spread the worse the CPDO performed) and a long term average spread (LTAS) of 100 bps. The fact that the CPDO performed better when the LTAS increased was counter intuitive as increasing spreads are a reflection of increased risks in markets. At least one person within S&P considered that Amro had effectively 'gamed' the model it knew S&P would apply to rate the CPDO.    Amro then engaged S&P to rate the CPDO and, in doing so, pressed S&P to adopt as the basis for the rating Amro's model inputs.  Most notably, Amro wrongly asserted to S&P that the average volatility of the Index was 15%.  The actual volatility was 28%. S&P believed Amro's assertions and did not calculate the volatility for itself.  As a result, S&P assigned a rating of AAA to the CPDO and authorised Amro to disseminate that information.    **(iii) Local involvement**   Subsequently, Amro created a version for the Australian market known as Rembrandt 2006-2.  By the time of issue, average spreads on the Index had reduced. Amro knew the sensitivity of the CPDO to starting spreads, but did not mention it or the decline to S&P.  In turn, S&P did not model the performance of the Rembrandt 2006-2 CPDO at the actual starting spread and instead assigned a rating of AAA based on the modelling it had done a month earlier.    One investor who saw the Rembrandt 2006-2 CPDO and the AAA rating was LGFS.  LGFS, who had been appointed by StateCover to manage StateCover's investments, purchased $10,000,000 of the Rembrandt 2006-2 CPDO notes.  LGFS looked for another structured financial product with a high rating and good return to enable them to compete with product providers which had been selling Collaterised Debt Obligations (CDOs) to councils with increasing success since 2003.  The infiltration of CDOs into LGFS's traditional deposit taking business had caused LGFS's profits to plummet and threatened the ongoing viability of its business model.  Amro then decided to create the Rembrandt 2006-3.   The Rembrandt 2006-3 was scheduled to be issued by Amro on 2 November 2006.  By 10 October 2006, S&P had realised for the first time that the decreased spreads on the Index adversely affected the CPDO.  S&P had also decided that the volatility had to be increased from the 15% of the other CPDOs, to 25%.  However, on the basis of Amro's descriptions that Rembrandt 2006-3 was a carbon copy of the Rembrandt 2006-2, S&P assigned a rating of AAA and did not carry out any recalculation despite S&P knowing that 15% volatility should no longer be used.  On that basis, LGFS purchased $40,000,000 of the Rembrandt 2006-3 CPDO on 2 November 2006 and an additional $5,000,000, for which S&P confirmed the rating of AAA, in January 2007.    From November 2006 to June 2007, LGFS sold approximately $16,000,000 of CPDO notes to the Councils.  LGFS held the balance of the Rembrandt 2006-3 CPDO notes on its balance sheet.  Two of the councils had entered into a contract with LGFS by which LGFS agreed to provide these councils with financial advice. The other councils, uncontracted, had engaged LGFS through numerous dealings and were induced to believe that LGFS would act in the best interests of the Councils.   In 2007, the global financial crisis hit. In response, S&P downgraded its rating of the Rembrandt 2006-2 and 2006-3 notes from AAA to BBB+ in February 2008.  Because LGFS was not permitted to hold the product at the downgraded rating pursuant to its investment policy, they arranged to sell the Rembrandt 2006-3 notes, thereby sustaining a loss of principal of nearly $16,000,000.  The Councils continued to hold the notes until they cashed out in October 2008, after which they received back less than 10% of the principal they invested.    **(c) Decision**   The Councils brought claims against S&P, Amro and the LGFS. The Councils argued they had been induced to invest in the CPDO in reliance, among other things, on the AAA rating that S&P assigned to the CPDO.    **(i) Claims against S&P**   The Federal Court held that S&P's rating conveyed a representation that S&P, through reasoned opinion and responsible analysis, considered the capacity of the notes to meet all financial obligations as 'extremely strong'.  The court found this was not the case and S&P knew this was not true at the time.  Given the high volatility of the CPDO, the court found that the inputs adopted by S&P were not inputs that any reasonable ratings agency would adopt.    S&P argued that the Councils themselves failed to exercise due care and skill by relying on advice and recommendations of LGFS and not having ensured that they understood for themselves the nature and risk of CPDOs.  Jagot J rejected these arguments, emphasising that S&P knew the councils were unsophisticated investors and that the very reason why S&P is paid by issuers of a financial product to assign a rating is because the rating is well known to be highly material to the decision of potential investors.  Her Honour noted it was reasonable for the councils to rely on LGFS's advice and S&P's rating and that it would have been extraordinary if they had not done so.    **(ii) Claims against Amro/LGFS**   The court was also critical of Amro, which it found to have inappropriately influenced S&P and misrepresented information that S&P relied upon in formulating its incorrect AAA rating of the CPDO.  Moreover, the court also ruled that Amro and LGFS had themselves engaged in misleading and deceptive conduct and had breached various other fiduciary and contractual duties owed by them.   **(iii) Relief**   S&P, Amro and LGFS were each ordered to repay one-third of the councils' entitlement to damages, to be calculated from the approximately $16 million invested the CPDOs.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h6)  **6.11** **UK Supreme Court makes it harder to enforce Australian insolvency judgments in the UK**   (By Bree Ludlow and Todd Allen, Corrs Chambers Westgarth)   Rubin v Eurofinance SA; New Cap Reinsurance Corporation (In liq) v AE Grant [2012] UKSC 46, United Kingdom Supreme Court, Lords Walker, Mance, Clark, Sumpton and Collins, 24 October 2012   The full text of this judgment is available at:  [http://www.bailii.org/uk/cases/UKSC/2012/46.html](http://www.bailii.org/uk/cases/UKSC/2012/46.html" \t "_new)   **(a) Summary**   Before the recent decision in Rubin v Eurofinance SA and New Cap Reinsurance Corporation (In liq) v AE Grant [2012] UKSC 46 (the joint appeal of two earlier cases) (the Rubin/New Cap Appeal), an insolvency judgment obtained in an Australian court could be enforced in the UK despite falling outside of the traditional common law enforceability rules.  The Rubin/New Cap Appeal has now removed this special treatment afforded to foreign insolvency judgments and the old common law rules once again apply.   **(b) Facts**     To enforce a foreign judgment in the UK a defendant has to have either been present in the foreign jurisdiction at the time the proceedings commenced or have agreed to submit to the foreign jurisdiction.  This is known as the Dicey Rule at common law and is reflected in the UK Foreign Judgments (Reciprocal Enforcement) Act 1933 (the 1933 Act).   In the earlier decisions of Rubin v Eurofinance SA [2010] EWCA Civ 895 (Rubin) and New Cap Reinsurance Corpn Ltd v Grant [2011] EWCA Civ 971 (New Cap), the UK Court of Appeal granted a special enforceability status to foreign insolvency judgments which allowed enforcement despite non-compliance with the Dicey Rule or 1933 Act.   In Rubin, the English Court of Appeal held that a $10m judgment of the US Bankruptcy Court was enforceable in England at common law, despite the defendant not being present in the US or having submitted to US jurisdiction. This was largely based on the principle of universalism in cross-border insolvency and bankruptcy.   In New Cap, bound by the prior decision in Rubin, the English Court enforced a US$8m default judgment of the New South Wales Supreme Court.    The appeals of both decisions were joined to form the Rubin/New Cap Appeal.   **(c) Decision**    The main issue before the court was whether there should be a special rule for the recognition and enforcement of foreign insolvency judgments which is more expansive than the traditional Dicey Rule. The majority found that:   * the Courts of Appeal were wrong to provide a special rule for insolvency because to do so is a radical departure from substantially settled law; * such a change to settled law would be a matter for legislation and not for judicial innovation; and * it would only be to the detriment of UK businesses without any corresponding benefit to allow such departure.   The Court also found that there is nothing in the UNCITRAL Model Law implemented by the Cross-Border Insolvency Regulations 2006 which permits recognition or enforcement of foreign judgments against third parties.   The question arose in New Cap as to whether the UK Insolvency Act 1986 (the 1986 Act) provides a procedure by which an Australian judgment may be enforced in the UK. Section 426(4) provides English courts with a statutory power to assist in foreign insolvency proceedings if so requested by a court in a 'relevant country'.  Despite Australia being a 'relevant country', the majority decided that this section of the 1986 Act is not concerned with the enforcement of judgments; rather, it allows an English court to assist by making its own orders similar to those sought by the foreign court. Therefore section 426(4) of the 1986 Act cannot be used to enforce an Australian judgment in the UK.   Despite having found that the Dicey Rule and/or 1933 Act apply, the Court still dismissed the New Cap appeal because it found that the defendant had in fact submitted to New South Wales Supreme Court jurisdiction (hence satisfying the common law test) by filing a proof of debt in the insolvency proceeding. The defendant was not allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h6)  **6.12** **Suitability of an Intensive Correction Order as a sentence for imprisonment where the offence relates to a white-collar crime and deliberately made, false and misleading statements**   (By Christina Koravos, DLA Piper Australia)    R v Pogson; R v Lapham; R v Martin [2012] NSWCCA 225, New South Wales Court of Criminal Appeal, McClellan CJ, Johnson, Price, RA Hulme and Button JJ, 22 October 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2012/225.html](http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2012/225.html" \t "_new)   **(a) Summary**  The court found that an Intensive Correction Order (ICO) can be used as a form of sentencing for any purpose, and is not limited to being used for rehabilitation of offenders.  However the court determined that in some circumstances, the use of an ICO may be inadequate for sentencing an offender.    **(b) Facts**     Samuel Jonathan Pogson and Murray John Lapham were the owners and executive directors of a group of companies in real estate development.  Steven John Martin was a non-executive director of Australian Capital Reserve Limited (ACR), a subsidiary of the group and the fund-raising arm of the entire group.    A prospectus for ACR lodged with Australian Securities and Investments Commission (ASIC) failed to include information about the group's consolidated profit.  ASIC became concerned with this and through an interim stop-order prohibited ACR from issuing the prospectus until these concerns were addressed.  A replacement prospectus was lodged with ASIC which included a falsely improved consolidated group profit of over $7.4 million.  The actual figure was approximately a loss of $1 million.    All three respondents pleaded guilty to the offences of making false and misleading statements in a prospectus.  Each of the terms of imprisonment were less than two years and were sentenced by way on an ICO under section 7(1) of the [Crimes (Sentencing Procedure) Act 1999 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=19135" \t "_default) (the Sentencing Procedure Act). All three respondents were charged with concurring in making a false or misleading statement in breach of section 178BB of the [Crimes Act 1900 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3907" \t "_default).  Mr Pogson was also charged with knowingly making a false statement in a document lodge with ASIC, in breach of section 1308(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).   The issue on appeal was the form of sentencing as an ICO instead of full-time custodial imprisonment. The Crown submitted that the judge erred in imposing ICO as the sentence on two grounds:   * the judge had erred in making an order for ICO pursuant to s 7(1) Sentencing Procedure Act; and * the sentence was manifestly inadequate.   In regards to the first ground, the Crown submitted that an ICO was not available to each of the respondents because there was no demonstrated need for rehabilitation.  The Crown relied upon:   * obiter statements in R v Boughen (Boughen) per Simpson J, who noted that ICO orders were only applicable where rehabilitation was needed such as for persons 'with significant drug problems, alcohol problems or mental health problems' not for 'persons of good character'; * the Attorney-General's second reading speech for the Bill providing for ICOs  noted that an ICO was 'designed to reduce an offender's risk of re-offending through the provision of intensive rehabilitation and supervision in the community'; * conditions of ICOs set out in regulations which emphasise the rehabilitative purpose of an ICO; and * the lack of utility for each of the respondents from the conditions of an ICO as set out in the regulations.   In regards to the second ground, the Crown argued that an ICO fails to provide a sufficient sentence for the respondents due to:   * a high degree of leniency associated with an ICO; * failure to generally deter persons from deliberate and dishonest conduct that is market-related; * minimal effect on the respondents; * gains made by the respondents by way of facilitating substantial investment and reinvestment; and * lack of distinction between the respondents' circumstances and other cases where an ICO has not been warranted.   The respondents argued that they were not motivated by greed or desire and never intended to deceive any investors.  Furthermore they emphasised that no investors suffered any losses and the subsequent failure of the company was not connected with the present offences. Mr Lapham and Mr Pogson both submitted statements regarding the suitability of an ICO, Mr Lapham emphasising that it had assisted him to understand the ramifications of his act and Mr Pogson to address mental health and finance issues.    **(c) Decision**    **(i) Availability of an ICO**    A sentencing judge can order an ICO as a form of custodial sentence under section 7 of the Sentencing Procedure Act. The court declared that an ICO may be available to all offenders unless there are clear words in the relevant statute or necessary implications which say otherwise.  The Sentencing Procedure Act expressly provides for when an ICO cannot be given as a form of sentencing.  None of these restrictions applied to the respondents.    **(ii) Purposes of sentencing**   The court determined that a sentence in the form of an ICO does not need to demonstrate the need for rehabilitation of an offender. The court considered:   * the general purposes of sentencing as set out in section 3A of the Sentencing Procedure Act, which includes punishment, deterrence, community protection, accountability, denunciation, recognition of harm and rehabilitation; * the Sentencing Procedure Act's failure to specifically exclude the making of an ICO for purposes other than rehabilitation; * the Attorney-General's second reading speech not limiting the use of an ICO to rehabilitation of offenders but instead emphasising its potential use as a rehabilitation tool; and * the purpose of regulations to give effect to the parent statute, the Sentencing Procedure Act, and not to restrict it.   Despite these findings, the court went on to discuss the definition of rehabilitation. Although there was no risk found of the respondents reoffending (determined in an assessment report), the court considered that the respondents might still come within the definition of rehabilitation based on:   * rehabilitation not being defined in the Sentencing Procedures Act or the [Crimes Act 1914 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6050" \t "_default); * the purpose of rehabilitation often being referred to as the establishment of the offender as an honourable law-abiding citizen and the renunciation of their wrongdoing (King CJ in Vartzokas v Zanker); and * every offender arguably being in need of rehabilitation to change a person's thinking and behaviour so that they can re-establish themselves in society.   The court referred to several cases where the sentence was in the form of an ICO. In these cases, the sentencing judge did not refer to rehabilitation as the only purpose of an ICO. In regards to the judgement of Simpson J in Boughen, the court found that the comments made regarding rehabilitation were obiter and inconsistent with other cases.    **(iii) Utility of ICO**    The court noted the utility of an ICO and stated that although the conditions imposed by an ICO allow for rehabilitation, they are also intrusive and restrict the respondents' liberty such as through 24 hour monitoring and mandatory drug and alcohol testings.    **(iv) Adequacy of an ICO**    The court agreed that despite there being no loss to investors as a result of the falsified prospectus, the offences by Mr Lapham and Mr Pogson were of a serious nature.  Given the offences were market-related, the court held that it is important to deter others from engaging in dishonest conduct.  Furthermore, given the level of dishonesty and an ICO being a less severe sentence than full-time imprisonment, the court held that the sentence given was manifestly inadequate.     Although the court can decline to interfere where the sentence is erroneously lenient, the court looked to several factors between the time of sentence and the hearing including: age of respondents, likely inability to re-establish successful business careers, and compliance with the ICOs. The court consequently allowed the ICO and determined that the respondents had suffered as a consequence of the ICO and would be deterred in the future.    Price J dissented and noted briefly that a full-time custodial sentence was needed and not an ICO in order to give proper weight to the particular significance that general deterrence plays in white collar crime.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h6)  **6.13** **No implied term in options about a company's board composition**    (By Rebekah Winsor, Clayton Utz)    Elkington v Farsands Solutions Pty Ltd [2012] NSWCA 334, New South Wales Court of Appeal, Barrett JA and Tobias AJA, 17 October 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWCA/2012/334.html](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2012/334.html" \t "_new)   **(a) Summary**   A contract which grants a person an option to subscribe for shares in a company does not have an implied term that the board of directors (and other decision making bodies) will never include any person who has an obligation that is in conflict with the obligation they owe to the company. It is not bad conduct, unsound practice or unlawful for a company merely to have a director, or decision-maker, who has other allegiances or interests.   It is also not possible for a company, as a contracting party, to promise that the board will be constituted (or not constituted) in any given way.   **(b) Facts**     The case was an application for leave to appeal against an interlocutory order of the District Court, which dismissed a statement of claim because no reasonable cause of action was disclosed.    The applicant held options in the respondent, Farsands Solutions Pty Ltd (Farsands). The options were issued when Farsands was an ASX-listed public company.  The applicant was not the original allottee of the options, they acquired their options by transfer.    In September 2005 the company Coffey International Ltd (Coffey) came to own all the issued shares in Farsands and Farsands was converted to a proprietary company. In December 2005 Farsands sold the whole of its assets (consisting of shares in other companies) to Coffey at book value. This decision was made by the board of Farsands which since October 2005 had consisted of 3 persons who were also directors of Coffey, and had been appointed to Farsands by Coffey.   The applicant sued the respondent for damages for breach of contract. The alleged contract was the contract by which the applicant's options to subscribe for unissued shares in the respondent were created. The applicant alleged an implied term was breached.   The alleged implied term was that decisions of Farsands would be made by persons who did not have obligations that were in conflict with the obligations they owed to Farsands. The applicants argued that the transfer of all of the shares in Farsands' subsidiaries to Coffey was a breach of this implied term.  They claimed damages for the reduction in the value of the options to zero.    **(c) Decision**    The appeal judges found (Barrett JA with Tobias AJA agreeing) that it was arguable that there may be an implied term in a contract for options.  However, the appeal judges found that there was no possibility of the implied term suggested in the statement of claim. They rejected the notion that a company issuing options impliedly accepts any fetters as to the manner in which its board of directors and other decision making bodies will be constituted.  Their reasons for not accepting the proposed implied term were:   * This would place option holders in a more advantageous position than other members. This was a powerful consideration against the implication of the term. According to Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204, a member cannot bring an action in respect of wrongful conduct of directors, diminishing the value of the member's shares. It is the company that suffers the relevant loss. Therefore, an option holder cannot be in any better position than a shareholder by being able to claim this loss. * Rules of good conduct or sound practice may be found to be implied in some contracts, however this suggested implied term was not related to good conduct or sound practice. It is not bad conduct, unsound practice or unlawful for a company merely to have a director who has other allegiances or interests.  The real challenge for people holding multiple directorships is to deal properly with conflicts between duty and duty, or between duty and interest, as and when they arise. It is thus meaningless to speak of conflict by virtue of holding multiple offices or interests except by reference to a particular factual context. * It is not possible to state that the company, as a contracting entity, has any capacity to promise that the board will be constituted (or not constituted) in any given way. The company has no capacity to decide who will or will not be a member of its board of directors. * A holder of options takes the risk that the fortunes of the company will decline, even that the company will go into liquidation, before the options are exercised.   Therefore, the appeal judges found that the applicant did not show that the primary judge was in error and therefore proposed that the leave to appeal be dismissed with costs.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/184-December-2012.html%23h6) | |  |  | | --- | |  |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **7. 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