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We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | |  | |      |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%231) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1 Report on corporate governance following the global financial crisis**  The United Nations Conference on Trade and Development (UNCTAD) has published a report titled "Corporate Governance in the Wake of the Financial Crisis: Selected International Views". The chapters in the report are:  Review of regulatory developments in the wake of the financial crisis  The corporate governance lessons from the financial crisis  The financial crisis: what are the corporate governance lessons for emerging market countries?  Governance of markets matters  Corporate governance still a matter for shareholders  Creating responsible financial markets  From conformance to performance: linking governance, strategy and sustainability.  The report is available on the [UNCTAD website](http://www.unctad.org/Templates/webflyer.asp?docid=14591&intItemID=2068&lang=1&mode=downloads" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.2 Principles for financial market infrastructures**  On 10 March 2011, new and more demanding international standards for payment, clearing and settlement systems were issued for public consultation by the Committee on Payment and Settlement Systems (CPSS) and the Technical Committee of the International Organization of Securities Commissions (IOSCO).  The new standards (called principles) are designed to ensure that the essential infrastructure supporting global financial markets is even more robust and thus even better placed to withstand financial shocks than at present. They are set out in a consultative report "Principles for Financial Market Infrastructures" which contains a single set of 24 principles designed to apply to all systemically important payment systems, central securities depositories, securities settlement systems, central counterparties and trade repositories (collectively financial market infrastructures or FMIs). These FMIs collectively record, clear and settle transactions in financial markets.  When finalised, the new principles will replace the three existing sets of CPSS and CPSS-IOSCO standards, the Core principles for systemically important payment systems (2001); the Recommendations for securities settlement systems (2001); and the Recommendations for central counterparties (2004). The CPSS and IOSCO believe that a single set of principles will provide greater consistency in the oversight and regulation of FMIs worldwide.  Compared with the current standards, the new principles introduce more demanding requirements in many important areas including:  the financial resources and risk management procedures an FMI uses to cope with the default of participants;  the mitigation of operational risk; and  the links and other interdependencies between FMIs through which operational and financial risks can spread.  There are also principles covering issues that are not fully addressed by the existing standards. These include new principles on segregation and portability, tiered participation and general business risk.  Published along with the report is a cover note which sets out some specific issues on which the committees are seeking comments during the public consultation period.  The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD350.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.3 Consultation on suspension of CIS redemptions**  On 8 March 2011, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a consultation report, "Principles on Suspensions of Redemptions in Collective Investment Schemes", which analyses how different jurisdictions' regulatory regimes address the suspension of redemptions by open-ended collective investment schemes (CIS) and proposes principles which provide general standards for how regulatory regimes should approach and oversee suspension of redemptions.  The principles generally cover all types of open-ended CIS which offer a continuous redemption right, and apply irrespective of whether they are offered to institutional or retail investors. They are addressed to those entities responsible for the overall operation of the CIS and in particular its compliance with the legal/regulatory framework in the respective jurisdiction and thus for the implementation of the principles. The delegation of activities may not be used to circumvent the principles and there should be compliance with the principles, whether activities are performed directly or through a third party.  **(a) Management of liquidity risk**  1. The responsible entity should ensure that the degree of liquidity of the open-ended CIS it manages allows it in general to meet redemption obligations and other liabilities.  2. Before and during any investment, the responsible entity should consider the liquidity of the types of instruments and assets and its consistency with the overall liquidity profile of the open-ended CIS. For this purpose, the responsible entity should establish, implement and maintain an appropriate liquidity management policy and process.  **(b) Criteria/reasons for the suspension**  3. Suspension of redemptions by the responsible entity may be justified only in exceptional circumstances provided such suspension is in the best interest of all unitholders within the CIS or if the suspension is required by law.  **(c) Decision to suspend**  4. The responsible entity should have the operational capability to suspend redemptions in an orderly and efficient manner.  5. The decision by the responsible entity to suspend redemptions, in particular the reasons for the suspension and the planned actions should be appropriately:  documented;  communicated to competent authorities and other relevant parties; and  communicated to unitholders.  **(e) During the suspension**  6. During the suspension of the redemptions, the responsible entity should generally not accept new subscriptions. Subscriptions cannot be accepted if a reliable, meaningful and robust valuation of the assets is not possible.  7. The suspension should be regularly reviewed by the responsible entity. The responsible entity should take all necessary steps in order to resume normal operations as soon as possible having regard to the best interest of unitholders.  8. The responsible entity should keep the competent authority and unitholders informed throughout the period of suspension. The decision to resume normal operations should also be communicated immediately.  Implementation of the principles may vary from jurisdiction to jurisdiction, depending on local conditions and circumstances.  The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD349.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.4 IOSCO survey results on implementation of securitisation recommendations**  On 4 March 2011, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published the results of a survey on the implementation of its September 2009 recommendations with respect to securitisation and credit default swap markets. The report is titled "Task Force on Unregulated Markets and Products - Implementation Report".  The report shows that all jurisdictions surveyed by the Task Force had at least one, if not multiple initiatives in progress to implement the recommendations on: disclosure; the retention of economic interest (skin in the game); investor suitability; international coordination; and regulatory cooperation.  The major themes which emerged from the Task Force's review were that:  The skin in the game concept is endorsed by most jurisdictions at this time. Furthermore, the majority of member jurisdictions are expected to implement the requirement for originator/sponsors to retain long term economic exposure to the securitisation.  In many instances, current laws, regulations or market practices for offering documents often covered elements of disclosure and third party service providers. Most jurisdictions are either enhancing or considering enhancements for these areas.  In relation to investor suitability, most jurisdictions are refining the definition of a sophisticated or wholesale investor. Depending on the jurisdiction, a greater burden will be put on the issuer/seller (to determine investor suitability) or on the investor (responsibility to buy products they understand).  Industry bodies are working with regulators on various unregulated markets and products related initiatives.  The Technical Committee, based on the survey responses and subsequent discussions, has made two further recommendations:  TFUMP Recommendation 1 - IOSCO recommends regulators encourage improvements in disclosure standards for private or wholesale offerings of securitised products; and  TFUMP Recommendation 2 - IOSCO recommends regulators engage in international cooperation toward convergence of national regulations, where desirable, and review progress regularly.  The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD348.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.5 Financial Reporting Council publishes new guidance on board effectiveness**  On 3 March 2011, the UK Financial Reporting Council (FRC) published new guidance to encourage the boards of listed companies to consider how they can lead their companies most effectively.  "Guidance on Board Effectiveness" is one of a series of guidance notes issued by the FRC to assist companies in applying the principles of the UK Corporate Governance Code. It reflects the changes that were made to the Code in 2010, such as the greater emphasis placed on the role of the chairman and the importance of getting the right balance on the board.  The guidance relates to the sections of the Code that deal with leadership and the effectiveness of the board. The guidance deals with:  The role of the board and directors (an effective board, the role of the chairman, the role of the senior independent director, the role of executive directors, and the role of non-executive directors);  Board support and the role of the company secretary;  Decision making;  Board composition and succession planning;  Evaluating the performance of the board and directors;  Audit, risk and remuneration; and  Relations with shareholders.  The new guidance replaces "Good Practice Suggestions from the Higgs Report" (known as the Higgs Guidance), which has been withdrawn.  The guidance is available on the [FRC website](http://www.frc.org.uk/images/uploaded/documents/Guidance%20on%20board%20effectiveness%20FINAL5.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.6 SEC proposes rules on disclosure of incentive-based compensation arrangements at financial institutions**  On 2 March 2011, the United States Securities and Exchange Commission (SEC) proposed a rule that would require certain financial institutions to disclose the structure of their incentive-based compensation practices, and prohibit such institutions from maintaining compensation arrangements that encourage inappropriate risks.  The proposed rule stems from section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010, which requires the SEC and several other agencies to jointly write rules and guidelines in this regard. The SEC-regulated financial institutions affected by the rulemaking include broker-dealers and investment advisers with US$1 billion or more in assets.  The SEC's proposed rules for certain financial institutions would:  require reports related to incentive-based compensation that they would file annually with SEC;  prohibit incentive-based compensation arrangements that encourage inappropriate risk-taking by providing excessive compensation or that could lead to material financial loss to the firm;  provide additional requirements for financial institutions with US$50 billion or more in assets, including deferral of incentive-based compensation of executive officers and approval of compensation for people whose job functions give them the ability to expose the firm to a substantial amount of risk; and  require them to develop policies and procedures that ensure and monitor compliance with requirements related to incentive-based compensation.  **(a) Background**  In 2010, the Dodd-Frank Act mandated that financial regulators jointly develop rules or guidelines governing incentive-based compensation practices at certain financial institutions with total assets of US$1 billion or more. In particular, the Act requires the SEC, the Federal Reserve, OCC, FDIC, OTS, FHFA, and the NCUA, to jointly write rules or guidelines that:  require these "covered financial institutions" to disclose to their appropriate federal regulator the structure of their incentive-based compensation arrangements so the regulator can determine whether such compensation is excessive or could lead to material financial loss to the firm; and  prohibit any type of incentive-based compensation that the regulators determine encourages inappropriate risks by providing excessive compensation or that could lead to material financial loss to the covered firm.  The proposed rule, which is substantially similar from agency to agency, contains technical differences to account for the different entities that the various agencies regulate. Each agency must individually review and approve the proposed rule for public comment before jointly publishing the proposal in the Federal Register.  **b) The proposal**  The proposed rule, which would apply to brokers, dealers or investment advisers with assets of at least US$1 billion, contains three elements.  **(i) Disclosures about incentive-based compensation arrangements**  Under the proposed rules, a covered financial institution would be required to file annually with its appropriate federal regulator a report describing the firm's incentive-based compensation arrangements. The information submitted would include but not be limited to:  a narrative description of the components of the firm's incentive-based compensation arrangements;  a succinct description of the firm's policies and procedures governing its incentive-based compensation arrangements; and  a statement of the specific reasons as to why the firm believes the structure of its incentive-based compensation arrangement will help prevent it from suffering a material financial loss or does not provide covered persons with excessive compensation.  **(ii) Prohibition on encouraging inappropriate risk**  **General prohibitions**  The proposed rule applies to executive officers, employees, directors, or principal shareholders - "covered persons" - at a covered financial institution. Under the proposed rule, a covered financial institution would be prohibited from establishing or maintaining an incentive-based compensation arrangement that encourages inappropriate risks by providing covered persons with excessive compensation, or that could lead to material financial loss.  The proposal states that incentive-based compensation arrangements would be deemed to encourage inappropriate risks unless the incentive-based compensation arrangements meet certain standards, which are drawn from standards established in prior legislation and from guidance published by US bank regulators last July.  **Prohibitions for larger financial institutions**  The proposed rule lays out more specific requirements for executive officers and certain other designated individuals at financial institutions with US$50 billion or more in total consolidated assets. For executive officers at these larger firms, the proposed rule would require the firms to defer for three years at least 50% of any incentive-based compensation for executive officers - and award such compensation no faster than on a pro rata basis. Any incentive-based compensation payments must be adjusted for losses incurred by the covered financial institution after the compensation was initially awarded.  The proposed rule recognises that some employees of a firm other than the executive officers may have the ability to impact the risk profile of the covered financial institution. Accordingly, at larger covered financial institutions, the proposed rule would set forth additional requirements for employees exposing such institution to risk of significant loss.  Under the proposed rule, the board of directors or a committee of the board would be charged with identifying the covered persons, other than executive officers, that individually have the ability to expose the firm to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance. This could include, for example, a trader with large position limits relative to the institution's overall risk tolerance. Once the board identifies such covered persons, the board or a committee would need to approve the incentive-based compensation arrangement for each such person.  **(iii) Establishing policies and procedures**  Under the proposed rule, a covered financial institution would be barred from establishing an incentive-based compensation arrangement unless the arrangement has been adopted under policies and procedures developed and maintained by the institution and approved by its board of directors.  The proposed rule recognises the diversity of institutions covered by the rule and explicitly states that the policies and procedures should be commensurate with the size and complexity of the organization, as well as the scope and nature of its use of incentive-based compensation.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.7 SEC proposes clearing agency standards for operations and governance**  On 2 March 2011, the United States Securities and Exchange Commission voted to propose rules in accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 and the Securities Exchange Act of 1934 regarding the operation and governance of clearing agencies.  The Commission also voted to reopen the public comment period for rules proposed in October 2010 to mitigate conflicts of interest for security-based swap clearing agencies, security-based swap execution facilities, and national securities exchanges that post or make available for trading security-based swaps.  Clearing agencies generally act as a middleman to the parties in a securities transaction. They play a critical role in the securities markets by ensuring that transactions settle on time and on the agreed-upon terms.  Among the things that the proposed rules would require of clearing agencies:  maintain certain standards with respect to risk management and operations;  have adequate safeguards and procedures to protect the confidentiality of trading information;  have procedures that identify and address conflicts of interest;  require minimum governance standards for their boards of directors;  designate a chief compliance officer; and  disseminate pricing and valuation information if they perform central counterparty services for security-based swaps.  Further information is available on the [SEC website](http://www.sec.gov/news/press/2011/2011-58.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.8 APRA clarifies implementation of global liquidity standards in Australia**  On 28 February 2011, the Australian Prudential Regulation Authority (APRA) clarified the treatment of high‑quality liquid assets it will apply when implementing the new global liquidity standard announced by the Basel Committee on Banking Supervision (Basel Committee) in December 2010.  The new global liquidity standard - known as the Liquidity Coverage Ratio (LCR) requirement - aims to ensure that banking institutions hold a stock of high‑quality liquid assets sufficient to survive an acute stress scenario lasting for one month. The Basel Committee defines two categories of assets that can be included in this stock:  Level 1 assets are limited to cash, central bank reserves and highest‑quality sovereign or quasi‑sovereign marketable instruments that are of undoubted liquidity, even during stressed market conditions; and  Level 2 assets (which can comprise no more than 40% of the total stock) are limited to certain other sovereign or quasi‑sovereign marketable instruments, as well as certain types of corporate bonds and covered bonds, that also have a proven record as a reliable source of liquidity even during stressed market conditions.  APRA has been reviewing a range of marketable instruments denominated in Australian dollars against the Basel Committee's criteria for high‑quality liquid assets. This review has taken into account the amount of the instrument on issue, the degree to which the instrument is broadly or narrowly held, and the degree to which the instrument is traded in large, deep and active markets. APRA has given particular attention to the liquidity of the instrument during the market disruptions of the global financial crisis.  Based on this review, APRA has determined that, at this point of time:  the only assets that qualify as Level 1 assets are cash, balances held with the Reserve Bank of Australia, and Commonwealth Government and semi‑government securities; and  there are no assets that qualify as Level 2 assets.  The LCR requirement comes into effect on 1 January 2015. During the preceding "observation period", the Basel Committee will be testing a number of additional qualitative and quantitative criteria to evaluate the liquidity characteristics of Level 2 assets. Depending on the outcome of this work and on market developments over this period, it is possible that some instruments may become eligible as Level 2 assets, or the range of qualifying Level 1 assets may expand, by the time the LCR requirement is introduced in Australia.  The treatment of Level 1 and Level 2 assets for purposes of the LCR requirement does not affect the set of instruments that the Reserve Bank of Australia (RBA) will accept as qualifying collateral for its committed secured liquidity facility. Qualifying collateral will comprise all assets eligible for repurchase transactions with the RBA under normal market conditions (see joint APRA/RBA media release of 17 December 2010). Accordingly, APRA does not anticipate that its treatment of Level 1 and Level 2 assets will have a material impact on the status of marketable instruments in the Australian capital market.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.9 The role of securities regulators in mitigating systemic risk**  On 25 February 2011, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a discussion paper titled "Mitigating Systemic Risk - A Role for Securities Regulators", which focuses on the role securities regulators play in addressing systemic risk.  The paper aims to promote discussion amongst securities regulators on the ways in which systemic risk intersects with their mandates and to provide insight into how IOSCO and its members can identify, monitor, mitigate and manage systemic risk.  IOSCO has identified reducing systemic risk as one of the three objectives of securities regulation and in July 2010 it published two new principles of securities regulation aimed at addressing systemic risk, namely:  Principle 6 - The regulator should have or contribute to a process to monitor, mitigate and manage systemic risk, appropriate to its mandate; and  Principle 7: The regulator should have or contribute to a process to review the perimeter of regulation regularly.  The discussion paper builds on these principles and begins a process of developing a methodology for the identification, analysis, monitoring and mitigation of systemic risk as well as the promotion of financial system stability.  The discussion paper puts into context the role of securities regulators with respect to systemic risk: the primary ways in which it can develop in securities markets; approaches and indicators that securities regulators may use in seeking to identify sources of systemic risk; and guidance on how securities regulators can act, both to reduce the opportunity for systemic risk to arise and to reduce its impact. The paper's preliminary findings are that:  1. Disclosure and transparency are critical to identifying the development of systemic risk and to arming regulators with the information needed to take action to address it. Transparency in markets and products is crucial to understanding and mitigating systemic risk, in addition to allowing market participants to better price risk. Securities regulators have a particular responsibility and interest in promoting transparency at the market level as well as adequate disclosure at the product and market participant level.  2. Robust regulatory supervision of business conduct is essential to managing conflicts of interest and the build-up of undesirable incentive structures within the financial system. Without it, incentives can quickly become distorted with drastic consequences such as increased leverage and risk in the system. With it, investor confidence is likely to provide greater stability to the market.  3. Financial innovation and its implications for financial stability should be a focus for securities regulators. Innovation should be encouraged and facilitated where it has the potential to improve the efficiency of the markets or to bring useful products and new participants to the market. Innovation which involves opacity or improper risk management should be carefully monitored.  4. Given the central role of markets in the overall financial system and their capability to generate and/or transmit risks, securities regulators should work with other supervisors to improve the overall understanding of the economics of the securities markets, their vulnerabilities and the interconnections with the broader financial sector and the real economy. Sharing market information and knowledge will be essential to deliver a truly efficient regulatory response to systemic risk.  5. It is important for securities regulators to develop key risk measurements relevant to systemic risk arising within securities markets, and improve their understanding and application of tangible steps to mitigate identified systemic risk.  The discussion paper is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD347.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.10 UK report on women in the boardroom**  On 24 February 2011, Lord Davies released his report titled "Women on Boards". The following is an extract from the executive summary of the report:  "In 2010 women made up only 12.5% of the members of the corporate boards of FTSE 100 companies. This was up from 9.4% in 2004. But the rate of increase is too slow. The business case for increasing the number of women on corporate boards is clear. Women are successful at university and in their early careers, but attrition rates increase as they progress through an organisation. When women are so under-represented on corporate boards, companies are missing out, as they are unable to draw from the widest possible range of talent. Evidence suggests that companies with a strong female representation at board and top management level perform better than those without and that gender-diverse boards have a positive impact on performance. It is clear that boards make better decisions where a range of voices, drawing on different life experiences, can be heard. That mix of voices must include women. The importance of improving the gender balance of corporate boards is increasingly recognised across the world. Some countries, including France and Italy, are considering significant action and some, including Norway, Spain and Australia, have made significant steps already.  "A report by the Equality and Human Rights Commission (2008) suggested that at the current rate of change it will take more than 70 years to achieve gender-balanced boardrooms in the UK's largest 100 companies. This pace of change is not good enough. Through our extensive consultations we have found that there are a number of reasons for women's low representation on boards, many well researched and familiar.  "Part of the challenge is around supply - the corporate pipeline. Fewer women than men are coming through to the top level of organisations. Part of the challenge is around demand. There are women in the UK more than capable of serving on boards who are not currently getting those roles.  "'If these challenges are to be met, then Chairmen and Chief Executives of UK companies need to take action, supported by others in the corporate world, including investors and executive search firms. Government must also play a supporting role."  The following recommendations are made in the report:  1. All Chairmen of FTSE 350 companies should set out the percentage of women they aim to have on their boards in 2013 and 2015. FTSE 100 boards should aim for a minimum of 25% female representation by 2015 and it is expected that many will achieve a higher figure. Chairmen should announce their aspirational goals within the next six months (by September 2011). Also it is expected that all Chief Executives will review the percentage of women they aim to have on their Executive Committees in 2013 and 2015.  2. Quoted companies should be required to disclose each year the proportion of women on the board, women in Senior Executive positions and female employees in the whole organisation.  3. The Financial Reporting Council should amend the UK Corporate Governance Code to require listed companies to establish a policy concerning boardroom diversity, including measurable objectives for implementing the policy, and disclose annually a summary of the policy and the progress made in achieving the objectives.  4. Companies should report on the matters in recommendations 1, 2 and 3 in their 2012 Corporate Governance Statement whether or not the underlying regulatory changes are in place. In addition, Chairmen will be encouraged to sign a charter supporting the recommendations.  5. In line with the UK Corporate Governance Code provision B2.4 "A separate section of the annual report should describe the work of the nomination committee, including the process it has used in relation to board appointments". Chairmen should disclose meaningful information about the company's appointment process and how it addresses diversity in the company's annual report including a description of the search and nominations process.  6. Investors play a critical role in engaging with company boards. Therefore investors should pay close attention to recommendations 1-5 when considering company reporting and appointments to the board.  7. Companies should periodically advertise non-executive board positions to encourage greater diversity in applications.  8. Executive search firms should draw up a Voluntary Code of Conduct addressing gender diversity and best practice which covers the relevant search criteria and processes relating to FTSE 350 board level appointments.  9. In order to achieve these recommendations, recognition and development of two different populations of women who are well-qualified to be appointed to UK boards needs to be considered:  executives from within the corporate sector, for whom there are many different training and mentoring opportunities; and  women from outside the corporate mainstream, including entrepreneurs, academics, civil servants and senior women with professional service backgrounds, for whom there are many fewer opportunities to take up corporate board positions.  A combination of entrepreneurs, existing providers and individuals needs to come together to consolidate and improve the provision of training and development for potential board members.  10. A steering board will meet every six months to consider progress against these measures and will report annually with an assessment of whether sufficient progress is being made.  Also on 24 February 2011, the UK Financial Reporting Council (FRC) announced that it will consult on the recommendation addressed to the FRC in Lord Davies' report.  As noted above, Lord Davies recommended that "the Financial Reporting Council should amend the UK Corporate Governance Code to require listed companies to establish a policy concerning boardroom diversity, including measurable objectives for implementing the policy, and disclose annually a summary of the policy and progress made in achieving the objectives".  The UK Corporate Governance Code was amended in June 2010 to state that, for all UK listed companies, "the search for board candidates should be conducted, and appointments made, on merit, against objective criteria and with due regard for the benefits of diversity on the board, including gender".  The FRC will consult on:  whether changes to the Code are an appropriate means of achieving more diverse and more effective boards;  if so, what form those changes should take. The consultation will set out the options, including the amendments recommended by Lord Davies; and the timetable for implementing any amendments to the Code.  The report of Lord Davies is available on the website of the [Department of Business Innovation and Skills](http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.11 Report on regulation of credit rating agencies**  On 24 February 2011, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a report in which it is stated that regulatory programs for credit rating agencies (CRAs) which have been recently implemented or are currently in progress implement the four principles for CRAs as set out in IOSCO's 2003 Statement of Principles Regarding the Activities of Credit Rating Agencies (IOSCO CRA Principles). The four principles address:  quality and integrity in the rating process;  independence and conflicts of interest;  transparency and timeliness of ratings disclosure; and  confidential information.  The report is titled "Regulatory Implementation of the Statement of Principles Regarding the Activities of Credit Rating Agencies" and it reviews CRA supervisory initiatives in Australia, the European Union (EU), Japan, Mexico, and the United States. The review found that while the structure and specific provisions of the different programs may differ, the objectives of IOSCO's CRA Principles are embedded into each of the programs. The principles also provide the building blocks upon which many of the regulatory programs have been based.  The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD346.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.12 Australian government introduces legislation into Parliament granting shareholders additional power over executive remuneration**  On 23 February 2011, the Australian Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP, introduced into Parliament the [Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=121392" \t "default). The Bill implements the Government's response to the recommendations made by the Productivity Commission in its recent inquiry into Australia's remuneration framework. For a summary of the Productivity Commission report on remuneration, see [item 1.13 in Corporate Law Bulletin No 149](http://my.lawlex.com.au/news.asp?id=7611&sp=1" \l "0113" \t "_new) (January 2010).  The Explanatory Memorandum to the Bill identifies the following key features contained in the Bill:  strengthening the non-binding vote on the remuneration report, by requiring a vote for directors to stand for re-election if they do not adequately address shareholder concerns on remuneration issues over two consecutive years. Shareholders will have the opportunity to remove the directors if the company's remuneration report has received a "no" vote of 25% or more at two consecutive annual general meetings;  increasing transparency and accountability with respect to the use of remuneration consultants;  eliminating conflicts of interest by prohibiting directors, executives and their closely related parties from participating in the vote on the remuneration of key management personnel;  ensuring that remuneration remains linked to performance by prohibiting hedging of incentive remuneration by directors and executives;  requiring shareholder agreement for declarations of "no vacancy" at an annual general meeting, should the number of board positions filled be less than the maximum number specified in the company's constitution;  prohibiting proxy holders from "cherry picking" the proxies they exercise, by requiring that any directed proxies that are not voted default to the Chair, who is required to vote the proxies as directed; and  reducing the complexity of the remuneration report by confining disclosures in the report to the key management personnel.  The Government reforms are intended to take effect from 1 July 2011.  The Bill and Explanatory Memorandum are also available on the [Comlaw website](http://www.comlaw.gov.au/" \t "_new).  The Australian Institute of Company Directors has issued a media release in which it states that the Bill is "excessive and fundamentally flawed, particularly in relation to the 'two strikes' and 'no-vacancy' rules". The media release is available on the [Institute's website](http://www.companydirectors.com.au/General/Header/Media/Media-Releases/2011/Pay-laws-excessive-and-fail-to-add-value-for-shareholders" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.13 Study of engagement between companies and investors**  On 22 February 2011, a study of the engagement between investors and public US corporate issuers has found a high and increasing trend of engagement. However, the study also shows a disconnect between investors and issuers in basic areas such as the time frame of engagement, the definition of a successful engagement and, by implication, what engagement itself means. The study also reveals that engagement is either a priority or a non-event for investors: asset owners and asset managers were most likely to report either that they had engaged with more than ten companies in the previous year, or that they had not engaged at all.  The study is titled "The State of Engagement Between US Corporations and Shareholders" and was commissioned by the IRRC Institute and conducted by Institutional Shareholder Services Inc. The report notes that engagement has become a focus of regulatory changes and governance reforms during the past decade, and the fallout from the financial crisis has increased the focus on engagement. The study indicates there is a power shift, and that issuers now appear to be more willing to engage, while investors have more to gain from engagement. Indeed, nearly nine out of ten public companies report having had at least one engagement with its investors during the prior year. Previously, routine engagement referred to quarterly discussions about earnings and corporate strategy that occurred in company-designed forums such as conference calls and analyst meetings. Today, engagement has become a year-round exercise involving dialogue on topics such as executive compensation, boardroom independence, and sustainability. Also, engagement now occurs via a variety of channels including conference calls, meetings, emails, public announcements, telephone calls, and regulatory filings, along with traditional quarterly discussions.  The report's key findings are as follows:  The level of engagement between issuers and investors is high. Approximately 87% of issuers, 70% of asset managers and 62% of asset owners reported at least one engagement in the past year.  The level of engagement is increasing. Some 53% of asset owners, 64% of asset managers, and 50% of issuers said they are engaging more. Virtually none of the investors and only 6% of issuers responded that engagement is decreasing.  Amongst investors, engagement is either a priority or a non-event. A bimodal, or "barbell", distribution was evident, with 28% of asset owners and 34% of asset managers reporting engagements with more than ten companies. On the other hand, about 45% of asset owners and 43% of asset managers indicated they did not initiate any engagement activity whatsoever.  Despite the headlines that result from high-profile conflicts between issuers and investors, the vast majority of engagements between issuers and investors are never made public. About 80% of issuers said most engagements remain private, as did 72% of asset owners and 62% of asset managers.  Asset owners, asset investors, and issuers do not always agree on what constitutes "successful" engagement. While all three groups believed constructive dialogue on a specific issue was a success, issuers were materially more likely than investors to think that establishment of a contentious dialogue was a success. An even more dramatic difference was that about three quarters of both asset managers and asset owners defined either additional corporate disclosures and/or changes in policies as a "success" while only about a third of issuers agreed.  Engagement is most likely to lead to concrete change by issuers in areas where shareholders are broadly in agreement, such as declassification of the board of directors or the elimination of poor pay practices, than in areas where shareholders' views diverge, such as the need for an independent board chair.  The report is available at [http://www.irrcinstitute.org](http://www.irrcinstitute.org" \t "_new)  and [www.issgovernance.com](http://www.issgovernance.com" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.14 APRA speech on redesigning financial regulation**  The Australian Prudential Regulation Authority (APRA) has published the speech by APRA Executive General Manager Wayne Byres titled "Redesigning financial regulation: do we have all the necessary ingredients?". The speech was delivered on 22 February 2011. In the speech, Mr Byrnes identifies the factors that caused and compounded the global financial crisis (misaligned incentives, failure of market discipline, weak regulation, poor supervision, and the absence of robust bank resolution schemes). He then discusses the reforms that have been introduced to deal with these factors.  The speech is available on the [APRA website](http://www.apra.gov.au/Speeches/upload/20110222_CEDA_Speech.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.15 Financial Stability Board reports to G20 on progress in implementing global financial reforms**  On 19 February 2011, the Financial Stability Board (FSB) published a report to G20 Finance Ministers and Central Bank Governors. The report sets out the most recent progress in the implementation of the G20 recommendations for strengthening financial stability. The issues dealt with in the report are:  implementation of reforms to bank capital and liquidity standards;  addressing systemically important financial institutions (SIFIs) - SIFI determination and loss absorbency;  resolution tools and regimes; and supervisory intensity and effectiveness;  shadow banking;  improving the OTC and commodity derivatives markets;  developing macroprudential frameworks and tools;  progress towards convergence on strengthened accounting standards;  strengthening adherence to international supervisory and regulatory standards;  reforming compensation practices to support financial stability;  co-operation and information exchange initiative; and  other issues - financial stability and regulatory issues in emerging and developing economies; consumer finance protection; reducing reliance on CRAs; addressing data gaps revealed by the financial crisis; and market integrity issues.  Also on 19 February 2011, the G20 Finance Ministers and Central Bank Governors recommitted to pursue the reform of the financial sector. As part of this, the G20:  will implement fully the Basel III new standards for banks within the agreed timelines;  called for completion by the November 2011 G20 Summit of ongoing policy work on systemically important financial institutions as scheduled in the FSB work program for 2011;  will implement the FSB's recommendations on OTC derivatives and on reducing reliance on credit rating agencies' ratings;  urged all jurisdictions to fully implement the FSB principles and standards on sound compensation practices, and looks forward to ongoing monitoring, including the publication of the FSB's second peer review in mid-2011; and  looks forward also to the preparation by the FSB by mid-2011 of recommendations on regulation and oversight of the shadow banking system.  The report to the G20 Finance Ministers and Central Bank Governors is available on the [FSB website](http://www.financialstabilityboard.org/publications/r_110219.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.16 IOSCO identifies benefits of organised platform derivatives trading**  On 18 February 2011, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published its "Report on Trading of OTC Derivatives". The report analyses the benefits, costs, and challenges associated with increasing exchange and electronic trading of over-the-counter (OTC) derivative products and contains recommendations to assist the transition of trading in standardised derivatives products from OTC venues onto exchanges and electronic trading platforms (organised platforms) while preserving the efficacy of those transactions for counterparties.  The report concludes that it is appropriate to trade standardised derivatives contracts with a suitable degree of liquidity on organised platforms, and that a flexible approach to defining what constitutes an organised platform for derivatives trading would maximise the number of standardised derivative products that can be appropriately traded on these venues. It identifies characteristics that an organised platform should exhibit, as well as the benefits and costs associated with transitioning trading of derivatives from OTC venues onto organised platforms. It also presents a range of actions that regulators may choose to take to increase organised platform trading of OTC derivatives products.  The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD345.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.17 Survey of global risk management in financial institutions**  On 18 February 2011, Deloitte published the results of its latest global risk management survey of financial institutions. The survey was conducted during the third quarter of 2010, and its results are based upon the responses of 131 financial institutions from around the world - including retail and commercial banks, insurance companies, and asset managers - with aggregate total assets of more than US$17 trillion. Key findings of the survey include:  The position of Chief Risk Officer (CRO) continued to become increasingly prevalent. Eighty-six percent of institutions had a CRO or equivalent position, up from 73% in 2008 and 65% in 2002. The CRO has been given a high profile, reporting at the board level or to the CEO (or both) at 85% of institutions. Fifty-one percent of institutions reported that the board of directors conducts executive sessions with the CRO, compared to 37% in 2008.  In the wake of the global financial crisis, the importance of incorporating risk management considerations into performance evaluations and compensation decisions has been widely discussed, but 37% of institutions reported that they had completely or substantially done so for business unit personnel.  More institutions have adopted Enterprise Risk Management (ERM) programs - 79% of institutions reported having an ERM program or equivalent in place or in progress, an increase from 59% in 2008. The greatest challenges in implementing an effective ERM program, cited by roughly a quarter of institutions as extremely or very challenging, were integrating data across the organization and cultural issues.  More than 80% of institutions experienced significant impacts from regulatory changes in the countries where they operate; at 40% of responding institutions, these impacts included the need to maintain higher capital levels and the need to maintain higher liquidity ratios.  The report is available on the [Deloitte website](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/FSI/GRMS%207th%20edition%20report%20final.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.18 Consultation on major changes to UK financial services regulatory structure**  On 17 February 2011, the UK Treasury published a consultation paper titled "A new approach to financial regulation: building a stronger system" which details major changes to the financial services regulatory structure in the UK. The proposed reforms focus on three key institutional changes:  a new Financial Policy Committee (FPC) in the Bank of England will have responsibility for "macro-prudential" regulation, or regulation of stability and resilience of the financial system as a whole;  "micro-prudential" (firm specific) regulation of financial institutions that manage significant risks on their balance sheets will be carried out by an operationally independent subsidiary of the Bank of England, the Prudential Regulation Authority (PRA); and  conduct of business regulation will be provided by a new regulator, the Financial Conduct Authority (FCA) which will have responsibility for conduct issues across the entire spectrum of financial services.  These institutional changes respond to what, in the UK government's view, were fundamental failings of the previous "tripartite" approach to financial regulation and financial stability. Under this framework, the Treasury, the Bank of England and the Financial Services Authority are collectively responsible for financial stability. It is stated in the consultation paper that this fragmentation of responsibilities has had a number of dysfunctional results. For example:  the Bank of England, while having statutory responsibility for financial stability, has only limited tools to deliver it;  the FSA, by contrast, has regulatory tools for delivering financial stability, but with such a wide mandate prior to the crisis - including consumer protection, public awareness, market confidence and the reduction of financial crime - was not sufficiently focused on stability issues; and  perhaps most significantly, the linkage between firm-level and systemic stability issues has fallen between the institutional cracks, with no one body having the remit to tackle this fundamentally important issue. This has created a significant area of regulatory "underlap" within the UK's framework.  The consultation paper is available on the [UK Treasury website](http://www.hm-treasury.gov.uk/d/consult_newfinancial_regulation170211.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.19 Survey of Australian directors on challenges in the boardroom**  On 16 February 2011, Mallesons Stephen Jaques published a report on the key issues and challenges facing boards and directors in Australia. 125 directors from more than 300 organisations across multiple sectors were surveyed for the report.  This report explores current issues and challenges facing Australian directors and boards in 2011:  board composition, which examines the attributes required of directors and the diversity of the board;  the role of boards and directors, which examines risk taking and risk management, as well as information flows and time commitments;  the regulatory landscape, which examines regulatory and compliance burdens, as well as class actions;  engaging with stakeholders, which examines communication challenges, the role of AGMs and proxy advisors; and  the outlook for 2011, including the opportunities and challenges for M&A activity.  Some of the findings from the survey are:  74% of respondents indicated they had seen significant upgrades to internal risk management in 2010;  46% of respondents said that introducing a broader business judgment defence would make a significant improvement to their role;  55% of respondents believe there is a lack of diversity on boards generally, but 75% said their company had made appointments to increase diversity in 2010;  64% of respondents think annual general meetings should be revised, with 50% in favour of online shareholder voting; and  although 42% of survey respondents said boards have become too risk averse when pursuing M&A opportunities, two thirds of respondents anticipate their companies will be involved in M&A activity in 2011.  The report is available on the [Mallesons website](http://www.mallesons.com/Expertise/mergers_and_acquisitions/Mallesons_M&A_Survey_2011.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.20 Report on reform of directors' liability**  On 11 February 2011, the Reform Council of the Council of Australian Governments (COAG) published a report titled "National Partnership Agreement to Deliver a Seamless National Economy". The report outlines progress relating to regulatory reforms that are designed to deliver what is termed a "seamless national economy" and, as part of this, the report identifies ten reforms that are at risk. One of the ten is directors' liability.  The objective of directors' liability reform is to achieve a nationally consistent approach to the imposition of personal criminal liability for directors and other corporate officers in circumstances of corporate fault. Three key steps are set out for achieving this reform:  agreement on principles for the imposition of personal liability for corporate fault;  audits of Commonwealth, State and Territory laws against the agreed principles; and  amendment of the legislative provisions which do not accord with the agreed principles, to bring them in line with the agreed principles.  This reform is being pursued to provide greater certainty for companies, their corporate officers, and the public as to when a corporate officer may be personally criminally liable because of a company's misconduct.  It is stated in the report that there has been some progress towards a nationally consistent approach to the imposition of directors' liability for corporate fault, with principles now agreed and audits and implementation plans prepared. However, the Council is concerned that there has been no process at a multi-jurisdictional level to consider whether the reforms proposed by individual jurisdictions will lead to a nationally consistent, principles-based approach to the imposition of personal criminal liability of directors.  The report is available on the [Reform Council website](http://www.coagreformcouncil.gov.au/reports/competition.cfm" \t "_new) and chapter 26 is the relevant chapter.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.21 Canadian Task Force report on financial literacy**  On 9 February 2011, Canada's Task Force on Financial Literacy made public its report to the federal Minister of Finance, recommending urgent action on a national strategy to strengthen Canadians' financial literacy.  The Task Force's recommended plan of action falls into five priority areas: shared responsibility, leadership and collaboration, lifelong learning, delivery and promotion and accountability. The 30 recommendations are aimed at enhancing formal education, integrating with federal government programs, creating a single-source website, delivering clear communications and building awareness.  The report is available on the [Task Force website](http://www.financialliteracyincanada.com" \t "_new).  ASIC has recently published a National Financial Literacy Strategy for Australia - see [Item 2.2](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm#22) in this Bulletin.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.22 Canadian director compensation principles**  In February 2011, the Canadian Coalition for Good Governance (CCGG) released a set of principles for director compensation for boards to consider when structuring their own compensation plans to ensure that their interests are aligned with those of the equity owners of the company. According to the principles: (i) director compensation should not be so high as to potentially compromise the independence of directors; (ii) compensation should reflect expertise and a director's actual time commitment to the board; (iii) compensation should vary for different director roles; (iv) boards should consider requiring a minimum shareholding for directors and encourage investment beyond the minimum; (v) boards should minimize the complexity of director compensation structures; and (vi) directors should consider periodically seeking approval for directors' compensation from shareholders.  The principles are available on the [CCGG website](http://www.ccgg.ca/site/ccgg/assets/pdf/2011_Director_Comp_PolicyFEB15.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1)  **1.23 Latest Centre for Corporate Law and Securities Regulation research reports**  The latest two research reports of the University of Melbourne's Centre for Corporate Law and Securities Regulation have been published. They are:  [The Evolution of Shareholder and Creditor Protection in Australia: An International Comparison](http://ssrn.com/abstract=1782412" \t "_new)  [What Do You Do With a High Court Decision You Don't Like? Legislative, Judicial and Academic Responses to Gambotto v. WCP Ltd.](http://ssrn.com/abstract=1774283" \t "_new)  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1 Guide for Trans-Tasman mutual recognition of securities offerings updated**  On 17 March 2011, ASIC and the New Zealand Securities Commission jointly published updated guidance for Australian and New Zealand issuers offering shares, debentures or interests in managed or collective investment schemes in both countries. The guide explains the requirements under the mutual recognition of securities offerings scheme (MRSO) and the role the regulators play in relation to an offer. The guide also alerts issuers to the specific sections of Australian and New Zealand law that will continue to apply when offers are made under the MRSO, such as the prohibition of door-to-door selling in New Zealand and the securities hawking laws in Australia.  The MRSO enables issuers of securities to use one disclosure document to offer shares, debentures, or managed or collective investment schemes to investors on both sides of the Tasman, subject to meeting certain requirements.  Many of the updates are based on feedback received from the market and are aimed at assisting issuers using the scheme. Key updates provide:  more detailed guidance by inserting references to underlying statutory requirements;  information relating to relevant forms and lodgement processes;  comment on the applicability of dispute resolution schemes;  reference to certain relief powers that enable each regulator to declare a recognised offer where certain requirements are not met by issuers; and  more guidance on the offers that can be recognised under the scheme where the issuer or offeror has obtained relief in its home jurisdiction.  The guide is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg190" \t "_new) and also the [New Zealand Securities Commission website](http://www.seccom.govt.nz/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h2)  **2.2 Financial literacy strategy**  On 15 March 2011, ASIC launched a new personal finance website called MoneySmart to help people make good financial decisions by providing free, independent and unbiased information, tools and motivation.  MoneySmart.gov.au is a key part of the National Financial Literacy Strategy, also launched by ASIC on 15 March 2011.  MoneySmart.gov.au includes 26 calculators and tools, some for use on mobile phones, to help people take simple steps to get quick answers to their questions about money. MoneySmart covers not only the basics such as budgeting, saving, credit cards and loans, but also more complicated issues such as superannuation contributions, margin loans and income tax.  The National Financial Literacy Strategy aims to create opportunities for Australians of all ages to learn about money and then apply these financial literacy skills to achieve better financial outcomes. It focuses on four interrelated areas of work, namely:  Delivering quality financial literacy education to all Australians through schools, workplaces, higher education institutions and in the community;  Providing all Australians with access to the information and tools they need to make good financial choices;  Going beyond education to guidance and other strategies to enhance the financial well being of Australians, including developing a new consumer website; and  Developing partnerships between the various sectors involved in financial literacy work, and better means of measuring the impact of what ASIC does.  For more information see:  [MoneySmart website](http://www.moneysmart.gov.au" \t "_new)  [Frequently asked questions about MoneySmart](http://www.asic.gov.au/asic/asic.nsf/byheadline/MoneySmart+-+Frequently+asked+questions?openDocument" \t "_new)  [Consumer financial confidence survey](http://www.asic.gov.au/asic/asic.nsf/byheadline/ASIC+consumer+financial+confidence+survey?openDocument" \t "_new)  [National Financial Literacy Strategy](http://www.financialliteracy.gov.au" \t "_new)  [Financial literacy and behavioural change](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/financial-literacy-and-behavioural-change.pdf/$file/financial-literacy-and-behavioural-change.pdf" \t "_new) (ASIC Report 230).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h2)  **2.3 ASIC announces timetable for the introduction of market competition**  On 3 March 2011, ASIC announced its timetable for the introduction of market competition and released a summary of the intended market integrity rule framework that would apply. The timetable also sets out the steps required for the commencement of operation of Chi-X Australia - the current market licence applicant. This will give effect to the Government's policy to support competition between exchange markets in Australia.  The timetable also sets out the steps ASIC, Chi-X and the industry need to take to enable Chi-X to commence operations in the Australian market, reflecting Chi-X's plans to have a phased "soft launch". Market operators and participants will need to prepare for a multi-market environment. Some of the steps industry will need to take prior to Chi-X's commencement include:  ASX and Chi-X will need to make operating rule and system changes, put in place procedures for simultaneously halting trading, for use of common stock and broker identifiers and for the sharing of certain data, and link to the nominated clock for synchronisation;  Chi-X will need to connect to market participants, CHESS, data vendors and ASIC (for the provision of real-time order and trade data for surveillance purposes);  participants will need to prepare to comply with the best execution obligation. Those intending to connect to Chi-X will need to amend their order routing and back office systems and prepare to comply with Chi-X operating rules, the new common market integrity rules, and the new market integrity rules specifically for the Chi-X market;  Chi-X will need access to clearing and settlement services; and  data vendors will need to connect to Chi-X, consolidate ASX and Chi-X data feeds and make the consolidated feeds available to clients.  The timetable is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/11-38MR-attachment-1.pdf/$file/11-38MR-attachment-1.pdf" \t "_new). A summary of the intended market integrity rules is also available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/11-38MR--attachment-2.pdf/$file/11-38MR--attachment-2.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h2)  **2.4 ASIC grants further extension of Class Order 10/333**  On 28 February 2011, ASIC announced its intention to extend the interim class order relief granted to lawyers and funders involved in legal proceedings structured as funded representative proceedings and funding claims lodged with liquidators to prove in the winding up of an insolvent company.  The extension of the relief until 30 June 2011 will enable the temporary operation of litigation funding schemes and proof of debt funding schemes without compliance with the requirements of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act). This is to allow additional time for the Federal Government to implement the legislative reform for litigation funding schemes and proof of debt schemes it previously announced, and to avoid any interim disruption that could adversely impact plaintiffs or interfere with the timely and efficient running of litigation.   The requirements that would apply to a litigation funding scheme and a proof of debt funding scheme without ASIC relief are detailed in Chapters 5C and 7 of the Act. These requirements include:  registering the scheme with ASIC;  adopting a complying constitution and compliance plan for the scheme;  appointing an AFS licensed public company as "responsible entity";  preparing a Product Disclosure Statement; and  providing ongoing disclosure to members of the scheme.  Following any law reform in this area, ASIC will consider issuing further regulatory guidance about these schemes after public consultation.  **Background**  ASIC's decision to extend its relief follows a decision by the Full Court of the Federal Court in Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd [2009] FCAFC 147. The court held that a funded class action constituted a "managed investment scheme" within the meaning of the Corporations Act. This decision may result in litigation funders being forced to comply with the requirements for a managed investment scheme under Chapter 5C and Chapter 7 of the Act.  On 4 May 2010, the Federal Government announced its plan to exempt representative proceedings and proof of debt arrangements from the definition of "managed investment scheme" in section 9 and Chapter 7 of the Act provided appropriate arrangements are in place to manage conflicts of interest.  Available on the ASIC website are [Class Order 10/333 'Funded representative proceedings'](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co10-333%2020110222.pdf/$file/co10-333%2020110222.pdf" \t "_new) and [Amending Class Order 11/128](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co11-128%2020110222.pdf/$file/co11-128%2020110222.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h2)  **2.5 Proposals to improve disclosure for hedge funds**  On 24 February 2011, ASIC released a consultation paper that outlines proposals to improve disclosure requirements for retail investors who invest in hedge funds. Consultation Paper 147 "Hedge Funds: Improving Disclosure for Retail Investors" seeks feedback on enhancements aimed at ensuring retail investors and their advisers have the information they need to make an informed investment decision about the risks posed by hedge funds.   In defining the scope of the proposed disclosure guidance, ASIC has focused on funds that are promoted as or likely to be regarded as hedge funds. ASIC has also identified some characteristics that will help identify the type of strategy pursued, the complexity of the structure and the use of leverage, derivatives and short selling.  As part of this consultation, ASIC is also seeking feedback on how the proposed disclosure guidance will interact with the tailored Product Disclosure Statement requirements for simple managed investment schemes.  Consultation Paper 147 is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp147.pdf/$file/cp147.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h2)  **2.6 Revised dispute resolution procedures for financial institutions**  On 16 February 2011, ASIC issued new regulatory guidance for financial institutions to settle simple disputes internally with customers: Regulatory Guide 165 - "Licensing: internal and external dispute resolution" and Regulatory Guide 139 - "Approval and oversight of external dispute resolution schemes". The guidance also provides coverage of internal dispute resolution (IDR) and external dispute resolution (EDR) procedures for customers who have loans from bodies which make or buy loans or leases, and repackage and sell them to investors (securitisation).  The guidance on IDR and EDR procedures applies to financial services licensees (AFSLs), credit licensees (ACLs), and some other financial services providers.  **(a) Greater flexibility in settling simpler complaints**  Credit and financial industry participants (e.g. banks, credit unions, insurers, financial planners, stockbrokers, insurance brokers and mortgage brokers) will have reduced paperwork obligations where they resolve quickly complaints at the IDR process.  A "final response" will not be required where a complaint is resolved to the customer's complete satisfaction by the end of the fifth business day after the complaint is received, and where the customer hasn't requested a response in writing. The exceptions to this are complaints relating to hardship, a declined insurance claim, or the value of an insurance claim - all of which will still require a final response.  The crucial link between IDR and EDR will be preserved - customers will continue to receive a written response (including EDR details) where the complaint is not resolved to the customer's complete satisfaction within five days.  This gives participants greater flexibility to respond to complaints verbally, particularly where the complaints are relatively straightforward, involve small sums, or relate to a customer service issue that can be resolved quickly. At the same time, it ensures that for more complex disputes the customer will receive a written response to their complaint and information about how to take it further at EDR if they wish. For those licensees for whom the new guidance is a heightening of standards, ASIC expects them to comply with the new standards as soon as practicable.  Insurance customers often phone the insurer to discuss a potential claim before lodging a claim. The Insurance Council of Australia (ICA) will consult with ASIC and consumer stakeholders on a proposal to amend the General Insurance Code of Practice in relation to those situations. The amendment would require insurers to ask customers verbally if they would like to lodge a formal claim in situations where customers make enquiries about whether they have the necessary cover. The aim is to make the proposed change without waiting for the next formal review of the Code in 2013.  In the meantime, ASIC anticipates insurers will follow this approach as soon as possible.  **(b) Coverage of ASIC IDR requirements for customers of securitisation bodies**  The new national consumer credit law introduced a modified regulatory regime for securitisation bodies (i.e. entities which make or buy loans or leases, and repackage them as investment products to sell to investors).  Securitisation bodies may be exempt from holding an ACL where they have a service agreement with a credit licensee who acts on their behalf as "representative" and, separately, they join one of the two ASIC-approved EDR schemes by 1 April 2011.  This means that customers who have loans or leases involving a securitisation body will not be disadvantaged - when making a complaint, or seeking to vary or set aside the consumer loan or lease (e.g. for a hardship variation) - compared with customers of other lenders. They will effectively have access to the same dispute resolution procedures as other consumers. Key changes regarding securitisation bodies include:  clarifying that the representative's IDR procedures must cover disputes relating to the credit activities they engage in on behalf of the securitisation body, and to disputes about the conduct of the securitisation body;  introducing a priority system for complaints handling at EDR, where the securitisation body and representative are members of different EDR schemes; and  clarifying that both the representative credit licensee and securitisation body should refrain from commencing or continuing any legal action or other enforcement action (i.e. debt collection) while a complaint is handled at IDR or EDR.  [Regulatory Guide 165](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg165" \t "_new) and [Regulatory Guide 139](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg139" \t "_new) are available on the ASIC website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h2) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1 ASX Limited Half-Year Report - 31 December 2010**  On 17 February 2011 ASX released its results for the half-year ending 31 December 2010.  Robert Elstone, Managing Director and CEO, said: "The ASX Group of companies performed well during the first half of the 2011 financial year, with underlying profit marginally higher within a market responding to renewed economic confidence.  ASX continued to play a role in facilitating large scale capital raisings, which helped underpin the relative strength of the Australian economy, and our clearing and settlement services made an important contribution to financial stability".  Available on the ASX website are the [ASX Media Release](http://www.asxgroup.com.au/media/PDFs/20110217_Half-Year_Results_Media_Release.pdf" \t "_new) and the [2011 Half-Year Report](http://www.asxgroup.com.au/media/PDFs/20110217_asx_interim_report_hy11.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h3)  **3.2 ASX-SGX merger proposal application lodged with FIRB**  On 11 March 2011 ASX announced that Singapore Exchange Limited (SGX) had lodged a formal application to the Australian Foreign Investment Review Board (FIRB) about the proposed merger of ASX and SGX.  Available on the ASX website is the [market announcement](http://www.asxgroup.com.au/media/PDFs/110318_ASXSGX_Merger_application_Lodged_FIRB.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h3)  **3.3 ASX and BRR launch investor relations initiative for ASX-listed companies**  On 3 March 2011 ASX announced that it will be launching, in conjunction with Boardroom Radio (BRR), an investor relations initiative called Corporate Profile. Corporate Profile is an investor relations tool that allows listed companies to raise their profile and better inform the investment community about their operations.  Under the initiative, CEOs or other senior executives of ASX-listed companies will work with BRR to record and distribute a video interview about their background and experience, and their company's operations and growth plans.  The video will be hosted on each company's information page on ASX.com.au, the websites of BRR and its distribution partners, and each company's own website for a maximum period of 12 months.  Available on the ASX website is the [Media Release](http://www.asxgroup.com.au/media/PDFs/110303mrASX-BRR_Corporate_Profile_Media_Release_FINAL.pdf" \t "_new).  Further information about Corporate Profile is available [here](http://www.asx.com.au/professionals/what-is-corporate-profile.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h3)  **3.4 Reports**  On 4 March 2011 ASX released:  the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/110304maMonthly_Activity_Report_-_Feb_2011_FINAL.pdf" \t "_new);  the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2011/notice2011_034.pdf" \t "_new); and  the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/110304maASXC_Monthly_Activity_-_Feb_FINAL.pdf" \t "_new)  for February 2011.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h3) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1 CMI Limited - declaration of unacceptable circumstances**  On 22 February 2011, the Takeovers Panel announced that it has made a declaration of unacceptable circumstances in relation to an application dated 6 January 2011 by Mr Gerry Pauley and Mr Gordon Elkington, in relation to the affairs of CMI Limited.  CMI Limited is a listed company. Mr Raymond Catelan is the Managing Director of CMI. RP Prospects Pty Ltd, as trustee for the M&L Trust, has a relevant interest in 36.8% of CMI. RP Prospects is owned by Mr Raymond Catelan. Ms Leanne Catelan (Mr Raymond Catelan's daughter) and Mr Raymond Catelan are identified in the trust deed as beneficiaries of the M&L Trust.  On 23 November 2010, Tinkerbell Enterprises Pty Limited, as trustee for the Leanne Catelan Trust, acquired a relevant interest in 9.22% of CMI. Ms Leanne Catelan and Mr Raymond Catelan are identified in the trust deed as beneficiaries of the Leanne Catelan Trust. Tinkerbell is wholly owned by Ms Leanne Catelan. The applicants submitted that this was the principal transaction that they wanted the Panel to investigate.  The Panel considered that the Ms Leanne Catelan and Mr Raymond Catelan (the Associated Parties) are associated:  under section 12(2)(b) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) for the purpose of controlling or influencing the conduct of CMI's affairs; or  under section 12(2)(c) of the Act in relation to the affairs of CMI.  The Panel further considered that the Associated Parties' voting power in CMI was previously above the 20% threshold in section 606 of the Act and the share acquisition by Tinkerbell occurred without using one of the exceptions in section 611 of the Act and that the combined voting power of the Associated Parties was not disclosed in the substantial shareholding notice lodged by Tinkerbell on 24 November 2010. The factors taken into account by the Panel included:  that the funds to acquire the 9.22% interest in CMI by Tinkerbell were provided by Mr Raymond Catelan as a gift to Ms Leanne Catelan;  the conduct of the Associated Parties and the directors of CMI in relation to the Tinkerbell acquisition;  the family relationship between the Associated Parties; and  structural and financial links between the Associated Parties.  On 25 February 2011, the Panel announced its final orders. In summary:  the 3,112,422 shares in CMI (or 9.22%) acquired by Tinkerbell Enterprises Pty Ltd (Tinkerbell) as trustee for the Leanne Catelan Trust on 23 November 2010 (Sale Shares) are to be vested in the Commonwealth on trust for ASIC to sell and return the proceeds net of costs to the owner;  the Sale Shares are not counted for the purposes of the 3% creep exception in item 9 of section 611 unless the Associated Parties acquire some Sale Shares on market as part of the sell-down (if they have an existing capacity to "creep" under item 9(b) of section 611);  the Associated Parties must disclose their voting power in CMI and their association in a substantial holder notice; and  the Associated Parties must not otherwise dispose of, transfer, charge or vote the Sale Shares.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h4) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%236) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **5.1 Obligation to provide register of members was unqualified**  (By Phoebe Berridge, Blake Dawson)  Direct Share Purchasing Corporation Pty Ltd v LM Investment Management Ltd [2011] FCA 165, Federal Court of Australia, Gordon J, 2 March 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/165.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/165.html" \t "_new)  **(a) Summary**  Section 173 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Corporations Act) (prior to the December 2010 amendments) imposed an unqualified obligation on a company to give a person a copy of its register within seven days of the person asking for a copy and paying any fee required by the company. If the company considered that the register was going to be used to engage in unconscionable conduct, it should seek an injunction.  The effect of section 177(1A) of the Corporations Act is that the prohibition in section 177(1)(b) against disclosing information about a person obtained from a register knowing that the information is likely to be used to contact or send material to the person does not apply if the proposed use of the register is to send offers to those persons to purchase their shares or units.  **(b) Facts**  Direct Share Purchasing Corporation Pty Ltd (Direct Share) (a company controlled by Mr David Tweed) conducts the business of acquiring financial products from members of the public by sending unsolicited offers to the holders of those products.  On 30 September 2010, Direct Share requested LM Investments Management Limited (LM Investments) provide it with a copy of the register of member unitholders of the LM First Mortgage Income Fund.  LM Investments did not respond to the request.  Direct Share wrote to LM Investments again on 4 October and 20 October 2010 requesting a copy of the register.  LM Investments did not respond to these further requests.  At the time of the requests section 173 of the Corporations Act required that a company must give a person a copy of its register within seven days of the person asking for a copy and paying any fee (up to the prescribed amount) required by the company.  On 13 December 2010, section 173 of the Corporations Act was amended to include a new section 173(3A) which relevantly allows a company to refuse a request for a copy of its register if the purpose of the request is to make unsolicited offers to acquire financial products and the offer is:  not made on a licensed market and the offer is not to acquire securities under an off-market bid; and  made or received in Australia.  However in this case the Court was concerned with the operation of section 173 as it was in force at the time of Direct Share's request.  LM Investments submitted that it was not obliged to provide a copy of the register on the grounds that:  the request was for an unlawful purpose because at the time of the request, Direct Share intended to use the information on the register to engage in unconscionable conduct by making unsolicited, off-market offers to vulnerable and inexperienced persons on the register in contravention of section 51AC of the Trade Practices Act 1974 (Cth) (TPA) and section 12CA of the [ASIC Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default);  LM Investments' obligation to provide the register was qualified by the prohibition in section 177(1)(b) of the Corporations Act against disclosing information about a person obtained from a register knowing that the information is likely to be used to contact or send material to the person.  At the end of its written submissions, LM Investments made an open offer that if Direct Share was willing to give an undertaking to:  use information obtained from the register for no purpose other than to make offers in a prescribed form in New Zealand to purchase units in the Fund from persons with registered addresses in New Zealand, within three months of the date of the order and at a price of $0.90 per unit in the Fund; and  not disclose the register or a copy of the register, or any information contained on the register, to any person.  LM Investments was prepared to submit to orders that it provide to Direct Share a copy of that part of the register relating to persons with addresses in New Zealand and the application otherwise be dismissed.  Direct Share agreed to the undertaking and with the order regarding provision of the register by LM Investments but did not agree that the application should be dismissed.  **(c) Decision**  The Federal Court determined that LM Investments' obligation under section 173 (as it was at the time of the request) to provide the register was unqualified and rejected LM Investments' submissions.  **(i) Did Direct Share engage in unconscionable conduct?**  LM Investments submitted that Direct Share's intended use of the register would be in contravention of section 12CA of the ASIC Act, which provides that a person must not, in trade or commerce, engage in conduct in relation to financial services if the conduct is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories. The allegation had to be prospective because at the time of the hearing Direct Share had not obtained access to the register and had not sent out offers to unitholders.  Gordon J found that there was no breach of section 12CA(1) as it would only be when Direct Share ultimately communicated with unitholders that its conduct could be judged by reference to the unwritten law. Gordon J recognised that at this time, unconscionable conduct may have already occurred, however, it would have been open to LM Investments to seek an interlocutory injunction to restrain anticipatory unconscionable conduct and LM Investments did not apply for this relief.  Gordon J rejected LM Investment's contention that its obligation to provide the register was, at the time of the request, qualified by section 51AC of the Trade Practices Act for the same reasons. The conduct LM Investments was alleging was prospective. If LM Investments intended to assert that Direct Share's conduct was likely to be contrary to section 51AC of the Trade Practices Act (as it then stood), it could have sought an interlocutory injunction and it did not.  **(ii) Was the obligation to provide the register under section 173(3) qualified by section 177(1)(b)?**  LM Investments submitted that the effect of section 177(1)(b) of the Corporations Act was that a company or a scheme is under no obligation to disclose its register if it knows that information from the register is likely to be used to contact or send material to persons on the register and that on a plain reading of the two provisions, the prohibition on disclosure in section 177(1)(b) qualifies the duty of disclosure in section 173(3).  However, Gordon J noted that section 177(1A) of the Corporations Act provides that section 177(1) does not apply if the use or disclosure of the information is relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them.  Gordon J found that the proposed use of the register by Direct Share (to use the information to contact the unitholders and seek to have them exercise their rights in relation to those units by selling them to Direct Share) fell squarely within section 177(1A) and therefore section 177(1) of the Corporations Act did not apply.  **(iii) Conclusion**  Gordon J therefore found that LM Investments had contravened section 173 of the Corporations Act by refusing to provide a copy of the register to Direct Share.  The effect of the December 2010 amendment to section 173 of the Corporations Act, had it been in force at the time of Direct Share's request, was that LM Investments could have refused to give Direct Share 94% of the register.  Given the change in law between the date of the request and the time the issue came to be determined by the Court, and the fact that Direct Share now had the part of the register it wanted, Gordon J refused Direct Share's application for a declaration that LM Investments had contravened section 173 of the Corporations Act.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h5)  **5.2 Application of reinsurance proceeds where the insurer is in liquidation**  (By Richard Plunkett, DLA Phillips Fox)  Amaca Pty Ltd v McGrath and Anor as liquidators of HIH Underwriting and Insurance (Australia) Pty Ltd [2011] NSWSC 90, Supreme Court of New South Wales, Barrett J, 2 March 2011  The full text of this judgment is available at:  [http://caselaw.lawlink.nsw.gov.au/action/PJUDG?jgmtid=150429](http://caselaw.lawlink.nsw.gov.au/action/PJUDG?jgmtid=150429" \t "_new)  **(a) Summary**  The plaintiffs were, at material times, members of the James Hardie Group and were exposed to ongoing claims.  Their insurer, HIH Underwriting and Insurance (Australia) Pty Ltd ('HIH'), had gone into liquidation.  This case provides guidance on the proper interpretation of section 562A of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ('the Act'), in particular the circumstances in which the Court will order that the proceeds of reinsurance contracts be applied by the liquidator in 'a manner that the Court considers just and equitable in the circumstances', in departure from the prevailing statutory scheme.  The case further clarifies that this statutory power cannot be exercised with respect to money yet to be received by a liquidator.  **(b) Facts**  The plaintiffs are wholly owned by Asbestos Injuries Compensation Fund Ltd and subject to insolvent external administration under the [James Hardie Former Subsidiaries (Winding up and Administration) Act 2005 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=88365" \t "default).  Each company remains exposed to asbestos-related liabilities and so is preserved in an operational state sufficient to enable it to receive and deal with claims.  Barrett J noted that the ability of each plaintiff to meet relevant claims is dependent upon obtaining insurance proceeds, contributions by the 'new Hardie Group' under a funding agreement and the provision of loan money from the public purse.  The plaintiffs carried insurance against liability for asbestos injury for the policy year 1981/82 and the policy year 1982/83.  The insurer, HIH, had gone into liquidation in 2001.  The insurance arrangements were complex (involving either direct placement or facultative reinsurance, depending on the treaty restrictions of the relevant reinsurer in the London market), and the plaintiffs had existing and unsatisfied claims with respect to these policies.  The plaintiffs sought orders under section 562A(4) of the Act displacing the operation of the statutory scheme, such that the liquidators of HIH would be required to pay the relevant money (less expenses) to the plaintiffs.  The orders sought applied to funds already in the liquidators' hands, and also funds expected to be received in the future.  The liquidators of HIH neither consented to nor opposed the relief sought in relation to funds already received, but opposed the application relating to any funds yet to be received.  **(c) Decision**  Barrett J noted that section 562A of the Act co-exists with section 555 and section 556.  Section 555 provides that unsecured debts and claims proved in a winding up rank equally, and must be paid proportionately where there is insufficiency of assets. Section 555 is overridden by section 556, which establishes that some categories of unsecured debts must be paid in priority to all other unsecured debts and claims.  Section 562A overrides both provisions, and deals specifically with reinsurance contracts held by a company in the course of winding up in respect of insurances written by that company.  Section 562A requires the liquidator to make certain payments to specified creditors out of reinsurance proceeds in priority to all payments in respect of debts mentioned in section 556.  His Honour observed that the general principle behind section 562A is that, in the winding up of an insolvent insurer, any reinsurance proceeds obtained by the liquidator under reinsurances that pre-date that winding up are to be applied towards claims arising from the insurer's liabilities under insurance contracts written before the winding up.  Such proceeds are not available to be applied to other debts unless and until claims arising from insurance contracts are satisfied in full.  One feature of section 562A is that all claims under insurance contracts are entitled to priority over such reinsurance proceeds, without reference to any link between those contracts and the reinsurance by which the proceeds are produced.  Barrett J noted that the liquidators had received reinsurance proceeds of the kind dealt with by section 562A.  In the absence of an order under section 562A(4), the amounts would have been applied pursuant to section 562A(3) of the Act, thereby giving entitlements to 'each person to whom an amount is payable by the company under a relevant contract of insurance'.  The orders sought by the plaintiffs under section 562A(4) would have the effect of eliminating the entitlement of all members of that class other than the plaintiffs.  His Honour then considered section 562A(4) of the Act, which empowers the court to authorise and require a manner of application different than that set out in sections 564(2) and 564(3) only it if considers that different manner to be 'just and equitable in the circumstances'. Section 564A(5) sets out four matters the court may take into account in deciding whether to make a section 562A(4) order.  Barrett J confirmed that the specified matters need not be taken into account, and that other relevant matters may be taken into account.  Barrett J observed that in applying the 'just and equitable' criterion the Court is given a wide discretion, though it is still bound to act judicially 'in the light of the whole of the circumstances surrounding the relevant subject matter'. His Honour cited Lord Wilberforce in Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 at 379:  "It [the phrase 'just and equitable'] does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."  In this context, the relevant 'legal rights' arose from section 562A(2) or section 562A(3) - first, the rights of all entitled creditors to participate (to the exclusion of other creditors) in the enjoyment of reinsurance proceeds until either 100 cents in the dollar has been paid on those debts or the proceeds have been exhausted, and secondly, the right of each favoured creditor to participate in that way pari passu with each other favoured creditor.  Barrett J confirmed that two of the 562A(5) optional criteria were satisfied in this context, namely that it was possible to identify the plaintiffs' particular insurance contracts with the relevant reinsurance contracts, and that the plaintiffs had paid extra to have their insurance contracts covered by reinsurance contracts.  These findings flowed from the manner in which the plaintiffs had, through HIH, obtained cover through the London market.  Importantly, his Honour also considered the requirement of section 562A(5)(d), namely whether a person would be 'severely prejudiced' if the reinsurance proceeds were distributed in accordance with sections 562A(2) or section 562A(3).  It was held that the question was whether the plaintiffs 'would be disadvantaged in a way that is harsh or unpleasantly extreme' if section 562A(3) applied in unmodified form.  The plaintiffs submitted that without the section 562A(4) orders, they would be unable to pay their creditors from 30 June 2011 and for a number of years afterwards.  Barrett J held that whether the section 562A scheme without a section 562A(4) order might make less money available to the plaintiffs' creditors was irrelevant for present purposes (although 'very important in a general sense').  It was equally irrelevant that the section 562A(4) order might result in reduced demands upon the new Hardie Group under the funding agreement, or upon the public purse.  Barrett J held that the strong and clear link between the HIH insurance cover and the specific reinsurance obtained by HIH made a section 562A(4) order just and equitable.  The reinsurance backing had been arranged by HIH with the full knowledge of the plaintiffs' insurance broker and the active assistance of the James Hardie Group, and was obtained for the express purpose of fulfilling the plaintiffs' needs.  Accordingly, his Honour granted the relief sought by the plaintiffs with respect to sums actually received under reinsurance for the two policy years in question, subject to minor changes.  However, Barrett J refused to make a section 562A(4) order in relation to reinsurance proceeds not yet received under a contract of reinsurance.  The power under section 562A(4) was a power to order that section 562A(2) and section 562A(3) 'do not apply to the amount received under the contract of reinsurance'.  His Honour noted that to attempt to apply section 562A(4) to future receipts which, if they were forthcoming at all, would emerge in circumstances not known at the time of making the order, would be to remove the inquiry from the specific facts to which the section directs attention.  Accordingly, the Court had no power to make the order sought by the plaintiffs.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h5)  **5.3 Unfair preferences -  Harris Scarfe creditor given the boot**  (By Caroline Wong, Mallesons Stephen Jaques)  Dwyer and Davies v Chicago Boot Co Pty Ltd [2011] SASC 27, Supreme Court of South Australia, Sulan J, 1 March 2011  The full text of this judgment is available at:  [http:/www.austlii.edu.au/au/cases/sa/SASC/2011/27.html](http://www.law.unimelb.edu.au/bulletins/%C2%ADhttp:/www.austlii.edu.au/au/cases/sa/SASC/2011/27.html" \t "_new)  **(a) Summary**  In Dwyer and Davies v Chicago Boot Co Pty Ltd, Sulan J held that payments made to Chicago Boot Co Pty Ltd ("Chicago Boot") by Harris Scarfe while Harris Scarfe was insolvent were unfair preferences under section 588FA of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Act").  Section 588FA of the Act provides that a transaction is an unfair preference given by an insolvent company to a creditor of the company if the company and the creditor are parties to the transaction and the transaction results in the creditor receiving, in relation to an unsecured debt owed to the company, more than the creditor would receive in respect of the debt if the transaction were set aside and the creditor were required to prove the debt in a winding up of the company.  Section 588F enables the court to make orders in relation to such transactions, for example, requiring the creditor to repay the company.  Chicago Boot argued that:  the liquidator's report should not be regarded as evidence of Harris Scarfe's insolvency at the time that the payments were made because the liquidator was not objective;  the retention of title clause in the contracts of sale had the effect that the payments did not fall within the definition of unfair preferences; and  the good faith defence under section 588FG of the Act applied.  Sulan J rejected each of those arguments, finding that the payments amounted to an unfair preference under section 588FA, and ordering Chicago Boot to pay the plaintiffs the sum of $316,801.33 in relation to the unfair preferences that it had received.  **(b) Facts**  Chicago Boot was the supplier of footwear products to Harris Scarfe.  The Receivers and Managers and Liquidators of Harris Scarfe brought an action against Chicago Boot alleging that payments made under supply contracts amounted to unfair preferences under the Act.  **(c) Decision**  **(i) Harris Scarfe's insolvency**  First, Sulan J considered whether the plaintiffs had shown that Harris Scarfe was insolvent at the time that the payments were made and found that it was.  A company is insolvent when it is unable to pay its debts as they fall due, with monies actually available by reference to both cash resources and assets that can be readily converted into cash.  Upon reviewing the evidence, Sulan J found that Harris Scarfe had been insolvent during the relevant period.  In coming to this conclusion, Sulan J rejected Chicago Boot's submission that the report of the liquidator, Samuel Davies, should not be relied upon as evidence.  His Honour accepted that Mr Davies was not independent but held that, as there was no principle under Australian law which rendered evidence inadmissible for not being independent, that matter went to the weight given to the evidence rather than its admissibility.  **(ii) The retention of title clause**  Chicago Boot argued that it did not receive an unfair preference under section 588FA of the Act because the relevant payments did not result in a decrease in the net value of the assets of Harris Scarfe which were available to creditors, since all of the goods supplied by Chicago Boot were subject to a retention of title clause.  Chicago Boot contended that, until it was paid in full, the goods remained the property of Chicago Boot and that it could retake possession of the goods if Harris Scarfe failed to make the required payment.  Sulan J considered the retention of title clause in the "context of the totality of the contractual arrangements", considering the parties' course of conduct in order to determine "the substance of the agreement".  He found that the manner in which they conducted business contradicted the claim that they did not intend title to pass until full payment had been received.  His Honour considered whether, in accordance with the requirements of the retention of title clause, Harris Scarfe stored Chicago Boot's goods separately from its own; whether the proceeds of sale were kept in separate accounts; and whether any record of goods owned by Chicago Boot was kept.  His Honour concluded that at no time did the parties treat the goods as though they were subject to the retention of title clause.  Rather, the parties acted at all times on the basis of a creditor and debtor relationship.  The goods were therefore not subject to any retention of title.  **(iii) The defence of good faith**  Chicago Boot sought to rely on the defence under section 588FG of the Act, which applies if it is proved that the person received the benefit in good faith and, at the time of receiving the benefit, they had no reasonable grounds for suspecting that the company was insolvent or would become insolvent as a result of the transaction, and a reasonable person in their circumstances would have had no such grounds for so suspecting.  Sulan J rejected the application of the good faith defence, since a reasonable person in the position of Chicago Boot would have had reasonable grounds for suspecting that Harris Scarfe was, or would become, insolvent.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h5)  **5.4 The powers of the court in determining the proper distribution of assets in accordance with section 511 of the Corporations Act**  (By Laura Keily and Daisy Darvall, Corrs Chambers Westgarth)  In the Matter of Ian James Purchas as Liquidator of Astarra Asset Management Pty Ltd (in liq) [2011] NSWSC 91, Supreme Court of New South Wales, Ward J, 1 March 2011  The full text of this judgment is available at:  [http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=150430](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=150430" \t "_new)  **(a)     Summary**  The case concerned an application by the liquidator, Purchas (Liquidator) of Astarra Asset Management Pty Ltd (in liq) (Astarra), in relation to disbursement of property comprising both shares (Shares) and monies (Funds) held by Astarra in its capacity as investment manager and agent for entity Trio, and to which other entities may have a beneficial entitlement.  The application was brought pursuant to section 511 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Corporations Act), and, in the alternative, sections 63(1) and 81 of the [Trustee Act 1925 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "default) (Trustee Act), in addition to the inherent or implied jurisdiction of the Court.  The Court ultimately determined that the proper Act under which to determine the distribution of the Funds and Shares was section 511 of the Corporations Act, that the Funds should be distributed to Trio having regard to the capacity in which Astarra had received them, and that Astarra was entitled to distribution of the Shares.  **(b)     Facts**  Trio Capital Limited (Trio) was an alternative financial services provider, specialising in administration and funds management.  Trio was the responsible entity for various registered managed investment schemes (Schemes) and had appointed Astarra as the investment manager of the Schemes, which included Astarra Strategic Fund (ASF).  Orders were made to wind up the Schemes pursuant to section 601ND(1)(c) of the Corporations Act, due to perceived problems with both the establishment and nature of asset investment of the Schemes.  ASF funds were applied under the terms of a Master Deferred Purchase Agreement (Agreement) to which Astarra, EMA International Ltd (EMA) and ANZ Nominees Ltd (custodian for Trio) were parties.  The Agreement described Astarra as both investment manager of ASF and, importantly, as "agent" for Trio.  Certain rights accrued to Astarra under the Agreement, including the right to receive future Delivery Assets (Delivery Assets), the value of which was based upon the performance of particular offshore funds in which EMA invested the purchase price paid to it (Investment). Each time an Investment was made, the Agreement provided for a supplemental agreement (Supplemental Agreement) to be executed between EMA, Astarra and Trio concerning the nature of the underlying investment (Underlying Investment), date and purchase price, which was payable by Astarra to EMA.  EMA undertook to use all the funds to acquire interests in the Underlying Investment, but was entitled to use a portion of funds necessary to acquire the Delivery Assets, to be held for the benefit of Astarra, and to which EMA acquired a beneficial interest in a portion, holding such interest until investment completion.  The procedure for completion set out in the Agreement was that Astarra was entitled to request completion and that EMA was obliged to complete a corresponding portion of the relevant Underlying Investment within 60 business days.  Upon delivery of the Delivery Assets to Astarra, EMA's obligations to Astarra were fully satisfied.  According to evidence, the investment completion procedure should have involved:  Investment of funds in ASF by investors;  The custodian for ASF would then pay a portion of those funds to Astarra for placement with EMA;  Trio would then complete a supplemental agreement in accordance with the Agreement, which nominated the amount payable on behalf of the ASF;  EMA would then become entitled to the ASF funds as provided in the Supplemental Agreement and was required to invest those funds in the Underlying Investment; and  Astarra or EMA could request completion of the Supplemental Agreement, requiring EMA to deliver the Delivery Asset Parcel, being the amount of the investment less fees.  However, the investment procedure that eventuated was not carried out in accordance with that specified under the Agreement.  Rather, evidence suggested that Astarra deposited the ASF funds into a US Company brokerage account (Interactive Brokers), who commenced securities trading, including investments in a Cayman Islands-based fund, Tailwind, to which Astarra was appointed investment manager. Records indicated that Astarra had made several substantial investments in Tailwind, and evidence indicted that Investment Brokers had made several payments to Astarra's account in relation to Tailwind (Fund).  Trio was eventually placed in liquidation.  The liquidator submitted that the assets, comprising both Shares and Fund, belonged either to ASF or EMA, and sought advice from the Court as to how to properly deal with those assets.  **(c)      Decision**  The relief sought was to both permit the distribution of property in which Astarra claimed no interest (i.e. the Fund) and to permit sale of the Shares, in which no other entity had an interest, in the ordinary course of winding up.  The Court was required to consider the application of section 511 of the Corporations Act, which provides that:  (1) The Liquidator, or any contributory or creditor, may apply to the Court:  (a)    To determine any question arising in the winding up of a company; or  (b)   To exercise all or any of the powers that the court might exercise if the company were being wound up by the Court.  (2) The Court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.  The Court noted that applications made under section 511 in a voluntary winding up are determined in much the same way as a court-ordered winding up under section 479(3) of the Corporations Act. The term "just and beneficial" was considered to be a similar concept to "just and equitable", allowing the court a discretion whether to make an order by reference to whether the relief sought is "of advantage in the liquidation".  The Court noted, citing Re Anglican Insurance Ltd [2008] NSWSC 41, [38] that a determination under section 511 could not, of itself, bind anyone except the liquidator and the persons entitled to participate under the winding up, the effect being to merely sanction a course of conduct on the part of the liquidator so that he or she might adopt that course free from risk of personal liability from breach of duty.  The Court also considered whether Astarra was a "bare trustee" of the property and the applicability of section 63(1) of the Trustee Act. Section 63(1) permits a trustee to apply to the court for an opinion, advice or direction on any question regarding administration or management of trust property.  Ward J considered the appropriateness of making the application under section 63.  Ward J noted that the High Court in Macedonian Orthodox Community Church v His Eminence Peter the Diocesan Bishop of the Macedonian Orthodox Diocese (2008) 237 CLR 66 (Macedonian Church Case), had considered that the proper purpose for seeking judicial advice under that section included relief aimed at resolving legitimate doubts held by the trustee as to the proper course of action and protecting the trust and those entitled to it.  However, Ward J also considered the general rule that, where the question concerned respective rights of beneficiaries, it was not considered appropriate for the court to give opinions or advice to a trustee under section 63 of the Trustee Act.  Further, Ward J cited Beazley and Giles JJA of the Court of Appeal in the Macedonian Church Case [2006] NSWCA 277, who stated that an "application for judicial advice is an inappropriate process to resolve disputes between trustees or to settle disputes between parties to a trust".  Ward J found that the Shares did not involve a consideration of competing beneficial entitlements to trust property, rather it was a question as to whether the liquidator can properly treat the shares as the property of the company.  Accordingly, had the matter not been able to be determined under section 511, it would have been an appropriate exercise of the power under section 63.  In relation to the Fund, there was more doubt as to the appropriateness of an order under section 63.  The competing interests of EMA and Trio as responsible entity for ASF created a potential for dispute and there was an "understandable reluctance" to permit the Fund to be placed outside the immediate reach of investors in Tailwind.  Furthermore, EMA was defunct and would have a contractual obligation to deliver up the Delivery Assets.  Also, Astarra had received the Funds in the capacity of "agent" for Trio and arguably that discharged the obligation to deliver the Delivery Asset parcel.  Ward J therefore determined that it was proper to make the determination under section 511 of the Corporations Act and it was just and beneficial for advice to be given as to the entitlement of the liquidator to deal with assets held by it but in respect of which there was legitimate doubt, because it was to the clear advantage of the liquidation.  Ward J accepted therefore that the Fund did not belong to Astarra, because it represented the "net proceeds of the investment of funds of the ASF under the investment management of Astarra".  Ward J considered that the proper question was whether the Fund should be distributed to the liquidators of Trio, as responsible entity for ASF, or should be distributed to Trio as agent for EMA.  Orders were made to distribute the Fund to Trio, in its capacity as either responsible entity for the ASF or agent for EMA.  The Shares were regarded by Ward J as the property of the company and, in "the absence of any identified claimant" were determined to be dealt with in the ordinary course of the administration of the company. A declaration was therefore made which entitled Astarra to the Shares.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h5)  **5.5 Breach of duty to avoid conflict and disclosure of conflict of interest**  (By Georgina Brueckner, Freehills)  Blackmagic Design Pty Ltd V Overliese [2011] FCAFC 24, Federal Court of Australia, Full Court, Finkelstein, Jacobson and Besanko JJ, 25 February 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/24.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/24.html" \t "_new)  **(a) Summary**  The appellant, a company engaged in the design, manufacture, marketing and sale of hardware and software, claimed the first and second respondents (who were employees of the appellant) developed a video capture card that would compete with the appellant's products. This card is referred to in the judgment as the "Simple Card". The appellant claimed the confidential information of the appellant was used to develop the Simple Card, and details of this product, and the appellant's products were contained in worksheets. These worksheets are referred to as the "ycalc" spreadsheet. The appellant maintained that the first and second respondents were involved in a conflict of interest and duty, and that there was no disclosure of that conflict.  The claim against the first respondent was for equitable compensation for a breach of duty to avoid conflict. The claim against the second respondent was for common law damages for a breach of a contractual provision to disclose a conflict of interest. The Full Court of the Federal Court of Australia found in favour of the respondents, only allowing the appeal in relation to costs.  In dispute were four key issues:  1.     should the trial judge have restrained the first, second and third respondents from producing the Simple Card;  2.     should the trial judge have ordered equitable compensation or common law damages in favour of the appellant for loss of opportunity to develop the Simple Card;  3.     should the appellant be able to claim breach of an implied contractual duty of good faith against the first and second respondents; and  4.     did the trial judge miscarry in the discretion as to costs.  **(b) Facts**  The first respondent worked for the appellant between June 2005 and May 2008, and was the Director of Hardware Engineering. The second respondent was employed by the appellant between April and May 2008 and was Business Development Manager. The third respondent is a company called Atomos Audio Pty Ltd.  In January - February 2008, the first and second respondents developed the Simple Card without the knowledge of the appellant. The appellant claimed that the Simple Card was developed with use of the appellant's confidential information. This encompassed the appellant's parts usage figures, the prices the appellant paid for those parts and profit margins. The first respondent also prepared the ycalc spreadsheet which recorded details of the Simple Card and details of the appellant's products.  The first and second respondent left the appellant's employ in May 2008, and versions of the ycalc spreadsheet were obtained with a search order executed on 13 May 2008.  Trial judge's factual findings:  1.     during their employment by the appellant, the first and second respondents established a business venture with the third respondent;  2.     from 2007, the business venture involved electronic products in the audio industry, and in 2008, in the video industry;  3.     the first respondent used the appellants confidential information to prepare the new business, and the second respondent received, but did not use the confidential information; and  4.     the first respondent formed the view in 2008 that the products would compete with the appellant's products.  **(c) Decision**  **(i) Injunction against the production of Simple Card**  Besanko J agreed with the trial judge that the Simple Card was not something that had a property right, but rather it was a product concept that never reached the stage of production. In light of that, the Simple Card did not represent a business opportunity and there was no obligation to disclose by the first or second respondent. Besanko J also considered that as the first respondent had been out of the appellant's employ for nearly two years, there was no basis for a permanent injunction.  **(ii) Equitable compensation against the first respondent and common law damages against the second respondent**  To claim for equitable compensation, the appellant argued it suffered a loss of opportunity to develop the Simple Card. Besanko J held that the conduct of the first respondent gave rise to a real possibility of conflict between his personal interest and duties. However, it must also be proved that the first respondent had a duty to disclose that conflict. Besanko J did not find this, rather agreeing with the approach of the trial judge that fiduciary duties are proscriptive, not prescriptive. The duty is therefore to avoid a conflict of interest and duty, rather than give disclosure.  Besanko J also noted that for a claim of equitable compensation to succeed, the appellant must show that the duty to disclose included the details of the Simple Card on the ycalc spreadsheet. Besanko J held that there was no requirement to provide the spreadsheet, or disclose details of the Simple Card.  Based on the findings of the trial judge, Besanko J did not find the second respondent had a conflict of interest and duty, as there was no intention to compete with the appellant. Additionally, any confidential information the second respondent had access to was not used in the development of the competing product.  **(iii) A claim in contract for breach of an implied duty of fidelity or good faith**  During oral submissions on appeal, the appellant applied to amend its Notice of Appeal to claim against the first and second respondents for breach of an implied contractual duty of good faith. Besanko J did not allow the appellant to amend its Notice of Appeal, as the matter was raised too late in the course of the appeal. Furthermore, to consider the amendment would require a reconsideration of the case by the trial judge.  Besanko J also noted that the development of the Simple Card may not have required disclosure under an implied contractual duty of disclosure. This is based on two reasons, first, the respondents did not solicit the appellant's clients: Mason Gray Strange v Eisdell (1989) 31 AILR 271. Secondly, the respondents did not recruit staff working for the appellant: Schindler Lifts Australia Pty Ltd v Debelak (1989) 89 ALR 275. The appellant's reliance on Robb v Green [1895] 2 QB 315 to claim a failure to disclose the details of  the Simple Card by the first and second respondents was negated as it was the basis of relief given by the trial judge, and furthermore, it did not give rise to the particular loss the appellant claimed.  **(iv) The trial judge's order as to costs**  Besanko J held in favour of the appellant that the trial judge erred in offsetting costs, because it assumed the costs of the various parties were the same, whereas the appellant's costs were likely to be in excess of the first, second and third respondents. Besanko J held that if costs are to be assessed on a issues basis, then a party is entitled to be compensated for the costs it incurred in relation to those issues.  Accordingly, Besanko J allowed the appeal, but only for the purpose of substituting a new costs order for the trial judge's costs order.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h5)  **5.6 Duty to terminate a receivership**  (By Richard Plunkett, DLA Phillips Fox)  Forest Marsh Pty Ltd v Pleash [2011] FCA 134, Federal Court of Australia, Yates J, 23 February 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/134.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/134.html" \t "_new)  **(a) Summary**  Forest Marsh Pty Ltd and its sole director, secretary and shareholder alleged that Blair Pleash, as receiver and manager, breached duties owed to Forest Marsh Pty Ltd under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Act") and at general law, as well as contravening section 52 of the former Trade Practices Act 1974 (Cth).  Forest Marsh Pty Ltd also sought orders that Pleash cease to act as receiver of the company and certain other companies.  In the alternative, an application was made under section 423 of the Act for an inquiry into Pleash's conduct as receiver, including into what were alleged to be excessive and unreasonable fees.  The application was dismissed. While largely confined to the facts, the decision offers guidance on a receiver's duty to terminate the receivership.  **(b) Facts**  A receiver, Blair Pleash, had been appointed to two companies which formed part of a Tasmanian fruit juice business by Bibby Financial Services Australia Pty Ltd ("Bibby") in April 2008.  Bibby and the Tasmanian companies had entered into a "full service factoring agreement" in 2007.  A lengthy and complex dispute over the termination of the receivership developed against the backdrop of litigation between debtors to the two companies and Business Expansion Capital Pty Ltd, which had appointed managing controllers to one of the two Tasmanian companies pursuant to a Deed of Charge.  **(c) Decision**  The applicants claimed that Pleash owed Forest Marsh Pty Ltd the duties imposed by sections 180, 181 and 182 of the Act and further alleged that Pleash owed various general law duties to the company, and in particular had breached the following duties:  a duty to exercise his powers in good faith and for a proper purpose, including the duty not to sacrifice the mortgagor's interests recklessly; and  a duty to terminate the receivership by handing over the money and other surplus assets to the mortgagor as soon as the debt of the mortgagee has been paid.  Yates J confirmed that the duty of a receiver to exercise his or her powers in good faith now seemed to be subsumed by the duty imposed by section 181 of the Act, which states:  Good faith-directors and other officers              (1) A director or other officer of a corporation must exercise their powers and discharge their duties: (a) in good faith in the best interests of the corporation; and (b) for a proper purpose. (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.  His Honour further observed that formulation of these duties appeared to be derived from the observations of Needham J in Expo International Pty Ltd (Receivers and Managers Appointed) (In Liquidation) v Chant [1979] 2 NSWLR 820 at 834.  Yates J noted that the statement of the latter duty by the applicants was an "embellishment". Needham J had conditioned the statement of the duty to terminate the receivership as soon as the interests of the mortgagee had been satisfied by the further observation that a receiver would be acting outside power in failing to terminate a receivership because of "some extraneous or collateral consideration".  His Honour confirmed that Needham J had not conditioned the duty simply on payment of the secured debt, but invoked a wider set of considerations affecting the mortgagee's or chargee's interests, including what the security document itself might provide in that regard.  "Needham J saw the receiver's duty to the mortgagor or charger to terminate the receivership as an incident of the duty to account to the mortgagor or charger *after* [emphasis in the original] the security had been discharged".  The applicants alleged that the receiver had "continued the receivership on the basis of an extraneous or collateral consideration", and as a consequence the receiver should not have charged fees after 10 October 2008.  In the alternative, the applicants alleged that the fees incurred were excessive and unreasonable.  Yates J held that the applicants had not proven that they had discharged the secured debt, and furthermore that in a context where the managing controllers were acting in a 'belligerent and unhelpful' fashion which lengthened the period of the receivership, the receiver and his solicitors had acted reasonably.  Accordingly, the applicants failed to establish the bases on which they alleged the first respondent acted in breach of the relevant statutory duties and general law duties.  Yates J also dismissed the Trade Practices Act claim.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h5)  **5.7 An unsecured creditor's right to be subrogated to a former trustee's right of indemnity out of the trust assets**  (By Steven Grant, Minter Ellison)  Helena Hu v PS Securities Pty Ltd as trustee of the Joseph Family Trust [2011] NSWSC 98, Supreme Court of New South Wales, Ward J, 22 February 2011.  The full text of this judgment is available at:  [http://caselaw.lawlink.nsw.gov.au/action/PJUDG?jgmtid=150447](http://caselaw.lawlink.nsw.gov.au/action/PJUDG?jgmtid=150447" \t "_new)  **(a) Summary**  The case concerns an application brought by an unsecured creditor, Ms Helena Hu, for a freezing order under rule 25.11 of the NSW Uniform Civil Procedure Rules against PS Securities Pty Ltd (PS Securities) as trustee of the Joseph Family Trust, in order to preserve sufficient assets of the trust (pending the determination of an application that was to come before the Court on 25 March 2011 in relation to the bringing of proceedings by Ms Hu against PS Securities seeking to recover trust assets) to meet a District Court judgment debt in her favour obtained against Alphena Pty Limited (Alphena) being the former trustee of the said trust.  The application was brought on the basis of Ms Hu's apprehension that steps may be taken by PS Securities which would have the effect of depriving Ms Hu of the benefit of the judgment debt and asserted an entitlement to be subrogated to Alphena's right of indemnity out of the trust assets.  **(b) Facts**  On 20 November 2009 Ms Hu obtained judgment in the District Court against a number of parties, including Alphena (the then trustee of the Joseph Family Trust).  In this respect Ms Hu obtained an order against Alphena in the sum of $419,176.62 and an order to pay Ms Hu's costs of the proceedings on an indemnity basis.  At that time Alphena held various assets as the trustee of the Joseph Family Trust including land on which there was a shopping centre (the Land) and Mr Paul Joseph was the appointor of the Joseph Family Trust.  On 9 December 2009 PS Securities was registered as a company with Mr Joseph as a director and secretary.  On 30 December 2009 Ms Shirley Therese Joseph was also appointed as a director of PS Securities and PS Securities was appointed by Mr Joseph as co-trustee of the Joseph Family Trust.  On 5 January 2010 a resolution was passed by the sole member of Alphena to wind up that company and liquidators were appointed to the company.  Simultaneously, Alphena ceased to act as a trustee of the Joseph Family Trust leaving the control of the trust assets (including the Land) solely in the hands of PS Securities.  On 13 January 2010 Ms Hu lodged a proof of debt with the liquidators of Alphena in the amount of $558,912.85 in respect of the District Court judgment.  On 2 March 2010 PS Securities was registered as the new proprietor of the Land and on that day a mortgage was registered in favour of NAB over the Land in the amount of $1,850,000.  There was then a course of correspondence with the liquidators of Alphena from August 2010 (when Ms Hu became aware that the Land had been transferred to PS Securities) in which the solicitors acting for Ms Hu urged the liquidators to take action against PS Securities in order to recover the sum referable to the District Court judgment debt (in reliance upon the trustee's right of indemnification in respect of that debt).  Ultimately this lead to these proceedings being instituted with the filing of a Statement of Claim under which Ms Hu, as an unsecured creditor of Alphena, asserted an entitlement to be subrogated to Alphena's right of indemnity out of the trust assets for the debt incurred by Alphena in defending the District Court proceedings on behalf of the Trust or to exercise on behalf of Alphena that right of indemnification in order to permit it to satisfy the District Court judgment debt.  **(c) Decision**  At the conclusion of a hearing of Ms Hu's application on 22 February 2011, Ward J made orders on an interlocutory basis as sought by Ms Hu on the usual undertaking by Ms Hu as to damages.  In making these orders, Ward J noted that a freezing order is justified where there is a danger or real risk that a judgment or prospective judgment of the court will be unsatisfied as a result of the defendant or a third party dealing with or disposing of its assets so as to frustrate the court's process and considered whether this was the case in these proceedings.  **(i) Is there a basis on which assets of PS Securities might be recovered by Ms Hu (or Alphena) in satisfaction of the judgment debt?**  Counsel for Ms Hu submitted that the facts established a strongly arguable case that the Land was held by Alphena on trust and was therefore properly described as trust property and that, in the circumstances, Ms Hu had a strongly arguable case that upon the liquidation of Alphena (as creditor of the trustee company) she had a right to be subrogated to Alphena's right of indemnity out of trust assets for liabilities incurred on behalf of the trust.  In this respect Ward J noted that the trustee's right of indemnity is a proprietary right and once the right had accrued it continued after the trustee has ceased acting in that position.  Accordingly, Ward J considered that there was a sufficiently arguable case to sustain the relief claimed by Ms Hu on the application made in these proceedings.  Counsel for PS Securities submitted that Alphena's right to seek indemnity out of the trust assets in the hands of the new trustee (PS Securities) was solely the right of the liquidator of Alphena and that Ms Hu could not pursue that right in her own name because of the merger in the winding up of her debt claim, arising by the lodgment of the proof of debt.  However, Counsel for PS Securities accepted that the trustee's right of indemnification was not extinguished by the entry of the trustee into liquidation and remained with that company, and that the change in the identity of the trustee did not extinguish the retired trustee's property rights.  On that basis, Ward J considered that there was a sufficiently arguable case (and a serious question to be tried) as to the claim by Ms Hu to be subrogated to Alphena's (acknowledged) right of indemnity for trust debts against any assets of the Joseph Family Trust, notwithstanding the lodgment of the proof of debt.  **(ii) Is there a risk of dissipation of assets?**  In this respect Counsel for Ms Hu submitted that:  the appointment of a new trustee (and the subsequent resolution to wind up Alphena) was an attempt to place the trust assets beyond the reach of Ms Hu and to deprive Alphena of the ability to meet the judgment debt;  Ms Hu feared that because Mr Joseph (as appointor of the Joseph Family Trust and director of PS Securities) had already once taken steps pursuant to which trust assets had been transferred to a new trustee and was now a director also of the new trustee company, she was at risk of further such action which could leave her unable to obtain satisfaction of the judgment debt; and  the Land was transferred to the new trustee when both Alphena and PS Securities must be taken to have been aware of the judgment debt (given the involvement of Mr Joseph in both companies) and the decision was made to transfer the Land rather than let Alphena retain possession as trustee to satisfy a liability incurred on behalf of the trust.  Ward J considered that there was some force in the third submission and that it was sufficient as to give rise to a real apprehension or risk that if a freezing order is not made then the assets may be dealt with in such a way as would have the effect of defeating a claim under the trustee's right of indemnification.  Accordingly, Ward J held that the effective transfer of ownership of the trust assets, without provision for the payment of the judgment debt, and the substantial encumbrance of the Land coupled with the expansive investment plans of PS Securities, gave rise to a sufficient risk or danger of the Court's process being frustrated, so as to satisfy the requirement that there be a risk of dissipation of assets.  **(iii) Balance of convenience**  In assessing the balance of convenience the Court was referred to a number of discretionary factors for its consideration.  Counsel for PS Securities submitted that the imposition of a freezing order on PS Securities would inhibit its ability to proceed with its business plans which would result in PS Securities suffering significant damages.  However, Ward J noted that those business plans did not appear to have been finalised and the duration of the freezing order was relatively limited in the first instance, whereas the prejudice Ms Hu would suffer if the trust assets are disbursed would be substantial given that Alphena had no assets of its own to meet the judgment debt and it is for a not inconsiderable amount.  Noting that Ms Hu was the major creditor of Alphena in liquidation, the transfer of the Land occurred without her knowledge and that the Land was now valued at some $6 million, Counsel for Ms Hu submitted that an inference be made that it was unlikely that a freezing order limited to a far smaller amount would materially impinge upon the trustee carrying on business in the ordinary course.  On balance, Counsel for Ms Hu submitted that the risk of the Court's processes being frustrated by the transfer of the Land to a new trustee and/or PS Securities encumbering the Land in a manner that would wholly or partly avoid satisfaction of the judgment debt as a result of the proceedings, was a real risk greatly outweighing any potential prejudice to PS Securities caused by the grant of a freezing order.  Ward J agreed with this submission and on balance held that the discretionary considerations favoured the imposition of a freezing order (at least pending th e determination of the March application and perhaps until the determination of the proceedings as a whole).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h5)  **5.8 Reinstatement orders under the Companies (New South Wales) Code**  (By Sabrina Ng and Cicely Sylow, Corrs Chambers Westgarth)  Tan v Australian Securities and Investments Commission; Comcare re Howard Smith & Patrick Travel Pty Ltd; Love v Australian Securities and Investments Commission [2011] NSWSC 58, New South Wales Supreme Court, Barrett J, 21 February 2011  The full text of this judgment is available at:  [http://caselaw.lawlink.nsw.gov.au/action/PJUDG?jgmtid=150316](http://caselaw.lawlink.nsw.gov.au/action/PJUDG?jgmtid=150316" \t "_new)  **(a) Summary**  In three unrelated proceedings, Barrett J made an order under the Companies (New South Wales) Code directing the reinstatement of the registration of each company, all of which had been deregistered prior to 1 January 1991.  His Honour relied on the Companies (New South Wales) Code to make this order as he was of the view that reinstatement of registration was unable to be dealt with by the Court and by ASIC under section 601AH of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  His Honour noted his distinct discomfort with making the order under the Companies (New South Wales) Code which is otherwise not in force, and called for legislative action to resolve the uncertainty as to what the correct approach should be.  **(b) Facts**  Three applications by unrelated companies were made to the Court seeking reinstatement of the registration of a company.  The reasons for these applications were:  after the company had been deregistered without the knowledge of its directors or shareholders it purported to become the registered proprietor to land and to mortgage that land to a financial institution as security for money borrowed;  a person with an asbestos induced illness sought to bring a former employer back into existence to bring proceedings for damages for bodily injury; and  the company had been deregistered by its own request but it was then later discovered that it owned a parcel of land.  Each of the three companies had been incorporated under the Companies (New South Wales) Code (or earlier New South Wales company legislation) and later deregistered under that Code.  The date of deregistration for each of the three companies was 5 May 1989, 13 December 1990 and 18 August 1988, all prior to January 1991.  Since the enactment of the Corporations Act 2001 (Cth) there has been no clear consensus on what the correct approach is for dealing with companies that were created and later struck-off under pre-January 1991 state legislation.  His Honour noted that the lack of clarity surrounding this issue was due to a combination of:  the transitional provisions of the [Corporations (New South Wales) Act 1990 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3886" \t "default);  the reinstatement provisions that correspond with the present section 601AH of the Corporations Act 2001 (Cth) and the transitional provision that became section 1362CH;  non-inclusion of section 1362CH in that Corporations Act 2001 (Cth); and  the generally and imprecisely expressed transitional provisions now in force through Division 6 of Part 10.1 of the Corporations Act 2001 (Cth).  His Honour formed the view that there was no basis for a conclusion that reinstatement of registration may be dealt with by the Court and by ASIC under section 601AH of the Corporations Act 2001 (Cth).  **(c) Decision**  His Honour made an order to reinstate each company under the Companies (New South Wales) Code as he was of the view there was no basis on which to make an order for reinstatement under the Corporations Act 2001 (Cth).  His Honour stated his distinct discomfort about continuing to resort to the Companies (New South Wales) Code given that its availability rests solely on the insubstantial foundation of section 85 of the Corporations (New South Wales) Act 1990.  His Honour referred to a number of cases in which the same issue had been considered at first instance and also took the view that his approach accorded with ASIC's Regulatory Guide 83, Reinstatement of Companies.  His Honour thought it desirable that Parliament enact legislation to deal in a clear and concise way with the reinstatement of the registration of a company that has either been deregistered or dissolved before 1 January 1991 under state or territory legislation then in force.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h5)  **5.9 The content of corporate disclosures and continuous disclosure obligations**  (By Angela Pearsall and Nicole Huggins, Blake Dawson)  Australian Securities and Investments Commission v Fortescue Metals Group Limited [2011] FCAFC 19, Federal Court of Australia, Full Court, Keane CJ, Emmett and Finklestein JJ, 18 February 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/19.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/19.html" \t "_new)  **(a) Summary**  In a unanimous decision the Full Federal Court upheld an appeal by the Australian Securities and Investments Commission (ASIC) against Fortescue Metals Group Limited (FMG) and its chairman and chief executive officer, Andrew Forrest.  The Court found that:  FMG breached its continuous disclosure obligations and engaged in conduct which was, or was likely to be, misleading or deceptive; and  Forrest was knowingly involved in FMG's breach of its continuous disclosure obligations and also breached his duty of care and diligence to FMG.  The decision provides further important guidance on the responsibilities of companies and their officers in the context of ASX announcements.  **(b) Facts**  In early 2004, FMG and Forrest commenced negotiations with three Chinese entities for the construction, financing and transfer of mine, rail and port infrastructure in the Pilbara region of Western Australia.  In the second half of 2004, FMG executed three substantially similar framework agreements with each of the Chinese contractors. The agreements made clear that the parties intended to create certain binding obligations but left a number of matters to be negotiated between the parties including detailed specifications for the scope of the construction work and the price to be paid by FMG.  In August and November 2004, FMG made a series of announcements to the Australian Securities Exchange (ASX) concerning the nature of the framework agreements, in purported compliance with its continuous disclosure obligation under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Act) and ASX Listing Rule 3.1.  The announcements stated that FMG had executed binding agreements with the Chinese entities to build, finance and transfer the railway, port and mine infrastructure.  ASIC commenced proceedings in March 2006 contending that FMG and Forrest had engaged in conduct contrary to the Act in relation to FMG's public disclosures.  ASIC asserted that to describe the agreements as binding was misleading or deceptive and breached FMG's continuous disclosure obligations because none of the agreements imposed on the Chinese contractors an enforceable obligation to build and transfer any component of the project.  ASIC asserted that Forrest was knowingly involved in FMG's breach of the continuous disclosure provisions and breached his duty of care and diligence by allowing FMG to contravene the continuous disclosure provisions, thereby exposing FMG to pecuniary penalty.  The trial judge (Gilmour J) dismissed ASIC's case, holding that the announcements and other public statements that the contracts were binding were "necessarily underpinned by an opinion" which was honestly and reasonably held.  ASIC appealed to the Full Federal Court.  **(c) Decision**  **(i)  Effect of the framework agreements**  The Full Court held that the framework agreements were not binding and either constituted no more than an agreement to agree or were void for uncertainty.  On either view they could not be accurately described as binding agreements to build, finance and transfer the infrastructure.  While the framework agreements were expressed to be immediately binding and the contracting parties' subsequent conduct indicated that they considered the agreements to be binding, the intention of the parties must be determined objectively, rather than subjectively.  The content of the framework agreements on essential terms such as the scope of works, scheduling and price was explicitly left to be agreed between the parties.  Emails from Forrest and subsequent drafts of supplementary agreements demonstrated how far apart the parties were from a real consensus on scope and price and emphasised the preliminary character of the framework agreements.  **(ii) Misleading or deceptive conduct**  In determining whether FMG's statements that the agreements were binding were misleading or deceptive, the real question was what members of the investing public would have understood from FMG's announcements.  It did not matter that FMG did not intend to mislead or deceive the investing public.  The Court found that FMG's emphatic statements would ordinarily and reasonably be understood as statements to be accepted at face value rather than as assertions of a contestable opinion.  The Court held that FMG's statements conveyed unequivocally that the Chinese contractors had assumed legally enforceable obligations to build the infrastructure and would not have been understood as statements of opinion to which a contrary view was reasonably open.  They would have been understood as conveying the historical fact that agreements containing terms accurately summarised in the announcements had been made between the parties.  In the absence of some indication that a statement as to the legal effect of an agreement is no more than a subjective opinion of the statement maker, such a statement must, as a matter of ordinary English, be construed as a statement as to the agreement's actual legal effect.  The Court considered that FMG could have avoided engaging in misleading or deceptive conduct by simply publishing copies of the framework agreements to the ASX and the media at the outset, rather than issuing a statement with summarised the nature and effect of those agreements.  **(iii) Continuous disclosure**  The Court held that the conclusion that the framework agreements were not binding also meant that FMG had breached its continuous disclosure obligations.  Once FMG had made misleading statements concerning the binding nature of the framework agreements, section 674 of the Corporations Act required that those statements be corrected.  The Court considered that the contravention was a failure to disclose the terms or the true effect of the framework agreements.  The continuous disclosure regime does not "in terms" impose an obligation to correct information already provided to the ASX.  The Court reasoned that corrective information was required in this case because the misstatement of terms of the agreements was a circumstance necessarily apt to affect the confidence of investors in FMG's management.  This would, or would be likely to, influence them to acquire or dispose of FMG shares.  **(iv) Directors' duties**  The Court found that Forrest knowingly participated in the relevant events leading to FMG making public announcements which were, or were likely to be, misleading or deceptive.  The Court held that Forrest knew the terms of the framework agreements and, it was inferred, knew of the disparity between those terms and FMG's representations about them.  Accordingly, the Court found that Forrest was involved in FMG's contraventions:  in respect of the misleading or deceptive announcements (within the meaning of section 79(c) of the Act);  and of FMG's continuous disclosure obligations (pursuant to section 674(2A) of the Act).  The Court found that Forrest had not discharged the onus he bore in proving the available defence in section 674(2B) of the Act - that he took all steps that were reasonable in the circumstances to ensure that FMG complied with its continuous disclosure obligations and, after doing so, he believed on reasonable grounds that FMG was so complying.  There was no evidence of any steps Forrest took to ensure that the framework agreements were, in law, binding agreements.  The only available evidence showed that FMG/Forrest obtained legal advice on the effect of the agreements after the impugned announcements were made.  The Court considered that Forrest's own email communications (which spoke of further steps necessary to reach agreement on scope, financing and price) were inconsistent with a belief on his part that FMG had made a binding agreement for the construction of the infrastructure.  **(v) Business judgment rule**  The Court found that Forrest had breached his duty of care and diligence to FMG as he had exposed FMG to a pecuniary penalty.  Forrest was not entitled to rely on the business judgment rule as a defence to the claim that he breached his director's duties. The Court stated that the business judgment rule did not apply as the decision not to disclose the true effect of the framework agreements could not be described as a "business judgment" (being a judgment to take or not take action in respect of a matter relevant to the business operations of the corporation).  It was a decision related to compliance with the requirements of the Act.  The Court considered that the legislature had not intended that a director could lawfully decide, as a matter of business judgment, that a corporation under his/her direction should not comply with a requirement of the Act.  Further, the Court reasoned that the business judgment rule could not be used as a defence to Forrest's involvement in FMG's breach of its continuous disclosure requirements as the provisions relating to continuous disclosure contained specific exculpatory provisions enacted for the benefit of directors and which Forrest had failed to establish.  **(vi) Next steps**  The proceedings have been remitted to a judge of the Federal Court to determine issues of exoneration and penalty.  FMG has announced that FMG and Forrest intend to seek leave to appeal to the High Court.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h5)  **5.10 Court unwilling to apply "deceptive and misleading" provisions to a responsible entity defending a motion for its replacement**  (By Simon Truskett, Clayton Utz)  Century Funds Management Limited v Opus Capital Limited [2011] FCA 78, Federal Court of Australia, Jacobson J, 10 February 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/78.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/78.html" \t "default)  **(a) Summary**  This case suggests that where a responsible entity defends a motion for its replacement, the Federal Court will be reluctant to intervene and adjudicate on allegedly misleading statements.  Further, it appears that responsible entities are not under a duty to maintain a completely neutral position in the lead up to meetings.  **(b) Facts**  The applicant Century Funds Management Limited (Century) is a responsible entity for a number of managed schemes.  On 13 January 2011, Century called a meeting of Opus Income and Capital Fund No 21 (the Fund) through members of the Fund.  The purpose of the meeting which was due to be held on 28 February 2011 was to remove the respondent Opus Capital Limited (Opus) as responsible entity for the Fund and to appoint Century in its place.  Century sought interlocutory relief including a claim for Opus to publish what were said to be corrections to allegedly misleading statements it had made in a brochure and an embargo on the right of Opus to communicate information to unit holders about the suitability of Century to manage the Fund.  **(c) Decision**  The Court had to determine whether Century had a prima facie case against Opus for the allegedly misleading and deceptive statements.  Ultimately, Jacobson J was not satisfied that there was a very strong likelihood of success at a final hearing on the question of whether the statements are misleading.  The Court noted the authority of Fraser v NRMA Holdings Limited (1995) 55 FCR 452, that where a contravention of section 52 of the Trade Practices Act 1974 (Cth) (or an analogous provision) is alleged on the basis of a failure to make full and fair disclosure of information, the applicant carries the onus of establishing how what was omitted had the potential to mislead.  It was commented that there would be room for debate in relation to each of the statements as to whether what was said in the brochure might be misleading and this would not be sufficient to find the necessary degree of likelihood of success at a final hearing.  It was also noted that establishing materiality would be difficult where the allegedly misleading statement involves questions of commercial judgment and matters of degree, and there would be scope for a range of honestly and reasonably held opinions.  On a consideration of the balance of convenience, the Court declined the application for interlocutory relief relying on the authorities of City Pacific Limited v Bacon (2009) 70 ACSR 418 (City Pacific) and Lachlan Reit Limited v Garnaut [2010] VSC 399 (Lachlan Reit).  In those cases, the courts were unwilling to use "misleading and deceptive" provisions against members leading up to similar meetings to remove a responsible entity.  In this case, Jacobson J extended the principle in City Pacific and Lachlan Reit to apply to statements made by the responsible entity itself and not just the members.  Jacobson J quoted comments in City Pacific that there will often be significant disagreement among members as to facts which are said to justify a proposed resolution and it is a function of the meeting that members be allowed the opportunity to hear different points of view and decide how to best protect their own best interests. Jacobson J similarly agreed with comments in Lachlan Reit that there is inherent difficulty in applying misleading conduct to an ongoing debate involving expressions of opinion and prediction in the course of advocating for a particular outcome.  The Court also supported the view in both City Pacific and Lachlan Reit that it would be an abuse of judicial process for members to resort to the courts to determine whether statements made in support of a proposed resolution are true as it would undermine the proper function of the meeting of members.  In addition, the Court rejected the applicant's argument that a responsible entity is under a duty to remain neutral whilst facing its own removal.  While the Court agreed with the applicant that a responsible entity should maintain a neutral position during the meeting process, it was not prepared to accept that a party in the position of responsible entity should refrain from making any statements at all.  Finally, Jacobson J pointed out that Century was in a position to respond to any statements or matters raised by Opus, rather than relying on the Court to "filter" what was said to unit holders before the meeting.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h5)  **5.11 Creditor unable to rely on presumption of insolvency because of debtor's invalid application to set aside statutory demand**  (By James Russell, Mallesons Stephen Jaques)  TQM Design & Construct Pty Ltd v KCL Developments Pty Ltd & Golden Plantation Pty Ltd [2011] NSWCA 7, New South Wales Court of Appeal, Spigelman CJ, Hodgson and Macfarlan JJA, 3 February 2011.  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWCA/2011/7.html](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2011/7.html" \t "_new)  **(a) Summary**  In this case, the New South Wales Court of Appeal found that a creditor was unable to rely upon the presumption of insolvency under section 459C(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), because it had not commenced winding up proceedings in time.  The debtors had jointly applied to set aside two creditor's statutory demands, but because the application had not been validly made "in accordance with section 459G", the debtors only had 21 days to comply with the demands.  Therefore, the creditor in this case needed to commence winding up proceedings against the debtors within three months after that compliance period had expired, in order to take advantage of the presumption of insolvency.  However, the creditor thought that the debtors' application was valid for the purpose of the compliance periods, and so did not commence winding up proceedings in time.  As a result of this decision, a creditor may seek to commence winding-up proceedings when it believes that a debtor's application to set aside its statutory demand would be treated as invalid by the Court, before proceedings to set aside the statutory demand have been resolved by the Court.  **(b) Facts**  Under section 459F of the Corporations Act, a company has 21 days after a statutory demand is served to either: (a) comply with the demand; or (b) apply to the Court for an order setting the demand under section 459G.  If an application under section 459G is made, then the relevant period to comply with the demand is determined by the Court after the application is heard.  The appellant in this case ("TQM") served separate creditor's statutory demands on both the first ("KCL") and second respondent ("GP"), on 20 May 2010.  KCL and GP then jointly filed a single application to set aside the two statutory demands.  The primary judge found that this joint application to set aside the statutory demands was not made "in accordance with section 459G".  Because no valid application had been made to set aside the demands, KCL and GP were required to comply with the demands within 21 days in accordance with section 459F(2)(b).  This compliance period expired on 11 June 2010.  Under section 459C(2)(a) of the Corporations Act, a Court must presume that a company is insolvent if it fails to comply with a creditor's statutory demand within the relevant compliance period.  However, in order to take advantage of the presumption of insolvency, the company commencing the winding-up proceedings must lodge its application to wind-up within three months of the date that the relevant statutory demand compliance period expires.  Therefore, TQM had until 10 September 2010 to commence winding-up proceedings if it was to rely upon the presumption.  No application was lodged prior to that date.  **(c) Decision**  At first instance, Bennett J found that the joint application to set aside the two separate statutory demands was not made "in accordance with section 459G", which is expressed in the singular and does not empower two companies to apply for a single order setting aside two separate statutory demands.  Therefore, the debtors were required to comply with each demand within 21 days in accordance with section 459F(2)(b), and TQM was required to issue winding up proceedings within three months of that date, if it was to rely upon the presumption of insolvency under section 459C(2)(a).  As TQM had not applied for the winding-up of KCL or GP prior to 10 September 2010, it could no longer rely on the presumption of insolvency.  On appeal, TQM argued that the only precondition for an application to set aside a demand to be valid, in terms of its effect on compliance periods, is that the application is made within 21 days of service.  Otherwise, it argued that creditors seeking to rely on the presumption of insolvency would be required to commence winding up proceedings before proceedings to set aside the statutory demand had been resolved by the Court.  In a unanimous judgment, the Court of Appeal upheld the primary judge's decision, finding that TQM could not rely upon the presumption of insolvency because it was out of time.  Spigelman CJ, who wrote the leading judgment, found that the statutory demand regime constitutes a "carefully formulated series of interlocked steps . which require precise compliance".  Whilst recognising that strict compliance with formalities might on occasion "give rise to anomalies", his Honour was reluctant to introduce doubt about the "precision with which the words 'in accordance with section 459G' in section 459F(2)(a) should be interpreted".  Section 459G not only requires an application to set aside a statutory demand be made within 21 days, but also requires supporting affidavits to be filed with the Court and copies of the application to be served on the person who served the demand.  Section 459G must be complied with strictly by the debtor for the relevant application to have been made in the first place.  As the primary judge had found that there was no valid application to set aside the statutory demand, the Court of Appeal found that Bennett J was correct in finding that no application had been made "in accordance with section 459G".  Therefore, the relevant period to comply with the demand was 21 days and TQM should have instituted proceedings within three months of the expiry of that period if it wished to rely upon the presumption of insolvency under section 459C(2)(a).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h5)  **5.12 Ruling on unruly meetings: foreign injunctions against voting and corporate representatives as chairpersons**  (By Simon Truskett, Clayton Utz)  Carpathian Resources Ltd v Hendriks [2011] FCA 41, Federal Court of Australia, Gilmour J, 2 February 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/41.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/41.html" \t "_new)  **(a) Summary**  This decision examined whether a foreign injunction on a shareholder's voting rights would prevent the chairperson from allowing the shareholder to vote.  The Court found that since the company was not a party to the foreign court order it was not bound by it and the shareholder's vote was accepted.  The Court also had to consider whether a company meeting could appoint a corporate representative to chair a meeting.  **(b) Facts**  Carpathian Resources Limited was a public company listed on the Australian Securities Exchange. Energo Holdings Corporation was the beneficial owner of shares in Carpathian held by OAG, a company incorporated in the Bahamas.  The Eastern Caribbean Supreme Court (Nevis Circuit) granted an injunction against OAG preventing it from voting its shares in Carpathian. Shortly afterwards, Carpathian held a general meeting to vote on motions to spill its board. OAG voted against each resolution.  Before the votes were tendered, a shareholder relied on the injunction to object to OAG being permitted to vote on the resolutions. However, the chairperson advised the meeting that Carpathian had taken advice in relation to the injunction, and he proposed to continue with the meeting and would count the OAG votes.  As a result, none of the spill motions was passed.  If OAG's votes had not been counted, the motions would have been carried.  Carpathian held its AGM on the following day. No directors apparently attended. The only relevant attendees were corporate representatives of shareholders. The AGM was described by Gilmour J as "variously intemperate, confused, unruly and disorderly".  One of those corporate representatives claimed to have been appointed chair by the meeting.  The issues before the Court were:  should OAG's votes have been counted?  could a corporate representative chair a company meeting?  could the many procedural defects which accompanied the purported appointment of the chair of the AGM be rectified by section 1322?  **(c) Decision**  **(i) The Foreign Injunction**  Regulation 43.1 of Carpathian's constitution provided that the voting of shares was "subject to any rights or restrictions for the time being attached to any shares". It was argued that the injunction constituted such a restriction.  The Court held that on its true construction, the "rights" and "restrictions" referred to in regulation 43 were those contained in the constitution itself.  The order granting the injunction also placed an extra-territorial limitation upon its reach that, "no person shall be affected thereby ... until it shall be declared unenforceable or be enforced by a foreign court and then it shall only affect them to the extent of such declaration or enforcement" unless they were a person addressed by the order or subject to the relevant jurisdiction. Further, the Court noted a number of authorities including Bank of Western Australia v Ocean Trawlers Pty Ltd (1995) 13 WAR 407 for the point that interlocutory injunctions operate in personam, attaching to the conscience of the person restrained rather than to the property to which it extends.  The Court was also satisfied that the chairman of the general meeting had acted in good faith in determining to admit the vote of OAG.  This finding was supported by the fact that he had sought legal advice, which was to the effect that, as Carpathian was not a party to the injunction, it should proceed with the AGM.  It was also found that as the injunction did not purport to bind Carpathian, the chairman had not acted improperly in allowing OAG to vote.  Consequently, the Court held that the OAG votes were rightfully counted and the motions had not been passed.  **(ii) The eligibility of corporate representatives as chairpersons**  Carpathian's constitution provided that "if no Director present is willing to take the chair, the Members may choose one of their number to be Chairperson".  It was argued that there was no one present at the AGM who was entitled to be chairperson:  no directors were present;  the only people present were corporate representatives; and  the constitution precluded a corporation from physically chairing a meeting.  The Court rejected this interpretation:  the definition of "Member" in the constitution accorded with "member" in sections 9 and 231 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Corporations Act), by which a reference to a "person" includes a body politic or corporate, as well as an individual;  directors could avoid shareholder scrutiny or resolutions for their removal by not attending general meetings or by refusing to take the chair at such meetings if all of the company's shareholders were corporations and corporate representatives unable to chair meetings; and  preventing corporate representatives from chairing a meeting would disenfranchise corporate shareholders in favour of individual shareholders - this would not comply with the grant to corporate representatives of "all of the powers that the body [corporate] could exercise at a meeting or in voting on a resolution" under section 250D of the Corporations Act.  **(iii) Was the chairperson validly elected?**  However, while it held that a corporate representative was eligible to be chairperson of the AGM, the Court also had to consider whether the chairman had been validly chosen in this instance. During the AGM, the corporate representative had voted for himself, while another member had nominated him and then withdrawn the nomination.  There was then a show of hands to determine who was against his appointment, rather than for his appointment.  During this short period, people at the meeting had been talking over each other.  Following this, there had been a purported poll.   Gilmore J declined to offer relief under section 1322 of the Corporations Act 2001 which would permit the Court to allow resolutions to be passed despite a procedural irregularity. In these circumstances it was held that the meeting had been tainted by a fundamental procedural irregularity as there had been no valid election of a chairperson.  Accordingly, it was held that no valid resolutions were passed at the AGM.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h5)  **5.13 Schemes of arrangement - discretion of the court**  (By Ben Landau, Freehills)  Re AXA Asia Pacific Holdings Ltd [2011] VSC 4, Supreme Court of Victoria, Croft J, 28 January 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2011/4.html](http://www.austlii.edu.au/au/cases/vic/VSC/2011/4.html" \t "_new)  **(a) Summary**  In this decision the Court approved the convening of meetings of classes of shareholders and creditors of AXA Asia Pacific Holdings Ltd (AXA APH) to consider the proposal pursuant to which AMP Limited would acquire all of the shares,  and cancel certain rights to shares, in AXA APH.  **(b) Facts**  AXA APH made an application to the Victorian Supreme Court for orders that:  a meeting of all shareholders in AXA APH other than its French Parent AXA S.A. be convened for the purposes of a scheme of arrangement (Share Scheme); and  a meeting of holders of certain rights to acquire ordinary shares (classified as creditors of the company) be convened for the purposes of a scheme of arrangement (Rights Scheme).  The schemes of arrangement were part of a series of transactions pursuant to which:  AMP Limited (through its wholly owned subsidiary, AMP Financial Services Holdings Limited) would acquire:  AXA S.A. and its subsidiaries' entire shareholding in AXA APH under a share sale agreement; and  all shares held by all other shareholders of AXA APH under the Share Scheme; and  AXA S.A. would then acquire pursuant to a number of share sale agreements certain subsidiaries of AXA APH, which conduct the Asian businesses of AXA APH.  **(c) Decision**  The Court made orders convening the meetings of shareholders and creditors to consider the Share Scheme and Rights Scheme, respectively.   His Honour referred to earlier authority that established two broad categories of matters relevant to exercising the Court's decision to making orders convening the meeting of members or creditors, being:  whether the scheme is of such a nature and cast in such terms that, if it achieves the statutory majority at the meeting, the court would be likely to approve of it on the hearing of an unopposed petition; and  whether the members or creditors are to be properly informed of the nature of the scheme before the scheme meeting.  On the facts, and based on the findings of the independent expert's report, Croft J held that the Court could be satisfied that the schemes, if approved by shareholders and members, would be likely to be approved by the Court at the second court hearing if the shareholders and rights holders vote in their favour.  Croft J also identified the following aspects of the role of the Court in exercising its discretion:  the Court must confirm that there is sufficient disclosure in the scheme booklet to enable shareholders to make an informed decision;  the Court must form a favourable view as to the reasonableness of the arrangement being put forward; and  the role of the Court is to be supervisory, but this does not involve second guessing the commercial judgment of shareholders or substituting its own commercial judgment for that of shareholders.  The Court was satisfied with the adequacy of the disclosure information in respect of the transaction, stating that the explanatory statement:  explained the effect of the compromise or arrangement;  set out the prescribed information; and  set out all other information material to the making of a decision whether or not to agree with the compromise or arrangement, being information in the knowledge of the directors.  Commentary was provided on the issue of "performance risk", that is the risk that a shareholder transfers their shares to the acquirer however the due consideration is not paid and the shareholder has to sue to recover their consideration.  His Honour noted that while provision of the funds in a trust account is one means to provide shareholders with protection, in the present case protection was achieved by requiring transfer of the consideration to occur before the shares were to be transferred and the rights cancelled. The Court was satisfied that this eliminated the performance risk.  The Court also accepted that the exclusivity arrangements entered into in respect of the bid were not unreasonable and the "no shop" exclusivity period of 7.5 months was within the range of a reasonable period.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h5) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Contributions** |  |  | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/163%20March%202011.htm%23h1) | | | http://my.lawlex.com.au/alert/pic/spacer.gif |

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