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| **Bulletin No. 157**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).[Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/157%20September%202010.htm#h1) [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/157%20September%202010.htm#h2) [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/157%20September%202010.htm#h3) [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/157%20September%202010.htm#h4) [Contributions](http://www.law.unimelb.edu.au/bulletins/157%20September%202010.htm#6) [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)  |

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

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| **1.1 Survey shows progress towards banking remuneration reforms** An international survey of leading wholesale banks, published on 3 September 2010, finds that significant progress has been made in improving remuneration policies and practices. Overall, most major banks are now implementing remuneration systems in line with the Implementation Standards published by the Financial Stability Board (FSB) in September 2009. The Institute of International Finance, in collaboration with Oliver Wyman, published its second survey-based report on remuneration in the financial services industry, which consists of responses from 37 financial services firms. These have been supplemented by a series of individual interviews with leading wholesale banks. Between them, these institutions represent 70% of total global wholesale banking revenues for 2009.  Substantial reforms in remuneration practices are taking place in governance, risk adjustment and deferred payouts, while further work is needed in such areas as disclosure and allocation of bonus pools to take greater account of risk-adjusted profitability, said the IIF, which is the global association of financial institutions with over 420 members.  The report states that since early 2009 there has been a dramatic increase in the involvement of the risk and control functions in setting front office remuneration. Risk management involvement in the remuneration process has risen from slightly less than half of the firms in 2008 to almost all firms in 2010. The risk function is now contributing, in varying degrees, to policy reviews, determining the suitability of performance metrics, establishing remuneration formulae and signing off on the risk-appropriateness of incentive plans.  The report notes some areas where further progress is needed. It stated that a significant majority of banks remain short of the FSB Implementation Standards on disclosure, with less than half of survey participants publishing information on bonus pool sizing and allocation, and on the methodology for determining individual remuneration of highly paid employees. In addition, the report points out that while the industry has made significant progress in the way it determines and allocates bonus pools to take greater account of risk-adjusted profitability, this is more of a multi-year effort as it requires not only moving to risk adjusted metrics but also adapting those metrics to the time horizon and specific risks of various businesses.  The survey found that progress on the key area of payout structures has been significant, with substantial improvements including: increased use of payout instruments aligned with the long term performance of the firm or business-unit, and increased recourse to non-cash instruments. In particular: the use of deferred remuneration has doubled to 39% of the remuneration pool; 85% of surveyed banks are now using deferral periods of three years or more and are tiering deferral rates so that the remuneration of the most senior and highest paid executives is deferred for longer; and nearly 70% of deferred remuneration is paid out in stock or stock-linked instruments (greater than the FSB Implementation Standards' 50% target). Firms have also made swift progress in eliminating potential rewards for failure, according to the report. Unconditional payouts have been reduced by 50%, with the remainder focused on new hires, and multi-year guarantees have been all but eliminated; of the 15% of firms that had some form of a golden parachute, most have taken steps to eliminate them.The report is available on the [IIF](http://www.iif.com/download.php?id=lcQmuRRwWEM=" \t "_new) website.etailed Contents**1.2 Super funds must improve governance practices** With the government response to the Cooper review set to tighten governance standards, Australian superannuation funds will have to pay closer attention to the decision-making process and board composition, according to a survey launched by Russell Investments at its Australian Investment Summit on 2 September 2010.The Governance Survey is based on interviews with 40 superannuation funds, 12 of which were under $500m and 28 of which were over $500m.**(a) Who is making decisions?** The survey focused on the investment decision-making process, which revealed responsibility for critical tasks was not clearly delineated with trustees, investment sub-committees, in-house teams and external managers all playing a part in some funds. Asset allocation falls to trustees in 80% of funds and to the sub-committee in 38%, whereas trustees take portfolio decisions in 60% of funds and the sub-committee in 43% of funds. The result shows not only a lack of delegation but a serious overlap in responsibility and potential lack of accountability according to the report.  The fiduciary role of a board is not defined and its lack of delegation wastes board time. Lack of delegation can slow down implementation and harm efficiency. When quizzed on the fund's ability to respond quickly to new situations, 40% thought it was very good and 33% good, but 15% said neither good nor poor, 8% said fairly poor and 3% very poor.Despite delegation and accountability issues, the survey shows 86% of funds are confident overall their decision-making processes are suitable. Therefore it is not surprising only 18% of funds said they are actively considering a change to their current decision-making process.**(b) No independent directors in 53% of funds** With the Cooper review recommending all funds comprise at least one independent director, the survey found 53% of respondents would be looking to fill this role.The survey also studied the composition of the trustee boards and whether members are being appropriately selected based on their skills and experience. In 70% of funds between one and four have a finance or investment background.  Only 20% have more than five members with finance or investment backgrounds and 5% have none at all. Most funds surveyed have between five and ten trustees. Meanwhile 68% of funds have at least one employer-nominated member, and 73% at least one employee-nominated member.Further information is available on the [Russell Investments](http://www.russell.com/au%22%20%5Ct%20%22_new) website.etailed Contents**1.3 European Commission approves the exchange of audit working papers with Australia and the USA**  On 1 September 2010, the European Commission adopted a decision recognising the adequacy of the auditor oversight authorities of Australia and the United States of America. Adequacy refers to the ability of a third country authority to fulfil the requirements set out in the EU's Statutory Audit Directive (2006/43/EC) and, in particular, its capacity to enter into reciprocal working arrangements with the EU Member States on the exchange of audit working papers or other relevant documents between competent authorities. This also covers the preservation of the confidentiality of any such documents that authorities from third countries may receive from EU Member States. The Commission decision will enable the exchange of audit working papers between the EU Member States' oversight authorities and their Australian and US counterparts. This will contribute to reinforcing international co-operation on audit oversight which will ultimately lead to increased investor protection. Following the Commission decision, EU Member States can now conclude reciprocal bilateral agreements with Australia and the USA on the exchange of audit working papers.  To ensure that high quality audit services are provided globally, international coordination and co-operation are necessary between auditor regulators. European legislation provides for a framework for international co-operation and allows the European Commission to determine the countries with which Member States may co-operate in that context. In February 2010 the European Commission adopted a similar decision for the auditor oversight authorities of Canada, Japan and Switzerland. The Commission is committed to co-operate with its international partners on auditor oversight and may adopt similar decisions regarding the auditor oversight authorities of other countries in the future. Further information is available on the [European Commission](http://ec.europa.eu/internal_market/auditing/relations/index_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.4 SEC issues report cautioning credit rating agencies** On 31 August 2010, the US Securities and Exchange Commission (SEC) issued a report cautioning credit rating agencies about deceptive ratings conduct and the importance of sufficient internal controls over the policies, procedures, and methodologies the firms use to determine credit ratings.The SEC's Report of Investigation stems from an Enforcement Division inquiry into whether Moody's Investors Service Inc (MIS) - the credit rating business segment of Moody's Corporation - violated the registration provisions or the antifraud provisions of the federal securities laws.The Report says that because of uncertainty regarding a jurisdictional nexus between the United States and the relevant ratings conduct, the Commission declined to pursue a fraud enforcement action in this matter. The Report notes that the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act provided expressly that federal district courts have jurisdiction over SEC enforcement actions alleging violations of the antifraud provisions of the securities laws when conduct includes significant steps, or a foreseeable substantial effect, within the United States. The Report also notes that the Dodd-Frank Act amended the securities laws to require nationally recognized statistical rating organizations (NRSROs) to "establish, maintain, enforce, and document an effective internal control structure governing the implementation of and adherence to policies, procedures, and methodologies for determining credit ratings."According to the Report, an MIS analyst discovered in early 2007 that a computer coding error had upwardly impacted by 1.5 to 3.5 notches the model output used to determine MIS credit ratings for certain constant proportion debt obligation notes. Nevertheless, shortly thereafter during a meeting in Europe, an MIS rating committee voted against taking responsive rating action, in part because of concerns that doing so would negatively impact MIS's business reputation.MIS applied in June 2007 to be registered with the Commission as an NRSRO. The Report notes that the European rating committee's self-serving consideration of non-credit related factors in support of the decision to maintain the credit ratings constituted conduct that was contrary to the MIS procedures used to determine credit ratings as described in the MIS application to the SEC.In the Report of Investigation, the Commission makes clear that credit rating agencies registered with the SEC must implement and follow appropriate internal controls and procedures governing their determination of credit ratings, and must also take reasonable steps to ensure the accuracy of statements in applications or reports submitted to the SEC.The Report cautions NRSROs that, when appropriate, the Commission will pursue antifraud enforcement actions against deceptive ratings conduct, including actions pursuant to the Dodd-Frank Act provisions regarding conduct that physically occurs outside the United States but involves significant steps or foreseeable effects within the US.The report is available on the [SEC](http://www.sec.gov/litigation/investreport/34-62802.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.5 CFTC releases final rules regarding retail forex transactions** On 30 August 2010, the US Commodity Futures Trading Commission (CFTC) announced the publication in the Federal Register of final regulations concerning off-exchange retail foreign currency transactions. The rules implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Food, Conservation, and Energy Act of 2008, which, together, provide the CFTC with broad authority to register and regulate entities wishing to serve as counterparties to, or to intermediate, retail foreign exchange (forex) transactions. The final forex rules put in place requirements for, among other things, registration, disclosure, recordkeeping, financial reporting, minimum capital and other business conduct and operational standards. Specifically, the regulations require the registration of counterparties offering retail foreign currency contracts as either futures commission merchants (FCMs) or retail foreign exchange dealers (RFEDs), a new category of registrant. Persons who solicit orders, exercise discretionary trading authority or operate pools with respect to retail forex will also be required to register, either as introducing brokers, commodity trading advisors, commodity pool operators (as appropriate) or as associated persons of such entities. "Otherwise regulated" entities, such as United States financial institutions and SEC-registered brokers or dealers, remain able to serve as counterparties in such transactions under the oversight of their primary regulators. The final rules include financial requirements designed to ensure the financial integrity of firms engaging in retail forex transactions and robust customer protections. For example, FCMs and RFEDs are required to maintain net capital of US$20 million plus 5% of the amount, if any, by which liabilities to retail forex customers exceed US$10 million. Leverage in retail forex customer accounts will be subject to a security deposit requirement to be set by the National Futures Association within limits provided by the Commission. All retail forex counterparties and intermediaries will be required to distribute forex-specific risk disclosure statements to customers and comply with comprehensive recordkeeping and reporting requirements. The final rules become effective 18 October 2010. Further information is available on the [CFTC](http://www.cftc.gov/%22%20%5Ct%20%22_new) website.etailed Contents**1.6 FSA outlines a fundamental review of trading activity regulation**  On 25 August 2010, the UK Financial Services Authority (FSA) published a discussion paper (DP) that considers fundamental changes to the regulation of trading activities - one of the key recommendations of the Turner Review following material trading losses incurred during the financial crisis.  Since the Turner Review was published, the Basel Committee on Banking Supervision (BCBS) has proposed several reforms to the prudential regime for banks and in addition has mandated a fundamental review of trading activities called for in the Turner Review.  The FSA believes that the delivery of a new, robust, long-term, approach to prudential requirements for trading activities is one of the key areas of regulatory reform that must be delivered to build a stronger financial system. The outcome of the BCBS's fundamental review is central to achieving this objective internationally.  The DP describes the FSA's current views and ideas in relation to major areas of reform that need to be considered to address areas of structural weakness that exacerbated the build up of risk before the financial crisis.  The DP sets out a number of recommendations which are grouped into three key areas:Valuation: The FSA recommends an increased regulatory focus on the valuation of traded positions and believes there is a need for a specific assessment of valuation uncertainty. Coverage, coherence and the capital framework: The FSA recommends changing the structure of the capital framework to bring greater coherence and reduce the opportunities for structural arbitrage within the banking sector and the wider financial system. Risk management and modelling: The FSA recommends specific measures aimed at improving firms' risk management and modelling standards, and ensuring that these are aligned with regulatory objectives. The closing date for responses is 26 November 2010. The FSA will issue a feedback statement in the first half of 2011. The Discussion Paper is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/DP/2010/10_04.shtml%22%20%5Ct%20%22_new) website. The Turner Review is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Corporate/turner/index.shtml%22%20%5Ct%20%22_new) website.etailed Contents**1.7 SEC adopts new measures to facilitate director nominations by shareholders** On 25 August 2010, the US Securities and Exchange Commission (SEC) adopted changes to the federal proxy and other rules to facilitate the rights of shareholders to nominate directors to a company's board. The new rules require companies to include the nominees of significant, long-term shareholders in their proxy materials, alongside the nominees of management. This "proxy access" is designed to facilitate the ability of shareholders to exercise their traditional rights under state law to nominate and elect members to company boards of directors. Under the rules, shareholders will be eligible to have their nominees included in the proxy materials if they own at least 3% of the company's shares continuously for at least the prior three years. The SEC's approval of the new measures follows enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which provided the SEC with explicit authority to make rules addressing shareholder access to company proxy materials. Under the new rules:Shareholders who otherwise are provided the opportunity to nominate directors at a shareholder meeting under applicable state or foreign law would be able to have their nominees included in the company proxy materials sent to all shareholders. Shareholders also have the ability to use the shareholder proposal process to establish procedures for the inclusion of shareholder director nominations in company proxy materials. Application of the new access rules to the smallest public companies - those that are defined as "smaller reporting companies" under SEC rules - will be deferred for three years. Generally, the new rules will become effective 60 days after their publication in the Federal Register. The release is available on the [SEC](http://www.sec.gov/rules/final/2010/33-9136.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.8 Law Commission says government agencies could seek alternatives to criminal prosecutions**  The number of criminal offences used by government departments and agencies could be reduced, according to the UK Law Commission in a consultation paper published on 25 August 2010. In the consultation paper, the Commission sets out the case for reducing the scope for criminal law to be used in regulated fields including banking. Criminal sanctions should only be used to tackle serious wrongdoing. The Commission argues it is out of proportion for regulators to rely wholly on the criminal law to punish and deter activities that are merely 'risky', in that they have the potential to lead to harm, unless the risk involved is a serious one. There has been a steep increase in the number of criminal offences created since the late 1980s to penalise risk-taking, and many more agencies have been set up with the power to make criminal laws of that kind. The areas regulated by these agencies cover a wide range of risk-posing activities, and involve millions of people and thousands of businesses.  By turning to civil penalties for minor breaches, regulators could reduce costs to themselves and the criminal justice system by £11 million a year. In some cases, criminal prosecution can cost almost twice what the courts obtain in fines. The Commission's paper, Criminal Liability in Regulatory Contexts, proposes that:regulatory authorities should make more use of cost-effective, efficient and fairer civil measures to govern standards of behaviour, such as 'stop' notices, enforcement undertakings and fixed penalties; a set of common principles should be established to help agencies consider when and how to use the criminal law to tackle serious wrongdoing; and existing low-level criminal offences should be repealed where civil penalties could be as effective. The Commission proposes that, where criminal offences are created in regulatory contexts, they should require proof of fault elements such as intention, knowledge, or a failure to take steps to avoid harm being done or serious risks posed. Businesses and individuals should generally not be penalised by the criminal law if they have made real efforts to comply with laws requiring, say, the provision of information.  The consultation paper is available on the [Law Commission](http://www.lawcom.gov.uk/regulation_liability.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.9 Research shows retail shareholders increasingly going online**On 23 August 2010, the Australasian Investor Relations Association (AIRA) released the results of the 2010 "Retail investors' use of electronic communications and social media" survey. The survey was run with the assistance of the Australian Shareholders' Association and the New Zealand Shareholders' Association.  **(a) Sourcing investment information online** 41% of retail investor respondents said that electronic communication had become more important to them in the last 12 months and 13% said that electronic communication had become much more important to them in the last 12 months. 2010 survey respondents said the most important electronic communication vehicles for investor information are the ASX website and listed company websites in line with the 2007 survey findings. **(b) Receiving shareholder communications online**  The research looked at what percentage of retail investor respondents would be happy to receive different types of shareholder communication exclusively by email. 82% would be happy to receive Share registry forms (eg change of address, DRP election) exclusively via email. 80% would be happy to receive the Annual Meeting presentations exclusively via email. 76% would be happy to receive notices of meeting/proxy forms exclusively via email. 62% would be happy to receive dividend advices exclusively via email. **(c) Annual reports**                  73% of respondents are happy to receive the annual report/shareholder reviews exclusively via email. Retail investor respondents said the section of the Annual report they are most likely to read is the financial report (78%). **(d) Listed entity websites**                  Retail investors are using listed entity websites to access timely, up to date information throughout the year. They expect these websites to be regularly updated, easy to navigate and to offer the ability to print. Interactive documents, mobile access to the website and email alerts/RSS feeds to notify investors new information is available are increasingly expected. There is increasing demand for mobile access for websites because a much higher number of investors are using smartphones than when the survey was conducted in 2007.  **(e) Email notifications**The results showed a growing demand for email notifications alerting investors to new company information and an expectation that these notifications are delivered in a timely fashion. 28% of retail investors expect an email notification immediately after an announcement is released, 32% of retail investors expect to receive an email notification within an hour, 13% within 2-3 hours and 21% before the market closes that day. 7% said they would expect an email notification the next business day.**(f) Webcasts**Retail investor respondents rated synchronised PowerPoint slides (60%), transcript of the webcast (59%) and Q&A Functionality (52%) as the most important features of webcasts. The webcast events rated as most important by retail investor respondents were financial results briefings (70%), Annual Meeting and M&A announcements (equal at 62%) and Investor Days (54%). 74% of respondents expect to be notified about a webcast by an email notification, 41% expect to be notified by an ASX/NZX announcement and 35% expect to be notified by accessing the listed entity website. 32% of respondents said they are offered the opportunity to dial into teleconferences. **(g) Social media**7% of respondents monitor social media for investment purposes, and 11% said that information found in a social media channel had influenced an investment decision. 10% of respondents said they access information via social media channels that they cannot get elsewhere. Google Finance and Yahoo Finance were the most popular of the online channels listed, with 18% and 24% of respondents respectively saying they use these sites. 10% of retail investor respondents use Hot Copper, and 10% use Motley Fool.   AIRA has also undertaken research on institutional investor and stockbroking analysts' use of electronic communications and social media. A full research report on both surveys is available from AIRA.etailed Contents**1.10 Assessment of the macroeconomic impact of stronger capital and liquidity requirements**On 18 August 2010, the Financial Stability Board (FSB) and Basel Committee on Banking Supervision (BCBS) published reports prepared as inputs to the calibration of the new bank capital and liquidity standards and to inform the transition arrangements for implementation of the new standards.   The two reports are titled 'An assessment of the long-term economic impact of stronger capital and liquidity requirements', prepared by the Basel Committee, and 'Assessing the macroeconomic impact of the transition to stronger capital and liquidity requirements', the interim report of the joint FSB-BCBS Macroeconomic Assessment Group (MAG). Together, the two reports provide an assessment of both the net economic impact of stronger capital and liquidity reforms once implementation is complete and the macroeconomic implications during the transition to full implementation. The Basel Committee's assessment of the long-term economic impact finds that there are clear net long term economic benefits from increasing the minimum capital and liquidity requirements from their current levels in order to raise the safety and soundness of the global banking system. The benefits of higher capital and liquidity requirements accrue from reducing the probability of financial crisis and the output losses associated with such crises. The benefits substantially exceed the potential output costs for a range of higher capital and liquidity requirements. The report titled 'An assessment of the long-term economic impact of stronger capital and liquidity requirements' is available on the [BIS](http://www.bis.org/publ/bcbs173.pdf%22%20%5Ct%20%22_new) website.The report titled 'Assessing the macroeconomic impact of the transition to stronger capital and liquidity requirements' is available on the [BIS](http://www.bis.org/publ/othp10.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

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

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| **2.1 ASIC updates guidance on product disclosure statements**On 6 September 2010, the Australian Securities and Investments Commission (ASIC) released updated Regulatory Guide 168 Disclosure: Product Disclosure Statements (and other disclosure obligations) (RG 168). The updated guide reflects key findings from ASIC's recent report Review of disclosure for capital protected products and retail structured or derivative products (REP 201) which was based on a program by ASIC which involved the review of 64 Product Disclosure Statements (PDS) for adequacy of disclosure.In particular, ASIC recommends issuers:clearly explain counterparty risk, and include supporting financial information, to ensure retail investors can assess the issuer's financial ability to meet its counterparty obligations; of capital protected products, ensure disclosure is sufficient so that investors can assess the likelihood of early termination or any other significant limitations of these products; and provide better disclosure of break costs that may apply when an investor seeks to terminate or redeem a product before its maturity date.The update does not otherwise change ASIC's existing policy on PDS disclosure.Updated RG168 consolidates guidance currently provided by ASIC in various locations and formats and provides a single guide for product issuers and other individuals responsible for PDSs and other disclosure obligations. It also refers to recent reforms to the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and [Corporations Regulations](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default) relating to shorter, simpler PDSs.Further amendments may be made to RG 168 in due course that provide guidance about these reforms. **Background**RG 168 contains ASIC's Good Disclosure Principles to help product issuers comply with the disclosure requirements and also promote good disclosure outcomes for consumers. The Good Disclosure Principles are:disclosure should be timely; disclosure should be relevant and complete; disclosure should promote product understanding; disclosure should promote product comparison; disclosure should highlight important information; and disclosure should have regard to consumers' needs. The report 'Review of Disclosure for Capital Protected Products and Retail Structured or Derivative Products' (REP 201) is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP201-PDS-reviews-2010-7-14.pdf/%24file/REP201-PDS-reviews-2010-7-14.pdf%22%20%5Ct%20%22_new) website. Regulatory Guide 168 'Disclosure: Product Disclosure Statements (and other disclosure obligations)' (RG 168) is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg168" \t "_new) website.etailed Contents |

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| **3. Recent ASX Developments** |  | ext Section |

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| **3.1 Reports** On 6 September 2010, the Australian Securities Exchange (ASX) released:the ASX group monthly activity report which is available on the [ASX](http://www.asx.com.au/about/pdf/20100906_asx_group_monthly_activity_report_august_2010.pdf%22%20%5Ct%20%22_new) website; the ASX 24 monthly volume and open interest report which is available on the [ASX](http://www.sfe.com.au/content/notices/2010/notice2010_142.pdf%22%20%5Ct%20%22_new) website; and the new ASX compliance monthly activity report (which replaces the ASXMS quarterly activity report) which is available on the [ASX](http://www.asx.com.au/about/pdf/20100906_asx_compliance_monthly_activity_august_2010.pdf%22%20%5Ct%20%22_new) website. etailed Contents**3.2 New online course on investing in interest rate securities** The Australian Securities Exchange (ASX) has released the latest in its suite of online courses designed for retail investors. The course consists of 7 modules that cover the essentials of investing in interest rate securities. The ASX online courses are free and require no registration. The new course is available on the [ASX](http://www.asx.com.au/products/interest_rate_securities/education/index.htm%22%20%5Ct%20%22_new) website. etailed Contents**3.3 ASX Limited annual report** On 19 August 2010, the Australian Securities Exchange (ASX) released its full-year result for the year ending 30 June 2010. ASX Managing Director and CEO Robert Elstone said: "The ASX Group of companies achieved resilient financial, operational and compliance performance in FY10, in a market environment that remained challenging despite improved conditions following the global financial crisis of the prior year.  ASX's sound result was achieved in parallel with the heavy organisational demands associated with the transfer of real-time participant surveillance activities to ASIC." The media release is available on the [ASX](http://www.asx.com.au/about/pdf/20100819_media_release_full_year_results.pdf%22%20%5Ct%20%22_new) website. The ASX Ltd annual report is available on the [ASX](http://www.asx.com.au/about/pdf/asx_annual_report_2010.pdf%22%20%5Ct%20%22_new) website. The transcript of the media briefing is available on the [ASX](http://www.asx.com.au/about/pdf/20100824_fy_2010_media_briefing_edited_transcript.pdf%22%20%5Ct%20%22_new) website. The transcript of the analyst briefing is available on the [ASX](http://www.asx.com.au/about/pdf/20100824_fy_2010_analyst_briefing_edited_transcript.pdf%22%20%5Ct%20%22_new) website along with two presentations and the Appendix 4E preliminary final report.etailed Contents |

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| **4. Recent Corporate Law Decisions** |  | ext Section |

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| **4.1 A liquidator's right to be indemnified out of trust assets where the company in liquidation was trustee of one or more trusts**(By Natalie Talia, Blake Dawson)Re Dalewon Pty Ltd (in liq) [2010] QSC 311, Queensland Supreme Court, McMurdo J, 27 August 2010The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/qld/QSC/2010/311.html](http://www.austlii.edu.au/au/cases/qld/QSC/2010/311.html%22%20%5Ct%20%22_new) **(a) Summary** This case considers two main issues:whether the liquidators of a company which was trustee of two trusts were entitled to a lien over the assets of the trusts, so as to be able to meet their fees and outlays incurred in relation to the liquidation; and pursuant to an application by Brisconnections to strike out certain pleadings and a cross application by the former company director and secretary for leave to bring proceedings on behalf of the company, whether the statutory demand which provided the basis for the winding up did not disclose a debt that was due and payable at the time the demand was issued (on the basis that the demand was misleading or deceptive, unconscionable or an abuse of process). Although a trustee may have recourse to the assets of the trust to meet liabilities incurred in the discharge of the trust, in the present case there was no evidence that the work of the liquidator was reasonably required for the administration of the trust. Moreover, in this case, the company was trustee of two trusts and McMurdo J found that the liquidators had failed to apportion the costs claimed to the trusts separately, noting that the assets of one trust cannot be applied to satisfy the liabilities of another. In relation to the winding up, his Honour found that the company's knowledge of the terms of the investment scheme meant that a claim that Brisconnections engaged in misleading or deceptive conduct in issuing the statutory demand and pursuing the winding up would fail.  **(b) Facts**Dalewon Pty Ltd (the company) was trustee of two trusts (the investment trust and the superannuation trust). In its capacity as trustee for the superannuation trust, it subscribed for partly paid units in the Brisconnections project. It was issued a statutory demand by Brisconnections Management Company Limited (Brisconnections) for an unpaid instalment of $350,000. It failed to pay the statutory demand and was wound up on the insolvency ground. The company itself had very few assets. The former company director and secretary (cross-applicants) filed an application to terminate the winding up on the basis that there was no debt due and payable by the company to Brisconnections at the time the statutory demand was issued, primarily on the basis that certain events had not occurred.  They also sought leave to bring proceedings on behalf of the company against Brisconnections. McMurdo J considered these matters along with the application by the liquidators seeking declarations that they were entitled to a charge or lien over the assets of the trusts as well as the assets of the trustee company in order to meet their fees and expenses. **(c) Decision** In relation to the liquidators' applications, McMurdo J referred to *Octavo Investments Proprietary Limited v Knight* [1979] HCA 61; (1979) 144 CLR 360 as authority for the proposition that trustees are entitled to be indemnified from trust assets for the liabilities they incur in transactions relating to the discharge of the trust, and that the trustee possesses an equitable charge or lien over those assets for the purposes of enforcing the indemnity. The liquidators argued that a similar entitlement existed to use trust assets to meet their fees and expenses where the company in liquidation was the trustee of one or more trusts. His Honour noted that where a trustee company goes into liquidation, the trustee's right of indemnity vests in the liquidator, citing *Belar Pty Ltd (in liq) v Mahaffey* [1999] QCA 2; [2000] 1 Qd R 477, and he mentioned the authorities relating to the scope of the indemnity inherited by the liquidator.In seeking a declaration that they should be entitled to a charge or lien over the assets of both trusts, the liquidators did not distinguish between the costs and expenses incurred in relation to administration of the superannuation trust and those incurred in relation to the investment trust. McMurdo J characterised this as a 'fundamental flaw in their case' [at 10] and indicated that the trusts must be considered separately, despite the fact that both trusts had the same beneficial owners.  McMurdo J referred with approval to the judgment of King CJ in *Re Suco Gold Pty Ltd (in liquidation)* (1982) 33 SASR 99 (Suco) where there were two bases for deciding that the costs and expenses incurred by the liquidator of a trustee company could be paid from assets which the company held as trustee. First, it was considered reasonable to regard the liquidators' expenses as covered by the trustee's right of indemnity since in that case the liquidation ensured that the obligations of the trustee were performed.  Alternatively, the decision could be based on the principle stated by Dixon J in *Re Universal Distributing Company Limited (in liquidation)* [1933] HCA 2; (1933) 48 CLR 171, where Dixon J reasoned that since creditors with a floating charge over the assets of a company in liquidation receive a share of the fund brought in by the liquidator after the liquidator's fees and expenses of realising the assets are deducted, a liquidator of a trustee company might similarly be entitled to an indemnity from trust assets for work referable to the discharge of the trust on behalf of beneficiaries.  McMurdo J concluded that the basis for the liquidators' entitlement to be paid from trust assets depends on [at 12] a 'direct connection between the performance of the trust and the interests of the ultimate beneficiaries under the trust which justified that use of what was effectively their property' and noted [at 13] that while there may be a discretion to allow a payment for work performed to be met out of trust property, 'there is a required nexus between the work for which payment is sought and the administration of certain property, such that it would be inequitable for the ultimate beneficial owner of the property not to meet the cost of that work as a condition of its interest being upheld'. McMurdo J also endorsed the test used by Finkelstein J in *Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)*, 'whether the work was 'reasonably required to be undertaken in the administration of the trusts'. McMurdo J considered that in the circumstances of the Dalewon liquidation, where the company's only business was as trustee of the trusts, it might be easier to establish that the liquidation was related to the administration of the trusts. His Honour noted [at 15] that '[i]n the case of a company that has carried on the business of a trustee it might be that much of the work involved in the liquidation is necessary for the proper administration of the trust'.  Nevertheless, McMurdo J indicated that the liquidators had provided insufficient evidence that all of their fees and expenses claimed related to work in the administration of the trusts. In particular, the fees and expenses in relation to the termination of the winding up only related to the administration of one of the trusts.  Further, the costs related to the termination application were not 'obviously within a reasonable range' and the outcome of the termination proceedings could include an order for Brisconnections to pay the liquidators' costs.  McMurdo J then turned to the question of the termination of the winding up. His Honour identified the substantial question as being whether the company was indebted to Brisconnections, indicating that if it is not so indebted, it would likely prove its solvency and be able to terminate the winding up.  The cross-applicants claimed that, according to the terms of their investment, there was no debt due and payable on unpaid instalments unless certain events took place, including the offer of the investor's units for sale by public offer. The cross-applicants claimed that these events did not occur before service of the statutory demand and that, therefore, no debt was due and payable which could support a statutory demand.  The cross-applicants alleged that Brisconnections' conduct in serving the statutory demand was misleading and deceptive, contravening sections 12DA and 12DB of the [ASIC Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default) (the Act), as well as constituting unconscionable conduct pursuant to section 12CB of the Act. Sections 12DA and 12DB of the Act prohibit a person from engaging in misleading or deceptive conduct in relation to financial services.  McMurdo J concluded that 'the claim that this was misleading or deceptive is bound to fail at least because there is no serious case that anyone was deceived, or was likely to be deceived, by this conduct'. The statutory demand was served on the company, which was aware of the terms of the investment scheme. Further, the claim that Brisconnections acted unconscionably in serving the statutory demand and seeking to wind the company up failed as the company could not claim it was unaware of facts 'upon which it is now said there was no debt due or payable'. McMurdo J struck out the pleadings to the effect that Brisconnections abused the process of the court by commencing the winding up for an ulterior purpose, and accordingly the cross-applicants were not granted leave to bring proceedings on behalf of the company against Brisconnections.etailed Contents**4.2 Order for judicial management - relevant factors**(By Laura Glover, DLA Phillips Fox) Australian Prudential Regulation Authority v ACN 000 007 492 (Under Judicial Management) (Subject to Deed of Company Arrangement) [2010] FCA 912, Federal Court of Australia, Perram J, 25 August 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2010/912.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/912.html%22%20%5Ct%20%22_new) **(a)  Summary** Pursuant to section 62L of the [Insurance Act 1973 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6398" \t "Default) ("Act"), and following investigations by the Australian Prudential Regulation Authority ("APRA") into the activities and financial position of the Respondent, the Federal Court of Australia ("court") ordered that the Respondent be placed under judicial management.  A judicial manager was then appointed pursuant to section 62R.  Factors in favour of the appointment included the possibility of the Respondent being solvent, the need to ascertain the Respondent's true position, and the likelihood that the appointment of a judicial manager may have a distinct and beneficial effect on the management of the Respondent. **(b)  Facts** The Respondent, formerly known as Rural and General Insurance Ltd ("Rural") was a general insurance company.  Following Rural's failure to respond to a 'show cause' notice issued by APRA on 16 October 2009, an inspector was appointed by APRA to investigate the activities and financial position of Rural on 9 November 2009.  The inspector concluded that:Rural was insolvent on base or pessimistic scenarios, but marginally solvent on optimistic scenarios; The management of Rural was dysfunctional; There was no plan administering the position of books of risk in run-off; and Rural did not comply with most of APRA's prudential standards.   An application was made by APRA to the court under section 62K of the Act to exercise its power to place Rural in judicial management pursuant to section 62L of the Act.  The issue before the court was whether, in the court's opinion, the interests of the policyholders would be best served by winding up Rural or by judicial management. **(c)  Decision** **(i)  Origins of judicial management** Perram J first considered the origins of judicial management.  Judicial management originated in South Africa and was created as an alternative to winding up and as a means of preventing a company from being placed into liquidation where, under proper management and by proper conservation of its resources, it would be able to meet its obligations. Judicial management was first introduced into Australia via Division 8 of Part III of the *Life Insurance Act 1945 (Cth)*.  It was only in 2008 with the insertion of Part VB (which includes section 62L) into the Act, that the appointment of a judicial manager became an available option in respect of a general insurance company. **(ii)  Current legislation** Under the Act, a judicial manager is vested with all management functions formerly held by the general insurer (section 62T).  This includes any power directed by the court (section 62Y).  A judicial manager must, as soon as possible after starting, complete a judicial manager's report (section 62ZI(1)(a)).  The report is to recommend a course of action, for example, for the transfer of the general insurer's business to another general insurer, for the winding up of the general insurer, or to allow the general insurer to carry on its business after a period of judicial management (section 62ZI(2)). The court is vested with power under section 62Z to effect any proposal to re-arrange the affairs of the insurer (section 62Z(1)).  The court may exercise this power irrespective of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), the constitution of the general insurer, any contract entered into by the general insurer, and/or any listing rule of a stock exchange (section 62ZJ(3)(b)(i)-(iv)). Only APRA or the insurer itself may apply to the Federal Court for an order for judicial management. Section 62L of the Act provides:"On an application under section 62K, the Federal Court may make an order that a general insurer be placed under judicial management if the court is satisfied:(a) that the insurance business of the general insurer has been investigated under Part V; and (b) that, having regard to the results of the investigation, it is in the interests of policyholders of the general insurer that the order be made."**(iii)   Decision**In determining whether it is in the interests of policyholders for a judicial manager to be appointed, the court's discretion is wide.  It is not necessary for there to be a reasonable likelihood that policyholders or creditors will be paid out in full. An order for judicial management is appropriate, where despite a serious position being disclosed, further investigation and experiment is desirable to give the company a chance to see what it can do: *Insurance Commissioner v Associated Dominions Assurance Society Pty Ltd* (1953) 89 CLR 78 at 91.  Moreover, even if section 62L is satisfied, the court must also keep in mind that the appointment of a judicial manager is a tool of reconstruction, that is, a tool to assist a struggling insurer. Perram J rejected APRA's submission that it was in the interests of policyholders to place Rural under judicial management as it would enable Rural's policyholders to receive full payment of their insurance claims in accordance with section 62ZZC of the Act.  Perram J was not satisfied that Rural was in fact insolvent, and therefore, his Honour was not satisfied that APRA would advise the Minister of Rural's insolvency in accordance with section 62ZZC.  He also noted his concern about 'serious drafting issues' with the section.   Perram J's rejection of APRA's submission did not however stop his Honour from making an order that Rural be placed under judicial management and given a chance to see what it could do.  In reaching his decision, Perram J balanced the factors against the appointment of a judicial manager and in favour of winding Rural up, against the factors in favour of making an order for judicial management.   The factors in favour of Rural being wound up were:a distinct, but not inevitable possibility that Rural may be insolvent; and dysfunctional management.The factors in favour of the appointment of a judicial manager were:the fact that there was a possibility that Rural could turn out to be solvent; the need to ascertain Rural's true position; and the likelihood that competent management may have a distinct and beneficial effect on the management of Rural. etailed Contents**4.3 The appropriate forum for Australian companies operating overseas** (By Benjamin Suen, Freehills) PCH Offshore Pty Ltd v Dunn (No 2) [2010] FCA 897, Federal Court of Australia, Siopis J, 20 August 2010 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2010/897.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/897.html%22%20%5Ct%20%22_new) **(a) Summary** PCH Offshore Pty Ltd (PCH), an Australian company operating primarily in Azerbaijan, commenced proceedings in Azerbaijan and Australia against a former manager and director of PCH (Dunn). During all material times, Dunn was a citizen of the United Kingdom and not resident in Australia. PCH claimed Dunn had breached his duties owed to PCH by misappropriating the property of PCH. At an ex parte hearing, the Federal Court made orders allowing PCH to serve Dunn out of the jurisdiction pursuant to Order 8 Rule 2 of the [Federal Court Rules](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8830" \t "Default) (Rules). Dunn sought to have these orders set aside. Siopis J held, inter alia, that PCH's cause of action falls within the scope of Order 8 Rule 2; PCH had a prima facie case satisfying Order 8 Rule 3(2); and this case would not be an abuse of process if it were heard in Australia. However, Siopis J also held that Australia was a clearly inappropriate forum because the majority of witnesses were based in Azerbaijan and were Azeri speakers which would mean great transport and translation expenses. Siopis J set aside the orders allowing PCH to serve Dunn out of Australia. **(b) Facts**  Pursuant to the laws of Azerbaijan, Dunn had powers of attorney which authorised him to carry out his duties on behalf of PCH. On 26 November 2007, Dunn ceased to be a director of PCH. On 31 March 2008, Dunn was removed as manager and the powers of attorney were revoked. PCH alleged that before and after Dunn was removed as director and manager, he had misappropriated the property of PCH. PCH alleged that this occurred in the form of Dunn withdrawing money from PCH's Azerbaijan bank account; directing debtors of PCH to make payments to a bank account not controlled by PCH; withholding PCH's office assets; and failing to return PCH's books and records. On 7 August 2008, PCH commenced proceedings against Dunn in Azerbaijan under Article 49.3 of the Civil Code of the Republic of Azerbaijan which provides that 'a person acting on behalf of a legal entity must act in good faith and reasonably for the benefit of the legal entity he or she represents. Unless an agreement provides otherwise, upon demand of the founders of the legal entity, he must reimburse the damage caused to the legal entity.' PCH sought to have Dunn deliver PCH's property and compensate PCH. On 26 January 2009, PCH withdrew its claim for compensation and confined its claim to the delivery of property.  On 1 May 2009, PCH sought relief in Australia at an ex parte hearing against Dunn for his alleged breaches of statutory ([Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)), contractual and fiduciary duties owed to PCH. On 20 May 2009 and 30 July 2009, Siopis J made orders (pursuant to Order 8, Rule 2 of the Rules) that the application and statement of claim be served on Dunn outside the jurisdiction (Orders).  On 30 September 2009, Dunn applied to set aside the Orders on the following grounds:PCH failed to disclose, at the ex parte hearing, that it had also brought proceedings in Azerbaijan; and on a re-exercise of its discretion, the court should decline to exercise its discretion in favour of service out of jurisdiction.  **(c) Decision** Siopis J did not consider the failure to disclose the proceedings in Azerbaijan because he set aside the Orders on the grounds of Australia being a clearly inappropriate forum.  His Honour noted that although Dunn made the application to have the Order set aside, the onus remained on PCH to show the proceedings would not be subsequently stayed as an abuse of process on forum non conveniens grounds or for some other reason.  **(i) Does the action fall within the Federal Court Rules?** Siopis J first looked at whether one of the causes of action contained in PCH's statement of claim was within the scope of Order 8, Rule 2 of the Rules, which allows proceedings to be served out of Australia. His Honour highlighted that Item 12 of Order 8, Rule 2 permits service out of the jurisdiction if the proceeding is based on damage suffered in Australia. His Honour made a distinction between the location of the injury and the location of damage. In doing so, His Honour found that while the 'injury' (that is, the misappropriation by Dunn) occurred in Azerbaijan, the damage was suffered in Australia because the property was owned by an Australian company. **(ii) Does PCH have a prima facie case?** Siopis J turned to Order 8 Rule 3(2) of the Rules which required, among other things, the court to be satisfied that the person seeking leave for the Orders have a prima facie case for the relief claimed in the proceeding. In order to have a prima facie case, there must be material before the court which would allow inferences, which if translated into findings of fact, would support the relief claimed. Siopis J took the view that PCH had satisfied this requirement.  **(iii) Abuse of process** His Honour then proceeded to consider the issue of whether the Orders would be an abuse of process by PCH. Dunn relied on the English case of *Charm Maritime Inc v Kyriakou* [1987] 1 Lloyd's Rep 433, which held that a foreign judgment is capable of giving rise to issue estoppel. That is, Dunn argued that issue estoppel would prevent PCH from bringing the current proceedings as it dealt with the same matters as the Azerbaijani proceedings. Dunn pointed to the fact that PCH, prior to amending its claim on 26 January 2009, had already sought compensation under Article 49.3 of the Civil Code. However, Siopis J held that because the translation of the judgments of Azerbaijani would not be easy to understand and the system of law is very different to Australia's system of law, the Orders should not be set aside for the reason that these proceedings would be an abuse of process. **(iv) Clearly inappropriate forum** Siopis J then considered whether Australia was a clearly inappropriate forum. It was noted that a greater connection with a forum does not justify a conclusion that the local forum is inappropriate. Rather, Australia would be clearly inappropriate if the subject-matter of the proceeding and the parties had little connection with the forum and the defendant may be put to great expense and inconvenience in defending the action (*Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538). His Honour found that Australia was a clearly inappropriate forum because:Dunn's breaches of his duties owed to PCH occurred in Azerbaijan and the damage was suffered in Australia merely because PCH is an Australian company; the majority of witnesses are resident in Azerbaijan and are likely to be Azeri speakers which would mean great expense would be incurred in transporting and translating witnesses if the proceedings were heard in Australia; it is a question under Azerbaijani law whether PCH would be estopped from bringing a second proceeding due to PCH's amendment on 26 January 2009 to exclude a claim for compensation in the Azerbaijani proceedings; and there are issues in PCH's claim which are likely to give rise to consideration of local practices of authorised representatives in Azerbaijan.  After Siopis J concluded that Australia was a clearly inappropriate forum, he then considered whether there was a juridical advantage to PCH that outweighed his earlier considerations. PCH argued that its juridical advantage in bringing proceedings in Australia is that it could claim under the Corporations Act 2001 and the common law. PCH submitted that there was no similar relief under Azerbaijani law as Article 49.3 of the Civil Code did not apply to Dunn in his capacity as an authorised representative of PCH. His Honour disagreed and found Article 49.3 did apply to Dunn. Siopis J concluded that PCH failed to show that Article 49.3 would not provide comparable relief to Australian law.  The Orders were set aside.etailed Contents**4.4 The importance of electing a supervisory law for international arbitration**  (By Laura Keily and Olivia Draudins, Corrs Chambers Westgarth)  Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS [2010] QCA 219, Queensland Court of Appeal, McMurdo P, Muir JA and White JA, 20 August 2010  The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/qld/QCA/2010/219.html](http://www.austlii.edu.au/au/cases/qld/QCA/2010/219.html%22%20%5Ct%20%22_new) **(a) Summary**  This case stands for the proposition that where parties to a commercial contract wish to exclude the operation of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) by nominating an alternate system of arbitral rules, it is vital that the rules adopted or the contract itself contain provisions regarding the supervisory law that applies to the arbitration where the rules adopted are simply procedural in nature.  In this case, the Appellant and the Respondent disagreed as to whether the Model Law applied to arbitral proceedings, despite the fact it had been provided for in the contract between them (the Contract) that the UNCITRAL Arbitration Rules (the UAR) would govern such proceedings. Whether the Model Law applied was the ultimate question and would influence the subsidiary question of whether a principle contained in the decision of the Queensland Court of Appeal in *Australian Granites Limited v Eisenwerk Hensel Bayreuth Dipl-lng GmbH* (2001) 1 Qd R 461 (the Eisenwerk Case) was distinguishable. The Eisenwerk Case found that "by expressly opting for one well known form of arbitration, the parties sufficiently showed an intention not to adopt or be bound by any quite different system of arbitration, such as the Model Law" (the Eisenwerk Principle). Further, if the answer to this question was "no", then the court was to determine if the Eisenwerk Principle was correctly decided. The court held that clause 8.17 was not sufficient to displace the Model Law in settling any dispute between the parties, as this clause alone did not sufficiently demonstrate that it was the intention of the parties to settle any disputes otherwise than in accordance with the Model Law. Of particular importance was that the UAR, unlike the Model Law, are silent on the important issue of the role of the courts and the supervisory law. Further, the Model Law and the UAR are capable of operating together. The Model Law also provides that the parties are free to adopt procedural rules, such as the UAR, to be followed by the arbitral tribunal. As the court determined that the operation of the Model Law had not been displaced, it was further found that it was inappropriate to decide whether the Eisenwerk Principle was distinguishable or whether it had been correctly decided. **(b) Facts**Clause 8.17 of the Contract provided "any dispute or difference whatsoever arising out of or in connection with this contract shall be and is hereby submitted to arbitration in accordance with and subject to the [UAR]." When the Respondent gave the Appellant a Notice of Arbitration, a dispute arose as to whether the parties had sufficiently demonstrated an intention "that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law" within the meaning of section 21 of the [International Arbitration Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7653" \t "Default) (the Act) due to the wording of clause 8.17 of the Contract.  The Appellant argued that the express selection of the UAR imported an agreement between the parties to have the dispute settled otherwise than in accordance with the Model Law for the following reasons: The UAR establish a regime distinct from the Model Law. The UAR provide a comprehensive framework for the establishment of a tribunal, the conduct of the proceedings and the making of a final and binding award and can therefore stand on their own. The Eisenwerk Principle applies in this case and should not be overruled unless the court found that the decision in the Eisenwerk Case was clearly incorrect. There are differences and incompatibilities between the Model Law and the UAR, suggesting that the two systems could not operate together. The Respondent argued that the parties had not expressed a sufficiently clear intention to settle any disputes otherwise than in accordance with the Model Law because: The UAR and the Model Law can operate in tandem and the adoption of the UAR in clause 8.17 of the Contract falls short of conveying an unambiguous intention to displace the model law. No agreement to displace the Model Law should be inferred as the UAR are silent on a critical element of international arbitration, the supervisory law and the role of the courts. Section 21 of the Act contemplates a like-for-like substitution of the Model Law for rules of the same genus, which the UAR are not.  The respondent noted that the UAR largely concern aspects of arbitral procedure governing the conduct and organisation of the proceeding and do not fulfil the role of a national law on arbitration. They are silent on the role of the courts. The purpose of the Model Law is fundamentally different, as it offers a system of national law governing international commercial arbitration and sets out the role of the courts. Commentary suggests that the two systems were intended to operate together within the one framework.  **(c) Decision**  Muir JA wrote the principal judgment in this case, with which McMurdo P and White JA concurred.  **(i) Had the Model Law been displaced by clause 8.17 of the Contract?** The court found that whether the parties had agreed that any dispute between them should be settled otherwise than in accordance with the Model Law depended on the construction of clause 8.17 of the Contract. The court found its role was to ascertain and give effect to the intentions of the contracting parties that a reasonable person with the level of the knowledge of the parties would have perceived when paying regard to the Contract itself, the purpose and object of the transaction and the surrounding circumstances. Muir JA noted that as neither the background of the Contract, nor its terms and conditions had been provided to the court, the court would have to interpret the Contract in an 'unusual and sterile nature'. The role, construction, or legal categorisation of the Model Law, the consequences of opting out of the Model Law and the intentions of Parliament in giving the Model Law the force of law in Australia were not the basis of determination. However, many of the matters relied on by the respondent were relevant to the construction of the Contract, as they form the background against which the contract was made.  The fact that neither the UAR nor clause 8.17 of the Contract referenced the choice of supervisory law was significant. While the Model Law provides a supervisory law for arbitrations and if adopted, becomes the controlling lex arbitri for international commercial arbitrations where the judicial seat is that of the adopting state, the UAR are procedural in nature and are not the law of a nation or state. As this is a vital issue for international arbitration proceedings, this is an argument that strongly suggests that the Model Law has not been displaced.  Further, the Model Law and the UAR are capable of operating together. This has been evidenced in a significant amount of commentary, most notably the second reading speech for the International Arbitration Bill and the Rules of the Australian Centre for International Commercial Arbitration (which are similar to the UAR) and provide in rule 2.3 that "[b]y selecting these Rules the parties do not intend to exclude the operation of the UNCITRAL Model Law".  Muir JA also noted that although Counsel for the Appellant drew attention to the inconsistencies between the Model Law and the UAR, it was never suggested that they could not be read together, nor that there would be difficulty in determining which provisions of the Model Law would be given precedence where inconsistencies between the Model Law and the UAR arose. Additionally, Articles 19 and 2(d) and (e) of the Model Law have the effect of allowing the parties to adopt different procedural rules, even where the Model Law applies, and to resolve any conflict arising between the two sets of rules. For all these reasons, clause 8.17 of the Contract did not manifest an intention that the Model Law should cease to apply.  **(ii) The Eisenwerk Principle**  The parties adopted the UAR in this case; the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the ICC Rules) were adopted in the Eisenwerk Case. The court found that as it was important to determine the intentions of the parties paying regard to the surrounding circumstances of the case, two identical arbitration clauses may be construed completely differently if the circumstances were significantly dissimilar. With the passage of time, circumstances may change also and this would further impact on the intentions of the parties as the court may interpret them. For this reason, the fact that the Eisenwerk Case found that the Model Law had been displaced when the parties adopted the ICC Rules was not conclusive. Muir JA considered that it was a case determining a matter of contractual construction, rather than setting out a general principle of law.  There are also significant differences between the ICC Rules and the UAR. Importantly, the ICC Rules establish the International Court of Arbitration and contain a provision for the supervisory role for the International Court of Arbitration. The UAR have no such effect. White JA also added to the reasoning of Muir JA, stating that due to the differences between the ICC Rules and other arbitral rules, the Eisenwerk Principle should not be interpreted to mean that the adoption of any other arbitral procedural rules should lead to the conclusion that the parties have decided to have their dispute settled under a supervisory law other than the Model Law. Further, as the Eisenwerk Case concerned the collision between the Model Law and the Act on entitlements to stay proceedings and subsequent decisions have found that the Model Law and the Act contain independent operative provisions when stays are concerned, the applicability of the Eisenwerk Case in the future may be questionable.The court therefore found that it was not appropriate to determine if the Eisenwerk Principle was distinguishable, nor whether the Eisenwerk Principle had been correctly determined.etailed Contents**4.5 Full Federal Court makes important findings about the derivatives provisions of the Corporations Act** (By Steven Rice, Freehills) Keynes v Rural Directions Pty Ltd [2010] FCAFC 100, Full Court of the Federal Court of Australia, Dowsett, Stone And Bennett JJ, 13 August 2010The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCAFC/2010/100.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2010/100.html%22%20%5Ct%20%22_new) **(a) Summary** The applicants (Keynes parties) are farmers and entered into contracts requiring the forward delivery of agricultural commodities (wheat and barley). They were unable to deliver the wheat and barley due to "production failure", the contracts were cancelled by the counterparty, and liquidated damages became payable to that counterparty. The Keynes parties claimed they were not liable for the liquidated damages on the basis that the counterparty did not provide them with a Product Disclosure Statement or a Statement of Advice as required by the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act). These documents were required (so the Keynes parties said) because the commodity contracts were derivatives (or, alternatively, financial products under the general definition of that term) under the Corporations Act. If they had received those documents, they would have been informed that there was a strong likelihood that the commodities prices would rise significantly, and they would not have entered into the commodities contracts. The Federal Court at first instance and the Full Federal Court on appeal rejected the claims of the Keynes parties. **(b) Facts** The proceeding in the Full Court was an appeal against an order against the Keynes parties in the Federal Court. Besanko J at first instance found that the commodities contracts were not derivatives. This was because, importantly, his Honour considered the arrangements fell within the exception in section 761D(3) to the meaning of "derivative". His Honour specifically found that the "washout provisions" (dealing with liquidated damages payable in the event of non-compliance) in the contracts did not mean that a party's obligations under the arrangements could be wholly settled in cash. **(c) The relevant law** The Corporations Act concept of "derivative" is critical to the Keynes decisions at first instance and on appeal. Section 761D(1) of the Corporations Act defines "derivative", and is a broad definitional provision which will capture as a derivative "arrangements" for the supply of tangible property where the prices are not fixed or the "value" of the arrangements may fluctuate. This fluctuation may occur because the value of an underlying asset, rate, index or commodity (or something else) is changing. However, section 761D(3) excludes from being a "derivative" arrangements for the supply of tangible property where one of the parties is actually expected to deliver the relevant property, and where rights and obligations under such arrangements are not usually traded, or not traded in a recognizable market.An arrangement excluded from the definition of "derivative" because it satisfies section 761D(3) is also excluded from the general definition of "financial product" in the Corporations Act. **(d) The decision of the Full Court of the Federal Court of Australia** The Full Court agreed with the trial judge that the claims by the Keynes parties should fail. This was because the Full Court agreed that the arrangements fell within the exception in section 761D(3) to the meaning of "derivative". The Full Court agreed with the finding of the trial judge that the "washout provisions" in the contracts did not mean that a party's obligations under the arrangements could be wholly settled in cash. The Full Court found (at 41) that wholly settling an arrangement by means other than in cash means that there must be "an alternative form of performance contemplated by the contract and at the seller's election", not merely "possible alternative means of performance after cancellation of the obligation to deliver, dependent on the buyer's concurrence". The Full Court also found that the fact that the arrangements fell within the exception in section 761D(3) to the meaning of "derivative" meant that the arrangements would also not be a "financial product" under the general definition of that term in the Corporations Act.etailed Contents**4.6 Court approves liquidator's application to compromise unresolved matters in voluntary wind up** (By Teena Zhang, DLA Phillips Fox)S & D International (in liq) v MIG Property Services Pty Ltd [2010] VSC 336, 13 August 2010, Supreme Court, Warren CJ, 13 August 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2010/336.html](http://www.austlii.edu.au/au/cases/vic/VSC/2010/336.html%22%20%5Ct%20%22_new) **(a) Summary** In this case the court ordered that a liquidator was justified in compromising with the second defendant unresolved matters in a related proceeding on the terms set out in a settlement deed. The application was made under sections 511 and 479(3) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  Section 511 states that a liquidator can apply to the court to determine questions regarding the winding up of a company, and section 479(3) provides similarly that a liquidator may apply to the court for directions in relation to any particular matter arising under the winding up.  In reaching its decision, the court considered that it had a broad jurisdiction under section 511 to determine matters, and in this instance found the decision to compromise the unresolved matters to be commercially appropriate.  This was because the parties were involved in multiple competing claims with the likelihood of further litigation arising in the future, and the liquidator (who was the first plaintiff) was subject to unusual personal risk. **(b) Facts** This case dealt with an application for orders to approve a deed of settlement between the first plaintiff (Geoffrey Niels Handberg, in his capacity as liquidator for S&D International Pty Ltd) and the second defendant (Paul Vartelas), the terms of which would compromise unresolved matters in related proceedings.    Each of the plaintiffs and defendants to the proceedings had an interest over property held on trust for the S&D International Unit Trust.  The trust assets consisted of two properties and an Indian wholesale grocery business run by the trustee S&D International Pty Ltd which had since gone into voluntary liquidation.  The parties had been involved in a long series of court cases before the current proceedings, and were likely to continue down this path for some time.  As a result of the complexity of the issues in dispute, the trial was conducted in stages.  Following the decision at the first stage, the first and second defendants lodged separate appeals. The second defendant was able to resolve his dispute with the plaintiffs and entered into a deed of settlement conditional on court approval under section 511.  The deed set out that the second defendant was to pay the first plaintiff $125,000 to discontinue his appeal, and release the plaintiffs from any claims arising from the trial, appeal or the instant proceeding.  In exchange, the plaintiffs would provide the second defendant with the same release and a full release from any costs orders.   The first plaintiff applied to the court under sections 511 and 479(3) of the Corporations Act seeking an order it was justified in compromising with the second defendant the unresolved matters in the related proceedings, and the matters raised in the appeal of that defendant on the terms set out in the settlement deed.   **(c) Decision** Warren CJ granted the orders sought, concluding that it was an appropriate commercial decision between parties engaged in multi-step litigation, only the first stage of which had been resolved.    In coming to this decision, her Honour considered the history and interpretation of sections 511 and 479(3), differences in the jurisdiction of the court where the winding up is voluntary or forced, and the importance of commercial considerations.   **(i) Voluntary vs compulsory winding up** Warren CJ stated that the power of the court to order directions in voluntary liquidations should be exercised where the order applied for is 'just and beneficial'.  Such an order will be just and beneficial where it will be of advantage in the liquidation.   The effect is not to determine rights and liabilities arising out of transactions, but to protect the liquidator from claims they have acted unreasonably or inappropriately.   Her Honour highlighted the traditional difference in treatment between compulsory (section 479(3)) and voluntary (section 511) wind ups, and cited Young J in Dean-Willocks:"There is a real difference between a court appointed liquidator and a liquidator appointed in a voluntary winding up because in the former case the liquidator is an officer of the court whereas in the latter case the liquidator is an agent of the company, but concluded that there was no real substantive difference between the powers of the court in each case." **(ii) Compromise order** In relation to the application before the court, Warren CJ stated that it is not the role of the court to make commercial decisions for liquidators except in special circumstances.  In considering whether to intervene, the court should consider whether a degree of personal risk attached to the liquidator so as to negatively affect the winding up process.  Her Honour held that the first plaintiff/ liquidator's sensitivity to further disputes arising from the claims in issue was well founded given the litigious history of the matter.  Hence the compromise with the second defendant was prudent and commercial, allowing the liquidator to progress in his administrative duties.   For these reasons, the court deemed it appropriate to make the orders sought.  etailed Contents**4.7 Issues arising following replacement of responsible entity** (By Ari Rosenbaum, Mallesons Stephen Jaques) Huntley Management Limited v Australian Olives Limited [2010] FCAFC 98, Federal Court of Australia, Full Court, Jacobson, Gilmour and Foster JJ, 12 August 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCAFC/2010/98.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2010/98.html%22%20%5Ct%20%22_new)   **(a) Summary**This decision of the Full Federal Court concerned an appeal by Huntley Management Limited arguing that:management fees paid in advance to another entity should be apportioned consistent with the date upon which it became the responsible entity of a managed investment scheme; and where there is a difference between the date of the shareholder resolution replacing the responsible entity and the date that the Australian Securities and Investments Commission ("ASIC") updates its records, the date that the entity becomes the responsible entity is the date of the shareholder resolution.  The court held that:an apportionment is only required if the payments which are the subject of the claim, are payments which have been made in arrears; even if Huntley could show that the fees were apportionable, it could not show a cause of action for its claim because it could not show it was the victim of some interception of funds; and the date that an entity becomes a responsible entity of a managed investment scheme is the date that ASIC changes its records.  **(b) Facts**Australian Olives Projects 1 to 6 were carried out at Yallamundi, Queensland.  Each project was a separate managed investment scheme which was registered and operated pursuant to Chapter 5C of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"). The respondent ("AOL") was the responsible entity ("RE") for all of the projects.  From March 2008 to November 2008, by several decisions made by the investors in the projects, the respondent was replaced as RE by the applicant ("Huntley"). AOL was paid management fees for some of the Projects in advance of management services being provided to investors, and the change of RE to Huntley was effected before the end of the period for which AOL was paid those fees. With respect to Projects 5 and 6, there was a ten day difference between the date that the respondent lodged the notice for change of RE and the date that ASIC processed the form and changed its records. **(c) The issues on appeal** **(i) Issue 1: Apportionment of fees and Huntley's rights in respect of them**The question was whether, in respect of Projects 1, 2 and 6, Huntley was entitled to recover from AOL a proportion of the management fees paid to AOL by the investors in those projects.  This proportion was referable to the part of the period after AOL had been removed as the RE of those projects and replaced with Huntley. **(ii) Issue 2: effective date of change of RE** The question in respect of project 5 was on which date the removal of AOL as the RE of Project 5 and its replacement with Huntley became effective.  The primary judge, Lindgren J, held that, in respect of Project 5, the removal of AOL and its replacement with Huntley became effective on the date when ASIC's records were actually altered to reflect the change of RE.  On appeal, Huntley contended that the replacement became effective when the investors in Project 5 passed the resolution removing AOL as the RE of Project 5 and replaced it with Huntley. **(d) Decision**  **(i) Issue 1** **Apportionment** Huntley claimed that it was a term of the relevant Constitutions and Agreements that for each financial year the RE was entitled to be paid by each member fees for the performance of its duties.  It further put forward that AOL ceased to perform any duties as RE after its removal so that the amounts held by AOL were held for the benefit of Huntley.   The court agreed with Lindgren J's decision that the management fees payable were not apportionable.  Sections 601FS and 601FT of the Act did not affect AOL's right to retain management fees which had been paid to it in satisfaction of a present debt.   The court held that pursuant to the various agreements, a debt in favour of AOL for the whole of the management fee payable in respect of each year, came into existence at the beginning of each year.  Once the annual amount was paid, the investors' debts to AOL as the RE of the Projects were discharged.  There was nothing to which Huntley could accede upon its appointment as the new RE for those projects. The court noted that various courts in a number of judgments have construed section 232 of the [Property Law Act 1974 (Qld)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12558" \t "Default), or provisions in substantially the same terms as section 232, as requiring an apportionment only if the payments which are the subject of the claim are payments which have been made in arrears.  The court held that those authorities stand for the proposition that section 232 does not apply to payments made in advance. The court saw no reason to depart from established authority in support of those propositions.  Further, the court agreed with the primary judge that even if section 232 of the Property Law Act did apply, it would be a matter relevant to the rights and obligations between Huntley and the investors in the Projects, not between Huntley and AOL. **Huntley's rights** The court held that even if Huntley was able to persuade the court that the management fees were apportionable, Huntley was unable to identify a cause of action known to the law which would enable it to succeed in its claim against AOL. Huntley submitted that the cause of action against AOL was for money had and received in respect of that part of the management fees for the Projects which was referable to the period of time when Huntley was the RE of those projects.   However, the court held that there were two fundamental problems with this submission.  First, Huntley did not plead a cause of action for money had and received against AOL nor did it litigate such a case at trial.  Secondly, Huntley was unable to point to any authority which supported the proposition that an action for money had and received could be brought by someone other than the person or entity which had made the payment in respect of which suit is brought. The court held that had Huntley pleaded the cause in action originally, AOL would have conducted its investigations and its trial differently.  It was now too late for Huntley to rely on that cause of action.   Huntley ultimately submitted that, while claims for money had and received are generally available to the payer of the funds, there is no reason in principle why a third party who, pursuant to an obligation owed to the payer, has performed the duties to which the payment relates, should not be able to recover the money directly from the recipient.  However, the court held that a plaintiff can succeed by showing that he or she was the victim of a wrong which enriched the defendant or that the defendant was enriched by receiving the plaintiff's money or property.   The court held that Huntley was not the victim of some interception of its funds.  Its claimed entitlement to a share of the management fees paid to AOL could not sensibly be said to arise from a total failure of consideration in respect of those payments.  The management functions were not carried out equally from month to month across each 12 month period and there was no evidence before the primary judge from which any conclusions could be drawn as to what work had been carried out by AOL as at the dates when it was removed as the RE for the relevant projects nor was there evidence as to what work remained to be done as at those dates.  Therefore, there was no identifiable portion of the management functions to be performed by AOL and, subsequently, by Huntley, referable to the claimed consideration. Further, Huntley's claimed entitlement did not arise from the circumstance that it was the payer of the management fees in question but rather arose solely from the circumstance that it became the RE of the Projects part way through the year in respect of which the payments were made.   The court held that sections 601FS and 601FT enabled and required Huntley to step into the shoes of AOL only in respect of those rights and obligations which continued post changeover of RE.  In the present case, the requirement to pay management fees in advance was not apportionable with the consequence that there was no right extant as at the date when Huntley was appointed as the RE of each of the relevant Projects in respect of management fees which could inure for the benefit of Huntley. Accordingly, Issue 1 in the appeal was decided against Huntley. **(ii) Issue 2** The court agreed with the Primary Judge that, under section 601FJ(1) of the Act, the former RE remains RE until the ASIC record is altered to name another company as RE.  If the ASIC record is never altered, the company named in ASIC's record of registration as the RE of a registered scheme remains the RE of that scheme.  This may be so, notwithstanding the fact that the members of that scheme had resolved to remove that entity and to replace it with another. The court held that the purpose of the requirement imposed upon ASIC to record all changes in the identity of the RE of a managed investment scheme is to enable those entities seeking to deal with the appropriate controller of a particular managed investment scheme to know with certainty the identity of the RE of that scheme.  It was therefore not to the point that ASIC may have recorded that the effective date of the changeover in the present case was the date of lodgement of the forms.  If a third party was interested in ascertaining the identity of the RE, a search would have revealed AOL until the register was changed. Their Honours further held that in any event, the entries in the ASIC record under the heading Documents Received are not the entries which matter for the purposes of section 601FJ(1) of the Act.  The part of ASIC's record that section 601FJ(1) is concerned with, is that part in which the responsible entity is "named". The column headed Effective Date is a reference to the date shown on the face of the form as the date when the relevant resolution was passed.  Section 601FJ of the Act contemplates that ASIC will alter its record if it is satisfied that there has been a change of responsible entity.  The final step in the process is not completed until ASIC changes their register. For those reasons, Huntley's contentions in respect of Issue 2 were rejected.etailed Contents**4.8 Exclusive jurisdiction clause not to be construed narrowly in the context of a contract having an international operation** (By Carolyn Wong, Mallesons Stephen Jaques)  Global Partners Fund Limited v Babcock & Brown Limited (in liq) [2010] NSWCA 196, New South Wales Court of Appeal, Spigelman CJ, Giles JA and Tobias JA, 12 August 2010  The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/196.html](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/196.html%22%20%5Ct%20%22_new) **(a) Summary** The court rejected a narrow interpretation of the exclusive jurisdiction clause in a partnership agreement. It ordered a stay of the proceedings and extended the operation of the clause to non-parties and claims arising indirectly from the agreement.  **(b) Facts** The applicant was the managing general partner of a partnership formed in the United Kingdom. The fourth respondent was a party to the partnership agreement. These proceedings arose out of an investment made by the partnership, as part of a consortium, in the acquisition of a company.  The investment was made prior to the applicant becoming managing general partner. The deal team on behalf of the partnership involved the first to fourth respondents, the first respondent being the ultimate holding company of the other respondents who were all related companies. A decline in credit and equity markets worldwide resulted in a proposal being made by a major consortium member to withdraw from the acquisition, offering a cancellation fee of US$17 million to be paid in full. This cancellation fee would cover the amounts for which other members of the consortium, including the partnership, would otherwise be liable. The deal team rejected this proposal and proceeded with the acquisition, making additional concessions to the consortium member to ensure the deal went ahead.  The applicant sought to recover losses made by the partnership flowing from the deal team's decision. It claimed that in rejecting the proposal, the respondents were liable for a breach of their fiduciary duties and a common law duty of care. The applicant further contended that the conduct complained of was subject to ultimate control from Sydney and sought to bring proceedings in Australia.  The respondents applied for a stay of these proceedings and asserted an exclusive jurisdiction clause in the partnership agreement. The clause granted exclusive jurisdiction to the courts of England to settle any disputes "arising out of or in connection with" the partnership agreement.  The applicant contended that its causes of action did not "arise out of or in connection with" the partnership agreement because they depended on rights created at law rather than by the agreement (subject matter scope claim). It also claimed that the first to third respondents were not parties to the partnership agreement and therefore the exclusive jurisdiction clause would not apply to any claims made against them (party scope claim).  **(c) Decision** **(i) Subject matter scope**  The court held that the addition of the words "in connection with" (as opposed to if it had merely been "arising out of") made it clear that a narrow interpretation of the exclusive jurisdiction clause should not be adopted. In this case, it was clear that the applicant's claims ultimately turned on the involvement of the respective respondents in the decision making process which led to the investment - an investment which was clearly made for the purposes of the partnership and pursuant to the provisions of the partnership agreement. Therefore, the exclusive jurisdiction clause would stretch to cover the applicant's claims, which were clearly "in connection with" the partnership agreement.  The court also held that exclusive jurisdiction clauses should be afforded the same liberal interpretation as arbitration clauses. The initial assumption to adopt in construing such a clause would be that the parties are likely to have intended that possible disputes arising from the transaction or contract are to be heard in one place or decided by the same tribunal or court. This is particularly so in the context of a contract intended to have an international operation. In this context, the commercial interest in having all disputes determined in a coherent manner by a single jurisdiction becomes particularly evident so that delay costs and inconsistencies are minimised.   **(ii) Party scope**  The question of whether exclusive jurisdiction clauses should be extended to non-parties is one which turns on the context of the contract. In this case, although the first to third respondents were not parties to the partnership agreement, the provisions of the partnership agreement directly contemplated the involvement of other group members in the decision-making processes of the partnership. Another factor which led to that conclusion was found in the indemnity provisions of the partnership agreement which also conferred benefits on the first to third respondents.  The court held that in light of the favoured wide interpretation of the exclusive jurisdiction clause and in a context where the very contract conferred rights on identified non-parties, the clause should be construed as binding on non-parties who are so closely connected with the contract, as were the first to third respondents in this case.  **(iii) Stay of proceedings**  In line with its previous reasoning that the exclusive jurisdiction clause should not be narrowly construed, the court emphasised the policy considerations that parties should be held to their contractual bargains and that resolutions of disputes arising from contracts should occur in a coherent and consistent manner and as expeditiously and efficaciously as possible. Although the existence of an exclusive jurisdiction clause was not determinative of whether a stay of proceedings should be granted, the court concluded that parties should be held to their contractual arrangements absent any strong countervailing reasons. The approach taken in establishing that Australia was not a "clearly inappropriate forum" was held not to apply to an exclusive jurisdiction clause. Therefore, the reasons advanced by the applicant for that purpose were not compelling enough to displace the court's discretion in determining that the proceedings should be stayed. etailed Contents**4.9 Shareholders deemed to be "creditors" for the purposes of the voluntary winding-up of a company with surplus assets**(By Dylan Barber, Blake Dawson) Re BM2008 Pty Ltd (in liq) [2010] VSC 337, Supreme Court of Victoria, Davies J, 11 August 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2010/337.html](http://www.austlii.edu.au/au/cases/vic/VSC/2010/337.html%22%20%5Ct%20%22_new) **(a) Summary** The liquidators of BM2008 Pty Ltd sought to place some restrictions on the transfer of shares in BM2008 after it was placed into voluntary liquidation.  The shares were to be transferred to Perth Freight Lines Pty Ltd, the plaintiffs, who owed money to BM2008.  The plaintiffs argued that the court should order that a condition placed on the transfer of shares, requiring the plaintiffs to settle its judgment debt in favour of BM2008, should be set aside as the court should be satisfied that the conditions of the transfer were not in the best interests of BM2008's creditors as a whole (BM2008 had no creditors).  The court declined to make an order setting aside the condition, finding that the circumstances of this case were sufficient to deem the shareholders of BM2008 creditors for the purpose of section 493A of the Act. **(b) The dispute** **(i) Voluntary liquidation** On 22 December 2008, BM2008 Pty Ltd went into voluntary liquidation and the defendants were appointed its liquidators.  Prior and up to being placed in liquidation BM2008 was solvent.  It was estimated the surplus of assets over liabilities of BM2008 was more than $8 million in the directors' declaration of solvency commencing the members' voluntary winding-up. Prior to being wound up, BM2008 Pty Ltd had conducted a national transport business which was sold to the plaintiffs, Perth Freight Lines Pty Ltd, under a Business Acquisition Agreement dated 25 June 2008.  The plaintiffs disputed the amount due under the Agreement.  The dispute was subsequently arbitrated and $2,320,485.20 plus interest was awarded to BM2008.  The plaintiffs were denied leave to appeal against the decision of the arbitrator to the Supreme Court of Victoria and leave was granted to the liquidators to treat the amount as a judgment debt. **(ii) Transfer of shares** On 28 November 2009 a shareholder of BM2008 agreed to transfer his shares in the company to the plaintiffs. As the company was in liquidation, the plaintiffs sought the liquidators' consent to the transfer.  The liquidators consented on the condition the plaintiffs pay BM2008 "all amounts owing by them under the Business Acquisition Agreement made on 25 June 2008" (this amount included the amount of the judgment debt which was still outstanding).  These proceedings related to the plaintiffs' application for an order setting aside this condition of the share transfer. **(c) Decision** **(i) The Act** Subsection (1) of section 493A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act) provides that a transfer of shares in a company that is made after a resolution winding the company up is void without the liquidator giving written consent to the transfer.  In giving this consent, a liquidator may make the transfer subject to one or more conditions.  Under subsection (2), consent may only be given to any such transfer if the liquidator is satisfied that the transfer is in the best interests of the company's creditors as a whole. The plaintiffs applied to the court under section 493A(5) of the Act for an order setting aside the relevant condition to which the consent to the transfer of the shares was subject.  Subsection (6) provides that on application by a prospective transferee a court may set aside any condition that consent may be subject to.  The exercise of the court's power in this respect depends on the court being satisfied that the conditions of the transfer are not in the best interests of the company's creditors as a whole. **(ii) Plaintiffs' contentions** The plaintiffs held that the sole question for the liquidators was whether or not the transfer was in the best interests of the company's creditors as a whole and, as BM2008 had no creditors, there was no basis upon which the liquidators could fail to give consent to the transfers. It was contended that the condition imposed by the liquidators related to the interests of the shareholders of the company in that capacity and not in their capacity as "creditors" of the company.  The plaintiffs argued that shareholders' expectations of a distribution upon winding-up did not qualify them as creditors and, furthermore, that the statutory scheme pointed away from viewing shareholders as creditors.  It was argued that where there was a voluntary winding-up of a solvent company where creditors were to receive 100 cents in the dollar and where the timing of payments to creditors would not be affected by the transfer of the shares to the plaintiffs, that the court should find that the condition on the transfer of the shares was not in the best interests of the company's creditors as a whole. **(iii) The court disagreed** The court found the circumstances of this case were sufficient to constitute the shareholders as creditors for the purpose of section 493A of the Act. In doing so, Justice Davies found it was incorrect to characterise the interests of the shareholders in the surplus on the winding-up of the company as a "mere expectancy on their part".  Instead it was a legal right reflecting a proportionate interest in the company assets, divisible amongst the company's shareholders and subject to relevant provisions in the company's constitution.  Section 501 of the Act, which relates to distribution of the property of a company on voluntary winding-up, was pointed to as an indication of statutory recognition of the right of members, as opposed to a mere expectancy, to a proportionate share of any surplus of assets on voluntary winding-up. Justice Davies noted that although "creditor" is not defined in the Act, in its ordinary sense, the definition of "creditor" would include shareholders as "someone to whom money is due".  It was determined that other references in the Act to "creditors" and "contributories" did not control the meaning of "creditors" in section 493A.  Furthermore, there was recognition in sections 553A and 563A of the Act that a shareholder may also have concurrent rights as a creditor of a company. It was found that reading section 493A to exclude shareholders would be an unwarranted restriction on the operation of these provisions of the Act.  It was important that the wording of the relevant section does not limit the ordinary meaning of "creditor".  As such, it was in the best interests of the creditors as a whole to impose the relevant condition on the transfer of the shares, as payment of the judgment debt would result in a greater amount of money to be distributed to BM2008's shareholders.  As such, the plaintiffs failed to satisfy the court that an order should be made to set aside the condition attached to the liquidator's consent.etailed Contents**4.10 Administration of arrangements under section 411** (By Mark Cessario and Nadya Riitano, Corrs Chambers Westgarth) Wattyl Ltd, in the matter of Wattyl Ltd [2010] FCA 854, Federal Court of Australia, Stone J, 10 August 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2010/854.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/854.html%22%20%5Ct%20%22_new)    **(a) Summary** Wattyl Limited ("Wattyl") sought an order from the court under section 411 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") to convene a meeting of its shareholders for the purpose of considering a proposal for Valspar (Australia) Paint Acquisition Pty Limited, a wholly-owned subsidiary of The Valspar Corporation ("Valspar"), to acquire all the shares in Wattyl.  The proposed acquisition raised an issue in regards to the fairness of the Scheme Implementation Agreement for the shareholders of Wattyl, in particular the partly paid shareholders. The court held that despite the significant difference in the price Valspar would be acquiring shares in Wattyl, being $1.67 for fully paid shares and $0.37 for partly paid shares, independent reports indicated that this was a proportionate figure of the value each shareholder had in their shares. On this basis, the court held that although shareholders were not being treated the same, they were being treated fairly and equally. Thus the court was satisfied that a community of interest existed between the fully paid and the partly paid shareholders, and there was no need for separate meetings be held for those two groups. **(b) Facts**  Wattyl entered into a Scheme Implementation Agreement with Valspar, a company incorporated in Minnesota. Under the Scheme, a wholly-owned subsidiary of Valspar, Valspar (Australia) Paint Acquisition Pty Limited, would acquire all the shares in Wattyl. This was explained by the Chairman of Wattyl in the Scheme Booklet as follows: "Under the Scheme, [Valspar Australia] will acquire all of the fully paid Wattyl Shares for $1.67 in cash per fully paid Wattyl Share. This represents a substantial premium of:113% to the closing price of $0.785 per fully paid Wattyl Share on 24 May 2010, being the day prior to Wattyl's announcement of receipt of an indicative and non-binding proposal; 91% to the three month volume weighted average price to 24 May 2010 of $0.875 per fully paid Wattyl Share; and 33% to the closing price of $1.26 per fully paid Wattyl Share on 25 June 2010, being the last trading day prior to Wattyl's announcement that it had entered into the Implementation Deed.  Partly paid Wattyl Shares issued under the Wattyl Employees Share Scheme will be acquired for $0.37 cash per partly paid Wattyl Share as part of the Scheme". Under section 411 of the Act, where an arrangement is proposed between a Part 5.1 body and its shareholders, the court may upon application, order a meeting or meetings of the shareholders to be convened in such manner, and to be held in such place or places, as the court directs. Consequently, Wattyl sought an order from the court under section 411 of the Act to convene a meeting of shareholders to consider Wattyl's entry into the Scheme. **(c) Decision**  In the present case, the court was satisfied that the information in the Scheme Booklet and annexed documents would result in proper disclosure to the shareholders, that the plaintiff was a "Part 5.1 body" and that ASIC had been given an opportunity to examine the proposal and adequate notice of the first court hearing date.  The court did have to consider a number of matters Wattyl raised pursuant to its duty of disclosure, but which Wattyl said ought to be of no concern to the court. The first two of those issues related to:a break fee payable if the Scheme did not proceed; and an exclusivity period during which there were "no shop", "no talk" and "no due diligence" restrictions.  The court was satisfied that neither of these provisions posed an impediment to the Scheme being approved, after receiving evidence that the provisions were agreed following arms' length commercial negotiations during which both Wattyl and Vaslpar received legal and financial advice. The third issue raised by Wattyl was the difference in the amounts to be paid to partly paid shareholders, compared with fully paid shareholders.  Given that difference in treatment between the two classes of shareholders, there was a need to consider whether it was necessary for separate meetings to be held so that their interests could be considered separately. The court stated that the question at hand was whether, at the meeting convened for the purpose of obtaining shareholder approval of the Scheme, the interests of the two classes of shareholders would be so different "as to make it impossible for them to consult together with a view to their common interest" (*Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 at 583 per Bowen LJ). Barrett J in Re Hills Motorway Management Ltd (2002) 43 ACSR 101 at 104 describes this as a "community interest". An independent report from Lonergan Edwards & Associates Limited concluded that the acquisition of Wattyl shares by Valspar under the Scheme would be fair, reasonable and in the best interests of Wattyl shareholders. In particular the report noted that shareholders of partly paid shares would be treated equally to shareholders of fully paid shares under the Scheme. In the present case, the court explained that although the price for a fully paid share is greater than for a partly paid share, on a pro rata basis each group would be paid the same in respect of the equity they have in their shares. That being so, the issue for all shareholders would be the same, namely whether they accept a price that ascribes a certain price to their shares on a basis that is proportionate to the value which each shareholder has in the shares. As such, the court held that although not treated the same, the groups can be seen to be being treated fairly and, in that sense, equally. On this basis the court ordered that pursuant to section 411(1) of the Act, Wattyl convene a meeting of the Wattyl shareholders for the purpose of considering the proposed Scheme.etailed Contents**4.11 Is competition an "unreasonable burden" for the Corporations Act financial reporting requirements?**(By Peter Hickey and Will LeMass, Clayton Utz) Dynamic Supplies Pty Ltd v Australian Securities and Investments Commission [2010] FCA 806, Federal Court of Australia, Reeves J, 30 July 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2010/806.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/806.html%22%20%5Ct%20%22_new) **(a) Summary**The [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) requires all large proprietary companies to lodge certain financial and directors reports.  Those reports are then made publicly available.   The Australian Securities and Investments Commission (ASIC) is empowered by the Act to relieve a company from the reporting requirements if compliance with the requirements would "impose unreasonable burdens" on the company.  Dynamic Supplies Pty Ltd (Dynamic) applied to ASIC to be relieved from the reporting requirements.  This application was refused.  Dynamic's appeal from this decision to the Administrative Appeals Tribunal (the Tribunal) was dismissed. The subsequent appeal to the Federal Court (the court), the subject of this case note, was also dismissed.   The case sheds light on the two stage test for determining whether a company meets the "unreasonable burden" exemption under section 342 of the Act.   **(b) Facts**   Dynamic is one of the largest independent wholesalers of printer toner and fax cartridges in Australia.  The court found that Dynamic met at least two of the three criteria for a "large proprietary company" under section 45A(3).  This finding creates a presumption that Dynamic is required to comply with the reporting requirements.   The market in Australia for the sale of printer cartridges and toner is highly competitive.  There was evidence that Dynamic's competitors included subsidiaries of well known international companies such as Hewlett Packard, Brother, Epson and Canon.  The Tribunal accepted that in this market there is little product differentiation and strong competition on price and service.  Dynamic claimed that the reporting requirements would impose an "unreasonable burden" because the reports would be used by its competitors to damage Dynamic in the market place.   **(c) Decision**  The court found that whether a company will be relieved under section 342 of the Act depends on a two stage test:  Firstly, ASIC (and the Tribunal on review) must determine whether it is satisfied that complying with section 319(1) of the Act (the requirement to lodge financial reports) would "impose unreasonable burdens" on the applicant; and  Secondly, whether ASIC should exercise its discretion to grant relief from that requirement.  The court endorsed the remarks of Emmett J in Directors of Liquid Air (WA) Pty Ltd v Commissioner for Corporate Affairs (1989) 15 ACLR 29 and found that for the first requirement, a causal link between the reporting requirements and the alleged detriment must be demonstrated.  A "mere subjective belief, or apprehension" will not be sufficient.   The Tribunal found that Dynamic's financial report was likely to be accessed and used by at least some of its rivals. It accepted that the information might be of particular interest to rivals who could use it to hone their marketing and pricing strategies and that this "could impact on Dynamic's profitability and ultimately threaten its survival if it could not respond effectively. That would have implications for Dynamics shareholders, employees, creditors and perhaps its customers."   Despite this finding, the Tribunal held that the evidence did not permit a conclusion that if Dynamic was not relieved from the reporting requirements an anti-competitive result would, as opposed to could, occur.  Consequently the Tribunal held that Dynamic could not meet the first stage of the two stage test.   The court held that the Tribunal properly assessed the evidence and that Dynamic had failed to meet the threshold requirement of demonstrating a causal link between the reporting requirements and the alleged detriment to Dynamic.  Consequently the court found that the Tribunal's decision was correct because Dynamic could not meet the threshold requirement of demonstrating that an unreasonable burden would result.   Dynamic's further argument that the Tribunal took into account an irrelevant consideration, namely, whether anti-competitive practices might occur, was also dismissed by the court.   **(d) Comment** The case demonstrates the extremely high threshold that a company must cross in order to be granted relief from the reporting requirements.  It is particularly noticeable that the two-step test endorsed by the court means that the size of the adverse impact that the company would face may never become an active consideration for the decision-maker (ASIC or the AAT). In this case, for example, the Tribunal accepted that the company's profitability would be threatened if its competitors behaved as it predicted they would. Despite this, the fact that the company was unable to prove that that outcome was probable - as opposed to possible - meant that that factor played no part in the consideration of the relief application. etailed Contents**4.12 Is a mortgagee with a registered charge over shares in a company bound by a shareholders' deed?** (By Steven Grant, Minter Ellison) Elders Forestry Ltd v BOSI Security Services Ltd [2010] SASC 223, Supreme Court of South Australia, Kourakis J, 21 July 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/sa/SASC/2010/223.html](http://www.austlii.edu.au/au/cases/sa/SASC/2010/223.html%22%20%5Ct%20%22_new) **(a) Summary** This case concerns whether a mortgagee with a registered charge over the shares in a company is bound by a shareholders' deed to which all the shareholders and the company are parties, in the same manner as a mortgagee would be bound by the constitution of the company.   **(b) Facts** In about 2003, the plaintiff, ITC Limited (now Elders Forestry Ltd (ITC)) and the fourth defendant, Timbercorp Ltd (in liquidation) (Timbercorp) agreed to enter into an incorporated joint venture arrangement using the fifth defendant, Plantation Pulpwood Terminals Pty Ltd (PPT) as the corporate vehicle through which the joint venture was undertaken.  ITC and Timbercorp each held 50,000 of the 100,000 issues shares of PPT.  The first defendant, BOSI Security Services Ltd (BOSI), was at all material times:from 29 January 2007 registered as chargee of property of Timbercorp pursuant to the Featherweight Fixed and Floating Charge dated 15 December 2006 (the December 2006 Charge); and from 1 October 2007 registered as chargee of interests held by Timbercorp in PPT pursuant to the Mortgage of Shares and Contractual Rights (Plantation Pulpwood Terminals Limited) dated 28 September 2007 (the Mortgage Deed) and the charge given by it as the equitable mortgage.  A constitution was adopted by the shareholders of PPT on its incorporation.  ITC and Timbercorp entered into a Shareholders' Deed dated 25 August 2004 (the Shareholders' Deed 2004) to regulate their respective rights and obligations in the joint venture.  ITC and Timbercorp purported to amend the constitution after entering into the Shareholders' Deed 2004 by subscribing to a circular resolution.  The effect of the amendment was to add a r 94 which provided that rights in the Shareholders' Deed 2004 would prevail over the terms of the constitution.  The Shareholders' Deed 2004 was amended in 2005 but not in a way which is material to these proceedings.  On 15 December 2006, Timbercorp entered into a Syndicated Loan Agreement with BOSI as a security trustee and at the same time, Timbercorp granted the December 2006 Charge over all of Timbercorp's assets including its shareholding in PPT.  The Shareholders' Deed 2004 was then further amended by a Supplemental Deed dated 18 September 2007.   The Supplemental Deed effected substantial changes:It acknowledged that the operations of PPT had been funded by loan capital provided by the Shareholders and recorded the amount and terms of repayment of those loans.  It conferred a right on ITC and Timbercorp to call for a transfer of the shares of the other in the event that the other requested a repayment of the balance of the capital of its loan.  The purchase price for the shares on the exercise of the repayment option was fixed at the lesser of $1, or the value of the shares as determined by an independent valuation in accordance with a procedure prescribed in Schedule 5 of the Shareholders' Deed as amended.  It changed the purchase price payable on the transfer of a share in exercise of the default option to reflect the same formula.  It amended Schedule 6 of the Shareholders' Deed 2004 so that the charging of any shares by one shareholder was proscribed unless the other shareholder consented and the chargee undertook to exercise its power of sale consistently with the pre-emption procedure established by the schedule.  On or about 28 September 2007, Timbercorp and BOSI entered into the Mortgage Deed pursuant to which Timbercorp granted an equitable mortgage over its 50,000 shares in favour of BOSI as security for a further advance.  On 22 October 2007, ITC and BOSI entered into a Deed of Acknowledgment pursuant to which BOSI acknowledged that it had been supplied with the Shareholders' Deed as amended and covenanted to observe, perform and be bound by Schedule 6 of the Shareholders' Deed as amended (the Deed of Acknowledgement). On 29 June 2009 KordaMentha was appointed as the liquidators of Timbercorp.  The appointment of KordaMentha as Timbercorp's administrators was a default event for the purposes of clause 7.2 of the Shareholders' Deed as amended, the December 2006 Charge and the Mortgage Deed.  ITC served a notice to exercise the default option on PPT on 30 September 2009.  Timbercorp by its liquidators refused to settle on the date specified in the notice being 8 October 2009.  On 8 October 2009, Timbercorp by its liquidators purported to issue a Notice of Sale to ITC under Schedule 6 of the Shareholders' Deed as amended.  On 12 October 2009, ITC commenced the proceedings asserting the validity of the manner in which it exercised the default option and the invalidity of Timbercorp's Notice of Sale (the 2009 Proceedings).  In those proceedings, Kourakis J declared that ITC had validly and lawfully given notice of the exercise of the default option pursuant to clause 7.2 of the Shareholders' Deed dated 13 September 2005, as supplemented and amended by a Supplemental Deed dated 18 September 2007.   The substantive controversy between the parties in these proceedings concerned competing claims of equitable rights over Timbercorp's shares in PPT.  As outlined above, BOSI had advanced substantial finance to Timbercorp on various securities over a period of time preceding Timbercorp's liquidation, including a floating charge over Timbercorp's assets and later a mortgage over the shares.  BOSI claimed equitable rights over the shares pursuant to its securities and ITC claimed an equitable right to the shares pursuant to the default option granted by the terms of a Shareholders Deed. **(c) Decision** Kourakis J found that Timbercorp committed an event of default by giving the 2006 Charge.  In the 2009 proceedings, Kourakis J held that the default option was validly exercised and having validly exercised the default option, ITC held as against Timbercorp an equitable interest in the shares from the time of the appointment of KordaMentha as administrator.  In the same proceedings, Kourakis J also found that by the very process of liquidation Timbercorp threatened 'to cease to carry on business' which was also a Default Event.  Accordingly, even though the administrators' appointment ended with the appointment of KordaMentha as liquidators from 23 April 2009, there had always existed a default event (albeit not the same default event), which empowered ITC to exercise its default option giving rise to an equitable interest in the shares. Kourakis J had also found that the Notice of Sale served by Timbercorp was ineffective.  On the evidence in these proceedings, Kourakis J made the same findings. The more important question was whether the mortgagee, BOSI, was bound by the Shareholders' Deed to which all the shareholders and PPT were parties, in the same manner as BOSI was bound by the constitution of PPT.   Kourakis J noted that the constitution of a company derives its legal force from section 140 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) which provides that a company's constitution, if any, and any replaceable rules that apply to it, have effect as a contract between the company and each member, between the company and each director and company secretary, and between a member and each other member.  Kourakis J considered that it would be an inversion of the rationale of section 140 if the terms of a deed to which all shareholders and the company were parties were denied the same legal effect that is given to the constitution of a company by section 140.  In the same manner as the entitlements of a shareholder may be affected by an amendment to the constitution of the company after the allotment of the shares, Kourakis J considered that the rights of a mortgagee of shares must be equally subject to alteration by any such amendment.  Assuming an equivalence between the Shareholders' Deed as amended and constitutional rights and obligations, Kourakis J found that the shares held by Timbercorp became subject to the exercise of the default option, not by an amendment to the Shareholders' Deed 2004, but by its operation on the subsequent insolvency of Timbercorp.  On execution of the Mortgage Deed, BOSI became an equitable assignee of the shares.  BOSI took that assignment after the amendment to the Shareholders' Deed 2004 which allowed ITC to exercise the default option at a price as low as $1 per share and at a time when the shares were vulnerable to the exercise of the default option.  As an equitable assignee, BOSI took its interest subject to those rights.  In this respect, BOSI has no greater interest than Timbercorp in the shares. Accordingly, Kourakis J declared that BOSI was bound by ITC's exercise of the default option under the Shareholders' Deed as amended and that ITC was entitled to the equitable interest in the shares.  On that basis, Kourakis J ordered that Timbercorp transfer the shares to ITC and that PPT register that transfer and declared that, on the transfer of the shares, BOSI had no further interest in or right over the shares.etailed Contents**4.13 Directors' leave entitlements and retrenchment payments in a winding up**(By Laura Gotlieb, Clayton Utz) Sturesteps v A G McGrath [2010] NSWSC 903, Supreme Court of New South Wales, Brereton J, 3 June 2010 Sturesteps v A G McGrath [2010] NSWSC 896, Supreme Court of New South Wales, Brereton J, 27 May 2010 The full text of these judgments is available at:[http://www.lawlink.nsw.gov.au/scjudgments/2010nswsc.nsf/6ccf7431c546464bca2570e6001a45d2/2071addd4e7ea99cca25777d000ba103?OpenDocument](http://www.lawlink.nsw.gov.au/scjudgments/2010nswsc.nsf/6ccf7431c546464bca2570e6001a45d2/2071addd4e7ea99cca25777d000ba103?OpenDocument" \t "_new) [http://www.lawlink.nsw.gov.au/scjudgments/2010nswsc.nsf/6ccf7431c546464bca2570e6001a45d2/5659de7de5a8b950ca25777c000b1b30?OpenDocument](http://www.lawlink.nsw.gov.au/scjudgments/2010nswsc.nsf/6ccf7431c546464bca2570e6001a45d2/5659de7de5a8b950ca25777c000b1b30?OpenDocument" \t "_new) **(a) Summary** The period during which the plaintiff was an employee and director of a related company did not count as non priority days. The plaintiff's retrenchment pay was attributable to the fact and date of his termination, which was not a "non priority day". The rule in Clayton's Case is applicable to the accrual of annual leave, which means that upon taking leave, the employee is taking that which accrued earliest. In this case, the majority of the plaintiff's annual leave was attributable to non priority days because it accrued when he was a director and employee.  **(b) Facts** The plaintiff, Mr Sturesteps, commenced employment with MW Payne Liability Agencies Pty Ltd on 10 January 1969. In 1974, as a result of a takeover by the C E Heath group, MW Payne Liability Agencies underwent a change of name, to C E Heath Underwriting Agencies Pty Limited. Mr Sturesteps was appointed Managing Director (International) for the CEH group in 1986. In December 1988, Mr Sturesteps became a director of the holding company, CEH International, and, in April 1989, of the third defendant, CEH Casualty & General.  CEH International became HIH Insurance Limited, and the third defendant, formerly CEH C&G, became HIH C&G (C&G). In 1999, Mr Sturesteps and C&G entered into an employment agreement (1999 Employment Agreement). Clause 17 provided for termination for redundancy. On 19 February 2010, Justice Brereton handed down a decision (*Sturesteps v A G McGrath* [2010] NSWSC 169) in which his Honour decided that: C&G was Mr Sturesteps' employer, he did not resign, and he remained in employment until termination by the provisional liquidator in April 2001. Mr Sturesteps sued for his accrued annual leave over the period of his employment from 1988, and a redundancy payment. **(c) Decision**  **(i) Definitions**  This case concerned the construction and application of section 556 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), which provides for the priority of payments in a liquidation.  Payment of wages (section 556(1)(e)) is subject to section 556(1A), which provides that the amount paid in respect of an "excluded employee" which is attributable to "non-priority days" does not exceed $2,000. Similarly, all amounts due to employees on or before the relevant date because of an industrial instrument in respect of leave of absence (section 556(1)(g)) are subject to section 556(1B), which provides that the amount paid in respect of an "excluded employee" which is attributable to "non-priority days" does not exceed $1,500. Retrenchment payments payable to employees of the company (section 556(1)(h)) are subject to section 556(1C), which provides that a retrenchment payment to an "excluded employee" of the company must not include an amount attributable to "non priority days". An "excluded employee" is defined in section 556(2) as an employee who was also a director of the company at any time during the period of 12 months ending on the relevant date or any time after the relevant date. A "non priority day" means a day on which the excluded employee was a director, even if the day was more than 12 months before the relevant date. A "retrenchment payment" means an amount payable by the company to the employee, by virtue of an industrial instrument, in respect of the termination of the employee's employment by the company, whether the amount becomes payable before, on or after the relevant date. **(ii) Whether the period during which the plaintiff was a director as well as an employee of MW Payne counts as non priority days** It was conceded that Mr Sturesteps was an "excluded employee" for the period 24 April 1989 to 12 September 2000 as he was a director and employee of C&G. Those days were considered "non priority days".  The issue was whether the period during which Mr Sturesteps was a director and employee of MW Payne should count as non priority days. Brereton J had determined that Mr Sturesteps' service for the purposes of clause 17.1 of the 1999 Employment Agreement included not only his service with C & G but also his service with predecessor employers, including MW Payne. The defendants argued that the definition of "excluded employee" in section 556 should be extended to any period in which Mr Sturesteps was a director and employee of any company in the HIH Group, and specifically MW Payne.   Justice Brereton held that section 556 is concerned only with the company in liquidation (in this case, C & G), and not with its subsidiaries or predecessor employers of the relevant employee director (at [10]). Therefore, the period which Mr Sturesteps was a director of MW Payne did not constitute non priority days. **(iii) Whether the plaintiff's retrenchment payment was attributable to non priority days** The next issue concerned the application of section 556(1)(h) to the retrenchment payment to which Mr Sturesteps was entitled under clause 17.1 of the 1999 Employment Agreement.  The issue was whether the retrenchment payment could be said to be attributable to non priority days.  After considering the legislative history and case law in relation to section 556(2), his Honour discerned competing views on when entitlements to retrenchment pay accrue, namely: that entitlements only accrue upon termination and relate to the future after termination (*International Harvester Expert Co v International Harvester Australia Ltd* (1982) 7 ACLR 391 per Beach J); that entitlements relate to the whole period of employment (*Rundell v Bedford* (1998) 28 ACSR 66 per White J); and that entitlements are attributable to the day on which the agreement under which retrenchment pay becomes payable is executed (the defendant's argument).  His Honour adopted the approach of Beach J in International Harvester and concluded that retrenchment pay does not accrue or arise over a period but rather upon a particular event. That event is the fact which triggers the entitlement to retrenchment pay (at [37]). Accordingly, his Honour held that Mr Sturesteps had no entitlement to retrenchment pay until he was actually retrenched. The retrenchment payment was attributable to the fact and date of his termination, which did not occur on a non priority day but occurred after he had ceased to be a director. None of the payment was attributable to a non priority day and the whole of it was entitled to priority under section 556(1)(h). **(iv) Whether the rule in Clayton's case applies to the accrual of annual leave**  There was an issue as to the apportionment of Mr Sturesteps' annual leave entitlements between non priority days and other days. As at 1992, Mr Sturesteps had accrued 98 days annual leave. When he took his ten days annual leave a year, he used the earliest accrued leave. By 18 April 2001, he had used all the leave accrued before 24 April 1989 (when he became a director) so that his only remaining annual leave entitlements were attributable to the period after he became a director (except for 11 days accrued in respect of the period after 12 September 2000 when he resigned as a director). Justice Brereton held that the policy reflected in Clayton's Case should apply in these circumstances, which meant that the first amounts credited are also the first amounts debited (at [10]). His Honour held that Mr Sturesteps was entitled to priority for the 11 days annual leave accrued in respect of the period after 12 September 2000, but the remainder was attributable to non priority days when he was a director.etailed Contents |

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