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| SAI Global Corporate Law Bulletin No. 179**>** |  |

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| **Bulletin No. 179**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, The University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Ashurst](http://www.ashurst.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Piper](http://www.dlapiper.com/Australia/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [King & Wood Mallesons](http://www.mallesons.com/%22%20%5Ct%20%22_new), [Minter Ellison](http://www.minterellison.com/%22%20%5Ct%20%22_new).1.     [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/179-July-2012.html#h1)2.     [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/179-July-2012.html#h2)3.     [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/179-July-2012.html#h3)4.     [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/179-July-2012.html#h4)5.     [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/179-July-2012.html#h5)6.     [Contributions](http://www.law.unimelb.edu.au/bulletins/179-July-2012.html#7)7.     [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)  |

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

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| **1.1** **Corporations Legislation Amendment (Derivatives Transactions) Bill 2012**On 25 July 2012, the Government released a draft of the Corporations Legislation Amendment (Derivatives Transactions) Bill 2012. The legislation would amend the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) by introducing a framework to allow the Minister for Financial Services and Superannuation to decide that mandatory obligations should apply to certain classes of over-the-counter (OTC) derivatives, requiring those classes to be reported, centrally cleared, or traded on suitable trading platforms. This will allow regulations and rules to be made to specify the details of these obligations. The framework would enable Australia to implement the commitments made at the Pittsburgh G-20 summit in September 2009. Consequential amendments to other Acts that may be introduced concurrently with the draft Bill have not been included in this exposure draft.The draft Bill is available on the [Treasury website](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Derivative-Transactions%22%20%5Ct%20%22_new).etailed Contents**1.2****New Corporations Regulations****(a) Corporations Amendment Regulation 2012 (No 4)** Commencing on 13 July 2012, the [Corporations Amendment Regulation 2012 (No 4) 2012 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=134167" \t "_default) amends the [Corporations Regulations 2001(Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "_default). According to the explanatory statement, the purpose of the amending Regulation is to vary a number of provisions relating to charging ongoing fees to clients and conflicted remuneration as introduced by the [Corporations Amendment (Future of Financial Advice) Act 2012 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=133665" \t "_default) and the [Corporations Amendment (Further Future of Financial Advice Measures) Act 2012 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=133664" \t "_default). Specifically, the amending Regulation: * excludes product fees from the definition of an 'ongoing fee arrangement';delays the application date to 1 July 2013 for the ban on conflicted remuneration with respect to benefits that relate to group life risk insurance inside superannuation funds and all life risk insurance policies in default superannuation funds; excludes benefits given for advice relating to interests in time-sharing schemes from the ban on conflicted remuneration; and
* further details the scope of the exemptions from the ban on conflicted remuneration for certain non-monetary or 'soft dollar' benefits, and introduces record keeping requirements in relation to those benefits.

**(b) Corporations Amendment Regulation 2012 (No 5)** Commencing on 25 July 2012, the [Corporations Amendment Regulation 2012 (No 5) 2012 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=134182" \t "_default) amends the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "_default). According to the explanatory statement, the objective of the amending Regulation is to 'strengthen Australia's audit regulation framework'.Specifically, the amending Regulation prescribes that an auditor's annual transparency report must contain, where relevant: * information about the auditor's legal structure and ownership;
* where the auditor belongs to a network, information about the network and the legal and structural arrangements in the network;
* information about the auditor's governance structure;
* information about the internal quality control system of the auditor;
* details of when the last reviews of the auditor conducted by an authorised body took place;
* the names of entities audited;
* information about the auditor's independence practices;
* the auditor's continuing professional development policy;
* financial information regarding the auditor's audit and non audit revenue; and
* information regarding the basis of remuneration of an auditor's partners or directors.

**(c) Corporations Amendment Regulation 2012 (No 6)** Commencing on 13 January 2013, the [Corporations Amendment Regulation 2012 (No 6) 2012 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=134183" \t "_default) amends the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "_default). According to the explanatory statement, the objective of the amending Regulation is to clarify that litigation funding schemes, as well as similar arrangements such as approved benefit funds and schemes relating to an externally-administered body corporate, are excluded from the definition of "managed investment schemes" in the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). etailed Contents**1.3** **Release of final report of Kay review of UK equity markets**On 23 July 2012, the Final Report of the Kay Review of UK Equity Markets and Long-Term Decision Making was released.  The Kay Review is an independent review examining investment in UK equity markets and its impact on the long-term performance and governance of UK quoted companies.In his Final Report, Professor John Kay provides a set of principles to ensure that equity markets support their core purpose of enhancing the performance of UK companies, and providing returns to savers. The Report finds that short-termism is an underlying problem in UK equity markets, principally caused by a misalignment of incentives within the investment chain and the displacement of trust relationships by a culture based on transactions and trading.The Final Report sets out measures to transform UK equity markets. It recommends a shift in the culture of key players in the market, aimed at restoring relationships built on long-term trust and confidence, and realigning incentives across the investment chain.Professor Kay's recommendations, which are aimed at key players in UK equity markets, as well as Government and regulators, look to: * Improve the incentives and quality of engagement, such as establishing an Investor Forum to foster more effective collective engagement by investors with UK companies.
* Restore relationships of trust and confidence in the investment chain, including by applying fiduciary standards more widely within the investment chain.
* Change the culture of market participants, including by adoption of 'good practice statements' by company directors, asset managers and asset holders that promote a more expansive form of stewardship and long-term decision making throughout the investment chain.
* Realign incentives by better relating directors' remuneration to long-term sustainable business performance and better aligning asset managers' remuneration to the interests of their clients.

The Kay Review, commissioned by the UK Department for Business Innovation & Skills (BIS) in June 2011, was established to consider how well equity markets are achieving their core purposes: to enhance the performance of UK companies, and to enable investors to benefit from this in returns from equity investment. An Interim Report in February 2012 collated the evidence gathered through extensive consultation, which was then considered by Professor Kay and his advisory board to produce the Final Report.The Final Report is available on the [BIS website](http://www.bis.gov.uk/assets/biscore/business-law/docs/k/12-917-kay-review-of-equity-markets-final-report.pdf%22%20%5Ct%20%22_new).etailed Contents**1.4** **APRA releases response paper on covered bonds and securitisation**On 12 July 2012, the Australian Prudential Regulation Authority (APRA) released a response paper in relation to the issue of covered bonds by authorized deposit-taking institutions (ADIs), and the final 'Prudential Standard APS 121 Covered Bonds' (APS 121).In October 2011, the Government amended the [Banking Act 1959 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6665" \t "_default) to allow ADIs to issue covered bonds. Since then, APRA has been consulting on a prudential standard to apply to ADIs that issue covered bonds. These consultations included a consultation package, released in November 2011, consisting of a discussion paper and a draft prudential standard. APRA has held discussions with a range of industry participants and received nine written submissions in response to the consultation package. The response paper sets out APRA's response to issues raised during these consultations. The response paper also addresses comments received in relation to APRA's proposal to amend 'Prudential Standard APS 120 Securitisation', in relation to the capital treatment of holdings of subordinate tranches of securitisations held by an ADI other than the originator of the securitised loans. This proposal is unrelated to covered bonds, but was included in the consultation package for convenience. The response paper and APS 121 are available on the [APRA website](http://www.apra.gov.au/adi/Pages/Covered-bonds-and-securitisation-matters-Nov-2011.aspx%22%20%5Ct%20%22_new).etailed Contents**1.5** **Discussion paper on a reporting framework for notes to the financial statements**On 12 July 2012, the European Financial Reporting Advisory Group (EFRAG), the Autorité des Normes Comptables (ANC) in France, and the Financial Reporting Council (FRC) in the United Kingdom published a Discussion Paper, titled 'Towards a Disclosure Framework for the Notes'.  Many commentators have indicated that the notes to the financial statements have grown considerably over the years as the International Accounting Standards Board (IASB) keeps adding to existing disclosure requirements in International Financial Reporting Standards to support more transparency. As a result, the notes have become so extensive that investors and creditors can no longer 'see the wood for the trees'. A major concern is that the notes to the financial statements have become a burden and it is not clear that they serve their intended purpose, which is to help users understand the numbers in the financial statements. The Discussion Paper outlines some key principles that EFRAG, the ANC and the FRC consider essential to the design of an effective disclosure framework. The proposals in the Discussion Paper set out a decision framework for both the standard setter in setting the requirements and for preparers, auditors and regulators in applying those requirements, placing emphasis on the need to improve the communication to investors, creditors and others who rely on the financial statements to make decisions. The Discussion Paper aims at contributing to the work of the IASB in the development of a Disclosure Framework.  The Discussion Paper is available on the [FRC website](http://www.frc.org.uk/getattachment/291da9e8-e717-4179-b05a-81e19bda14a1/Discussion-Paper-Towards-a-Disclosure-Framework-for-the-Notes.aspx%22%20%5Ct%20%22_new).etailed Contents**1.6** **HKMA and SFC release consultation conclusions on proposals to regulate OTC derivatives market**On 11 July 2012, the Hong Kong Monetary Authority (HKMA) and Securities and Futures Commission (SFC) jointly released the 'Consultation Conclusions on the Proposed Regulatory Regime for the Over-the-counter (OTC) Derivatives Market in Hong Kong'. In general, respondents were supportive of the proposed regulatory regime and recognise the need for Hong Kong to develop and implement measures in line with G20 Leaders' objectives of improving transparency, regulatory monitoring and reducing counterparty and systemic risk in the OTC derivatives market. Taking into consideration the responses received, the HKMA and SFC have fine-tuned some of the features of the regime.The Consultation Conclusions Paper summarises the comments received and the HKMA and SFC's responses to these comments.  It also sets out the conclusions and proposals for taking the OTC derivatives reform initiative forward.The HKMA and SFC have also issued a Supplemental Consultation Paper on the proposed scope of the new regulated activities to be introduced under the proposed OTC derivatives regulatory regime, and the proposed oversight of systemically important players.  The Consultation Conclusions Paper and the Supplemental Consultation Paper are available on the [SFC website](http://www.sfc.hk/sfcPressRelease/EN/sfcOpenDocServlet?docno=12PR75" \t "_new).etailed Contents**1.7** **Report on MiFID II** On 10 July 2012, the UK House of Lords Economic and Financial Affairs European Union Sub-Committee released the results of a short inquiry regarding MiFID II, in a report titled 'MiFID II: Getting it Right for the City and EU Financial Services Industry'. According to the Committee, the MiFID II proposals from the European Commission to regulate financial markets have been rushed, and risk creating confusion rather than providing clarity in terms of the regulatory framework for investment.The Committee has scrutinised the Commission's proposals for a Directive and a Regulation in Markets in Financial Instruments (known as MiFID II). The new regulatory framework applies to a wide range of investment services such as global investment banks trading complex securities, fund managers investing pension funds, stock-broking firms and small high street financial advisers providing financial advice to the general public. This proposal seeks to meet the G20 commitment to tackle the less regulated and more opaque parts ('dark pools') of the financial system, and to enable regulators to regulate, traders to trade, and consumers to use such products, with confidence.In its report, the Committee concludes that while a review of the existing MiFID I regulatory package is necessary, the proposals contain fundamental flaws that must be corrected as a matter of urgency if serious damage to the EU financial services industry is to be avoided. In summary:* Proposals on third country access would effectively create a 'fortress Europe' - forcing countries such as the USA and China out of affected markets, to the detriment of EU consumers.
* Whilst the Commission's desire for greater transparency is to be welcomed, an unsophisticated, 'one-size-fits-all' approach that ignores the sensitivity of information before a trade is made (pre-trade transparency) not only risks damaging liquidity and reducing competition, but could also have a serious effect on market innovation.
* The new category of Organized Trading Facilities (OTFs), aimed at ensuring all organized trading is conducted on regulated venues, risks creating red tape through an overly complicated regulatory framework.

The Report is available on the [UK Parliament's website](http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/28/28.pdf%22%20%5Ct%20%22_new).etailed Contents**1.8** **SEC approves rules and interpretations on key terms for regulating derivatives**On 9 July 2012, the US Securities and Exchange Commission (SEC) announced that it had unanimously approved rules and interpretations for key definitions of certain derivative products.The SEC rules and interpretations further define the terms 'swap' and 'security-based swap' and whether a particular instrument is a 'swap' regulated by the Commodity Futures Trading Commission (CFTC) or a 'security-based swap' regulated by the SEC.  The SEC action also addresses 'mixed swaps', which are regulated by both agencies, and 'security-based swap agreements', which are regulated by the CFTC but over which the SEC has anti-fraud and other authority.The rules and interpretations, written jointly with the CFTC, implement provisions of the 2010 Dodd-Frank Act that establish a comprehensive framework for regulating over-the-counter derivatives. Once both agencies adopt the final rules, they will become effective 60 days after the date of publication in the US Federal Register. The compliance date of such rules for purposes of certain interim exemptions under the federal securities laws will be 180 days after the date of publication in the Federal Register. Further information is available on the [SEC website](http://www.sec.gov/news/press/2012/2012-130.htm%22%20%5Ct%20%22_new).etailed Contents**1.9** **BCBS and IOSCO release consultative paper on margin requirements for non-centrally-cleared derivatives** On 6 July 2012, the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) released a consultative paper on margin requirements for non-centrally-cleared derivatives. In 2009, the G20 Leaders initiated a reform program to reduce the systemic risk of over-the-counter (OTC) derivatives markets. In particular, a number of measures were agreed to enhance the transparency and regulation of OTC derivatives, including mandatory central clearing. However, mandatory clearing requirements will capture only standardized OTC derivatives. Non-standardized products will thus continue to be non-centrally cleared and will remain subject to bilateral counterparty risk management.In 2011, the G20 Leaders agreed to add margin requirements on non-centrally-cleared derivatives to the reform program. These requirements can further mitigate systemic risk in the derivatives markets. In addition, they can encourage standardization and promote central clearing of derivatives by reflecting the generally higher risk of non-centrally-cleared derivatives. The consultative paper lays out a set of high-level principles on margining practices and treatment of collateral, and proposes margin requirements for non-centrally-cleared derivatives. These policy proposals are articulated through a set of key principles that primarily seek to ensure that appropriate margining practices will be established for all non-centrally-cleared OTC derivative transactions. These principles will apply to all transactions that involve either financial firms or systemically important non-financial entities. The consultative paper is available on the [BIS website](http://www.bis.org/publ/bcbs226.htm%22%20%5Ct%20%22_new).etailed Contents**1.10** **MiFID guidelines to enhance investor protection**On 6 July 2012, the European Securities and Markets Authority (ESMA) released two final sets of guidelines aimed at enhancing the protection of investors in the EU. The guidelines relate to the provisions under the Markets in Financial Instruments Directive (MiFID) relating to the suitability of investment advice and the compliance function.**(a) Appropriate arrangements for the suitability assessment**Assessing suitability is an important MiFID investor protection requirement. Before providing investment advice or portfolio management services, investment firms must ensure that any investment product recommended is suitable for the client in question.Therefore, investment firms must obtain the necessary information to be able to understand the essential facts about the client in order to assess the suitability of any investment for that client. This includes information about a client's investment objectives, financial situation and knowledge and experience.Based on the information collected, an investment firm must assess whether the specific transaction to be recommended or entered into in the course of providing portfolio management service is suitable.ESMA found the following shortcomings in the implementation of the MiFID suitability requirements:* failure to ask clients the right questions;
* failure to collect the necessary and relevant information;
* failure to interpret correctly the information provided by the client; and
* even where the right information is collected, failure to recommend a suitable investment.

These new guidelines focus on the need for firms to have in place appropriate arrangements to enable them to meet the suitability requirements on an on-going and consistent basis for any client, and irrespective of the distribution channel used.**(b) Responsibilities of the compliance function**MiFID requires investment firms to implement a series of systems and controls (appropriate to the nature, scale and complexity of their business) aimed at securing a robust governance framework, with a clear organizational structure and lines of responsibility, and effective risk management and compliance processes. This includes policies and procedures to ensure regulatory compliance and the establishment of a compliance function.This second set of guidelines is focused on the responsibilities of the compliance function and is aimed at helping investment firms to increase the effectiveness, and importance, of the compliance function. They focus on:* the responsibilities of the compliance function for monitoring, reporting and advising;
* the organizational requirements of the compliance function for the standards of effectiveness, permanence and independence;the extent of interaction of the compliance function with other functions, and the outsourcing of the tasks of the compliance function; and
* approaches for competent authority review of compliance function requirements.

Further information is available on the [ESMA website](http://www.esma.europa.eu/news/ESMA-publishes-MiFID-guidelines-enhance-investor-protection?t=326&o=home" \t "_new).etailed Contents**1.11** **UK's Takeover Panel Code Committee releases three consultation papers** On 5 July 2012, the UK's Takeover Panel Code Committee released three consultation papers, setting out proposed amendments to the Takeover Code. The first paper concerns profits forecasts, quantified financial benefits statements and material changes in information. The second paper is concerned with issues relating to pension scheme trustees. In this paper, the Code Committee proposes that the provisions of the Code which apply to employee representatives should apply also to the trustees of the offeree company's pension scheme(s). As such, offerors will, amongst other things, be required to state in the offer document what their intentions are with regard to the offeree company's pension scheme(s).  The third paper is concerned with companies subject to the Takeover Code. In this paper, the Committee proposes removing the residency test. The consultation papers are available on the [Takeover Panel website](http://www.thetakeoverpanel.org.uk/structure/committees/code-committee%22%20%5Ct%20%22_new).etailed Contents**1.12** **Short selling: European Commission rules on the ban on uncovered sovereign credit default swaps and short sales of shares and sovereign debt**On 5 July 2012, the European Commission (EC) announced the adoption of a Delegated Act which sets out important technical rules needed to ensure the uniform application and enforcement of the Short Selling Regulation.  In particular, the Delegated Act specifies the cases in which sovereign credit default swaps are considered covered, and therefore not banned in accordance with the Regulation. Investors can demonstrate that the sovereign credit default swap contracts they have entered into are covered by demonstrating either a quantitative or a qualitative correlation between the hedged assets and liabilities and the sovereign credit default swap.  Other issues addressed in the Act include technical rules relating to the reporting of short positions in shares and sovereign debt, and the thresholds which can trigger a short term suspension of short selling in illiquid shares and other financial instruments.  The Delegated Act also details technical rules on a number of other key issues, including:* how to calculate the significant short positions that must be disclosed to regulators or the market;
* how short positions are calculated and reported by fund managers managing several funds, or different entities within a group;
* the levels at which short positions in sovereign debt must be notified to regulators;
* the thresholds for different financial instruments, ranging from illiquid shares to financial derivatives, which can trigger a short term suspension of short selling by regulators;
* the decline in liquidity which triggers the possibility for Member States to suspend restrictions on uncovered short sales of sovereign debt; and
* the criteria to be taken into account when determining what constitutes an adverse development or event.

Further information is available on the [EU website](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/746&format=HTML&aged=0&language=en&guiLanguage=en" \t "_new).etailed Contents**1.13** **UK's Nuttall Review releases report on employee ownership**On 4 July 2012, the Final Report from the Nuttall Review of Employee Ownership was released. In January 2012, Graeme Nuttall was commissioned by the UK Government to identify barriers to employee ownership in the private sector and make recommendations.  The Review found that there are three main barriers holding back the creation of more employee owned businesses: * a lack of awareness of employee ownership;
* a lack of resources, including finance; and
* perceived or real legal, tax and regulatory complexities.

The Final Report sets out a number of proposals for Government, sector representatives, employer and employee groups and professional advisers to dismantle these barriers. The UK Government's response to the Review includes:* An independent and expert Institute for Employee Ownership:  This would be established to provide information and advice to managers and employees, lawyers and accountants, business schools, researchers and Ministers.  It would be a professional body, offering accreditation to its members.
* A call for evidence on how a Right to Request employee ownership could operate:  This would examine what the minimum number of employees needed to make a request should be; what fair grounds for turning a request down could be; whether requests should be allowed at any time and whether the best way to achieve this is through a new statutory right or another mechanism.
* New off-the-shelf 'DIY packs' for companies:  Covering legal, tax and other regulatory considerations, this would help companies adopt employee owned business models quickly and easily. It would help combat the perception that employee ownership is too difficult, time-consuming and expensive compared to more traditional routes.

The Report is available on the [BIS website](http://www.bis.gov.uk/assets/biscore/business-law/docs/s/12-933-sharing-success-nuttall-review-employee-ownership%22%20%5Ct%20%22_new).etailed Contents**1.14** **UK Government's consultation on sanctions for directors of failed banks** On 3 July 2012, the UK Treasury released a consultation paper titled 'Sanctions for the directors of failed banks'. The consultation follows the findings of a report by the Financial Services Authority (FSA) into the failure of the Royal Bank of Scotland (RBS), published in December 2011, which highlighted how the errors made by senior management contributed to the bank having to be saved by the taxpayer. The consultation seeks comments on two proposals:  (1)  the introduction of a 'rebuttable presumption' that the director of a failed bank would not be suitable for approval by the regulator to hold a senior executive position in a bank; and (2)  the introduction of criminal sanctions for serious misconduct, based on recklessness, in the management of a bank. The consultation paper rejects the introduction of strict liability offences. The first proposal, if adopted, would be included in the Financial Services Bill currently before the UK Parliament.  The measure could be supported by complementary reforms (which the regulators could take forward) to clarify management responsibilities and change the regulatory duties of bank directors. The consultation paper is available on the [UK Treasury website](http://www.hm-treasury.gov.uk/d/consult_sanctions_directors_banks.pdf%22%20%5Ct%20%22_new).etailed Contents**1.15** **EC proposes legislation to improve consumer protection in financial services**On 3 July 2012, the European Commission announced a legislative package aimed at improving consumer protection in financial services.  The package proposes new standards for information about investments, raises standards for advice, and tightens certain rules on investment funds to ensure their safety. The package is composed of three legislative proposals: a proposal for a regulation on key information documents for packaged retail investment products (PRIPS), a revision of the Insurance Mediation Directive (IMD), and a proposal to boost protection for those who buy investment funds (currently governed by the Directive on Undertakings for Collective Investment in Transferable Securities (UCITS).  Further information is available on the [EU website](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/736&format=HTML&aged=0&language=en&guiLanguage=en" \t "_new).etailed Contents**1.16** **ESMA concludes no need for regulatory action on empty voting** On 29 June 2012, the European Securities and Markets Authority (ESMA) released a Feedback Statement following its recent consultation on empty voting. The separation of the economic interest relating to shares from their voting interest (decoupling of voting rights), usually achieved by using derivative instruments and trading strategies in the securities markets, has led to discussion about the need for possible regulatory action. In this context, issues and potential problems relating to empty voting (ie having voting rights attached to shares without corresponding economic exposure) have also been raised. ESMA launched a Call for Evidence on Empty Voting in September 2011, to analyze the potential issues and concerns raised by the practice of empty voting and to examine whether there was a possible need for further action. The main objective of the consultation was to assess issues relating to empty voting as a whole. Therefore, the call for evidence was not restricted to transparency or corporate governance issues, or to a specific piece of European legislation. Rather, ESMA was seeking views in a broader context on the occurrence of empty voting and the possible market failures that could arise from such occurrence. ESMA received 29 responses to the call for evidence on empty voting. Responses were mainly received from the investment services, banking, and asset management sectors.  An analysis of the responses received to the consultation has led ESMA to conclude that there is insufficient evidence to justify any regulatory action at the European level at present. The Feedback Statement is available on [ESMA website](http://www.esma.europa.eu/system/files/2012-415.pdf%22%20%5Ct%20%22_new).etailed Contents**1.17** **Basel Committee releases consultation on dealing with domestic systemically important banks**On 29 June 2012, the Basel Committee on Banking Supervision issued a consultative document titled 'A framework for dealing with domestic systemically important banks'.In November 2011, the Basel Committee issued final rules for global systemically important banks (G-SIBs). These rules, titled '[Global systemically important banks: assessment methodology and the additional loss absorbency requirement](http://www.bis.org/publ/bcbs207.htm%22%20%5Ct%20%22_new)', were endorsed by the G20 Leaders at their November 2011 meeting. At that meeting, the G20 Leaders asked the Basel Committee and the Financial Stability Board to work on 'the modalities to extend expeditiously the G-SIFI framework to domestic systemically important banks (D-SIBs).' G-SIBs will be subject to an additional loss absorbency requirement over and above the Basel III requirements that are being introduced for all internationally active banks. This additional requirement is intended to limit the cross-border negative externalities on the global financial system and economy associated with the most globally systemic banking institutions. But similar externalities can apply at a domestic level. While not all D-SIBs are significant from a global perspective, the failure of such a bank could have a much greater impact on its domestic financial system and economy than that of a non-systemic institution. Against this backdrop, the Basel Committee has developed a set of principles on the assessment methodology and the higher loss absorbency requirement for D-SIBs. The proposed framework takes a complementary perspective to the G-SIB framework by focusing on the impact that the distress or failure of banks will have on the domestic economy. However, the proposed D-SIB framework will take a principles-based approach, in contrast to the prescriptive approach of the G-SIB framework. This will allow an appropriate degree of national discretion in the assessment and application of policy tools in order to accommodate the structural characteristics of individual jurisdictions. The proposed D-SIB framework requires banks identified as D-SIBs by their national authorities to comply with the principles from January 2016. This is consistent with the phase-in arrangements for the G-SIB framework and means that national authorities will establish a D-SIB framework by 2016. The Basel Committee will introduce a strong peer review process for the implementation of the principles. This will help ensure that appropriate and effective frameworks for D-SIBs are in place across different jurisdictions. The consultative document is available on the [BIS website](http://www.bis.org/publ/bcbs224.htm%22%20%5Ct%20%22_new).etailed Contents**1.18** **EC adopts technical standards on short selling**On 29 June 2012, the European Commission announced detailed rules aimed at reducing the risk of settlement failures linked to naked short selling, as well as the means by which market participants should disclose significant short positions to the market.The technical standards adopted by the Commission are based on the work of the European Securities and Markets Authority (ESMA). They specify the details of the so-called 'locate rule', which ensures that short sales do not result in a failure to deliver. The new rules also detail how ESMA is to determine the shares which are exempt from the Short Selling Regulation by virtue of their principal trading venue being outside the Union. Together with the Short Selling Regulation that they implement, the adopted regulations aim to create a more transparent, orderly and stable market by reducing the risks tied to short selling.Further information is available on the [EU website](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/727&format=HTML&aged=0&language=en&guiLanguage=en" \t "_new).etailed Contents**1.19** **IFAC issues new guidance to help organisations improve internal control**On 28 June 2012, the Professional Accountants in Business (PAIB) Committee of the International Federation of Accountants (IFAC) issued a new International Good Practice Guidance, titled 'Evaluating and Improving Internal Control in Organisations'.  The new guidance highlights areas where the practical application of existing internal control standards and frameworks often fails in many organisations.  It aims to assist professional accountants in business as they work with their organisations to continuously evaluate and improve internal control, and ensure that it is an integrated part of the organisation's systems of governance and risk management.  The new guidance is available on the [IFAC website](https://www.ifac.org/publications-resources?tag=189" \t "_new).etailed Contents**1.20** **Corporations Amendment (Future of Financial Advice) Act**On 27 June 2012, the [Corporations Amendment (Future of Financial Advice) Act 2012 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=133665" \t "_default), which amends the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), received assent.  According to the explanatory memorandum, the Act implements the first components of the Future of Financial Advice reforms, to require providers of financial advice to obtain client agreement to ongoing advice fees and to enhance disclosure of fees and services associated with charging ongoing fees to clients, including to:* require, in order to charge an ongoing advice fee to a retail client for a period of longer than 12 months, the fee recipient to provide a fee disclosure statement to the client detailing advice fee and service information for both the previous and forthcoming 12 months;
* require, in order to charge an ongoing advice fee to a retail client for a period of longer than 24 months, the fee recipient to provide a renewal notice and a fee disclosure statement to the client, which will detail advice fee and service information for both the previous and forthcoming 12 months, and provide that if the client opts not to renew the arrangement with the fee recipient, or does not respond to the renewal notice, the arrangement ceases and an ongoing advice fee can no longer be charged to the retail client; and
* allow the client to 'opt-out' of or terminate the arrangement for an ongoing fee at any time.

The Act also enhances of the ability of ASIC to supervise the financial services industry through changes to its licensing and banning powers. Commencement details are contained in Section 2 of the Act. etailed Contents**1.21** **Basel Committee issues final rules on banks' disclosure of the composition of their capital** On 26 June 2012, the Basel Committee on Banking Supervision issued its final rules on the information banks must disclose when detailing the composition of their capital. The publication, titled '[Composition of capital disclosure requirements - Rules text](http://www.bis.org/publ/bcbs221.htm%22%20%5Ct%20%22_new)', sets out a framework to ensure that the components of banks' capital bases are disclosed in standardised formats across jurisdictions.During the financial crisis, market participants and supervisors were hampered in their efforts to undertake detailed assessments of banks' capital positions and make comparisons across jurisdictions. Adding to these difficulties were insufficiently detailed disclosure by banks and a lack of consistency in reporting across banks and jurisdictions. This lack of clarity may have contributed to uncertainty during the financial crisis and could have masked how far banks were relying on forms of capital that were insufficiently loss-absorbent. The published disclosure requirements seek to help improve market discipline by enhancing both transparency and comparability. The publication aims to help improve the quality of Pillar 3 disclosures in respect of the capital that banks use to meet their regulatory requirements. Improvements to the disclosure of banks' capital requirements (ie the composition of risk-weighted assets) are also under consideration as part of the Committee's review of Basel III implementation. The final rules are available on the [BIS website](http://www.bis.org/publ/bcbs221.pdf%22%20%5Ct%20%22_new).etailed Contents |

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| **2. Recent ASIC Developments** |  | ext Section |

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| **2.1** **C****onsultation on retail trading of Commonwealth Government securities** On 20 July 2012, ASIC released Consultation Paper 181 'Retail trading in Commonwealth Government Securities'. The consultation paper will help to implement the Australian Government's decision to facilitate retail trading of Commonwealth Government Securities (CGS) as part of fostering a deep and liquid corporate bond market.  It proposes market integrity rules to provide for fair, orderly and transparent trading of depository interests in CGS traded on public exchanges. CP 181 proposes to specifically include CGS depository interest within the scope of the ASIC Market Integrity Rules Competition in Exchange Markets 2011, adopting the proposals in Consultation Paper 179 'Australian market structure: Draft market integrity rules and guidance' and tailoring them to CGS depository interests. Feedback is sought on specific regulatory proposals for CGS depository interests relating to:* extreme price movements;
* best execution;
* pre- and post-trade transparency;
* regulatory data for market surveillance;
* market operator obligations in a multi-market environmen; and
* market participant obligations.

Feedback is also sought on whether, and to what extent, the proposals should be applied to other debt market products, such as corporate debt, that are or may be traded on public exchanges.  This will assist ASIC in developing the regulatory framework as part of the Government's long term plan to foster the retail corporate debt market.Consultation Papers 179 and 181 are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp181" \t "_new).etailed Contents**2.2** **Review of unlisted property MIS sector**On 17 July 2012, ASIC released the findings of a review of responsible entities (REs) operating managed investment schemes in the unlisted property sector. As part of this review, ASIC is highlighting some areas where compliance behaviours could be improved to meet both the legal obligations of the REs and good practice within the industry.ASIC chose REs operating unlisted property schemes because they are a popular investment vehicle for retail investors and they pose some risks, particularly because of their illiquidity. Current economic conditions meant this sector had been experiencing some stress.According to ASIC, the majority of the REs reviewed are complying with their obligations and adhering to good industry practice.  However, there were some areas of non-compliance with key obligations which ASIC has highlighted to ensure REs take steps to rectify.  These areas include: * non-compliance with key Australian financial services (AFS) licence conditions including net tangible assets (NTA), base level financial requirements, professional indemnity insurance, external dispute resolution scheme membership and key persons;
* inappropriate compliance arrangements for the nature, scale and complexity of the REs business and insufficient resources to undertake the compliance function;
* poor risk management systems/plans;
* insufficient measures to control and monitor the release of information to investors; and
* inadequate controls to manage related party transactions.

Further details about the specific issues identified and ASIC guidance about compliance with these obligations are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-168MR%2Battachment%3A%2BNon-compliance%2Bareas%2Band%2BASIC%2Bguidance?openDocument" \t "_new).etailed Contents**2.3** **New rules on suspicious activity reporting and short sale tagging**On 16 July 2012, ASIC announced new market integrity rules for suspicious activity reporting and short sale tagging requirements, which will apply for the Australian Securities Exchange (ASX) and Chi-X markets. The suspicious activity reporting rule has a stated commencement date of 1 November 2012, but consistent with ASIC's commitment to provide industry with a six-month implementation period to allow it to adapt systems and processes, ASIC will waive the obligation to comply with the rule until 20 January 2013. The obligation will require participants of the ASX and Chi-X markets to notify ASIC when they become aware, in the course of their business activities and in the course of complying with existing obligations, of certain suspicious trading activity. The short sale tagging obligation will commence on 1 March 2014 and will require market participants to specify, at the time an order is placed, the quantity of a sell order that is a short sale.  For on order book transactions, this will require specification of the number of products that are short at the time the order is placed into the market. For off order book transactions, the number of products that are short will need to be provided in the trade report provided to a market operator.To assist market operators better understand the operation of the rules and how to comply with them, ASIC has released Regulatory Guide 238 'Suspicious activity reporting' and Information Sheet 158 'Short sale tagging'.Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-162MR%2BNew%2Brules%2Bon%2Bsuspicious%2Bactivity%2Breporting%2Band%2Bshort%2Bsale%2Btagging?openDocument" \t "_new).etailed Contents**2.4** **Proposals on winding up abandoned companies**On 12 July 2012, ASIC released a consultation paper outlining how it intends to implement its new power to wind up abandoned companies under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) to facilitate greater access to the General Employee Entitlements Redundancy Scheme (GEERS).Consultation Paper 180 'ASIC's power to wind up abandoned companies' outlines how ASIC intends to exercise this new power, and how it will prioritise matters for winding up. GEERS is a scheme funded by the Australian Government to assist employees of companies that have gone into liquidation and who are owed certain employee entitlements. However, companies are sometimes abandoned by their directors without being put into liquidation. This has previously resulted in employees of the company who are owed employee entitlements being unable to access GEERS.Consistent with the new law, ASIC is proposing to apply a public interest test when deciding whether to wind up a company. This public interest test will consider factors like the cost of winding up, the amount of outstanding employee entitlements and how many employees are affected.ASIC is proposing not to reinstate companies that have already been deregistered in order to wind them up later. Among other reasons, there are already court processes in place to facilitate the reinstatement of a company where that is needed. ASIC intends to commence using this new power to wind up abandoned companies in the final quarter of 2012.Consultation Paper 180 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp180" \t "_new).etailed Contents**2.5** **Release of ASX assessment report** On 5 July 2012, ASIC released its annual assessment report of the ASX Group (ASX) licensees ('Report 289').The assessment covers the period 1 July 2010 to 1 November 2011 and pays attention to how ASX dealt with a number of specific issues, including:* the sufficiency of ASX's technological resources, in particular following the ASX market outage on 27 October 2011;
* the operation of ASX's conflict handling arrangements, in particular the arrangements it has in place to manage entities with which it has a real or perceived conflict of interest, and any considerations arising from ASX's new managing director and CEO's board membership of another ASX-listed company; and
* ASX's framework for admitting participants to its markets and clearing and settlement facilities.

The report sets out a number of areas for attention that ASX has agreed to address, working closely with ASIC. In some cases, ASX has already initiated steps to meet the agreed actions. While important, these issues did not cause ASIC to qualify the conclusion that ASX adequately met its obligations during the reporting period.The agreed actions from this report deal with:* **Technology** - Following the ASX market outage on 27 October 2011, ASX conducted a wide review of its trading system support and testing framework. As a result of its findings, which ASIC agree with, ASX will enhance arrangements in four key areas, including requiring its trading system vendor to establish an office in Australia to provide better support. ASX has also agreed to more regularly run 'live' testing of its back-up facilities to better ensure they are effective if needed.
* **Conflict handling** - Attention was given to the adequacy of ASX's conflict handling arrangements, with particular focus on the processes in place to manage entities with which ASX has an existing commercial or competitive relationship. ASIC also considered arrangements in respect of ASX's CEO, and his board membership of another ASX-listed company. ASIC considers that ASX has arrangements in place that meet the standards required by the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) and that action should be taken to improve the market's visibility of these arrangements. ASX has agreed to take action which will include better disclosure on its website of the nature of its conflicts and the arrangements it has in place to adequately manage them.
* **Monitoring and enforcing compliance** - Attention was also given to ASX's monitoring and enforcement of compliance with its operating rules, especially in the area of admitting participants to its markets. ASX has agreed to make a number of changes including implementing a more rigorous process for considering applications and communicating with the market about admission.

Report 289 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep289" \t "_new).etailed Contents**2.6** **Release of custodial and depository services report**On 5 July 2012, ASIC released a report into custodial and depository services in Australia, following a review of the industry.  Report 291 'Custodial and depository services in Australia' identifies a number of key risks to the safety of client assets and recommends some matters of 'good practice' that custodians and responsible entities may need to consider.The role of custodians has come to the fore in recent times following a number of high-profile collapses in the financial services industry, including Trio Capital. Specifically, there have been concerns regarding the safety of investment assets that custodians hold; the duty of care custodians exercise; and whether custodians have appropriate internal controls to ensure the safety of assets held for others.At the end of 2011, approximately $1.8 trillion of assets of Australian investors was held in custody. This is expected to more than triple over the next 15 years to $6.4 trillion.Given the role of custodians as key service providers within the financial services industry, areas that a custodian may need to consider include:* unauthorised debiting of omnibus accounts;
* stability and safety of IT systems;
* operational risks created by manual and disparate systems;
* whistleblowing culture and framework;
* reporting in relation to suspicious third party valuations;
* breach reporting relating to custodial and investment administration services; and
* the risks inherent in corporate actions such as share buy-backs and rights issues.

For each aforementioned issue, ASIC has highlighted key aspects of 'good practice', in line with its current regulatory guidance.The Report also foreshadows ASIC's intention to consult with industry about updating its regulatory guidance for the holding of scheme property.  In addition, ASIC is proposing:* changes to the financial resource requirements of custodians; and
* to require responsible entities and other financial product issuers to provide clearer disclosure about the role of custodians in retail marketing material, including product disclosure statements (PDS).

Report 291 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep291" \t "_new).etailed Contents**2.7** **Launch of new government website for insolvency notices**    On 2 July 2012, the Government and ASIC announced the launch of a website that publishes notices on insolvency and other matters.   Hosted by ASIC, the 'Insolvency Notices' website will provide a single point for searching almost all notices on external administration and company deregistration, which were formerly advertised in the print media.  The website is expected to replace 53,000 newspaper advertisements over the next four years.It includes published notices on companies that are either:* subject to a winding up application filed with an Australian court;
* in external administration (liquidation, voluntary administration etc);
* considering entering into a scheme of arrangement; or
* to be deregistered.

The new website is part of the [ASIC website](https://insolvencynotices.asic.gov.au/%22%20%5Ct%20%22_new).etailed Contents**2.8** **Trans-Tasman mutual recognition of financial advisers**On 2 July 2012, ASIC and New Zealand's Financial Markets Authority (FMA) announced mutual recognition arrangements for Australian and New Zealand financial advisers.This will enable financial advisers to provide services in each other's countries based on the qualifications and experience they have attained from their home country.  The mutual recognition arrangements aims to strengthen the Australian and New Zealand financial services industries by increasing competition and lowering transaction costs. While the Trans-Tasman Mutual Recognition legislation already applies to Australian financial services licence holders, most of these licence holders are firms or companies.  To enable individual financial advisers with relevant qualifications to operate on either side of the Tasman, both regulators recognised a need for a different mechanism based on the spirit of that legislation.FMA has granted an exemption for Australian qualified advisers allowing them to apply to be authorised financial advisers (AFAs) in New Zealand based on their existing Australian qualifications. Australian advisers who hold the specified qualifications will be exempt from the educational qualifications requirements for AFAs set out in the Code of Professional Conduct for AFAs, and will be able to hold a licence relevant to their practice area and qualifications in Australia.  The exemption is also subject to a number of other restrictions and conditions, such as compliance with the New Zealand Code of Professional Conduct for AFAs. To enable New Zealand AFAs to operate in Australia, ASIC has amended its regulatory guides which set out the minimum training requirements for individual financial advisers in Australia.  Recognition has been given to New Zealand AFAs and Qualifying Financial Entity (QFE) advisers to enable them to practise in Australia in certain areas. Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-149MR%2BJoint%2BASIC%2B-%2BFinancial%2BMarkets%2BAuthority%2Bmedia%2Brelease%3A%2BTrans-Tasman%2Bmutual%2Brecognition%2Bof%2Bfinancial%2Badvisers%2Bannounced?openDocument" \t "_new).etailed Contents**2.9** **Policy guidance update on approach to cross-border financial regulation**On 29 June 2012, ASIC released updated policy guidance about its approach to facilitating cross-border financial regulation to assist foreign providers of financial facilities, services and products that wish to operate in Australia.The updated guidance is covered in new versions of:* Regulatory Guide 54 'Principles for cross-border financial regulation' ([RG 54](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg54" \t "_new));
* Regulatory Guide 176 'Foreign financial services providers' ([RG 176](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg176" \t "_new)); and
* Regulatory Guide 178 'Foreign collective investment schemes' ([RG 178](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg178" \t "_new)).

The new versions remove outdated references since the guides were last published and also include content refinements following feedback from respondents to the Joint Treasury/ASIC Consultation Paper 98 'Cross-border recognition: Facilitating access to overseas markets and financial services' ([CP 98](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp98" \t "_new)) and ongoing industry consultation. ASIC has made class orders to vary existing class orders under RG 176 and RG 178, reflecting key changes to the guides. An additional class order has been made to revoke related class orders that are no longer applicable. In addition, information sheets are now available about how to apply for relief under the guides.Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-148MR%2BASIC%2Bupdates%2Bpolicy%2Bguidance%2Bon%2Bapproach%2Bto%2Bcross-border%2Bfinancial%2Bregulation?openDocument" \t "_new).etailed Contents |

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| **3.1** **Reports** On 4 July 2012, ASX released:* the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Group_Monthly_Activity_Report_-_June_2012%282%29.pdf%22%20%5Ct%20%22_new);
* the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2012/notice2012_168.pdf%22%20%5Ct%20%22_new); and
* the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Compliance_Monthly_Activity_Report_-_June_2012%282%29.pdf%22%20%5Ct%20%22_new)

for June 2012.etailed Contents**3.2** **Launch of Centre Point Block** On 9 July 2012, ASX launched Centre Point Block, a new service that supports users seeking larger block execution that allows them to nominate a minimum acceptable fill size for their anonymous block order.  This is part of a range of enhancements to Centre Point, ASX's anonymous mid-spread matching solution. The enhancements also include the introduction of 'sweep' functionality that seeks meaningful price improvement in Centre Point for marketable orders prior to routing to the main market, ASX TradeMatch.  The sweep functionality is contained within the matching system, ASX Trade, and so provides the lowest latency routing between Centre Point and TradeMatch. Since its inception in 2010, Centre Point has matched more than $23 billion of trades.  A Centre Point Order enables anonymous execution at the prevailing midpoint of the best bid and offer of ASX TradeMatch with other Centre Point Orders in a licensed market environment. The media release is available on [ASXGroup.com.au](http://www.asxgroup.com.au/media/PDFs/Centre_Point_Block_-_FINAL.pdf%22%20%5Ct%20%22_new).etailed Contents**3.3** **Consultation paper on modernising the timetable for rights issues** On 3 July 2012, ASX released a consultation paper titled 'Modernising the timetable for rights issues: facilitating efficient and timely rights issues'.  The consultation paper sets out a number of proposals to reduce the standard timetable for rights issues by leveraging off advancements in technology, systems and operational processes. Rights issues are a capital raising mechanism whereby subscription offers are made to all existing shareholders for additional securities in a company in proportion to the shareholders' existing holdings.  The time taken to complete a standard rights issue - up to 26 business days - creates additional pricing risk and execution uncertainty for companies considering this capital raising mechanism, particularly when compared to placements. ASX has identified a number of potential efficiency savings to the standard timetable for rights issues that could reduce the timetable by more than a third, with the new maximum as low as 16 business days. Reducing the standard timetable for rights issues is a key element in a suite of capital raising initiatives that ASX currently has underway.  These initiatives seek to provide flexibility in the choice of capital raising mechanisms and better accommodate the capital raising needs of the diverse range of ASX-listed companies across the credit cycle. The [Consultation Paper](http://www.asxgroup.com.au/media/consultation_paper_rights_issue_timetable_3Jul12.pdf%22%20%5Ct%20%22_new) and the [Media Release](http://www.asxgroup.com.au/media/PDFs/Final_Media_Release_-_Modernising_the_Timetable_for_Rights_Issues.pdf%22%20%5Ct%20%22_new) are available on [ASXGroup.com.au](http://www.asxgroup.com.au/%22%20%5Ct%20%22_new).  etailed Contents |

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| **4.1** **The President's Club Limited**On 26 July 2012, the Takeovers Panel announced that it had made a declaration of unacceptable circumstances in relation to an application dated 26 June 2012 by The President's Club Limited, in relation to its affairs.The President's Club, an unlisted public company with more than 50 members, operates a time share scheme at the Palmer Coolum Resort. At the date of the application, each President's Club shareholder held ordinary shares (which are voting shares) and a corresponding villa interest.In July 2011, Queensland North Australia Pty Ltd (QNA) acquired 98% of Coeur de Lion Holdings Pty Ltd (CDLH), which owns all the shares in Coeur de Lion Investments Pty Ltd (CDLI). CDLI owns 3,107 shares (approximately 41.4%) in President's Club. Subsequently, QNA acquired another 2.9% of President's Club. QNA lodged a bidder's statement, then supplementary and replacement bidder's statements, with ASIC in respect of an offer to acquire all of the shares and corresponding villa interests in President's Club. It has not despatched the bidder's statement and has not proceeded to make offers.The Panel considers that the first acquisition of President's Club shares was made in contravention of section 606. The Panel considers that the subsequent acquisitions of President's Club shares were made in purported reliance on item 9 of section 611 (the 'creep exception') but to the extent that the requirements of item 9 were met, it was only by reason of the first acquisition, which contravened section 606. Accordingly, the Panel considers that the first and subsequent acquisitions of President's Club shares give rise to unacceptable circumstances.The Panel is still considering what orders are appropriate to remedy the unacceptable circumstances. The declaration of unacceptable circumstances is available on the [Takeovers Panel website.](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=media_releases/2012/046.htm&pageID=&Year=" \t "_new)etailed Contents**4.2** **Flinders Mines Limited**On 29 June 2012, the Takeovers Panel announced that it had declined to conduct proceedings on an application dated 15 June 2012 from Ms Geraldine Carter in relation to the affairs of Flinders Mines Limited.On 30 March 2012, Flinders shareholders voted in favour of a scheme of arrangement under which Magnitogorsk Iron and Steel Works OJSC (MMK) or its nominee would acquire all of the issued ordinary shares of Flinders not already held by MMK for A$0.30 per share.Ms Elena Nikolayenva Egorova, a minority shareholder of MMK, had obtained injunctive relief in the Arbitration Court of Chelyabinsk, Russian Federation, under which MMK is restrained from implementing its directors' resolutions with respect to the acquisition of Flinders.  Flinders has not yet sought final court approval for the scheme because of the injunction.On 8 June 2012, Flinders announced that appeals by Flinders and MMK against the injunction had been dismissed and that the next court hearing regarding the injunction would be on 2 July 2012.  The scheme of arrangement 'Quit Date' is 30 June 2012 or such later date as Flinders and MMK agree in writing.Ms Carter submitted that Ms Egorova does not exist or it is very likely that she does not exist and therefore it has not been established that the injunction had a proper legal basis. The Panel did not have any prima facie basis to consider that Ms Egorova does not exist. The Panel also had no prima facie basis to consider that Ms Egorova and MMK are colluding.Ms Carter also submitted that, even if Ms Egorova is a real person, it is not in the public interest or conducive to takeover efficiency that a small shareholder with poor information can block a mutually agreed and highly beneficial transaction between two parties. The Panel did not consider that it would be likely to interfere with the terms of the scheme of arrangement or scheme implementation agreement, which have been disclosed to the market, or otherwise make orders affecting the contractual rights of the parties.The Panel also considered that there was no prima facie evidence that Flinders had not done enough to ensure that the scheme proceeds.The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the Panel declined to conduct proceedings.The reasons for the decision are available on the [Takeovers Panel website.](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=reasons_for_decisions/2012/009.htm&doctype=" \t "_new)etailed Contents |

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| **5. Recent Corporate Law Decisions** |  | ext Section |

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| **5.1** **Power of responsible entity to amend the scheme's constitution** (By John O'Grady and Theonie Scott, Corrs Chambers Westgarth) Re Elders Forestry Management Ltd [2012] VSC 287, Supreme Court of Victoria, Robson J, 28 June 2012 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/vic/VSC/2012/287.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/287.html%22%20%5Ct%20%22_new) **(a) Summary** This case examines the ability of a responsible entity to unilaterally modify the constitution of a registered scheme under section 601GC(1)(b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ('Corporations Act') 'where the responsible entity reasonably considers the change will not adversely affect members' rights'.  It also considers the ability of the responsible entity to amend the constitution under section 601GC(1)(a) of the Corporations Act 'by special resolution of the members of the scheme'.  Elders Forestry Management Limited ('EFML'), the manager and responsible entity of various forestry registered and unregistered managed investment schemes, sought direction from the Court in relation to the extinguishment of Growers' rights in order for a sale to be completed for the benefit of Grower members. Robson J primarily examined the meaning of the phrases 'reasonably consider', 'adversely affects' and 'members' rights' in the context of section 601GC(1)(b) of the Corporations Act.  His Honour concluded that EFML did have reasonable grounds for holding the view that the amendment to the constitution would not adversely affect the Growers' rights.  His Honour also concluded that the power under section 601GC(1)(a) of the Corporations Act was exercised for a proper purpose and the amendment to the constitution by members' resolutions was legitimate. **(b) Facts** EFML was the responsible entity of a number of registered managed investment schemes, described as the Mature Projects and the Immature Projects, and the manager of an unregistered managed investment scheme, the Tree Project 2005 (collectively the 'Projects').  The purpose of these Projects was to cultivate, harvest and sell trees on parcels of land.  The Projects operated through EFML granting a sub-lease to a Grower who then in turn engaged EFML to perform planting, harvesting and marketing services. EFML encountered financial difficulties. To remain operational, EFML received financial support from its parent company, Elders Forestry Ltd, however this support was to be short term support only.  To resolve this issue, EFML proposed to restructure the Projects through the divestment of certain plantations and other assets to entities associated with Global Forest Partners LP ('GFP'). On 18 April 2012, EFML entered into a sale and purchase agreement ('SPA') with entities associated with GFP. A stipulation of the SPA was that the trees were to be sold unencumbered by the Grower sub-leases.  At the same time the SPA was signed, an implementation agreement ('IM') was entered into by the parties. This IM required, as a condition precedent, that EFML seek specific direction from the Court pursuant to Rule 54.02 of the Supreme Court Rules in relation to the proposed GFP transaction.   EMFL sought directions from the Court that:* it would be justified in unilaterally amending the constitutions of the Mature Projects pursuant to section 601GC(1)(b); and
* it could legitimately amend the constitutions of the Immature Projects through a special members' resolution, pursuant to section 601GC(1)(a).

These amendments would enable the termination of the Grower sub-leases for the Projects and the completion of the GFP sale. **(c) Decision** Section 601GC(1)(b) of the Corporations Act allows the responsible entity to amend the constitution of a registered scheme if it 'reasonably considers the change will not adversely affect members' rights'. Robson J followed the reasoning of Barrett J in ING Funds Management when examining the interpretation of the key phrases, 'reasonably consider', 'adversely affect' and 'members' rights'.   **(i) Members' rights** In ING Funds Management, Barrett J held that members' rights are not defined in the same way as members' interests.  Members' interests may encompass the members' enjoyment of their rights or the monetary value attached to their rights.   In contrast, his Honour stated that in section 601GC(1)(b) of the Corporations Act, the reference to members' rights should be interpreted as the 'rights created or secured by the Constitution itself'.   Therefore if the member is only affected in a commercial sense by an amendment to the constitution, such as a 'watering down of the value of shares in a particular class by ... reducing capital', then the members' interests may be affected but the rights arising from their holdings of shares will not be.   **(ii) Adversely affected** Barrett J stated that members' rights would be adversely affected by a modification of the constitution if that modification were to 'remove, curtail or impair existing rights' in a way that disadvantages the holder of those rights.   To establish whether an amendment to the constitution will have an adverse effect on members' rights, the responsible entity must follow a three step process:* before the modification, an assessment of the members' rights should take place;
* after the modification, the members' rights should be reassessed; and
* 'if the rights afterwards are different from the rights beforehand, the responsible entity must decide whether the difference in the rights will be, from a members' perspective, unfavourable'.

Any adverse effect to the rights, however slight, will be sufficient to deny the responsible entity the power to modify the constitution. **(iii) Reasonably considers** Barrett J proposed a two-step test. The first requirement is that 'the relevant belief or opinion be actually held by the responsible entity'.  The second requirement is that 'facts exist that are sufficient to induce the belief or opinion in a reasonable person'.  **(iv) Robson J concludes section 601GC(1)(b) of the Corporations Act is satisfied**Robson J applied the reasoning of Barrett J when considering EFML's application to modify the constitution for the Mature Projects.  He determined that the members' rights are their 'contractual and equitable rights under the constitution' and that they are clearly distinguished from a member's interests. His Honour examined the minutes of EFML's board meeting, where the decision to amend the constitution was made, and he found that the board genuinely believed that the modification would have no adverse effect on members' rights.   His Honour further found that the 'rationale and grounds that EFML took into account did form a reasonable basis for the view ... that the amendment would not adversely affect the Growers' rights'.   He based this conclusion on the following two key findings:* the financial situation of EFML was dire and continued funding from Elders or an alternate restructure of the Projects was unlikely to occur; and
* even without the GFP transaction the Projects would be terminated and the Growers' sub-leases would be extinguished.

Therefore, the modification of the constitution, which would extinguish the sub-leases of the Growers, would not adversely affect the members' rights to a sub-lease and would leave intact their right to share in the proceeds of the harvested timber grown on the Project land.**(v) Members' resolution**  EFML sought directions from the court that it could legitimately amend the constitutions of the Immature Projects through a special members' resolution, pursuant to section 601GC(1)(a).   Section 601GC(1)(a) of the Corporations Act authorises an amendment to the constitution of a registered scheme by special members' resolution.  Robson J stated that the only restriction imposed on this amendment power is that it must be exercised for a proper purpose.   Robson J went on to find that 'the restructure of a managed investment scheme with a responsible entity that faces financial difficulties which are likely to prevent it from continuing to operate the scheme in the manner originally envisaged is and must be a proper use of the power under section 601GC'.   **(vi) Findings** Robson J made orders directing that the amendment of the constitution unilaterally under section 601GC(1)(b) was valid and the amendment through members' resolution under section 601GC(1)(a) was authorised and legitimate. His Honour also considered EFML's proposal to amend the constitution for the unregistered Tree Project through members' resolutions.  As the Tree Project is an unregistered scheme and the Corporations Act is silent on the issue, Robson J considered the terms of the constitution of the Tree Project and held that the terms of the constitution permitted the constitution to be modified by special resolution. His Honour also considered the concerns of two independent Growers but rejected their applications.etailed Contents**5.2** **Winding up of a company on just and equitable grounds**  (By Stephanie De Vere, Minter Ellison) Giacobbe v Giacobbe [2012] VSC 285, Supreme Court of Victoria, Ferguson J, 28 June 2012 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/vic/VSC/2012/285.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/285.html%22%20%5Ct%20%22_new) **(a) Summary** Although this case turns on its facts, it provides some useful guidance on the types of factors the Court takes into account when making a decision as to whether it is just and equitable that the relevant company be wound up pursuant to section 461(1)(k) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act). Ultimately, the Court made an order for the winding up of the company on the ground that there was a management deadlock which could not be effectively resolved. **(b) Facts**    The plaintiffs, Michele Giacobbe and Joseph Giacobbe sought an order under section 461(1)(k) of the Corporations Act to wind up the trustee company Inon Nominees Pty Ltd ('Inon').  Section 461(1)(k) of the Corporations Act provides that the Court may order the winding up of a company if the Court is of the opinion that it is just and equitable that the company be wound up. Michele and Antonio Giacobbe are brothers who established a business together in 1962 manufacturing and selling office furniture.  In October 1974, a family trust was established and the business became an asset of the trust. The beneficiaries of the trust were Michele and Antonio Giacobbe and their respective families, including Michele's son, Joseph and Antonio's son, Anthony.   Inon was appointed as the trustee of the trust. Fifty percent of the shares in Inon were held by Joseph and the remaining fifty percent were held by Anthony. Despite a complete breakdown of the relationship between the two branches of the family in the early 1980's, the furniture business continued in operation until 2003.   The trust no longer carries on any business. The only remaining trust assets were three properties at Airport West which were valued at more than $1 million.  The properties were not generating income. Inon had an overdraft facility of approximately $80,000 (which was almost at its maximum) and ongoing liabilities which were estimated to be $17,000 per year. The ongoing liabilities included amounts for rates and taxes in relation to the properties. The original directors of Inon were Michele and Antonio. However, several years' later they were replaced by Joseph and Anthony.  A further change was made with Michele resuming as a director, replacing Joseph.   On 13 October 2011 Anthony resigned as director. On 6 February 2012, Joseph was appointed by Michele to fill the casual vacancy.  Under Inon's constitution, Joseph's appointment was only valid until the next annual meeting where he would be eligible for re-election.   This would require Anthony to vote for the appointment of Joseph as a director because a special resolution of 75% of the shareholders was required.   No general meeting had been held since Joseph was appointed as a director. In March 2012, Anthony sought to requisition an extraordinary meeting for the purpose of a shareholder vote regarding the appointment of Joseph as a director.  Anthony made it clear that he would vote against Joseph being re-elected as a director. The relationship between the two branches of the family had irretrievably broken down and each branch of the family made allegations against one or more members of the other branch concerning their conduct in respect of the business.  Anthony alleged that moneys were missing from Inon's bank account.   Many difficulties were experienced in managing the trust as a result of the relationship breakdown. For example, cheques drawn on the company's bank account were required to be signed by two people (one from each branch of the family). Due to the tension between the branches of the family, Anthony would sign cheques and send them to Michele's solicitors for him to sign.  Also, the two families were unable to agree on the appointment of an agent to offer the properties for lease. Anthony opposed the winding up application, arguing that the State Trustees should replace Inon as trustee of the trust.  Joseph opposed the appointment of the State Trustees because the appointment of the new trustee of the trust would incur unnecessary costs and perpetuate a financial relationship between the two branches of the family who had no wish to have any further relationship. The issue considered by the Court was whether Inon should be wound up pursuant to section 461(1)(k) of the Corporations Act 2001 (Cth), on the ground that it was just and equitable to do so.   **(c) Decision**   Ferguson J ordered that Inon be wound up on the just and equitable ground and appointed Luke Christopher Targett and Rachel Elizabeth Burdett-Baker of the firm PKF Chartered Accountants as liquidators. Ferguson J noted that there are many circumstances in which the Court will wind up a company on the just and equitable ground. Ferguson J confirmed that one of the circumstances in which a Court will wind up a company is where there is a deadlock between those who control the company and where there has been a breakdown of the personal relationship between them.   In making her decision that it was just and equitable that Inon be wound up, Ferguson J took into account the following factors: * The relationship between the two branches of the family had become untenable.  Anthony made it clear that he would not agree to Joseph's ongoing role as a director.  Consequently, the only director was Michele, who was elderly and frail and did not want to be director;
* there was no prospect of holding a constructive shareholders' meeting to appoint future directors;
* the properties were not generating income yet expenses continue to accrue and the bank account was close to its overdraft limit;
* there was no evidence that Inon's position as trustee would terminate should the company be placed into liquidation;
* a liquidator would be:     - independent of the two family factions;     - well placed to investigate Anthony's allegations of inappropriate payment of moneys from the bank account and other relevant allegations concerning the trust that had been made by       the parties against one another; and     - in the best position to investigate and determine what action ought to be taken in relation to the trust and trust property; and
* Inon did not have ongoing business that might be adversely affected by the appointment of a liquidator.

Ferguson J stated that the appointment of the State Trustee would not be appropriate as Inon's affairs would still need to be brought to a conclusion through the realisation of its assets (primarily, it would seem, its right of indemnity out of the trust assets protected by a lien over those assets) and payment of its creditors. Consequently, Ferguson J determined that it would be preferable for a liquidator who had no dealings with either branch of the family to be appointed. The appointed liquidators, Luke Christopher Targett and Rachel Elizabeth Burdett-Baker, signed a consent to act as liquidators in which they stated that they were not aware of any relevant relationship with Inon or an associate of Inon. etailed Contents**5.3** **Clarification of ASIC's role and obligations when authorising examinations**  (By Adrian Chai and Paul Walker, Ashurst) Saraceni v ASIC [2012] FCA 688, Federal Court of Australia, Barker J, 28 June 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2012/688.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/688.html%22%20%5Ct%20%22_new) **(a) Summary** The decision in *Saraceni v Australian Securities and Investments Commission (ASIC)* demonstrates the difficulties in successfully challenging a decision of ASIC to authorise a person to apply for the issue of an examination summons under Part 5.9 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act). Helpfully, it also clarifies ASIC's role and obligations when deciding to authorise such an applicant. In this case, Mr Saraceni argued that ASIC had made an invalid decision in authorising the receivers and managers of a number of companies to apply to the Supreme Court of Western Australia for his compulsory examination. He contended that ASIC had denied him procedural fairness by failing to consult with him prior to making its decision, and that it had also failed to take account of a number of other matters such as the existence of litigation between him and the appointor of the receivers and managers. Mr Saraceni also raised the same constitutional argument raised and (later) determined adversely to him in the separate case of *Saraceni v Jones* [2012] WASCA 59. The Federal Court found that ASIC had no obligation to do any of the things contended by the applicant, and that there was nothing to suggest ASIC had improperly exercised its powers. The Court considered that the constitutional issue could not be maintained in light of Saraceni v Jones. It summarily dismissed the judicial review proceeding as having no reasonable prospect of success. **(b) Facts**    The Bank of Western Australia Ltd ('Bankwest') held various securities over assets of three companies, of which Mr Luke Saraceni was a director. The companies were Newport Securities Pty Ltd, Mayport Nominees Pty Ltd and Seaport Pty Ltd ('the companies'). In early 2011, Bankwest appointed Ferrier Hodgson as receivers and managers of certain assets of each of the companies. In addition, Bankwest entered into possession of certain real property owned by Newport as mortgagee, and appointed Ferrier Hodgson as its agents. Subsequent to their appointment, Ferrier Hodgson applied to ASIC for authorisation to seek the issue of an examination summons against Mr Saraceni. ASIC granted that authorisation, and Ferrier Hodgson obtained orders from the Supreme Court of Western Australia for the issue of an examination summons to Mr Saraceni under section 596A of the Corporations Act. In addition to mounting a constitutional challenge to the Supreme Court's ability to order and conduct his examination (later determined in Saraceni v Jones), Mr Saraceni separately applied to the Federal Court for judicial review to set aside ASIC's prior authorisation decision that ultimately led to the issue of the summons for his examination. The receivers and managers were also joined to the proceeding. **(c) Decision**   **(i) What did the Federal Court decide?** The receivers and managers, supported by ASIC, applied to dismiss the proceedings summarily. They argued that ASIC was not obliged to give Mr Saraceni notice, or to consider his submissions, before deciding to authorise the receivers and managers. They also argued that there was no basis for claiming ASIC had improperly exercised its powers. Barker J granted summary judgment and dismissed the proceeding.  Justice Barker made the following observations on the general nature of ASIC's powers of authorisation:* The question for ASIC was whether a person seeking authorisation was an appropriate person to make an application to the Court for an examination to take place. That required consideration of the relationship which that applicant had to the corporation in relation to which an examination may take place, although it might also encompass matters personal to that applicant that might make them unsuitable to be authorised by ASIC (such as a prior relationship with persons to be examined or the corporation itself).
* Receivers and managers appointed over assets of a corporation were generally suitable persons to be authorised by ASIC to make a Court application for a compulsory examination.

His Honour considered that Mr Saraceni's argument that ASIC had to consult with him, prior to making an authorisation decision, could not succeed for the following reasons:* The authorisation was but the first stage of a two stage process, potentially culminating in the issue of a summons by a Court for compulsory examination.
* The authorisation stage did not affect the interests of a potential examinee 'in a direct and immediate way', since potential examinees might constitute a large and potentially indeterminate class of people. This meant there was no obligation to afford procedural fairness to potential examinees.
* If a potential examinee had an entitlement to be heard, that might delay the sensible administration of the Corporations Act. It would also provide a target examinee with two opportunities, at least, to challenge ASIC's decision - both at the first stage authorisation decision and then in the course of resisting the second stage examination in a court.

Mr Saraceni had separately argued that the authorisations were an improper exercise of power conferred on ASIC. Mr Saraceni said that ASIC was bound to take account of submissions or comments that might have been made by him about the suitability of the receivers and managers to conduct his examination. Mr Saraceni also argued ASIC had to take account of ongoing litigation between him and Bankwest.  Barker J also concluded that these contentions had no reasonable prospect of success for the following reasons:* Since ASIC did not have a legal duty to consult the applicant before making a decision, there was nothing improper about it not seeking out and regarding his views about the suitability of the receivers and managers.
* There was nothing personal to the receivers and managers which could make them unsuitable to be authorised by ASIC. Pending litigation between Mr Saraceni and Bankwest had no bearing whatsoever on the suitability of the receivers and managers, who were not parties to that litigation, to conduct a compulsory examination. It was not something that ASIC had to consider.

Mr Saraceni also made a further argument that ASIC had failed to take account of the fact that the receivers and managers were only appointed over some (and not all) of the assets of the relevant companies. Barker J considered that this was a meaningless distinction that ASIC did not need to have regard to. There was no relevant difference between the responsibilities, interests or objectives of a receiver and manager appointed to some of a corporation's assets, rather than one appointed to all assets. **(ii) What is the significance of the decision?** The decision in Saraceni v ASIC demonstrates the considerable difficulties that will be encountered by potential examinees seeking to challenge ASIC's decision to authorise a person to approach the Court to apply for and conduct a compulsory examination under Part 5.9 of the Corporations Act. ASIC is not required to give reasons for an authorisation decision. Further, ASIC does not have to consult potential examinees prior to making such a decision. These matters mean that potential examinees are unlikely to have access to any specific information about what ASIC took into account in granting an authorisation for their public examination, or any entitlement to obtain it. Combined with the very broad power of authorisation which ASIC exercises, which largely depends on ASIC's assessment of how suitable the person is to be authorised as an eligible applicant, this leaves very little room for a judicial review challenge to succeed. The decision is also significant for receivers and managers seeking to conduct compulsory examinations, since they require authorisation from ASIC before being able to do so. The Court confirmed that receivers and managers are likely to be suitable for authorisation in most cases, irrespective of the scope of their receivership or the existence of litigation between their appointor and potential examinees. Saraceni v ASIC should be welcomed by insolvency administrators, and is likely to discourage further attempts by examinees to avoid being examined in public about the examinable affairs of corporations in external administration by raising judicial review challenges to ASIC's authorisation decision. It may also assist in enabling any judicial review challenges by examinees to be brought to an early resolution by summary dismissal.etailed Contents**5.4** **Employment contract terms determine fidelity and fiduciary obligations**  (By John Whitehill, Clayton Utz) Ranson v Customer Systems PLC [2012] EWCA Civ 841, England and Wales Court of Appeal (Civil Division), Lewison LJ, Lloyd LJ and Pill LJ, 27 June 2012 The full text of this judgment is available at:[http://www.bailii.org/ew/cases/EWCA/Civ/2012/841.html](http://www.bailii.org/ew/cases/EWCA/Civ/2012/841.html%22%20%5Ct%20%22_new) **(a) Summary** This decision examines the relationship between fiduciary and contractual duties in the employment context and it overturns a judgment delivered last year by the Queen's Bench Division of the High Court of Justice.    The case highlights that, although an employee has a general contractual obligation of fidelity towards his employer, the content of that obligation of fidelity, and the existence and content of any fiduciary duty of loyalty, are determined in the first instance by reference to the terms of the employee's contract of employment.  Without contractual terms on which to hang any expanded duties, an employee's general obligation of fidelity is no more than an obligation to loyally carry out the job that the employee agreed to do.   The case also highlights that, unless their employment contract provides otherwise, employees do not have an obligation to disclose their own wrongdoing.  This includes scenarios in which that wrongdoing relates to contacting the employer's clients after the employee has tendered their resignation. **(b) Facts** Customer Systems PLC ('CS') is the holding company of a specialist information technology consultancy corporate group.  It specialises in customer relationship management software provided by the American software company, Siebel Systems Inc ('Siebel').  Mr Jeremy Ranson was first employed by CS in April 2001 as an entry level technical employee.  By the time he left CS in 2009, he had been promoted to divisional manager.  This role required Mr Ranson to both nurture existing clients and to identify new clients within his 'patch' of certain sectors and corporate groups.  Mr Ranson had never acted as a director of CS. Despite Mr Ranson's promotions within CS, his employment contract was unchanged from that which he had signed when he first started working for CS.  Relevantly, the only restrictions in the contract related to undertaking other employment while still employed by CS and working for CS's 'business partners' for a period after ceasing employment with CS.  Mr Ranson could terminate the contract on one month's notice. Mr Ranson had grown dissatisfied with his job over a long period and he had begun to consider his options, which included seeking work elsewhere.  In 2007, Mr Ranson and another CS employee, Mr Atherton, had incorporated Praesto Consulting (UK) Ltd ('Praesto'), with each a director and shareholder of Praesto. Although business plans were drafted, a domain name registered and bank accounts opened, Praesto went into abeyance.   Dissatisfied with his potential career path at CS, Mr Ranson gave notice of termination on 12 January 2009.  Notwithstanding his contractual notice period, Mr Ranson's final day was scheduled for 27 February 2009 to assist CS to finalise a major contract with a client, Reckitt Benckiser.  In early February 2009, Mr Ranson told Mr Atherton that he was leaving CS, and Mr Atherton agreed to resign as director of, and relinquish his shares in, Praesto. The Court analysed two specific interactions between Mr Ranson and existing and potential clients of CS: **(i) Mr Clothier - Diageo Great Britain Ltd ('Diageo')** Until the end of January 2009, Mr Clothier was employed at Reckitt Benckiser, a good customer of CS.  During his time there, Mr Clothier had worked closely with Mr Ranson and they had become friends.  At the beginning of February 2009, Mr Clothier moved to Diageo. In anticipation of this move, Mr Scattergood (a director of CS) and Mr Ranson had lunch with Mr Clothier for the purpose of CS obtaining work from Diageo through Mr Clothier.  It was agreed that Mr Clothier should be contacted after he began at Diageo to see if there were opportunities for CS. When Mr Clothier started at Diageo he was immediately involved in discussions to upgrade Diageo's Siebel systems.  Mr Clothier was aware that Mr Ranson was leaving CS and recommended him to Mr Bruhin, the Diageo manager responsible for deciding who would perform the work.  Mr Clothier then arranged a teleconference with Mr Ranson (in his capacity as a director of Praesto) and Mr Bruhin.  Mr Bruhin was impressed by Mr Ranson and elected to give the contract to Praesto.  Praesto's independence from Siebel was cited as a contributing factor.  Two days prior to Mr Ranson's departure from CS, Mr Bruhin signed a work order with Praseto for services to begin after Mr Ronson's departure from CS.  Although Mr Scattergood had attended the lunch at which Mr Clothier's move to Diegeo was discussed, Mr Scattergood had not contacted Mr Clothier after Mr Ranson's departure. **(ii) Mr Boardman - AstraZeneca PLC ('AstraZeneca')** In 2009, Mr Boardman was the manager of the IT department of AstraZeneca's UK sales and marketing division.  Mr Boardman had dealt directly with Mr Ranson in his capacity as CS's manager of the AstraZeneca account for around two years.  Mr Boardman had only met Mr Scattergood twice prior to 2009. Two days prior to his employment with CS ending, Mr Ranson invited Mr Boardman to dinner to, amongst other things, pave the way for Praesto to obtain work from AstraZeneca in the future.  Although this was discussed, the Court accepted that nothing specific was agreed at the dinner and Mr Boardman made no promises. CS continued to carry out work for AstraZeneca for some months and the Court found that AstraZeneca only turned to Praesto when CS could not or would not provide a suitably qualified replacement at CS.     **(c) Decision**   At trial, it was found that Mr Ranson's failure to inform CS of his dealings and future intentions constituted a breach of a contractual duty of fidelity and a fiduciary duty of loyalty. The Court of Appeal distinguished between the contractual duty of fidelity and fiduciary duties.  It was held that fiduciary duties can arise in the employment context but, citing *Nottingham v Fishel* [2000] ICR 1462, 1491, the Court noted that the content of the contractual obligation of fidelity and also the existence and content of any fiduciary duty are determined by the terms of the employment contract.  Without expansion, the scope of an employee's contractual duty of fidelity was considered to be limited to loyally performing the agreed services. Although the employment contract had not been updated since 2001, the Court considered Mr Ranson's agreed services at the time of his departure as being nurturing existing clients and identifying new clients within his patch.  The Court found that Diageo did not fall within Mr Ranson's patch so Mr Ranson had no obligation to pursue the business opportunity on behalf of CS.  Accordingly, the Court found that the trial judge erred in applying directors' implicit fiduciary duties to Mr Ranson.   The Court considered CS's assertion that Mr Ranson's role required him to disclose his contact with Mr Clothier and Mr Bruhin.  On this point the Court held that there is no free-standing duty imposed on directors to inform the company of their wrongdoing so employees could not be burdened with such an obligation unless it arose from the terms of their employment contract.   The Court found that no such term existed in Mr Ranson's employment contract. In relation to Mr Ranson's dealings with Mr Boardman, the Court disagreed with the trial judge's findings that Mr Ranson had canvassed Mr Boardman.  The Court noted that CS did not suffer loss as CS had continued to supply services to AstraZeneca until months later so CS's real complaint related to Mr Ranson's failure to inform CS of his plans.  As noted, the Court did not consider that Mr Ranson's employment contract required him to do so.etailed Contents**5.5** **Winding up order unable to protect future creditors in the absence of a disqualification order** (By Seamus Wiltshire, Ashurst) Re Kitchen Dimensions Pty Ltd (in liq) [2012] VSC 280, Supreme Court of Victoria, Judd J, 26 June 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2012/280.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/280.html%22%20%5Ct%20%22_new)  **(a) Summary** The Court upheld an appeal on a decision to wind up Kitchen Dimensions Pty Ltd (the 'Company'). The appeal was brought by Mr Mario Giudice, a director of the Company who, by reason of a temporary stay pending hearing of the appeal, was able to restore the affairs of the Company. The Court considered that notions of commercial morality and the public interest largely referred to whether or not termination of the winding up would endanger future creditors. The Court concluded that in the absence of an order disqualifying Mr Giudice and his wife from establishing and operating a new company in the future, refusing Mr Giudice's application to terminate the winding up would not protect the interests of future creditors. **(b) Facts**    On 18 May 2011, an application for the winding up of the Company was brought following the Company's failure to comply with a statutory demand for payment of $37,000. On 15 June 2011, an order for winding up was made and a liquidator was appointed (the 'Liquidator'). The Liquidator reported that the Company had, amongst other things, failed to lodge multiple business activity statements and an income tax return with the Australian Tax Office ('ATO') and had significant ATO and superannuation guarantee charge liabilities. The Liquidator also reported that the Company had borrowed unlawfully from the Giudices' superannuation fund.  The Company's sole director, Mr Giudice, made an application that the order for winding up be terminated pursuant to section 482 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). This section empowers the Court to stay or terminate a winding up. Mr Giudice's interlocutory application was dismissed. A temporary stay of winding up was granted pending appeal on 19 December 2011. Mr Giudice was restored as a director of the Company, with limited powers to sign and lodge outstanding tax returns and business activity statements on behalf of the Company. The stay also empowered Mr Giudice to consult with the Official Trustee in Bankruptcy (the 'Trustee') regarding the bankrupt estate of his wife, Mrs Cherise Giudice. Mrs Giudice had been declared bankrupt in May 2007. The Trustee held Mrs Giudice's shares in the Company and had lodged caveats over the Giudices' properties. The caveats limited the Giudices' ability to borrow against those properties in order to recapitalise the Company.  The appeal proceedings were adjourned from time to time to allow for lodgement of the Company's tax returns and statements. With the assistance of advisors, the Giudices were also able to have Mrs Giudice's bankruptcy annulled and the relevant caveats removed. This allowed the Giudices to borrow approximately $785,000 required to discharge their tax, superannuation guarantee charge and other liabilities. The Giudices also reached agreement with the Liquidator for payment of his costs and expenses. Following these steps, the Liquidator withdrew its opposition to Mr Giudice's application for termination of the winding up. **(c) Decision**   The Court allowed the appeal and ordered that the winding up be terminated. The Court found that the Company was now solvent and attributed the Giudices' past failures to ignorance and overwhelming circumstances, rather than dishonesty. The Court cautioned that even with competent advisors there remained a risk that the Giudices might endanger future creditors by their conduct. However, the misconduct identified by the Liquidator was insufficient for the Australian Securities and Investments Commission to disqualify the Giudices from managing corporations. In the absence of an order disqualifying the Giudices from continuing to carry on a business via a new entity, the Court concluded that this risk would not be avoided by refusing Mr Giudice's application for termination.  In granting the order, the Court considered whether the 'commercial morality' of Mr and Mrs Giudice as directors of the Company was sufficient to ground an order for winding up where:* the company is the alter ego of a director who is free to recommence business with a new entity; and
* where the Company could now demonstrate solvency.

The Court explained that the concept of 'commercial morality' was introduced as a discretionary element in bankruptcy matters in the English decision of *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174. The Court considered that the purpose of considering 'commercial morality' in winding up applications is to ensure that private arrangements with creditors do not disadvantage others and to ensure that future creditors are not disadvantaged. The Court referred to *Re Data Homes* [1972] 2 NSWLR 22 in which Mason JA held that notions of commercial morality and the public interest gave the Court a 'very broad discretion' which could be used to describe a situation where a company might be technically solvent due to private agreements with creditors, but its liabilities greatly exceeded its assets. In *Krextile Holdings* [1974] VR 689 (at 695), Gillard J cast considerations of commercial morality much wider, by reference to the future consequences that would flow if a winding up was terminated, focusing on whether future creditors would be imperilled.  The Court found that Gillard J's conception of commercial reality has been applied where serious impropriety on the part of directors has been seen as endangering future creditors (*Apostolou v VA Corporation of Australia Pty Ltd* (2010) 77 ACSR 84). In *Prendergast v Rolcross Pty Ltd (In Liq)* [2008] NSWSC 146 (at [24]-[25]), White J focused on the interests of current and future creditors, considering bare failures to meet statutory reporting obligations insufficient proof of a lack of commercial morality on the part of directors. On this point, the Court concluded that, despite some authority to the contrary, failure to meet statutory reporting requirements with ASIC or the ATO will not be determinative in a winding up application. The Court added that in those cases where statutory reporting failures were relevant to the question of commercial morality, the companies in question were 'clearly insolvent'.etailed Contents**5.6** **Evidence of surrounding circumstances irrelevant for contractual interpretation** (By Aman Gaur and Jack Hill, King & Wood Mallesons) Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria St Doncaster Pty Ltd [2012] VSCA 134, Court of Appeal of the Supreme Court of Victoria, Warren CJ, Harper JA and Robson AJA, 22 June 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSCA/2012/134.html](http://www.austlii.edu.au/au/cases/vic/VSCA/2012/134.html%22%20%5Ct%20%22_new) **(a) Summary** This decision emphasises the importance of ensuring that written contracts are clear and reflect the intention of the parties. It considers the extent to which extrinsic evidence, such as statements of intention and expectations, can be used to interpret a contract and confirms that such evidence cannot be used to subtract from, add to, vary or contradict the language of a written contract except where the contractual language is ambiguous.   **(b) Facts**    In 2001, a member of the Darnley Group ('Darnley') entered into a management agreement with Retirement Services Australia Pty Ltd ('RSA'), under which Darnley agreed to appoint RSA as the manager of a retirement village it was developing.  The management agreement was included as a schedule to a joint venture agreement entered into by the parties. The joint venture agreement contained an 'entire agreement' clause which provided that all the agreements and understandings between the parties in relation to the development were embodied in the agreements. The management agreement stated that RSA was required to manage the retirement village as a 'first class retirement village' and to 'provide management services to a high standard'.  Darnley alleged that RSA had not met its contractual obligations as it had failed to set aside 12 units as 'respite units' and failed to retain a qualified nurse to staff a purpose-built nursing station at the village.  It alleged that, on a proper interpretation of the agreement, the requirement to manage a 'first class retirement village' and to provide management services to a 'high standard' carried with it obligations to set aside the respite units and retain a nurse. Darnley submitted that statements made by RSA before and after its entry into the agreement, that it would set aside the units and retain a qualified nurse, formed evidence of the 'surrounding circumstances known to the parties and the purpose and object of the transaction', and therefore were able to be used to interpret RSA's obligations.  Darnley also alleged that the pre-contractual statements made by RSA formed the basis of the parties' mutual relations and that therefore RSA was estopped from denying the binding effect of its representations. **(c) Decision**   **(i) First instance** At first instance, the Supreme Court held that RSA had failed to provide the services required under the management agreement. The court found that it was entitled to receive evidence of 'contextual material, including statements made between the parties both before and after contracting' when interpreting clause 7(a).  In reaching its finding, the court assessed the principles articulated by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337 ('Codelfa'). It noted that, following Codelfa, it is clear that 'statements and actions of parties which reflect their actual intentions may not be used to displace their written agreement'. The court went on to hold that 'Darnley did not seek to rely upon the facts and circumstances outside of the contract 'to contradict the language of the contract' . but, rather, sought to rely upon evidence of surrounding circumstances 'to assist in the interpretation of the contract'.  RSA appealed, submitting that his Honour ought to have put aside the evidence of the surrounding circumstances and should have construed the contracts by reference to the words used by the parties in the written documents. **(ii) Decision on appeal** The Court of Appeal unanimously upheld RSA's appeal.  It found that there had been an inconsistency between the principles laid down in Codelfa and the application of those principles by the trial judge. The Court held that the trial judge should have ruled that much of the evidence of intention and pre and post-contractual conduct was 'irrelevant' and therefore 'to be put to one side'. The Court considered the leading authorities on the parol evidence rule and found that (except in cases of latent ambiguity) the rule excludes three categories of evidence as an aid to interpretation: (i) direct evidence of the actual (subjective) intentions of the parties; (ii) evidence of the parties' prior negotiations; and (iii) evidence of the parties' subsequent conduct.  It rejected Darnley's argument that the evidence it relied on was evidence of the 'objective factual matrix in which the court must place itself when construing a contract' that did not fall within the scope of the parol evidence rule.  The Court found that the evidence was evidence 'of statements and actions of the parties which are reflective of their actual intentions and expectations'.  It clearly fell within the scope of the parol evidence rule and therefore could not be used as an aide to the proper construction of the agreement.  In light of its finding, the Court sought to give meaning to RSA's obligation to provide 'high standard' services to ensure that the facility was a 'first class retirement village'.  In doing so, the Court referred to *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 218 CLR 164 where the High Court stated that 'it is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations' but rather, 'the meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean'. The Court also referred to *Hope v RCA Photophone of Australia Pty Ltd* (1937) CLR 348 and noted that the existence of the 'entire agreement' clause left no room for a submission that the terms of the agreement 'were not fully embraced within its four walls'.   Examining the terms of the management agreement, together with the provisions of the joint venture agreement and the services agreements entered into with each resident, the Court held that RSA was not obliged to provide either the nursing services or the respite care contemplated by Darnley.  Finally, the Court affirmed that the parol evidence rule operates to exclude evidence of an estoppel by convention alleged to arise from pre-contractual negotiations and consequently rejected Darnley's submission that RSA was estopped from denying the binding effect of its pre-contractual statements. In any event, the Court found that RSA's pre-contractual statements did not form the basis of the parties' mutual relations, and even if an estoppel had arisen on the facts because of the pre-contractual statements, it was superseded by the written agreement between the parties.etailed Contents**5.7** **English Court of Appeal restricts scope of 'veil piercing' principle** (By Isabel Waters and Marissa Bendyk, King & Wood Mallesons) VTB Capital PLC v Nutritek International Corp [2012] EWCA Civ 808, England and Wales Court of Appeal (Civil Division), 20 June 2012 The full text of this judgment is available at:[http://www.bailii.org/ew/cases/EWCA/Civ/2012/808.html](http://www.bailii.org/ew/cases/EWCA/Civ/2012/808.html%22%20%5Ct%20%22_new) **(a) Summary** In this decision, the England and Wales Court of Appeal clarified the limited grounds on which the corporate veil can be pierced.  The key issue on appeal related to the jurisdiction of English courts over foreign parties, specifically whether the corporate veil could be pierced to allow claims founded on contract to proceed against non-contracting parties.   Lord Justice Lloyd, delivering the joint judgment, determined that:* the 'piercing the veil' principle is of limited scope, and the court may apply it only in circumstances where:     - the 'puppeteer' controls the 'puppet' company at the relevant time; and     - the puppet company is a 'mere façade concealing the true facts'; and
* contrary to the view favoured in *Antonio Gramsci Shipping Corporation v Stepanovs* [2011] EWHC 333 (Comm) ('Gramsci'), the doctrine cannot be extended to allow a claimant to enforce a contract entered into by the puppet company against a non-contracting puppeteer.

This case also touches on the use of a worldwide freezing order ('WFO'). **(b) Facts** The claimant, VTB Capital Plc ('VTB'), advanced a $225 million loan to Russagroprom LLC ('RAP') under a facility agreement governed by English law ('Facility Agreement') to fund the acquisition of six Russian dairy plants and associated companies from the first defendant, Nutritek International Corp ('Nutritek').  VTB's Russian parent company, JSC VTB Bank ('VTB Moscow'), provided all the funding for the facility pursuant to a Participation Agreement with VTB.  VTB Moscow paid the funds to VTB, and VTB then transferred the loan amount in tranches to RAP according to the terms of a Share Purchase Agreement ('SPA'). RAP soon defaulted on its repayments and, after enforcing its security, VTB recovered less than $40 million resulting in a substantial shortfall on the outstanding debt. VTB alleged that it had been induced to enter into the Facility Agreement as a result of fraudulent misrepresentations made by Nutritek.  Specifically, these representations related to:* false information given by Nutritek which formed the basis for a gross overstatement of the assets of the dairy companies in the independent valuation report; and
* the nature of RAP as an independent third party, when in fact both Nutritek and RAP were under the common ownership and control of a Russian national, Mr Malofeev (the fourth defendant).

VTB alleged that, through a number of connected companies, Mr Malofeev was the principal and beneficial owner of both RAP and Nutritek.  VTB subsequently sought to amend its Particulars of Claim to add a claim in contract on the new Gramsci basis.  It alleged breaches of the Facility Agreement and SPA by Mr Malofeev and his companies (even though they were not parties to those agreements). VTB submitted that the contractual cause of action was simply a logical application of the 'veil piercing' principle and, drawing on Burton J's reasoning in Gramsci, a fraudulent controller who is 'manipulating the strings' should be equally liable in respect of the contracts into which its puppet company enters.  The claimant argued three separate issues on the appeal, which can be summarised as follows: (i)   the judge at first instance, Arnold J, erred in finding that VTB did not have an arguable case for piercing RAP's veil of incorporation; (ii)  in respect of the claims in tort, VTB should be permitted to serve the proceedings on the defendants out of the jurisdiction; and (iii) the worldwide freezing order in place against Mr Malofeev should continue.   **(c) Decision** **(i) Piercing the veil of incorporation** It is established law that a company has a distinct legal personality separate from its controllers.  In exceptional cases, however, the court will pierce the corporate veil to prevent fraudulent misuse of a company structure.  It will look behind the corporate personality at the individuals who control the company if they are attempting to avoid personal liability by using the company as 'a device or façade to conceal the true facts'.  According to the Court of Appeal, 'the principle is, in its application, a limited one, which has been developed pragmatically for the purpose of providing a practical solution in particular factual circumstances'.  The Court of Appeal considered next whether it was a principled development of the law to recognise, as Burton J did in Gramsci, that the veil could be pierced to allow a claimant to enforce the terms of an agreement against not only the fraudulent company but also the individual fraudster.  Such a finding would bind the puppeteer to the jurisdiction clauses in the relevant agreements, giving the English courts jurisdiction to hear the dishonesty case against the puppeteers.  The Court of Appeal held that VTB's proposed contractual cause of action was unsustainable as a matter of law.  It refused to accept that such a fundamental inroad could be made into the basic principle of law that contracts are the result of a consensual arrangement between, and only between, those intending to be parties to them.  It stated that the mere suggestion that the three defendants could be regarded as original parties to the Facility Agreement or the SPA 'is nothing more than an appeal to the court to decide the case on the basis of pure fiction'.  The court concluded that, where it is appropriate to pierce the veil, any resulting order is made by way of the exercise by the court of its discretionary jurisdiction.  Courts can therefore pierce the veil to give equitable remedies, but not purely contractual ones.  **(ii) Service out of the jurisdiction** The Court of Appeal also found that Arnold J had been correct to set aside an earlier order granting permission to serve the proceedings in respect of the tortious claims out of the jurisdiction.   The applicable principles can be summarised as follows:* there must be a serious issue to be tried;
* there must be a good arguable case that the claim against the foreign defendant falls within one or more classes of case for which leave to serve out of the jurisdiction may be given; and
* England must be clearly or distinctly the appropriate forum for the trial of the dispute and, in all the circumstances, the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

While VTB satisfied the court on the first two limbs, it fell short of proving on the facts that England was clearly or distinctly the most appropriate forum to hear the case.   The court found that, although the loss to VTB occurred in England, the 'ultimate economic impact' was felt by VTB Moscow, to whom VTB had to account for any recoveries, and VTB Moscow had ultimately decided to enter into the proposed transaction in reliance on representations made by the defendants in Russia. The court therefore concluded that 'the centre of gravity' of the torts alleged lies in Russia and the applicable law of the torts was therefore Russian law.  **(iii) The worldwide freezing order** Given that the court agreed with Arnold J's findings on the first two issues on the appeal, the question of continuing the WFO did not arise for decision.  The court observed, however, that a wealthy individual, such as Mr Malofeev, who employs a web of offshore corporate entities to commit large-scale fraud against a bank, would likely dispose of his assets if he thought he was at risk of having them seized to answer a judgment against him.  By way of obiter, the court noted that such considerations support the case of a risk of dissipation and favour the grant of an injunction.etailed Contents**5.8** **Providing financial advice by providing access to a contracts for difference trading platform: drawing inferences from a bank account**  (By Marianna Parry, Freehills) ASIC v Stone Assets Management Pty Ltd [2012] FCA 630, Federal Court of Australia, Besanko J, 19 June 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2012/630.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/630.html%22%20%5Ct%20%22_new) **(a) Summary** The Australian Securities and Investments Commission ('ASIC') had sought declaratory and injunctive relief, as well as orders to wind up the defendant's company on just and equitable grounds for stark contraventions of numerous sections of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the 'Act'), such as operating without an Australian financial services licence ('AFSL') while holding out to have one; misleading or deceptive conduct in relation to financial products and financial services; inducing persons to deal in financial products by publishing misleading statements; and having a single director who never resided Australia.  As Stone Assets Management Pty Ltd ('Stone Assets') had not filed any defence, Besanko J held that the case against the defendant was made out on all grounds and granted all orders sought. The linchpin for the findings against the defendant was the inference made, on the basis of the deposits in the defendant's bank account, that those deposits were commissions paid for provision of access to the MetaTrader4 platform.  **(b) Facts**    Stone Assets was incorporated in 2010, its sole director being Ms Liang, purportedly residing in South Australia. The business of Stone Assets comprised facilitation of online access to the trading of contracts for difference ('CFDs') in forex, gold, stock index and so on, via an online trading platform, MetaTrader4. Stone Assets made representations on its website to the effect that it was headquartered in Adelaide, had an AFSL authorised by ASIC, and was formerly known as Adelaide Finance Market Co Ltd and Brisbane Financial Securities Co Ltd, in operation since 2003 ('Representations').     ASIC presented strong evidence that Ms Liang had never entered Australia and her purported residential address in fact corresponded to student accommodation. The defendant's principal place of business turned out to be premises of 'Auto Power & Associates'. The funds, amounting to over $10 million, deposited into the defendant's Commonwealth Bank account had been largely transferred to a Chinese bank account in the name of Ms Liang.  ASIC established that the Representations were not supported by factual evidence. Upon commencement of the proceedings, the defendant nominated solicitors who, several months' later, filed a notice of ceasing to act. No defence was ever filed. In addition, the Court found that the defendant disregarded the interim injunction order granted to ASIC on 4 November 2011.     **(c) Decision**   As the matter was undefended, Besanko J accepted the evidence presented by ASIC and in light of that evidence considered, inter alia, the following questions:* has the defendant breached sections 911A(1) and 911C(a) of the Act?
* has the defendant breached sections 1041, 1041E and 1041F of the Act?
* should Stone Assets be wound up on just and equitable grounds?
* should a permanent injunction be granted in view of the winding up?

Below is the summary of his Honour's answers to these questions: **(i) Has the defendant breached sections 911A(1) and 911C(a) of the Act?** Section 911A(1) requires persons carrying on financial services business in Australia to hold an AFSL, while section 911C(a) makes it an offence for a person to hold out that they have an AFSL if this is not the case. The focus of Besanko J was therefore on the terms 'financial service' and 'financial product' as defined in Part 7.1A of the Act. One of the questions was whether CFDs are financial products. According to the expert evidence presented to the judge, a CFD is 'an agreement between two parties to pay the difference in price of a contract between the date on which the contract is agreed to be opened and the date on which it is agreed to be closed. It allows investors to take a position on the change in value of an underlying asset over time'.  On the basis of this definition and evidence that CFDs can be closed out over a period of seconds to weeks depending on the contract, Besanko J concluded that CFDs fall within the definition of 'a derivative' and therefore constitute a 'financial product'.  Another question was whether, by facilitating client's access to the MetaTrader4 platform, which in turn allowed the defendant's clients to acquire CFDs, the defendant had engaged in 'dealing' in financial products which would constitute a 'financial service'. The definition of a 'dealing' includes arranging for a person to apply for or acquire a financial product. Although his Honour acknowledged that there was no express evidence that Stone Assets arranged for a person to acquire CFDs, ASIC's submission was accepted that such an inference should be drawn from the defendant's bank records, with the deposits amounting to over $10 million  inferred to be 'by way of commission' charged for access to MetaTrader4. Besanko J held that Stone Assets arranged for a person to apply for or acquire CFDs offered by MetaTrader4, thereby engaging in the provision of financial services.  These findings entailed the conclusion that the defendant contravened both sections 911A(1) and 911C(a) of the Act, as the defendant never had an AFSL but purported to have it. It is interesting that Besanko J went further and found that Stone Assets also provided 'financial product advice', since the online platform to which it gave access featured 'the ability of the MetaTrader4 to "automate trades or generate trading signals" and develop tools to "analyse the market"'. An inference was made that clients would base their trading decisions upon these. Although MetaTrader4 did not hold out this trading 'methodology' as being successful, Besanko J held that it provided trading analysis information and trading indicators.   **(ii) Has the defendant breached sections 1041H, 1041E and 1041F of the Act?** Besanko J found that all of these sections had been breached. Section 1041H deals with misleading or deceptive conduct in relation to a financial product or a financial service. It does not require a mental element. The defendant breached it by publishing the false Representations as to the headquarters, licensing and company history on its website.  Section 1041E prohibits making statements which may induce persons to apply for financial products if the person knows or ought to know that the statements are false in a material particular. His Honour held that this section was contravened because the defendant ought to have known that the statements it made about its corporate history and Australian headquarters were false and likely to instil a level of comfort in a potential CFD investor inducing these persons to apply for or acquire CFDs.  Finally, section 1041F prohibits inducing another person to deal in financial products by making misleading, false or deceptive statements. His Honour suggested that the finding of misleading, false or deceptive statement had already been made, and as 'the evidence concerning the defendant's bank accounts suggests the payment of client commissions. [i]t seems proper to infer that the defendant has been successful in inducing clients to deal in the financial products'. **(iii) Should Stone Assets be wound up on just and equitable grounds?**Section 461k(1) empowers the Court to order the winding up of a company if the Court is of the opinion that it is just and equitable that the company be wound up. In this case, the Court made this order as a consequence of the defendant's breaching of the interim injunction by not removing publication of its website in English and Chinese and 'the overall misconduct and mismanagement' which justified the finding that 'there is a cause for a lack of confidence in the future conduct and management of the defendant, should it be allowed to continue trading'.**(iv) Should a permanent injunction be granted in view of the winding up?**  In view of the winding up, granting of a permanent injunction appeared to raise the query as to whether it would 'serve a useful end'. Besanko J stated that the presence of the defendant's director in China 'has the potential to make a clean handover to any appointed liquidator more difficult'. His Honour relied on *ASIC v West* (2008) 66 ACSR 143, where both orders had been made to find that, since 'the defendant has previously shown a willingness to disregard the orders of this court, namely, the interim injunction' and 'is. susceptible to repeating its contraventions of the Act', a permanent injunction should be granted. etailed Contents**5.9** **Liquidators ought to exercise care when applying for an extension of time for making a voidable transaction claim** (By James Byrnes, Clayton Utz) Williams (as liquidator of Willahra Pty Ltd (in liq)) v Kim Management Pty Ltd [2012] QSC 143, Supreme Court of Queensland, Dalton J, 19 June 2012 The full text of this judgment is available at:[http://archive.sclqld.org.au/qjudgment/2012/QSC12-143.pdf](http://archive.sclqld.org.au/qjudgment/2012/QSC12-143.pdf%22%20%5Ct%20%22_new)   **(a) Summary** This decision concerns an application by Kim Management Pty Ltd to set aside an order of the Supreme Court made under section 588FF(3)(b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), extending the time for the liquidator of Willahra Pty Ltd (in liquidation) to make an application about voidable transactions under section 588FF(1). The order obtained was a 'shelf order' in that it did not extend time for an application against any particular person but operated generally. The order had been obtained without notice to Kim Management and, other than service on an unrelated entity, was obtained at an ex parte hearing.  Dalton J decided to set aside the order because, had the liquidator exercised reasonable diligence in the circumstances, she ought to have identified Kim Management as a potential target of an application under section 588FF(1) and, accordingly, ought to have given Kim Management notice of the application seeking the extension.  In addition, Dalton J would have set aside the order on the basis of non-disclosure at the ex parte hearing. **(b) Facts**    On 24 September 2008, the Court made an order appointing Williams as liquidator of Willahra. The relation-back day was 20 August 2008. Accordingly, any application to extend time under section 588FF(3)(b) was required to be made before 20 August 2011. On 22 July 2011, the liquidator applied for an extension under section 588FF(3)(b), without notice to Kim Management. The Court made an order on 26 August 2011 that the time for making any application in respect of Willahra under section 588FF(1) be extended for 12 months from the date of the order. The order operated generally and was obtained following an ex parte hearing (other than notification to an entity unrelated to this decision). On 18 January 2012, the liquidator commenced a proceeding against Kim Management in respect of a voidable preference relating to contracts for the sale of certain units.  Kim Management had signed the contracts to purchase units from Willahra; however, on completion, an amount of nearly $3,000,000 less than the purchase price on the contracts had been paid. On 16 September 2010, following enquiries by the liquidator, Kim Management's solicitors explained to the liquidator that one component of the reduction was for outstanding consideration of $1,200,000 for shares transferred to Ms Lee (which were to be held for Willahra). The liquidator did not initially believe this explanation. Eventually, on 21 November 2011, the liquidator's solicitors confirmed the explanation after reviewing the records of the solicitors who acted for Willahra on the sale of units. As a result of the explanation, the liquidator considered that there was a voidable preference in respect of the amount of $1,200,000 and commenced the proceeding. Kim Management applied to have the shelf order dated 26 August 2011 set aside insofar as it affected Kim Management. **(c) Decision**   Kim Management's application was made relying on the following submissions: (1) although the order adversely affected Kim Management's rights, it had not been given the opportunity to be heard on the application on which the order was made (a) simpliciter, or (b) in circumstances where a diligent liquidator ought to have known of Kim Management as a potential target of a section 588FF(1) application; or (2) the liquidator who made the section 588FF(3)(b) order did not comply with obligations of candour on an ex parte application. Dalton J decided that the order dated 26 August 2011 should be set aside so far as it affected Kim Management and agreed with Kim Management's grounds at 1(b) and (2) above. Dalton J did not agree with the submission at 1(a). A recurring observation in Dalton J's judgment was that a party who is not given notice of an application under section 588FF(3)(b) may be unfairly prejudiced because they stand to lose a complete defence (by reason of the limitation period) to a voidable transaction claim.  **(i) Shelf orders made ex parte and the rights of creditors not heard** Following an examination of relevant authorities, Dalton J concluded that the Court had power to make a shelf order and that such orders should only be made in extraordinary circumstances (for example, the same type of extraordinary circumstances that might motivate a court to act ex parte on an application for an interim injunction). Dalton J considered that Kim Management was not entitled to have the order of 26 August 2011 set aside as of right simply because it was affected by the order made and was not given an opportunity to be heard on the ex parte application. Dalton J observed that there would be little utility in properly making a shelf order if every person affected by it could have the order set aside as of right. **(ii) Whether the liquidator ought to have notified Kim Management** After rejecting the ground at 1(a), Dalton J accepted the submission that the shelf order should be set aside where a person who ought to have been given notice of the section 588FF(3)(b) application had not been given such notice. Whether or not a person ought to have been given such notice depended on whether that person would have been identified by the liquidator as a potential section 588FF(1) target, had the liquidator acted with reasonable diligence in all the circumstances. Dalton J was of the view that the standard of diligence required by the liquidator in this regard should be judged by reference to the duties of a party making an ex parte application.  Dalton J analysed the principles associated with duty of candour on ex parte applications. The most relevant duties were the duties to disclose material facts (including those which could be discovered on making proper enquiries) and to make proper enquiries in the circumstances (including having regard to the effect of the order and any circumstances of urgency). It was no excuse to say that the party was not aware of the importance of matters that were omitted. In deciding that the liquidator ought to have given notice to Kim Management, Dalton J referred to the following:* the liquidator held the view, as reflected in the first creditors' report dated 8 April 2010, that the books of Willahra were unreliable (which might support the explanation for the underpayment for the units) and that there were numerous potential applications to be made under section 588FF(1);
* the liquidator was aware of the explanation for the reduction in payment for the units and failed to investigate the explanation (despite having access to legal advice). There was no reason for the failure to investigate earlier. Had the liquidator given the matter proper consideration and made proper enquires, Kim Management would have been identified as a potential target;
* the liquidator was asking for an order which would have a final effect on the rights of persons who were not given a chance to be heard on the section 588FF(3)(b) application; and
* there was no urgency in the circumstances.

**(iii) Breach of duty on an ex parte application** For the sake of clarity, Dalton J decided that she also would have exercised her discretion to set aside the shelf order because there had been sufficient non-disclosure on the ex parte application. This was based on the following three non-disclosures on the ex parte application:* the liquidator failed to identify Kim Management as a potential target of an application under section 588FF(1);
* the liquidator's submissions on the ex parte application were inadequate. The submissions failed to note that shelf orders are exceptional and contained no reference to dicta that caution should be taken in making shelf orders. Further, the submissions incorrectly stated that, in making the shelf order, those parties who would subsequently be subject to a voidable transaction claim would not be unfairly prejudiced. Dalton J considered that such parties are prejudiced because they would lose a complete defence to such a claim; and
* the liquidator's failure to inform the Court as to her dealings with Kim Management and what enquiries had been made to determine whether Kim Management was a proper party to the application.

etailed Contents**5.10** **Voidable transactions: Uncommercial transactions which cause a company's insolvency** (By Dean Merriman, DLA Piper Australia) Campbell Street Theatre Pty Ltd (receiver and manager appointed) (in liquidation) v Commercial Mortgage Trade Pty Ltd [2012] NSWSC 669, New South Wales Supreme Court, Black J, 19 June 2012 The full text of this judgement is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/669.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/669.html%22%20%5Ct%20%22_new) **(a) Summary** The Court made orders that the three agreements in question were one transaction, and that the transaction was uncommercial and insolvent, and therefore voidable under section 588FE of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act). **(b) Facts** On 14 July 2009, Campbell Street Theatre Pty Ltd (Campbell Street) and Commercial Mortgage Trade Pty Ltd (CMT) entered into three agreements, all of which took effect after 10 August 2009. The first agreement, a Deed of Loan (the Loan Agreemen'), provided that CMT, at Campbell Street's request, would provide $1,200,000 to Campbell Street through advances made on occasions and in amounts at CMT's discretion to CMT, Campbell Street and third parties elected by CMT, in connection with services to be supplied under the Deed of Mandate (Mandate Agreement) (see below). No payments were ever advanced under the Loan Agreement. The second agreement, the Mandate Agreement, provided that CMT was to provide (or facilitate the provision of) consultancy and other services to Campbell Street and Mr Kevin Jacobsen (the sole director of Campbell Street) relating to a dispute arising from a registered charge granted in favour of Campbell Street by Arena Management Pty Ltd (Arena', the negotiation and execution of a Deed of Company Arrangement by Arena, and other matters (see Arena Management Pty Ltd (Admin App) (Rec & Mgrs App) v Campbell Street Theatre Pty Ltd [2010] NSWSC 957 (2 September 2010).  Relevantly, clause 2.3 of the Mandate Agreement had three effects. First, it placed an obligation on Mr Jacobsen and Campbell Street to pay $400,000 upon the execution of the Mandate Agreement, irrespective of the outcome and irrespective of whether CMT performed any work under the Mandate Agreement. Second, it entitled CMT to a payment of $39,600 in addition to interest accruing under the Loan Agreement, though this payment was referrable to the actual advance of funds. Third, Mr Jacobsen and Campbell Street were required to pay to CMT 40% of the amount owed by Arena to all creditors participating in the Deed of Company Arrangement. The third agreement provided that Campbell Street grant a fixed and floating charge (the Charge) in favour of CMT to secure performance of Campbell Street's obligations under the Loan Agreement and Mandate Agreement. On 31 January 2011, CMT made a demand on Campbell Street for $879,998, and Mr Robert Whitton was appointed as receiver under the Charge on 18 February 2011. Campbell Street sought a declaration that this appointment was invalid. **(c) Decision** The Court proceeded to answer three separate questions: **(i) Whether the entry into the Loan Agreement, Mandate Agreement and the Charge was an uncommercial transaction under section 588FB of the Corporations Act** The Court began by holding that the Loan Agreement, Mandate Agreement and the Charge were a single transaction, because the three agreements were linked in such a manner that they affected the rights and liabilities of Campbell Street. Thus, taken together, the agreements fell within the definition of 'transaction' in section 9 of the Corporations Act. The Court then held that the transaction was uncommercial under section 588FB(1) of the Corporations Act, because a reasonable person would not have entered into the transaction having regard to the benefits and detriment to Campbell Street of the transaction. Considering each element of the transaction separately, the Court held:* The benefit of the Loan Agreement was 'highly doubtful', because it imposed no obligation on CMT to advance funds, give control of when funds were advanced to Campbell Street, or require CMT to consult Campbell Street in determining to whom the funds should be advanced.
* The Mandate Agreement did not specifically identify the services that CMT was to provide, and created no obligations for CMT regarding the quality, quantity or outcome to be secured. Moreover, it was unclear whether CMT's services were still required, were it necessary for Campbell Street to retain legal representation in its dispute with Arena. The evidence also failed to demonstrate that the sole director and principal of CMT, Mr Lazar, possessed the qualifications to provide the services envisaged by the Mandate Agreement. However, the Mandate Agreement created 'obvious and substantial' detriment for Campbell Street, including the requirement to make the upfront payment of $400,000 irrespective of the provision of services. The Court concluded that these factors created a bargain of such magnitude that it was 'wholly inexplicable by normal commercial practice'.

**(ii) Whether the transaction was an insolvent transaction under section 588FC of the Corporations Act**The Court held that Campbell Street had failed to keep written records that correctly recorded and explained transactions and financial positions, giving rise to a presumption of insolvency under sections 286 and 588E(4) of the Corporations Act. The Court considered that the absence of documentation which would disclose the details of dealings with significant creditors and explain significant transactions was sufficient to establish that proper books and records were not retained. The Court relied on evidence from one liquidator and an expert report in reaching this conclusion. The Court also held that statements in an administrators' report to creditors were insufficient to rebut the presumption, because such information was not of the 'level' required to allow true and fair financial reports to be prepared and audited. The Court then considered whether the transaction caused the insolvency pursuant to section 588FC(b) of the Corporations Act. Applying the 'cash-flow test' of solvency in section 95A, the Court noted that although the Loan Agreement created a mechanism for CMT to loan $1.2 million to Campbell Street, such funding remained at the discretion of CMT and no advances were made. Moreover, Campbell Street had no funds to make the $400,000 payment required by the Mandate Agreement. Noting that there was no evidence that Campbell Street could obtain funding from a third party, the Court concluded that Campbell Street became insolvent immediately on the execution of the Mandate Agreement.**(iii) Whether the transaction was a voidable transaction under section 588FE of the Corporations Act**The parties agreed that they entered the transaction during the relation-back period under section 588FE(3) of the Corporations Act. The Court, having found that the transaction was an uncommercial transaction and an insolvent transaction, thus determined that the requirements of section 588FE were satisfied and that the transaction should be set aside.**(iv) Whether Campbell Street was entitled to rescind the transaction under section 925A of the Corporations Act**As an alternative argument, Campbell Street sought an order that any or all of the agreements were unenforceable because CMT provided a financial service to Campbell Street without holding a financial licence to deal in a financial product under section 911A of the Corporations Act.The Court found that Campbell Street failed to establish an additional requirement of section 911A, namely that CMT was a person 'who carries on a financial services business'. Though the transactions were capable of constituting a step in the conduct of a business, there was no evidence that CMT intended to carry on such a business and therefore nothing to indicate that it was required to be licensed.The Court also expressed doubt as to whether the Loan or Mandate Agreements satisfied the definition of financial product in section 763A(1). An element of this definition is that the product assists the acquirer in the management of financial risk. The Court found nothing in the Loan or Mandate Agreements which could manage the adverse financial consequences to Campbell Street of any particular financial event, meaning the agreements could not be characterised as financial products.**(d) Orders**The Court declared that the Loan Agreement, the Mandate Agreement and the Charge were a single transaction which was an uncommercial transaction and an insolvent transaction within (respectively) sections 588FB and 588FC of the Corporations Act, and was a voidable transaction within section 588FE of the Corporations Act. The Court ordered that each agreement be released or discharged.The Court also declared that the purported appointment of Mr Whitton as receiver of Campbell Street was invalid.etailed Contents**5.11** **The removal of a liquidator for the better conduct of the liquidation in the absence of misconduct** (By David Miller, DLA Piper Australia) Haulotte Australia Pty Ltd v All Area Rentals Pty Ltd (In Liq) [2012] FCA 615, Federal Court of Australia, Jessup J, 15 June 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2012/615.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/615.html%22%20%5Ct%20%22_new) **(a) Summary** The court granted an application for the removal of a liquidator on submissions that the removal would be for the betterment of the liquidation, even in the absence of misconduct or impropriety on the part of the liquidator. **(b) Facts**    The plaintiff was concerned in the manufacture and sale of scissor lifts and lifting equipment. The first defendant was a company (the 'Company') that carried on the business of equipment hire-purchase. In 2007, the plaintiff entered into a hire-purchase agreement with the Company (the 'agreement'). The agreement was undated but commenced on 3 December 2008.  The Company fell substantially behind in payments due under the agreement. In August 2011, the plaintiff's solicitors wrote to the company demanding it pay outstanding instalments with interest. The Company did not comply with the demand. The plaintiff terminated the agreement pursuant to a provision that permitted that course. The plaintiff required the Company to return the equipment, the amount outstanding and reimburse the plaintiff for legal costs.  The Company did none of these things. Accordingly, the plaintiff took steps to repossess the equipment and successfully did so with respect to all but two items (which had been destroyed by fire).  On 22 February 2012, the Company went into voluntary administration with the second defendant appointed as administrator. The company subsequently went into liquidation with the second defendant appointed as liquidator (the 'liquidator').The plaintiff initially commenced an application under sections 600AA, 445D, 445G and 1322 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 to set aside a deed of company arrangement. After being informed that the company was in liquidation and that there was no such deed in place, the plaintiff amended its application seeking orders to replace the liquidator with another liquidator under section 503 of the Corporations Act.  The plaintiff submitted that success under the application was not dependant on whether specific considerations would amount to a justification for the removal of the liquidator, but rather from an overall perspective, it was for the better conduct of the liquidation. The court agreed on this point and then considered three grounds the plaintiff advanced in support of its argument. The plaintiff's first ground was that the liquidator breached section 439A(3) of the Corporations Act by failing to give written notice of the second meeting of the creditors of the Company. The plaintiff did not receive notice of the second meeting of creditors and was therefore not represented. According to the liquidator, the notice was sent by ordinary post to the plaintiff's solicitors. The plaintiff however did not receive the notice.  The plaintiff's second ground was that the liquidator was ill-disposed and antagonistic toward the Company.  In support of this, the plaintiff submitted that at the second meeting of creditors, the liquidator's solicitor accused the plaintiff of 'double-dipping' because the plaintiff had re-leased the repossessed assets while making a claim against the Company. Further, the liquidator expended valuable resources on securing a valuation of the equipment repossessed from the Company by the plaintiff after termination of the agreement. According to the plaintiff, the value of the equipment was irrelevant to the size of its legitimate claim in the winding up of the Company. The plaintiff's third ground was that the professional relationship between the liquidator and the accountant of the Company's director was irregular and therefore contrary to the better conduct of the liquidation. The accountant was known to the liquidator only as a source of referrals of which there had been three in the twelve-month period since the first such referral was made. Prior to his appointment as administrator of the Company, the liquidator had had no contact with the Company or the director. The plaintiff submitted that during the administration the director sought to transfer the Company's customers and receivables to a new company called All Site Rentals Pty Ltd. The wife of the director is the secretary and sole director of All Site. This matter was put to the liquidator in cross examination. He responded that he was aware of All Site, knew that its director was the wife of the director of the Company and that some creditors had been 'transferred' to All Site. On the other hand, he stated he had no knowledge of the purported 'transfer' of trade debtors to All Site. The plaintiff submitted that given the connection between the accountant of the director of the Company and the liquidator, and that the director's actions would require proper independent investigation by the liquidator, the liquidator should be replaced.  **(c) Decision**   The court rejected the plaintiff's first two grounds but granted the application based on the third.  In relation to the first ground, the court considered the regulatory environment governing such matters. The Corporations Regulations 2001 require notice of the meeting to be given to creditors in writing and a permitted means of doing so is by pre-paid post. The court determined that the notice was mailed to the plaintiff's solicitors but also that it was not received. His Honour found that in all the circumstances, he considered this to be one of those unusual occasions upon which something has become 'lost in the mail' and that none of the parties should be blamed for that.  In relation to the second ground, the Court found that the liquidator was not antagonistic or ill-disposed towards the plaintiff since the liquidator was merely acting on legal advice as to the plaintiff's rights under the agreement. His Honour noted that under the agreement, the plaintiff was entitled be paid the outstanding rent, interest, and any other sum that was due under the agreement and to repossess the equipment which, under the terms of the agreement, remained its property.  Additionally, his Honour accepted the plaintiff's argument that the liquidator, by the agency of his solicitor, took too categorical, and perhaps too adversarial, a position about the justification for the plaintiff's proof of debt at the second meeting of creditors. That position was reflected in the liquidator's decision to procure a valuation of the equipment repossessed by the plaintiff. However, his Honour concluded that the liquidator was entirely within his rights - and was acting in the interests of the creditors as a whole - to have cast an especially careful eye over such a large claim as the plaintiff's. The way he did so was, his Honour said, 'not, in my view, indicative of a disposition antagonistic to the plaintiff's claim or of partiality in any other sense'.  However, the Court accepted the third ground. While his Honour held there was 'no reason to doubt that there is a completely professional relationship between these two men', nonetheless the accountant has been a source of work for the liquidator and on the evidence, steps taken by, or with the endorsement or knowledge of, the accountant and/or his company, require proper investigation by the liquidator. In the circumstances, his Honour determined that it would be preferable for those investigations to be undertaken by someone with no prior connection to the accountant, and having no expectation of obtaining work from him in the future.  The court concluded that, on balance, it would be in the best interests of the winding up of the company, and of the creditors generally, that the second defendant be removed under section 503 of the Corporations Act. However, his Honour added that the plaintiff should not succeed in having a liquidator of its own choice installed - either as a matter of reality or as a matter of appearance. The plaintiff was prepared to accept a liquidator recommended by the Insolvency Practitioners' Association absent consensus on the appointment of its preference, and his Honour found that to be the preferable course.etailed Contents**5.12** **Holders of HIH Converting Notes held not to have an accrued right as creditors of HIH NZ but merely a cause of action in damages** (By Monali Pandey and Jin Ooi, Corrs Chambers Westgarth) Perpetual Trustee Company Limited v HIH Holdings (NZ) Limited (in liquidation) [2012] NSWSC 611, Supreme Court of New South Wales, Stevenson J, 5 June 2012 The full text of this judgement is available at: [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/611.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/611.html%22%20%5Ct%20%22_new) **(a) Summary** This case concerned the nature of the accrued rights of holders of debentures referred to as HIH Converting Notes ('Notes'), which were issued in 1998 by the first defendant, HIH Holdings (NZ) Limited (in liquidation) ('HIH NZ'), a wholly owned New Zealand-based subsidiary of the second defendant, HIH Insurance Limited (in liquidation) ('HIH').  The proceedings arose out of the liquidation of the HIH group of companies, in particular HIH NZ, and were commenced by the first plaintiff, Perpetual Trustee Company Limited (Perpetual), as trustee appointed under a deed entered into between HIH, HIH NZ, and Perpetual ('Trust Deed') in respect of certain rights held by holders of the Notes ('Noteholders') and the second plaintiff, Societe Generale Australia Limited ('SocGen') as representative of all Noteholders. The issue was whether the Noteholders were creditors of HIH NZ for the Face Value of the Notes, in which case the Noteholders could expect to receive a dividend in the winding up of HIH NZ, or whether the Noteholders have no more than a claim in damages against HIH NZ, in which case the Noteholders would receive nothing. Stevenson J held that on its proper construction, the Trust Deed did not allow the Noteholders to call for redemption of the Notes for cash, but only for the conversion of the Notes to Ordinary Shares in HIH, such that the Noteholders do not have an accrued right as creditors of HIH NZ. His Honour held that the Noteholders merely have a cause of action in damages to compensate for the loss they have suffered. **(b) Facts** In 1998, HIH, by its New Zealand subsidiary, HIH NZ, issued a prospectus ('Prospectus') to raise up to AUD$155 million for the takeover of FAI Insurances Limited through the issue of Notes. The Notes were issued through Perpetual as trustee appointed in respect of certain rights held by the Noteholders, pursuant to the Trust Deed. The obligations of HIH NZ under the Trust Deed were guaranteed pursuant to a deed poll entered into by HIH ('Deed Poll'). The second plaintiff, SocGen, has been a Noteholder at all material times and had been appointed and permitted to bring the proceedings as a representative of all Noteholders. Upon subscription for the Notes, each of the Noteholders entered into a contract with HIH NZ ('Notes Contracts'), the terms of which incorporated the Trust Deed and the Deed Poll. The Notes were issued subject to the conditions set out in the Trust Deed ('Conditions'), which relevantly provided that the Notes were 'convertible' or in other words, redeemable 'in conjunction with [HIH NZ] applying, at the irrevocable direction of the Noteholder, the principal amount of that Note in subscription for Ordinary Shares'. On issue of the Notes, HIH NZ also issued an Allotment Certificate which acknowledged the indebtedness of HIH NZ in respect of the Notes. As at the date of liquidation, 42,620,000 Notes had been issued with a Face Value of AUD$213.1 million (ie AUD$5 per Note). HIH NZ and HIH went into liquidation in July and August 2001 respectively and remain in liquidation. In November 2007, Perpetual (in its own capacity and as trustee on behalf of the Noteholders) served a notice of termination on HIH NZ, terminating each of the Notes Contracts and treating HIH NZ's insolvency as a repudiation of the Notes Contracts, by reason of its continuing failure to redeem each Note for an amount equal to its Face Value and to then apply the redemption monies payable to the Noteholders to subscribe for Ordinary Shares in HIH.  In Federal Court proceedings *McGrath v Perpetual Trustee Co Ltd* (2008) 66 ACSR 210, commenced by the liquidators of HIH in 2007, Graham J held, inter alia, that Perpetual and the Noteholders were entitled to terminate the Notes Contracts on the basis that HIH's failure to redeem and convert the Notes was a repudiation. Perpetual then submitted a creditor's claim under section 304(1) of the Companies Act 1993 (NZ), being for NZD$277,304,142.50, the Face Value of the Notes. The liquidator of HIH NZ rejected the claim. By interlocutory application to the High Court of New Zealand, Perpetual sought an order reversing the decision of the liquidator of HIH NZ. Those proceedings were stayed in October 2011, pending the resolution of the Australian proceedings. **(c) Decision** Perpetual argued that the accrued right of the Noteholders is as a creditor of HIH NZ for the Face Value of the Notes, such that the Noteholders can expect to receive a dividend of approximately 24 cents in the dollar in the winding up of HIH NZ. HIH NZ argued that the accrued right of the Noteholders is merely a claim in damages against HIH NZ and no more, in which case it is agreed that the claim is of no value and that the Noteholders would receive nothing. The Court found in favour of HIH NZ. **(i) No right to redeem for cash** Consistent with the Prospectus, Stevenson J found that on a proper construction of the Trust Deed, there was no provision giving the Noteholders a right to redeem the Notes for cash or to otherwise call for repayment of the amount subscribed for the Notes, except as provided for in two specific circumstances under Conditions 12.1 and 12.2, neither of which gave rise to much concern in the proceedings as the rights available to HIH NZ in both Conditions were not exercised. **(ii) Right to conversion** Although the Noteholders had no right to redeem their Notes for cash, Stevenson J held that they had a right to call for conversion of the Notes into Ordinary Shares in HIH:* on any 'Conversion Date' (in effect quarterly) during the Conversion Period; that is, before 12 June 2003; or
* by serving a 'Conversion Notice' within 20 business days of any 'Conversion Event', which included any 'Event of Default'.

Notwithstanding the mechanisms in place for Noteholders to convert their Notes, Condition 12.3 of the Trust Deed further provided that '[i]f [HIH NZ] elects not to redeem all the Notes for cash pursuant to Condition 12.2 all Notes outstanding and not converted at the End of the Conversion Period must be automatically converted'. Condition 12.3 of the Trust Deed's use of the words 'must be automatically converted' rather than, for example, 'are automatically converted', was construed by the Court as suggesting that the parties contemplated that some steps were to be taken by a party, being HIH NZ, to bring about the result that the Notes were 'automatically converted' into Ordinary Shares in HIH. Stevenson J further noted that:* Pursuant to the operation of Condition 6.2, HIH NZ was obliged to effect the conversion within 20 business days of the end of the Conversion Period, being 12 June 2003.
* Condition 12.3 mandated that the Notes 'must be automatically' converted into shares. The conjunction of the words 'must be' and 'automatically' led his Honour to conclude that the parties intended that the word 'automatically' have the effect that, although HIH NZ had the obligation to effect the conversion, it was to be done 'automatically' in the sense of without the need for any notice from the Noteholders.
* Although not specified in Condition 12.3, conversion was to be 'into the number of Ordinary Shares in HIH' determined in accordance with Condition 6.5, which provided for a 'two step process' in the larger process of conversion, namely redemption of the Notes for Face Value, and application of the proceeds of the redemption in subscription for Ordinary Shares in HIH.

The obligation of HIH NZ to 'automatically convert' outstanding Notes was enlivened as a result of its liquidation, notwithstanding that it was unable to comply with that obligation. Having failed to perform its obligation, Stevenson J found that HIH NZ thereby repudiated its obligations under the Notes Contract, the breach of which provided the basis for Perpetual to validly terminate the Notes Contracts. As a result, the Noteholders are entitled to damages to compensate for the loss they have suffered by reason of the Notes not being converted to Ordinary Shares in HIH. **(iii) Are the Noteholders creditors of HIH NZ? Clause 2A.1** Clause 2A.1 was held to be of critical importance in considering whether the Noteholders are creditors of HIH NZ. Consistent with the Allotment Certificate, subclause 2A.1(a) provided that HIH NZ acknowledged it was 'indebted' to Perpetual in respect of the 'Moneys Owing from time to time'. Despite the language used, Stevenson J stated that these acknowledgements of 'indebtedness' must be seen in the context of the Trust Deed as a whole. His Honour found that the 'indebtedness' of HIH NZ to the Noteholders was subject to the very significant qualification, referred to above, that the Noteholders could not call for repayment to them of the 'debt', that is the moneys subscribed for the Notes. Only HIH NZ (the 'debtor') could redeem the Notes for cash pursuant to Conditions 12.1 and 12.2, and under no other circumstances. As discussed above, the only entitlement given to the Noteholders by the Trust Deed was to call for conversion of the Notes into Ordinary Shares in HIH. As such, although the parties had used the word 'indebtedness' to describe their relationship, Stevenson J held that it was clear from their agreement that the Trust Deed would govern their relationship, and from its terms, that they did not intend their relationship to be a debtor-creditor relationship in the conventional sense. Redemption of the Notes, leading to the repayment to Noteholders, was a matter entirely for HIH NZ's discretion and the Noteholders could only recoup their investment if HIH NZ chose to return it to them. Therefore, the Noteholders could not be held to be creditors and they were never entitled to assert that HIH NZ was indebted to them for the Face Value of the Notes. Subclause 2A.1(a) must also be read in light of subclause 2A.1(b) which provided that HIH NZ 'must, subject to any obligation of [HIH NZ] to convert the Notes to Ordinary Shares' pay the 'Principal Moneys' to Perpetual. As discussed above, Stevenson J was satisfied that HIH NZ became obliged to convert the Notes to Ordinary Shares in HIH by operation of Condition 12.3, such that even if, contrary to his Honour's findings, HIH NZ otherwise had an obligation to pay the 'Principal Moneys' to Perpetual on behalf of the Noteholders, it ceased to have that obligation upon it becoming obliged to convert the Notes by operation of Condition 12.3.etailed Contents**5.13** **Reinstatement of a company: When is a person aggrieved and is it just for the company to be reinstated?**  (By Steven Grant, Minter Ellison) Re Brockweir Pty Ltd [2012] VSC 225, Supreme Court of Victoria, Sifris J, 4 June 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2012/225.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/225.html%22%20%5Ct%20%22_new) **(a) Summary** This case provides useful guidance as to the matters which may be considered by a Court upon hearing an application to reinstate a company by a person who was aggrieved by its deregistration; namely whether a person is aggrieved and is it just for the company to be reinstated. **(b) Facts**   Brockweir Pty Ltd (deregistered) ('the Company') was trustee of the Swanston Street Unit Trust which was terminated in accordance with the trust deed.  Prior to 10 April 2000, the plaintiffs or their predecessors in title had entered into contracts of sale to purchase lots on an unregistered plan of subdivision relating to 227 Collins Street from the Company.  On 10 April 2000, a plan of subdivision was registered in respect of the land and Owners' Corporation No. PS425082B ('the Owners Corporation') was created pursuant to the provisions of the [Subdivision Act 1988 No. 53 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=242" \t "_default).   On the date that the Owners' Corporation was created, the Company was its sole member and the Owners' Corporation held its first meeting.  In that meeting, the Company procured the Owners' Corporation (as licensor) to enter into two licence agreements with the Company (as licensee), in respect of part of the common property of the Owners' Corporation.  Each licence was for a fee of $1.00 per year for an indefinite term, by which the Owners' Corporation licensed to the Company parts of the common property, being the roof and the walls of the property.  Subsequently, the Company entered into two more financially lucrative licence agreements with third parties, being a Roof Licence and a Signage Licence. As registered proprietors of certain lots, the plaintiffs became members of the Owners' Corporation on the date of settlement of their respective contracts and owners as tenants in common and shares proportional to their lot entitlement in the common property of the Owners Corporation.  The Company was deregistered on 16 May 2010. The plaintiffs filed a statement of claim on 3 September 2010 which was not served on the Company and was stale as it had not been served.  In the statement of claim, the plaintiffs claimed that:* The Company was the constructive trustee of the common property, including the roof and the external walls of the building, the subject of the Roof Licence and the Signage Licence respectively, which it held on trust for those persons who had entered into contracts of sale for the lots.
* As a constructive trustee, the Company owed the plaintiffs obligations in equity not to place itself in a position of conflict or to profit from contracts entered into relating to the common property.
* The Company breached that obligation.
* The Company holds on trust for the plaintiffs, such parts of the moneys that it has received from the licensees of the Roof Licence and Sign Licence, and that it received upon selling its interests in those licences, as was referable to the plaintiffs' proportionate share in the common property as determined by lot entitlements, or alternatively was liable to pay such amounts by way of equitable compensation to the Plaintiffs.

The plaintiffs made an application under section 601AH(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) for the reinstatement of registration of Brockweir Pty Ltd (deregistered) ('the Company') on the basis that they had a claim against the Company.  Section 601AH(2) provides that the Court may make an order that ASIC reinstate the registration of a company if an application for reinstatement is made by the Court by a person aggrieved by the deregistration.  The former directors of the Company made submissions to the effect that any claim against the Company would be futile and that the application for reinstatement should be dismissed.  The application came on for hearing before Efthim AsJ on 7 March 2012.  Without formally giving the directors leave to appear, his Honour heard submissions and ordered the reinstatement of the Company.   The former directors appealed the decision to reinstate the Company **(c) Decision**  Sifris J noted that for the Company to be reinstated, the plaintiffs must demonstrate that they are aggrieved by the deregistration, and that it is just that the Company be reinstated.  Sifris J considered each of these points in turn. **(i) Were the plaintiffs aggrieved?** Sifris J noted that in order to assess whether the plaintiffs are aggrieved parties, it is not necessary to embark upon a detailed and exhaustive analysis of the facts and the law underpinning the claim.  The threshold is low and the assessment needs to be dealt with in a summary way.  As long as the claim is not plainly hopeless and bound to fail, it should proceed, subject to other relevant matters. Sifris J considered that the nature and extent of the interests of the plaintiffs as purchasers, the time of their accrual, whether it was affected by the granting of the licences and whether and at what stage the Company had fiduciary or other duties, were all matters that were not capable of immediate resolution.  Rather, the issues were complex and it could not be said that any claim was plainly hopeless.  Although there may be difficulties with the present formulation of the claim, it did not follow that the claim is plainly hopeless. **(ii) Was it just for the Company to be reinstated?** Sifris J held that it was not just that the registration of the Company be reinstated at the stage when the matter was heard, for the following reasons. Firstly, re-creation of the corporate existence of the Company was not necessary.  Although any proceeding would necessitate a finding against the Company and perhaps others, it was not a relevant or necessary party by this fact alone.  Liability on the part of the Company could be established in its absence. The liability of the Company in the circumstances is, for practical purposes, of little consequence.   It was only a bare trustee or a trustee with a paid up capital of $2.00.  Unless it was entitled to indemnity out of trust assets, any proceeding was pointless.  If the existence and extent of any indemnity were made part of the proceeding, it would not require the joinder or presence of the Company.  Accordingly, there was very little added advantage in reinstating the Company and having it as a party without means, simply for the sake of a judgment.  The suggested advantage, namely that a liquidator would have the ability to conduct any relevant public examination and further, that the company would be obliged to make discovery, did not constitute a sufficient reason to reinstate the Company.  If the plaintiffs were successful against the absent Company, the plaintiffs could still pursue any right of indemnity - presently an asset held by ASIC - that would give the Company, as an incident of such a right, an equitable proprietary interest in the assets of the trust.  This process would be part of the subrogated right held by ASIC. Secondly, at the time of the Company's deregistration, there was no indication that a proceeding of the kind now sought would be agitated by the plaintiffs.  In fact, it may be said that the contrary was the position.  A meeting of members of the Owners' Corporation was held on 17 February 2010, to consider a proposal to commence a proceeding of the kind now sought to be agitated.  However, no resolution was passed and the directors of the Company then took steps to deregister the Company.  The directors took the view after reading the minutes of that meeting that no claim would be made on behalf of the Owners' Corporation.  If reinstated, the directors would presumably need to take an active role in the litigation and procure necessary funding. Thirdly, there were some minor matters which made it just that the registration of the Company not be reinstated, including the fact that there had been an inordinate and inexcusable delay on the part of the plaintiffs.  Whilst the claim may not be statute barred, the factual position was known over ten years before these proceedings. As the registration of the Company was reinstated after the decision of Efthim AsJ, Sifris J ordered that the register of companies be rectified to delete the registration of the Company.etailed Contents**5.14** **Guarantor not liable under guarantees because it is unconscionable for bank to enforce guarantees: Operation of the Garcia Principles** (By Ravinder Arora, Freehills) Bank of Western Australia Ltd v Abdul [2012] VSC 222, Supreme Court of Victoria, Croft J, 1 June 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2012/222.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/222.html%22%20%5Ct%20%22_new) **(a) Summary**The Bank of Western Australia ('Bankwest') applied for a summary judgment in relation to the recovery of a debt owed by the defendants, Mr and Mrs Abdul. This application was denied. On appeal, the defendants sought Court determination of four questions to expedite the resolution of the dispute. Those questions formed the substance of the proceedings. Croft J held that the certificate of indebtedness ('Certificate') had been accurately calculated and was sufficient evidence to prove the amount of debt payable by the defendants. Further, that Bankwest was not directly liable for the conduct of the receivers and managers because the agency relationship had not been displaced. His Honour found that Mrs Abdul ('the second defendant') was absolved of liability because it would be unconscionable for Bankwest to seek enforcement of the guarantees.**(b) Facts**Mr  Abdul ('the first defendant'), was the director of four companies ('the Abdul Companies'). The second defendant was a director of one company. The first defendant controlled the management and financial affairs of all four companies. In May 2007, Bankwest advanced moneys in favour of the Abdul companies, including a personal facility (the 'Abdul facility'). The second defendant signed guarantees in relation to three other facilities. All four companies are now in liquidation. On 1 April 2010, a writ was issued for the recovery of $10,676,328, being the total amounts owing under all facilities less the amount remitted to Bankwest by the receivers and managers. Bankwest relied on a certificate of indebtedness under clause 18.2 of Bankwest's General Terms for Business Lending ('Clause 18.2') to prove the amount payable by the defendants.The second defendant claimed that she should be absolved from liability by operation of the principles enunciated by the High Court in Garcia v National Australia Bank (1998) 194 CLR 395 ('Garcia Principles') and, in the alternative, due to unconscionability on the part of Bankwest. Bankwest applied for a summary judgment under Order 22 of the Supreme Court (General Civil Procedure Rules) 2005. On 23 November 2011, Efthim J refused the application. Bankwest sought leave to appeal and the parties agreed to Court determination of the four questions set out below.**(c) Decision**Croft J considered the following questions as summarised below:**(i) Does the Certificate provide conclusive evidence of the amounts payable by the defendant?**Croft J found that the Certificate was sufficient evidence of the amounts payable. His Honour referred to the High Court decision of *Dobbs v National Bank of Australasia Limited* (1935) 53 CLR 643, 651 ('Dobbs'). The principle in Dobbs is that the certificate provides evidence of the material fact of the debt. In *Permanent Trustee Company Ltd v Gulf Import and Export Co* [2008] VSC 162, Hansen J applied Dobbs and found the object of the clause is a means to establish the legal existence and amount of the debt, unless proven to be false. The proper approach is to ascertain the objective intention of the parties. Croft J found that, in light of interrelated provisions and upon proper construction of Clause 18.2, the certificate operates to establish the fact of the debt and shifts the onus to the defendants to prove the certificate is incorrect.**(ii) Had the defendants proven that the sum in the Certificate, showing the amounts payable, had been calculated incorrectly?**His Honour concluded that the Certificate had been accurately calculated. What was decisive was that the funds received and evidenced in bank statements matched the figure in the cost schedule. The defendants could not challenge the funds that Bankwest had accepted and applied.**(iii) Could Bankwest be held directly liable for the conduct of the receivers and managers?**His Honour held that the agency relationship was not displaced and therefore, Bankwest was not liable for the actions of the receivers and managers. Croft J referred to the judgement of Einstein J in *State Bank of New South Wales Ltd v Chia* (2000) 50 NSWLR 587, 625 ('Chia'), where it was held the receiver is an agent of the mortgagor. The principle in Chia is that the defendants must show that the bank was 'heavily involved' in the performance of the activities of the receivers and managers to be liable for their actions. According to Chia, 'heavily involved' indicates directing when and how the receiver should exercise its powers.Communication between the mortgagee and the receivers and managers is insufficient involvement. The receivers and managers have a duty to keep the mortgagee informed. The degree of communication permitted rests on factors such as the nature of the property, the size, complexity and nature of the receivership task.  **(iv) Should the second defendant be absolved of liability under the Garcia Principles?**His Honour found that the second defendant was absolved from liability for the guarantees and under the Abdul facility under the Garcia Principles. Croft J found the four elements of the Garcia Principles were satisfied as follows:* The second defendant lacked understanding of the purport and effect of the transaction: the urgency in the execution, the thick pile of paper and tags for signature were all considered to be decisive factors;
* The second defendant was a volunteer: being a director is not an obstacle to being a volunteer. She received no direct and immediate gain;
* Bankwest knew the defendants were married; and
* Bankwest failed to explain the transaction: Bankwest took no steps to provide warnings or allow adequate time to read, understand or seek legal advice in relation to the guarantees.

In addition, Bankwest could not rely on statutory declarations executed by the second defendant stating that she obtained independent legal and financial advice, because:* The requirement that the statutory declaration must be signed in the presence of an authorised witness had not been satisfied;
* The guarantees were dated after the declarations and the declarations used past tense in relation to the guarantees; and
* As a matter of policy, Bankwest 'should not be able to defeat the equity in favour of the second defendant by adding an additional document to the pile to be signed that effectively purports to waive her rights'.

The defendants attempted to characterise the Abdul facility as a constructive suretyship. Bankwest argued that this would extend the application of the Garcia Principles beyond guarantees. Croft J noted that Nettle JA in *Narain v Euroasia (Pacific) Ltd* (2009) 26 VR 387 did not restrict the Garcia Principles to guarantees. His Honour found that the Abdul facility was a contract of suretyship in relation to the second defendant. Even if funds travel through a joint account, one party may be considered a volunteer if they are not interested in the third party transaction. In addition, it was submitted with reference to *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 that the second defendant was under a special disadvantage and Bankwest had engaged in unconscionable conduct. Bankwest was on notice of the second defendant's lack of understanding of business and financial matters which constituted her special disadvantage. Contrary to the Code of Banking Practice, Bankwest failed to ensure the second defendant obtained independent financial and legal advice. Croft J found it unconscionable for Bankwest to seek enforcement of the guarantees.  etailed Contents |

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