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[Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm#h1)  [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm#h2)  [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm#h3)  [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm#h4)  [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm#h5)  [Contributions](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm#6)  [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new) | | [eview my Newsfeed selections](http://my.lawlex.com.au/default.asp?goto=news_sub) [iew past editions of Newsfeeds](http://my.lawlex.com.au/default.asp?goto=news) [iew a list of related Standards](http://infostore.saiglobal.com/store/results2.aspx?searchType=subject&publisher=All&doctype=All&status=Current&sfld1=ICS%20Code&sval1=03.160) [earch all Australian legislation from one website](http://my.lawlex.com.au/default.asp?goto=search_leg) [ree trial our Lawlex Legislative Alerts](http://www.saiglobal.com/Compliance/regulatory-news/asiapac/lawlex-legislative-alert.htm) [ree trial our other regulatory products and services](http://www.saiglobal.com/compliance/regulatory-news/default.htm) [overnance, risk and compliance solutions](http://www.saiglobal.com/compliance/about/) | | |  | | --- | | COPYRIGHT WARNING Use of this product must be in accordance with our licence agreement and the relevant licence fee paid by your organisation. We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | |  | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%231) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | | [1. 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I would like to take this opportunity to thank the supporters of the Bulletin - ASIC, ASX and, in particular, our sponsoring law firms listed above.   I wish all of our readers an enjoyable Christmas and a happy and prosperous New Year.  Professor Ian Ramsay Editor |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **1. Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1 New guidance for audit committees**    On 17 December 2010, the Auditing Practices Board (APB) of the UK Financial Reporting Council (FRC) published revised Ethical Standards for Auditors and the FRC issued revisions to its Guidance on Audit Committees.   Respondents to the earlier consultation on proposed changes were supportive of proposals to:  increase the rigour with which auditors assess threats to their independence;  introduce a new non-audit services disclosure regime; and  increase the role of audit committees in overseeing the retention of a company's auditors to undertake non-audit services.  The APB consultation also included proposals to address certain concerns identified by respondents, namely to:  extend the guidance to auditors in relation to conflicts of interest and to require them to consider the consequential implications for their independence;  prohibit the provision of restructuring services in certain circumstances; and  broaden the definition of a contingent fee and further prohibit the circumstances in which non-audit services may be provided on such a basis.  A copy of the APB's Ethical Standards for Auditors and its feedback paper are available from the [APB](http://www.frc.org.uk/apb/publications" \t "_new) website.   A copy of the FRC's Guidance on Audit Committees is available from the [FRC](http://www.frc.org.uk/publications/pubs.cfm?mode=list&year=2010" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.2 Operational risk - consultative papers issued by the Basel Committee**   On 10 December 2010, the Basel Committee on Banking Supervision (BIS) issued for consultation two papers on operational risk: 'Sound Practices for the Management and Supervision of Operational Risk' and 'Supervisory Guidelines for the Advanced Measurement Approaches'.  The paper titled 'Sound Practices for the Management and Supervision of Operational Risk' updates the Committee's 2003 paper on this topic. The updated version highlights the evolution of operational risk management since 2003 and is based on best industry practice and supervisory experience. The principles outlined in the report are discussed within the context of three overarching themes: governance, risk management and disclosure.    The Committee also issued for consultation a paper titled 'Operational Risk - Supervisory Guidelines for the Advanced Measurement Approaches'. The regulatory capital adequacy framework envisages that, over time, the operational risk discipline will continue to mature and converge towards a narrower band of effective risk management and measurement practices. The guidance seeks to better achieve this by setting out supervisory guidelines relating to governance, data and modeling.   The papers are available on the [BIS](http://www.bis.org/publ/bcbs183.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.3 CEBS publishes guidelines on remuneration policies and practices**   On 10 December 2010, the Committee of European Banking Supervisors (CEBS) published its final Guidelines on Remuneration Policies and Practices.  Article 22 of the Guidelines lays down the fundamental principle whereby institutions are required to ensure that their remuneration policies and practices are consistent with their organisational structure and promote sound and effective risk management.   CEBS had already published a set of High-level Principles for Remuneration Policies (Rem. HLP) on 20 April 2009 aimed at assisting in remedying unsound remuneration policies. These principles also built on the remuneration work carried out by other bodies, namely the Financial Stability Board and the European Commission. A study regarding the national implementation of the High-level principles was carried out by CEBS and served as input to the current guidelines.  CEBS has considered the feedback received and has revised its initial proposal in order to address the main issues and concerns raised, namely those related to proportionality, equity-linked and other instruments as part of variable remuneration, distribution of such instruments and retention periods.  The final Guidelines are to be implemented from 1 January 2011.    The Guidelines are available on the [CEBS](http://www.c-ebs.org/cebs/media/Publications/Standards%20and%20Guidelines/2010/Remuneration/Guidelines.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.4 Consultation on European rules for financial actors and instruments**  As part of its work in creating a more transparent and stable financial system, the European Commission launched on 8 December 2010 a consultation on the review of the Markets in Financial Instruments Directive (MiFID). In force since November 2007, MiFID provides a comprehensive framework for investment firms offering services in relation to financial instruments, as well as rules to protect investors. It allows trading venues and investment firms to operate freely across the EU. It has increased competition and integration in EU financial markets, and led to significant improvements in investor protection. However, rapid technological advances, the complexity and changing make-up of financial markets and the lessons of the financial crisis call for an extensive review targeted at addressing all of the areas where shortcomings have been revealed or improvements are needed. The purpose of this consultation is to gather input from all stakeholders in order to inform the legislative proposals due in the spring of 2011.    Key elements of the consultation:  **Developments in market structures and practices:** Financial markets are increasingly complex. There are now many more trading venues, participants and products available. The European framework needs to keep pace with changes to methods of trading and technological developments. The consultation asks how MiFID should be updated to provide a robust regulatory framework covering all investment services and activities in an appropriate manner to avoid risks linked to activities not covered.  **Transparency of markets:** Transparency of market data (including pre- and post-trade data) is crucial so that all market participants have equal access to information on trading opportunities. This also facilitates price formation and promotes liquidity. Currently, MiFID transparency rules only cover shares. The consultation looks at how to limit derogations from the current framework (i.e. the issue of dark pools) and asks whether other financial products, such as bonds and OTC (over-the-counter) derivatives should also be subject to similar rules, in line with G-20 commitments. Measures to improve the availability, quality and consolidation of trading data are also proposed.   **Commodity derivative markets:** The consultation also asks what measures could be taken to address concerns relating to the functioning of commodity derivative markets and their impact on commodity price volatility. It asks how to improve information flows, what reporting requirements might be needed and whether position limits should be considered. The MiFID review will complement other Commission initiatives in this field, such as the review of the Market Abuse Directive scheduled for spring 2011.  **Investor protection:** The consultation asks about measures needed to strengthen investor protection, so that investment firms treat all investors appropriately in light of their specific profiles.  **Supervision:** The consultation asks where changes to the supervision of the various activities and participants may be needed, and in particular the precise role for the European Securities and Markets Authority (ESMA) to ensure a better supervision of these markets. This new Authority will commence operation in January 2011.   Further information is available on the [European Commission](http://ec.europa.eu/internal_market/securities/isd/mifid_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.5 Parliament Reverses High Court decision in Sons of Gwalia**   In *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160, the plaintiff shareholder claimed that he was misled by the company into acquiring his shares by misleading disclosure by the company. The High Court of Australia held that the plaintiff was not claiming in his capacity as a member of the company, which would have postponed the claim behind the claims of unsecured creditors in insolvency of the company. Instead, the court held that the plaintiff's claim, which was based on statutory investor protection provisions, ranked equally with the claims of unsecured creditors in the corporate insolvency.  On 26 November 2010, the Australian Parliament passed the [Corporations Amendment (Sons of Gwalia) Act 2010](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=118026" \t "Default) which gives effect to the Government's decision to reverse the High Court's decision in *Sons of Gwalia v Margaretic*. The Act returns the order of claims to that which existed prior to the Sons of Gwalia judgment.    The Act also makes procedural reforms relating to notices to creditors and shareholder voting, designed to remove a cost burden on companies in external administration, and clarifies the position of shareholders bringing claims for damages against companies.   Specifically, the Act removes the right of persons bringing claims regarding shareholdings to:  vote as creditors in a voluntary administration or a winding-up, unless they receive permission from the court; or  receive reports to creditors, unless they make a request in writing to the external administrator.  The Act also eliminates a number of restrictions on the capacity of a shareholder to recover damages against a company based on how they acquired the shares or whether they still hold the shares.   During the Parliamentary debates, the Senate referred the Bill to the Legal and Constitutional Affairs Committee for inquiry. On 18 November 2010, the Committee published its report in which it recommends that, subject to the drafting matters raised by the Law Council of Australia during the inquiry being addressed, the Senate pass the Bill.    The report is available on the [Parliamentary Committee](http://www.aph.gov.au/senate/committee/legcon_ctte/corporations_amendment_sonsofgwalia_43/index.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.6 Guidelines for the regulation of conflicts of interest facing market intermediaries**   On 25 November 2010, the International Organization of Securities Commissions (IOSCO) published a report titled 'Guidelines for the Regulation of Conflicts of Interest Facing Market Intermediaries'. The last few years have seen a significant growth in the involvement of market intermediaries in the financial market, which has led to increased complexity in the range of business services provided as well as the usage of financial products and instruments. The recent financial crisis and several corporate scandals have given rise to concern over the conduct of market intermediaries due to their inherent agency structure that gives rise to conflicts of interests. Many cases have arisen where intermediaries are not acting in the best interests of their clients. Further, due to providing a wide range of services, market intermediaries are prone to conflicts of interest, which can lead them to diverge from adopting strategies and behaviour to benefit their clients.   The report examines the role of market intermediaries in financial markets and highlights different scenarios where conflicts of interest can take place. The report goes on to identify remedies and suitable guidelines which can be used by jurisdictions for better management of conflicts of interest.   The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD342.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.7 Amendments to Corporations Act to limit access to share registers, increase insider trading penalties and increase regulatory agency investigation powers**   On 24 November 2010, the [Corporations Amendment (No. 1) Act 2010 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=119522" \t "Default) received assent. It deals with the following matters.   **(a) Access to share registers**   According to the Explanatory Memorandum, the Act:  limits the instances in which a copy of a register of members of a company or registered scheme may be obtained, by requiring a person seeking a copy of the register to apply to the company and state the purpose for which they intend to use the information, and allow the company to refuse to provide a copy where the purpose is an "improper purpose";  increases the penalty for misuse of information contained in a register from 10 penalty units to 50 penalty units (50 penalty units is $5,500);  provides that where a copy of the register is provided, the copy must be provided in a prescribed format; and  specifies that where the register is maintained on a computer, a person seeking to inspect the register must do so on a computer.  **(b) Increased penalties for market offences**   The Act increases the penalties that can be imposed by a court for breaches of the insider trading and other market misconduct provisions in Part 7.10 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The market misconduct provisions include offences such as market manipulation and market rigging (ie, creating a false or misleading appearance of active trading). In the case of insider trading by an individual, the maximum criminal penalty increases from five years imprisonment and/or 2,000 penalty units to 10 years imprisonment and/or the greater of 4,500 penalty units or three times the profit gained or loss avoided. The penalties are also increased where the offender is a corporation.   **(c) Increased regulatory agency investigation powers**   The Act amends the [Telecommunications (Interception and Access) Act 1979 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8268" \t "Default) to enable an agency such as the Federal Police to apply for telecommunications interception warrants in the course of an investigation into possible breaches of the insider trading and market misconduct provisions in Part 7.10 of the Corporations Act.   The Act also increases ASIC's search warrant power to enable ASIC to apply for a search warrant under the ASIC Act without first having to issue a notice to produce the material.   **(d) Unsolicited offer to purchase financial products off-market**   The Act also amends section 1019G of the Corporations Act to clarify that any unsolicited offer that is made to purchase financial products off-market must remain open for at least one month from the date of the offer.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.8 Corporate governance guidance for unlisted companies**    On 22 November 2010, the UK Institute of Directors (IoD) published a report titled 'Corporate Governance Guidance and Principles for Unlisted Companies in the UK'.   Unlisted companies make a major contribution to UK economic growth and employment. However, the corporate governance needs of unlisted companies have, to date, been relatively neglected by governance experts as well as by policy-makers. In particular, the UK Corporate Governance Code is primarily aimed at listed rather than unlisted enterprises. The publication is designed to fill the void.  **Key features of the guidance and principles**  The report provides guidance for unlisted companies on the issues involved in designing an appropriate corporate governance framework. It also presents a set of governance principles that can be followed or not. This remains a voluntary decision of each unlisted company.  Fourteen principles of good governance are presented on the basis of a dynamic phased approach, which takes into account the degree of openness, size, complexity and level of maturity of individual enterprises. A dynamic approach towards governance is essential, since governance frameworks must evolve over the life cycle of a business.  The principles provide a governance roadmap for family owners or founder-entrepreneurs as they plan the development of their companies over the corporate life cycle. These principles may be relevant for subsidiary companies and joint ventures as well. Even state-owned companies or social enterprise organisations may find the best practices useful.  **The case for better corporate governance in unlisted companies**  Many unlisted enterprises are owned and controlled by single individuals or families. Good corporate governance in this context is not primarily concerned with the relationship between boards and external shareholders (as in listed companies). Nor is it mainly about compliance with formal rules and regulations. Rather, it is about establishing a framework of company processes and attitudes that add value to the business, help build its reputation and ensure its long-term continuity and success.  Good corporate governance is particularly important to the shareholders of unlisted companies. In most cases, such shareholders have limited ability to sell their ownership stakes, and are therefore committed to staying with the company for the medium to long term. This increases their dependence on good governance.  Good governance can also play a crucial role in gaining the respect of key external stakeholders. In an environment of mounting societal scrutiny towards the business world, even unlisted companies have to devote attention to their stakeholder responsibilities. Corporate reputation will benefit from gradually increasing transparency and accountability.  An effective governance framework defines roles, responsibilities and an agreed distribution of power amongst shareholders, the board, management and other stakeholders. Especially in smaller companies, it is important to recognise that the company is not an extension of the personal property of the owner.  The report is available on the [IoD](http://www.iod.com/MainWebsite/Resources/Document/corp_gov_guidance_and_principles_for_unlisted_companies_in_the_uk_final_1011.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.9 Draft guiding principles for business and human rights**   On 22 November 2010, the Special Representative of the United Nations Secretary-General for Business and Human Rights (SRSG), Professor John Ruggie, published the draft 'Guiding Principles for the Implementation of the UN "Protect, Respect and Remedy" Framework'.  The Guiding Principles elaborate and clarify for companies, states, and other stakeholders how they can operationalize the UN 'Protect, Respect and Remedy' Framework, by taking practical steps to address business impacts on the human rights of individuals. The UN Human Rights Council had endorsed the Framework unanimously in 2008, and asked Ruggie to provide this additional concrete guidance.  After the forum closes in January 2011, Ruggie will submit the final text of the Guiding Principles to the UN for translation, before presenting it formally to the Human Rights Council at its June session.  The consultation is available on the [SRSG](http://www.srsgconsultation.org/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.10 Report on how the European Company Statute works for business**   On 19 November 2010, the European Commission presented a Report to the European Parliament and the Council on the application of the Regulation on the Statute for a European Company (Societas Europaea or SE). In theory, the Statute gives companies operating in more than one Member State the option of establishing themselves as a single company under EU law. This would make them able to operate throughout the EU with one set of rules, including a unified management and reporting system. The report is part of the review process of the SE Regulation. It includes a description of the positive and negative factors, which influence setting up an SE and highlights trends on the distribution of SEs throughout the EU. It also analyses the main problems encountered when setting up and running an SE. An accompanying Commission Staff Working Document supplements the assessment. It provides an inventory of SEs and analyses the flexibility of relevant national legislation in the different Member States.    The European Company Statute has made it possible for companies with a European dimension to transfer the registered seat cross-border, to better reorganise and restructure, and to choose between different board structures. At the same time, it has upheld the rights of employees to be involved in decision-making within companies and has protected the interests of minority shareholders and third parties.    However, experience thus far with the SE Regulation has demonstrated that applying the Statute poses a number of practical problems. The SE Statute does not result in a uniform SE legal form across the European Union. The Statute also contains multiple references to national law and uncertainty remains as to the legal implications of the Statute's directly applicable rules and their interface with national law. Furthermore, the uneven distribution of SEs across the European Union suggests that the Statute does not respond sufficiently well to the needs of companies in all 27 Member States.    Further information is available on the [European Commission](http://ec.europa.eu/internal_market/company/se/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.11 Two new CAMAC reviews: regulation of managed investment schemes and the definition of derivatives**   On 18 November 2010, the Australian Parliamentary Secretary to the Treasurer, Mr David Bradbury MP, announced two new references for the Corporations and Markets Advisory Committee (CAMAC). Following are extracts from the terms of reference.   **(a) Regulation of managed investment schemes**   The recent global financial crisis highlighted the difficulties that arise for responsible entities (REs), scheme members, and creditors where a managed investment scheme (MIS) comes under financial stress in a credit constrained environment. Those difficulties were evidenced initially through the freezing of investor redemptions in the mortgage fund sector, and then through the collapse of a number of significant participants in the agribusiness MIS market.    It is therefore not clear whether the legislative arrangements contained in the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) are adequate to maintain the confident participation of retail investors in MIS because of deficiencies in the way the Corporations Act deals with resolving the consequence, for otherwise viable schemes, of the insolvency of their RE; and what is to occur when the RE is insolvent and the scheme itself has failed. CAMAC is therefore requested to:  examine whether the current statutory framework is adequate for the winding up of MIS, and agribusinesses in particular, and whether it provides the necessary guidance for liquidators, creditors, investors and growers;  advise what legislative amendments should be made if the current legislative framework does not provide the necessary legislative tools with respect to the arrangements for dealing with non-viable MIS;  examine whether the current temporary RE framework enables the transfer of viable MIS businesses where the original RE is under financial stress, and if not whether it should be reformed or replaced;  examine whether REs are unable to restructure a financially viable MIS and advise if the current legislative methods available to companies under the Corporations Act should be adapted to managed schemes; and  examine other proposals to improve Chapter 5C of the Corporations Act, including in relation to: convening scheme meetings; cross-guarantees entered into by REs on behalf of other group members; and statutory limited liability.  **(b) Definition of derivatives**   Section 761D(1) of the Corporations Act, in conjunction with the [Corporations Regulations 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default) (the Corporations Regulations), defines a derivative as an arrangement where:  a party must or may be required to provide consideration at some future time;  that future time is not less than three business days for foreign exchange contracts and one business day for all other arrangements; and  the amount of consideration or the value of the arrangement is determined by reference to something else.  Many derivative market participants regard physically settled forward contracts over shares as derivatives, primarily because the value of the forward contract varies by reference to the value of the shares, even though the price of the contract does not alter.   Treasury was considering an amendment to clarify the law, however, following targeted consultation, Treasury encountered concern that the amendment could have unintended consequences. The proposed amendment would have stated that an arrangement is not a derivative for the purposes of the Corporations Act if the arrangement would not be covered by the definition but for the fact that the value of the arrangement is ultimately determined by reference to the time value of money. However, stakeholders were concerned that the amendment might exclude physically settled forward contracts from the definition and add complexity to a highly technical area of the law. Treasury also encountered significant confusion surrounding section 761D generally and the implication that there may be significant non-compliance with the current legal requirements.    The lack of clarity as to what changes are required, coupled with confusion among industry participants, suggest that a wider review is required. CAMAC is therefore requested to:  examine the definition of a derivative;  examine the way in which such a definition may be changed to clarify the position of physically settled forward contracts; and  suggest options to decrease complexity in this area of the law.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.12 FSA publishes platform proposals**   On 17 November 2010, the UK Financial Services Authority (FSA) published proposals to ensure that the platform services used to buy and manage investments after January 2013 are fully aligned with standards required by the Retail Distribution Review.    From January 2013, the cost of advice will be decided by the client and adviser - not the adviser and product provider, as was the case - and can no longer be hidden from the customer in the cost of the product. Additionally, advisers will offer either independent advice which is free from restrictions or bias and which reviews the market comprehensively - or alternatively, restricted advice, having to explain the customer the nature of the restriction to their customer.     The main proposals:  Prevent product providers from making payments that advisers could use to disguise the charge the customer is paying for advice, and which could influence advisers in recommending one product over another;  Ensure platforms allow their customers to transfer their investments elsewhere without having to cash them in first - a practice which can result in losses;  Require platforms to be upfront about the income they receive from fund managers or product providers. This will make it easier for advisers and consumers to compare different types of platform and the services provided; and  Make sure that customers who invest in funds through platforms are provided with information about the fund from their fund managers, and maintain their voting rights.  The consultation paper is available on the [FSA](http://www.fsa.gov.uk/pubs/cp/cp10_29.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.13 CEO remuneration in Australia's largest companies**  A new study of remuneration at Australia's 50 largest companies reveals the typical CEO receives remuneration almost 100 times that of the average worker. The study was undertaken by the Australian Council of Trade Unions (ACTU) and published on 25 November 2010.   The analysis of CEO remuneration at companies listed on the ASX/S&P 50 Index, shows that the gap is widening between what CEOs earn and what they pay their employees.   The study finds that the average CEO will this year receive $6.4 million in total remuneration. Other findings include:  Executive pay rose by an average of more than $940,000 or 17.2% over the past year, while the annual wage of a full-time worker rose by just $3,200, or 5.2%.  Since 2001, the base pay for CEOs has grown by 130%.  The report is available on the [ACTU](http://www.actu.org.au/Images/Dynamic/attachments/7142/ACTU%20Executive%20PayWatch%202010.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.14 Private equity conflicts of interest**   On 15 November 2010, the International Organization of Securities Commissions (IOSCO) published a report titled 'Private Equity Conflicts of Interest'.    The report focuses on the risks posed to fund investors or the efficient functioning of financial markets from conflicts of interest which may exist within a private equity firm or within a private equity fund, particularly the potential conflicts of interest that may be faced by the manager of a private equity fund. The report sets out the conflict of interest risks encountered through the life cycle of a typical private equity fund which is managed by a multi-fund, multi-strategy firm, as identified by an IOSCO working group formed of industry participants and members of the regulatory community. Potential and common methods for mitigating these potential conflicts of interest are set out alongside the respective risks. Mitigation typically takes the form of alignment of interest through incentive structures, disclosure and legal agreements.    Finally, based on the mitigating measures identified by the working group, the report outlines a set of principles for the management of conflicts of interest in private equity. These principles are intended to be readily applicable to all private equity firms regardless of where they are organised or operating, their chosen investment strategy(ies), fund structure or other investment business activities.   The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD341.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.15 Few boards splitting the Chairman and CEO roles among largest US companies**   A relatively small percentage of the largest US public companies have installed non-executive chairmen on their boards.  This is one of the key findings of the Korn/Ferry Market Cap 100 (KFMC 100) report released in November 2010.  The KFMC 100 tracks corporate governance practices this year focusing on board leadership models at America's highest market cap companies.  The report draws from proxy data from fiscal year 2009 as well as interviews with non-executive board leaders.    In its report, The KFMC 100 found that only nine percent of boards have a non-executive chairman as the independent board leader. Instead, of the remaining 91 percent, many have fashioned a more robust role in the form of a non-executive lead and/or presiding director to demonstrate board independence and add value to the board. Three-quarters of these non-executive board leaders also serve on the nominating/governance committee, as chair in about half of those cases.  The report also notes that 11 percent of KFMC 100 boards have executive chairmen who would not be considered "independent," most often a former CEO, a founder, or someone else who would be defined as an insider. The role is usually the result of a company emerging from crisis, historical precedent, or CEO succession.    Other key findings of the 2010 KFMC 100:  Non-executive chairmen are compensated at higher levels than lead directors or presiding directors - even though the jobs of all three are functionally the same: Of the board leaders that do receive additional compensation, non-executive chairmen receive a median retainer of US$87,500 over and above the customary board retainer, while the median retainer for lead directors is US$25,000 and for presiding directors, US$17,500 (forty percent of the boards in the KFMC 100 do not provide any additional compensation).  Current or former CEOs are the most sought-after group for the role of non-executive board leader: About three-quarters of non-executive board leaders have held one or more top corporate titles (chairman, president or CEO) and 8 percent are active CEOs at public companies.  Thirteen percent of companies rotate the role of non-executive board leader. The methods vary from switching among committee chairs to an alphabetical rotation of directors.  The report is available on the [Korn/Ferry](http://www.kornferry.com/Publication/11735" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.16 2010 international audit committee member survey**   Risk management, financial statement issues, and the impact of public policy initiatives are areas of oversight that most concern audit committees around the world according to KPMG's Audit Committee Institute results of the 2010 International Audit Committee Member Survey, in which nearly 1,200 audit committee members from 34 countries identify their top concerns and share their views on a host of financial reporting issues and oversight challenges.   Other key areas of concern are the maintenance of internal controls, liquidity, access to capital, information technology risk, and legal/regulatory compliance.   In light of those key concerns, respondents say they are focusing on:  Improving the quality and flow of information from management;  Ensuring the CFO and finance team have sufficient resources to do their jobs;  Being more involved in all financial communications and disclosures;  Ensuring that the company's internal audit plan is risk-based; and  Maintaining vigilance regarding the key financial, operational, and strategic risks facing the business.  The survey is available on the [KPMG](http://www.kpmginstitutes.com/aci/insights/2010/pdf/2010-aci-nacd-global-survey.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.17 New book - The Takeovers Panel and Takeovers Regulation in Australia**    This new book is the first detailed analysis of the Australian Takeovers Panel. The Takeovers Panel is the primary forum for resolving disputes about a takeover bid. The Panel has played an important role in a number of very high profile takeovers, including the 2007 attempted takeover of Qantas.   It is now almost 20 years since the Takeovers Panel became part of the framework of takeovers regulation in Australia. Although the first 10 years of the Panel are regarded as unsuccessful (only four matters were considered by the Panel), since 2000, the Panel has considered more than 300 matters. It is regarded as having made a very important contribution to the effective regulation of takeovers in Australia. The book considers the functions and powers of the Panel, explores why it was established, provides an assessment of the work of the Panel, examines key issues dealt with by the Panel, and discusses possible reforms that would make the Panel even more effective. The authors of the book include leading takeovers practitioners.   The chapters in the book are:  1     The Takeovers Panel: A Review         Ian Ramsay   2     An Overview of the Role, Functions and Powers of the Takeovers Panel         Michael Hoyle   3     Why was the Takeovers Panel Established?         Bruce Dyer and Marie McDonald  4      An Assessment of the Work of the Takeovers Panel During the Past Decade          Emin Altiparmak, Jemima O'Callaghan, Jerome Santamaria and Jon Webster  5      Key Issues Dealt With by the Takeovers Panel - Lock-up Devices, Disclosure and Rights Issues         Alison Lansley and Kate Johnson  6      Judicial Review of Takeovers Panel Decisions         Emma Armson  7      The Takeovers Panel of the Future - Proposals to Enhance the Effectiveness and the Role of the Panel           Rodd Levy and Neil Pathak   The book is published by Melbourne University Publishing and is available for purchase at: [http://www.mup.unimelb.edu.au/](http://www.mup.unimelb.edu.au/" \t "_new). Please click on "New and forthcoming titles".   The price of the book is $49.99 (paperback) or $39.99 (downloadable e-book).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1)  **1.18 Regulators and government agencies annual reports**   Several regulators and other government agencies with responsibility for corporate law and corporate governance have recently released their annual reports for 2009-2010.   They include:  [Australian Accounting Standards Board Annual Report 2009-10](http://www.aasb.com.au/About-the-AASB/AASB-annual-reports.aspx" \t "_new)  [Australian Auditing and Assurance Standards Board Annual Report 2009-10](http://www.auasb.gov.au/About-the-AUASB/Annual-reports.aspx" \t "_new)  [Australian Office of Financial Management Annual Report 2009-10](http://www.aofm.gov.au/content/publications/reports/AnnualReports/2009-2010/index.asp" \t "_new)  [Australian Prudential Regulation Authority Annual Report 2009-10](http://www.apra.gov.au/AboutAPRA/Annual-Report-2010.cfm" \t "_new)  [Australian Securities and Investments Commission Annual Report 2009-10](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Annual%20reports" \t "_new)  [Australian Securities Exchange Annual Report 2009-10](http://www.asxgroup.com.au/asx-shareholder-reports.htm" \t "_new)  [Commonwealth Director of Public Prosecutions Annual Report 2009-10](http://www.cdpp.gov.au/Publications/AnnualReports" \t "_new)  [Commonwealth Treasury Annual Report 2009-10](http://www.treasury.gov.au/contentitem.asp?NavId=036&ContentID=1893" \t "_new)  [Companies Auditors and Liquidators Disciplinary Board Annual Report 2009-10](http://www.caldb.gov.au/CALDB/CALDBWeb.nsf/byheadline/Annual+Reports?opendocument" \t "_new)  [Corporations and Markets Advisory Committee Annual Report 2009-10](http://www.camac.gov.au/CAMAC/camac.nsf/0/4873391D9063AD4ECA256B6C007FFD41?opendocument" \t "_new)  [Financial Reporting Council Annual Report 2009-10](http://www.frc.gov.au/reports" \t "_new)  [Insolvency and Trustee Service Australia Annual Report 2009-10](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/about+us-%3Epublications-%3Eannual+reports?opendocument" \t "_new)  [Takeovers Panel Annual Report 2009-10](http://www.takeovers.gov.au/content/reports/annual_reports.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1 Guidance to provide greater certainty about delivering online financial services disclosures**  On 30 November 2010, the Australian Securities and Investments Commission (ASIC) released guidance to provide greater certainty for financial services providers who supply financial services disclosures such as product disclosure statements to clients using online means, including email and the internet.  While the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) allows the online delivery of financial services disclosures in many cases, ASIC understands that some providers have been discouraged from doing so because of uncertainty about what specific practices the law permits.  In Regulatory Guide 221 titled 'Facilitating online financial services disclosures' (RG 221) ASIC sets out:  its interpretation of the online disclosure provisions under the Corporations Act; and  the relief ASIC has given in [CO 10/1219] to enable providers to deliver:            PDSs, FSGs, and SOAs by sending a written notice (paper or electronic) with a reference to a website address where the disclosure can be found; and           PDSs and FSGs by sending an email with a hyperlink to the disclosure if the client or the client's agent agrees to receive disclosure in this way.  RG 221 also includes good practice guidance for online delivery of financial services disclosures to ensure that clients receive clear, concise and effective information as well as minimising their exposure to security risks where disclosures are delivered online - noting that some industry standards (e.g. the EFT Code) may prohibit or discourage delivery by methods such as hyperlinks.  ASIC believes providers of financial services disclosures should always consider which form of delivery of disclosure (paper or online) best suits their clients.    The guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg221.pdf/$file/rg221.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h2)  **2.2 Stakeholders continue to support key consumer protection regime for electronic funds transfer products in recent review**  On 30 November 2010, the Australian Securities and Investments Commission (ASIC) released Report 218 titled 'Electronic Funds Transfer Code of Conduct Review: Feedback on CP 90 and Final Positions', which summarises the outcome of the recent review of the Electronic Funds Transfer Code of Conduct (EFT Code). The EFT Code is the voluntary code that provides protection for consumers who use electronic means for making payments (including ATMs, EFTPOS, credit cards, online payments, internet banking and BPAY). The code provides key consumer protections in cases of fraud and unauthorised transactions.  As the report outlines, the EFT Code will be clarified and strengthened in some areas. The report outlines the final policy positions ASIC has reached on the various issues raised during this review of the code.   Improvements to the code resulting from the review include:  a tailored set of 'light touch' requirements for low value products (with a maximum balance of $500);  allowing electronic delivery of code-disclosures where consumers agree (e.g. notices of changes to fees and periodic statements); and  a new regime to resolving mistaken 'internet banking' payments.  ASIC is currently redrafting the EFT Code to take into account the final policy positions set out in the report. The revised code will be in plain English. ASIC anticipates releasing the revised code in mid-2011. The revised code will commence after an appropriate transition period (the timing will be discussed with stakeholders in the coming months).   Areas where the code will be revised include:  a statement of objectives that the code aims to provide. Currently, the code does not have such a statement;  clarifying the types of transactions that are covered by the code to include all consumer transfer transactions initiated electronically. The revised code will include a non-exhaustive list of examples of such transactions and a non-exhaustive list of transactions that are not covered;  providing tailored requirements ('light touch' requirements) for payment products that are capable of holding no more than $500 at any one-time (e.g. pre-paid gift cards and mobile phones), recognising that the risk to consumers from such products is lower than products that hold higher value;  allowing code subscribers to provide disclosure information to consumers by notifying them that it is available electronically on a website provided certain conditions are met. However, use of hyperlinks will be discouraged for security reasons;  clarifying the requirements on subscribers to provide information - to consumers and/or external dispute resolution schemes (EDRS) - where there are complaints and/or disputes. Imposing a six-year limit for complaints to be brought to a subscriber for determination in accordance with EFT Code provisions;  establishing consumer liability where they leave a card in an active ATM, provided the ATM satisfies standards aimed at mitigating the risk of people leaving cards behind;  requiring subscribers to prohibit merchants from obtaining consumers' PINs as part of 'book-up' practices;  important new protections regarding mistaken payments, including obligations in relation to recovery of funds and liability for mistaken payments;  compliance requirements for subscribers to provide ASIC data on unauthorised transactions;  ASIC (or its delegate) monitoring compliance with specific code requirements; and  including a new power for ASIC to issue modifications to or exemptions from the code to facilitate future developments in the industry and to provide greater flexibility for all stakeholders.  The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep218.pdf/$file/rep218.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h2)  **2.3 ASIC releases Australian Securities Exchange market assessment report**  On 30 November 2010, the Australian Securities and Investments Commission (ASIC) released its annual market assessment of the Australian Securities Exchange group (ASX). The report is for the period of 1 January 2009 to 31 December 2009. Where relevant, it takes into account ASX activities relevant to the 'flash crash' in the United States on 6 May 2010 and the transfer of supervision to ASIC which occurred on 1 August 2010.   The report does not deal with more recent matters such as the proposed transaction between ASX and the Singapore Stock Exchange or ASIC's consultation on the structure of Australia's equity markets (see ASIC Consultation Paper 145).  ASIC has concluded that during 2009, the ASX group licensees had adequate arrangements in place to supervise their markets (including to manage their conflicts of interest) and their clearing and settlement facilities under sections 792A(c) and 821A(c) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).   The Assessment Report notes that during the assessment period ASX Group continuously monitored and improved the performance of its supervisory activities. The report also sets out a number of areas ASX Group, working closely with ASIC, has agreed to address. A number of these relate to work that ASX Group has already initiated. While important, these agreed actions do not cause ASIC to qualify its conclusion that ASX Group Licensees met their supervisory obligations as they existed at the time of the assessment period.  The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep222.pdf/$file/rep222.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h2)  **2.4 Margin lending relief for ASX-traded instalment warrants**  On 29 November 2010, the Australian Securities and Investments Commission (ASIC) issued class order relief to ensure that the ASX-traded instalment warrant market can continue to operate appropriately after 1 January 2011 when the new margin lending provisions in the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) commence. This follows industry concern that some ASX-traded instalment warrants might technically be classified as margin loans and therefore included in the new margin lending provisions.  In January 2010, Parliament amended the Act to include margin lending facilities as a financial product. The amendments added a number of new obligations on margin lenders, over and above the existing general obligations in the Act. For margin lenders, the new provisions take effect on 1 January 2011.   In granting relief, ASIC was of the view that Parliament's main focus in enacting the new margin lending provisions was to regulate traditional margin loans, rather than instalment warrants that are bought on a secondary market where timing is critical and involve non-recourse credit with limited investor liability. Additionally, ASIC considers that the ASIC Market Integrity Rules (ASX Market) and the ASX Operating Rules have a number of provisions that protect investors in ASX- traded instalment warrants.  Class Order [CO 10/1034] Margin lending Relief for ASX-Traded Instalment Warrants ensures that ASX-traded instalment warrants continue to be regulated under the Act as either a security or an interest in a managed investment product, while excluding them from the new margin lending provisions.  The Class Order declares that an instalment warrant that is:  ASX-traded  issued by a financial services licensee  a 'standard margin lending facility',  is not a margin lending facility.  The explanatory statement to [CO 10/1034] explains the Class Order in more detail.   The Class Order and explanatory statement are available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ES%20co10-1034.pdf/$file/ES%20co10-1034.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h2)  **2.5 New investor guide plugs knowledge gaps for retail investors considering trading contracts for difference**  Retail investors who are contemplating the risks of trading in contracts for difference (CFDs) have a new resource that aims to provide clear, independent advice on CFDs and the risks they entail.   CFDs are highly-leveraged derivative products. CFDs offer retail investors the ability to take a leveraged position on future changes in the market price of a share or a commodity, or on the value of an index, or a currency exchange rate. The majority of CFDs in Australia are issued and traded as over-the-counter products (OTC).  The ASIC guide, published on 23 November 2010, provides retail investors with information about how CFDs work, and also explains the significant risks that can be involved in CFD trading. The guide says that - in ASIC's view - retail investors should consider trading CFDs only if they:  have extensive trading experience;  are used to trading in volatile market conditions; and  can afford to lose all of - or more than - the money they put in.  The guide includes explanations of:  how CFDs work, including how trading CFDs differ from investing in shares;  the questions that a retail investor should ask a provider before they agree to trade in CFDs;  the main risks of trading, including investment, counterparty, client money and other trading risks;  different CFD-provider business models, including differences between OTC and exchange-traded CFDs; and  common traps to avoid.  The guide includes an example of a hypothetical CFD trade. The example illustrates the possible outcomes for the retail investor depending on shifts in the market price of the asset over which the CFD operates.   The guide titled 'Thinking of trading contracts for difference (CFDs)?' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC_CFD_22112010.pdf/$file/ASIC_CFD_22112010.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h2)  **2.6 Updated guidance on administrative powers to enforce financial services legislation**  On 18 November 2010, the Australian Securities and Investments Commission (ASIC) released updated guidance on how it will use its administrative powers to enforce the financial services legislation, including its new markets supervisory powers.  ASIC has updated Regulatory Guide 98 titled 'Licensing: Administrative action against financial services providers' (RG 98), which outlines how ASIC uses administrative remedies to enforce the compliance of Australian financial services (AFS) licensees - and their representatives - with the financial services legislation.  The updated version of RG 98 does not represent a substantive change to ASIC's approach to using its administrative powers, but includes additional sections on ASIC's new powers to supervise market participants. That is, for AFS licensees who are market participants - in addition to the general remedies - ASIC may also ask the Markets Disciplinary Panel (MDP) to issue an infringement notice.   Compliance with an infringement notice may involve the payment of a penalty, undertaking remedial measures, accepting sanctions or entering into an enforceable undertaking.  The guide titled 'Licensing: Administrative action against financial services providers' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg98-Nov2010.pdf/$file/rg98-Nov2010.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h2)  **2.7 Consultation paper on OTC CFDs**  On 17 November 2010, the Australian Securities and Investments Commission (ASIC) released a consultation paper setting out ways for issuers to improve product disclosure for people investing in over-the-counter contracts for difference (CFDs).  CFDs are highly-leveraged derivative products that are marketed to, and traded by, retail investors. CFDs offer investors a leveraged position on future changes in the market price of a share or a commodity, or on the value of an index, or a currency exchange rate. The majority of CFDs in Australia are issued and traded as over-the-counter products (OTC).  Consultation paper 146 titled 'Over-the-counter contracts for difference: Improving disclosure for retail investors' (CP 146), which includes a draft regulatory guide (RG), proposes an ASIC benchmark-based disclosure model for OTC CFDs.   Product disclosure statements (PDSs) and ongoing disclosures would be required to address the benchmarks on an 'if not, why not' basis. Further, ASIC's proposed guidance provides an indication of the standards ASIC would expect an issuer to meet when advertising OTC CFDs to retail investors.  The benchmarks are aimed at issuers of CFDs and focus on:  ensuring client suitability;  disclosing counterparty-risk;  stewardship of client monies; and  practices where issuers make margin calls on clients.  The consultation paper titled 'Over-the-counter contracts for difference: Improving disclosure for retail investors' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp146-Nov2010.pdf/$file/cp146-Nov2010.pdf" \t "_new) website.  **2.8 Report on relief decisions**  On 17 November 2010, the Australian Securities and Investments Commission (ASIC) released a report outlining decisions on relief applications during the period 1 December 2009 to 31 May 2010, which aims to improve the level of transparency and the quality of information available about decisions ASIC makes when asked to exercise discretionary powers to grant relief from provisions of the Corporations Act, National Credit Act or the Transitional Act.   The report titled 'Overview of decisions on relief applications' (December 2009 to May 2010) (REP 217) summarises situations where ASIC has exercised, or refused to exercise, its exemption and modification powers under the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Corporations Act), the licensing and responsible lending provisions of the [National Consumer Credit Protection Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "Default) (National Credit Act) and the registration provisions of Schedule 2 to the [National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111363" \t "Default) (Transitional Act).  The report provides examples of decisions that demonstrate how ASIC has applied ASIC policy in practice and will be of particular interest for participants in the capital markets and financial services industry.  ASIC uses its discretion to vary or set aside certain requirements of the law where the burden of complying with the law significantly detracts from its overall benefit, or where ASIC can facilitate businesses without harming other stakeholders.  REP 217 also highlights instances where ASIC has decided to adopt a no-action position regarding specified non-compliance with statutory provisions, and features an appendix detailing the relief instruments it executed.  The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep217.pdf/$file/rep217.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1 Access economics report on ASX - SGX combination**   On 6 December 2010, the Australian Securities Exchange (ASX) released a report prepared by Access Economics entitled "ASX-SGX: why the combination is in Australia's national interest".   ASX engaged Access Economics to examine the Australian national interest implications to help inform the debate about the proposal to merge ASX Limited and Singapore Exchange Limited (SGX) to create the fifth largest securities exchange group in the world.   The Access Economics report concludes that the formation of ASX-SGX would promote Australia's national interest since it is highly likely to raise the economic welfare of Australians by:  improving Australia's chances of becoming a financial services hub in Asia;  improving the ability of Australians to diversify their savings; and  lowering the cost of capital for Australian companies.  Furthermore, the report finds that the merger is not contrary to Australia's national interest since ASX will continue to operate in Australia and be regulated by Australian authorities.   The media release is available on the [ASX](http://www.asxgroup.com.au/media/PDFs/101206Launch_of_Access_Economics_Report_on_ASX-SGX_Final.pdf" \t "_new) website.   The Access Economics report is available on the [ASX](http://www.asxgroup.com.au/media/PDFs/20101206_ASX_SGX__AccessReport.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h3)  **3.2 Reports**   On 6 December 2010, ASX released:  ASX Group Monthly Activity Report;  ASX 24 Monthly Volume and Open Interest Report; and  ASX Compliance Monthly Activity Report.  for November 2010.   The ASX Group monthly activity report is available on the [ASX](http://www.asxgroup.com.au/media/101206Monthly_Activity_Report_Nov_2010_FINAL.pdf" \t "_new) website.   The ASX 24 monthly volume and open interest report is available on the [ASX](http://www.sfe.com.au/content/notices/2010/notice2010_198.pdf" \t "_new) website.   The ASX compliance monthly activity report is available on the [ASX](http://www.asxgroup.com.au/media/101206ASX_Compliance_Monthly_Activity_Report_November_2010_FINAL.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h3)  **3.3 ASX launches next generation trading platform powered by NASDAQ OMX's Genium INET**   ASX has launched its next generation trading system, ASX Trade, providing the fastest integrated equities and derivatives trading platform in the world.   ASX Trade is powered by NASDAQ OMX's Genium INET platform and combines rich functionality with high reliability, and has delivered significant latency and transaction capacity improvements.  The new system is at the forefront of a suite of ASX equity and derivatives markets innovations, tailoring services to users with diverse trade execution needs.   ASX Trade went live on Monday, 29 November 2010 and follows the upgrade of the ASX Trade 24 futures platform on 11 October 2010, ensuring faster and more functional trading options for customers.  The new trading systems, combined with ASX's expanded co-location facilities, high bandwidth dark fibre for ASX Net, and new and enlarged data centre (planned for late 2011), strengthen the global competitiveness of the Australian capital market to the benefit of traders, companies and investors alike.   Further information is available on the [ASX](http://www.asxgroup.com.au/media/101203ASXTradeLaunchFINAL.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h3)  **3.4 Updates to ASX Operating Rules Procedures and Appendices for ASX Trade**   On 29 November 2010, amendments were made to the ASX Operating Rules Procedures and Appendices to support the functionality changes introduced with ASX Trade.   At a high level, the changes to the Procedures and Appendices included:  Removing Procedures relating to the Bulletin Board (the Bulletin Board does not exist in ASX Trade);  Clarifying when, during a Trading Day, a representative of the Participant needs to be available;  Updating information relating to Iceberg Orders;  Correcting and updating existing Crossing examples;  Moving the Prescribed Strategies for different Combinations to a different part of the Procedures;  Updating various cross-references and correcting typographical errors;  Amending existing definitions; and  Adding the Wholesale and Government Loan Securities Session State to Part 2 of Appendix 4013.  Further information is available on the [ASX](https://www.asxonline.com/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h3)  **3.5 ASX launches new corporate website**   ASX has launched a new corporate website that communicates the broad activities and values of the ASX Group of companies.  The new website includes an information centre with improved search capabilities for media, regulators, shareholders and other interested parties.   The new website provides:  An overview of the Australian market;  A description of the ASX Group of companies, its history, corporate governance arrangements and career opportunities;  A high-level overview of the services ASX offers and the value they deliver, with links to relevant pages on [http://www.asx.com.au](http://www.asx.com.au/" \t "_new); and  An outline of the operating infrastructure ASX relies on to deliver its services.  The ASX Group site is also the new home for content relating to ASX Compliance. The existing website remains.   The ASX Group website is available at: [http://www.asxgroup.com.au](http://www.asxgroup.com.au/index.htm" \t "_new)  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1 Panel publishes consultation paper on frustrating action**   On 10 December 2010, the Takeovers Panel released a consultation paper seeking public comment in relation to a revised draft Guidance Note 12 on Frustrating Action.   The revised draft Guidance Note:  clarifies the application of the Panel's frustrating action policy to reflect the decision in Transurban Group [2010] ATP 5 and clarifies the 'passage of time' carve-out in example 1 of paragraph 14; and  proposes that a target might be able to proceed with a potential frustrating action where a private approach has been received by putting the bidder on notice.  The consultation paper is available on the [Panel](http://www.takeovers.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h4)  **4.2 Leighton Holdings Limited - decision**   On 29 November 2010, the review Panel announced that it has decided not to make a declaration of unacceptable circumstances in respect of the application dated 9 November 2010 from HOCHTIEF Aktiengesellschaft seeking a review of the Panel's decision in Leighton Holdings Limited 02 (see TP10/66).   Actividades de Construcción y Servicios, SA (ACS) is a Spanish company listed on the Madrid Stock Exchange. It holds approximately 29.98% of Hochtief. Hochtief is a German company listed on the Frankfurt Stock Exchange. It holds approximately 54.5% of Leighton.   On or about 16 September 2010 ACS announced a proposal to acquire 50% or more of the shares in Hochtief. The proposal offers ACS scrip under a German voluntary public tender offer. ACS may also make subsequent on market acquisitions of shares in Hochtief to achieve its shareholding objective. Item 14 of section 611 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) provides for an exception from the takeovers prohibition, allowing ACS to make the indirect downstream acquisition of Leighton.  In Leighton 02, Hochtief submitted, among other things, that the ACS proposal would result in ACS acquiring control of Leighton contrary to the section 602 principles and accordingly give rise to unacceptable circumstances. The initial Panel declined to conduct proceedings (see TP10/65).   The following factors (among other things) were significant to the review Panel in coming to its decision not to make a declaration of unacceptable circumstances:  The review Panel was not satisfied on the evidence before it that ACS's proposal to acquire Hochtief was an artifice to obtain control of Leighton.  While the market capitalisation of Hochtief is often less than the market value of its shareholding in Leighton, Hochtief has a substantial portfolio of other businesses in Western Europe and North America which are material to its business portfolio.  If successful, ACS's proposal will expose it to the risks associated with all of Hochtief's assets including Leighton.  The material establishes that ACS decided to proceed with the proposal principally in order to obtain financial consolidation of Hochtief and to obtain international business diversification into Germany, North America and the Asia/Pacific region.  ACS has had a relevant interest in Leighton since 2007 (due to its shareholding in Hochtief) and Hochtief has had its substantial shareholding in Leighton for a considerable time.  ACS has provided a written commitment that it is prepared to make similar governance arrangements with respect to Leighton as Hochtief has in the past.  Further information is available on the [Panel](http://www.takeovers.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%236) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **5.1 Substitute remedy for non performance of specific performance**  (By Laura Glover, DLA Phillips Fox)   Georges v Peter Wieland [2010] NSWSC 1378, Supreme Court of New South Wales, Brereton J, 30 November 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1378.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1378.html" \t "_new)   **(a) Summary**   The court determined that while a decree for specific performance remained unperformed as a consequence of persistent default, and in circumstances where certain personal claims against the defendants had not been finally disposed of in the original proceedings (as it had not been necessary to resolve them given the order for specific performance), it was open to the court to rescind the specific performance decree and substitute orders that were not limited to the subject of the original order, but extended to the personal claims.   **(b) Facts**    In September 2005, Mr Georges, sole shareholder of the second plaintiff company, Parra Power Tools Pty Ltd ("PPT") sold all of his shares in PPT to the fifth defendant Grintara Pty Ltd ("Grintara").  In essence, a share sale agreement and two loan agreements were executed, the practical effect of which was that Mr and Mrs Weiland (as directors of and shareholders in Grintara and PR Wieland Investments Pty Limited ("PRWI")) acquired PPT from Mr Georges for a total of $600,000 of which $150,000 was attributed to equity and $450,000 to loan capital.   By May 2006, $500,000 of the $600,000 that Grintara and PRWI were obliged to lend to PPT under the loan agreements had been advanced, however $100,000 of Mr Georges' loan account in the company remained unpaid, as did the equity payment of $150,000.   In May 2007, the Wielands took a number of steps which effectively removed control of the company's business from PPT, transferred that business to a new company, Parramatta Tools Pty Ltd (of which Mr Georges was not a director or shareholder), and physically relocated the business from its Granville premises (sub-let from Mr Georges by PPT and in respect of which an indemnity had been given) to new premises in Parramatta.  The Wielands then resigned as directors of PPT, leaving Mr Georges as the sole director and registered shareholder of PPT.   Mr Georges and PPT sought to enforce the share sale agreement.  In an amended statement of claim they also alleged that the Wieland's had breached their statutory duties as directors of PPT.     In a judgment given on 18 June 2009 [Georges v Wieland [2009] NSWSC 733] Brereton J held that, in so far as they remained unperformed both the share sale agreement and the two loan agreements should be specifically performed and made orders to that effect.   In the circumstances it was not necessary to deal with the breach of directors' duties case (although it was observed that the case mounted was formidable).    Following non-performance of the orders, Mr Georges instituted winding up proceedings against Grintara and PRWI and on 12 February 2010 the court made an order winding up Grintara.  In circumstances where there was no prospect of Grintara performing its obligations under the share sale agreement  (as a consequence of being wound up), or of PPT having the capacity to repay the loans to Mr Georges, the plaintiffs sought orders that the decree for specific performance be rescinded and an alternative remedy granted.   **(c) Held**   **(i) Consideration of a further claim for relief**   His Honour considered whether, given the previous order for specific performance, it was open to the court to further consider the plaintiff's claim for relief.  His Honour commented that as a general rule, "once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance, in my opinion, beyond recall by that court" [Bailey v Marinoff [1971] HCA 49].  His Honour noted that while the general rule is subject to a number of recognised qualifications and exceptions (including rule 36.16 of the [Uniform Civil Procedure Rules (NSW) 2005](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "Default), and reservation of liberty to apply), they did not apply in the current context.   However, his Honour held that in the particular circumstances of the present case there was an implied reservation of further consideration which enabled the court to further consider the plaintiff's claim for relief (at least so long as the decree for specific performance remained unimplemented), for the following reasons:  1. A specific performance order implicitly carries with it the notion that the order would remain under the control of the court, and in the event of non-compliance, the court may substitute some different order 2. A manifestly strong case against Mr and Mrs Wieland in relation to the alleged breach of their duties as directors of PPT did not result in orders against them, expressly because a specific performance order was to be made 3. No defence of impossibility or hardship was raised in the substantive proceedings to the claim for specific performance, nor any suggestion advanced that the decree could not be performed 4. The personal claims against the Wielands were not expressly dismissed in the substantive proceedings, and hence the possibility that they might be pursued remained alive, at least so long as the order for specific performance remained unperformed  5. The relief sought in substitution for the decree for specific performance was sought in the statement of claim as amended at the time of hearing.    His Honour therefore held that as the share sale agreement had not been performed, the proceedings remained open, and the court was free to rescind the decree for specific performance (to the extent that performance had not occurred) and substitute new orders.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h5)  **5.2 Is a voluntary winding up of a company capable of being terminated?**   (By Mark Cessario and Nadya Riitano, Corrs Chambers Westgarth)   Arnold World Trading Pty Ltd v ACN 133 427 335 Pty Limited [2010] NSWSC 1369, Supreme Court of New South Wales, Barrett J, 29 November 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1369.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1369.html" \t "_new)    **(a) Summary**  Arnold World Trading Pty Ltd ("Arnold"), as the sole member of ACN 133 427 335 Pty Limited ("ACN"), sought an order from the court under sections 482 and 511(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") to terminate the winding up of ACN.   The application raised a question as to whether the winding up of a company can be terminated if the affairs of the company are fully wound up. Mr Gladman, the liquidator of ACN, had at the time of the application already taken steps under section 509 of the Act to conduct the final meeting of creditors and to finalise an account showing how the winding up had been conducted. These steps arguably signified that the company had been "wound up".   The court held that given the stage that the winding up had reached, the absence of any argument that the affairs of ACN have not in truth been fully wound up, and that the reasons advanced by Arnott in support of its application were unrelated to the company's affairs, the court should not to exercise its discretion to terminate the winding up.    **(b) Facts**    In January 2010, ACN became subject to a creditors voluntary winding up, with Mr Gladman being the appointed liquidator.    On 22 April 2010, in accordance with section 509 of the Act, Mr Gladman gave notice of the final meeting of members and creditors. Accompanying the notice of meeting was a summary of the liquidator's receipts and payments for the period from 28 January 2010 to 22 April 2010, a final report to members and creditors and a copy of an advertisement to be placed in the Commonwealth Gazette on 4 May 2010.    On 2 November 2010, Arnold filed an originating process seeking an order that the winding up of ACN be terminated. Prior to the winding up being imposed, ACN had made attempts to do business in the Middle East but had been unsuccessful. Arnold had ambitions to renew the company's commercial efforts in the Middle East and argued that the prospects of success in this endeavour would be enhanced if the same corporate entity was used. Further Arnold believed that culturally it would reflect badly on the company and the sole director if ACN were to be wound up.   Consequently, Arnold sought an order from the court under sections 482 and 511(1) of the Act to terminate the winding up of ACN.  Section 482 allows the court to make an order terminating a court-ordered winding up.  Section 511 of the Act provides, in relation to a voluntary winding up, that the court may exercise any of the powers that it might exercise if the company were being wound up by the court.   **(c) Decision**    According to section 509 of the Act, "as soon as the affairs of a company are fully wound up", the liquidator must make up an account showing how the winding up has been conducted, how the property of the company has been disposed and, when the account is so made up, he or she must convene a meeting of the creditors and members of the company, for the purpose of laying before it the account and giving any explanation of the account.  In the present case, Mr Gladman as the liquidator of ACN took all of the above mentioned steps on the basis that the affairs of the company were fully wound up.    Section 482 of the Act provides that the court may, on application, make an order terminating the winding up "at any time during the winding up of a company".   Therefore, a preliminary issue arose as to whether an order could be made under section 482 when steps have already been taken by the liquidator on the basis that a company's affairs have already been "fully wound up".     The court agreed with Arnold's submission that there is a distinction between completion of the process of winding up the company's "affairs", as referred to in section 509, and the status of the company as one that "is being wound up". For example section 601AB(2), which deals with ASIC initiated deregistration, recognises that even though "the company's affairs have been fully wound up", the company can still be one that "is being wound up".    On this basis the court found that section 482, as applied by section 511, remained available as the company has not yet reached the point of deregistration by ASIC (Re Eastern Investment Co Ltd [1905] 1 Ch 352).    Barrett J then considered whether the discretion in section 482 should be exercised.  In that regard, his Honour referred to the decision in Vero Workers Compensation (NSW) Ltd v Ferrentti Pty Ltd (2006) 57 ACSR 103, in which Austin J summarised that in exercising that discretion, "the court considers the interests of:  creditors of the company (including future creditors);  the liquidator, particularly with respect to costs;  the contributories; and  the public, including the public interest in matters of commercial morality, and the public interest that insolvent companies should be wound up."  Barrett J considered that the reasons advanced by Arnold as to why the winding up of ACN should be terminated were insufficient. Essentially prospective business relations in the Middle East and the adverse effect of such failed relations on the director and his family were totally unrelated to ACN, its affairs and its constituency. On this basis Barrett J found it difficult to reconcile commercial perception and personal reputation with the greater interests of the company.   In considering other arguments raised by Arnold, the court found that a member of a company that is deregistered pursuant to section 509, where there has been full satisfaction of the entitlements of members, does not suffer prejudice as a result of the deregistration or have any proprietary or pecuniary interest in bringing the company back into existence.    Barrett J did not believe that the present case was such that the court should exercise its discretion to terminate the winding up, given that:  there was an absence of any suggestion that the affairs of ACN had not in truth been fully wound up;  the stage that the winding up had reached was such that neither the sole creditor nor the sole member had any right or claim in respect of the company;  there was no indication that the winding up needed to be re-opened or that any matter relevant to the rights and interests of the member or the creditor makes dissolution inappropriate; and  the expressed concern of Arnold related to matters of commercial perception and personal reputation, which were foreign to the interests of ACN.  As such, Barrett J dismissed Arnold's application.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h5)  **5.3 ABB Grain scheme of arrangement approved - relevant considerations for the court**  (By Celine Yim, Freehills)    ABB Grain Ltd, in the matter of ABB Grain Ltd [2010] FCA 1309, Federal Court of Australia,  Besanko J, 26 November 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2010/1309.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/1309.html" \t "_new)   **(a)  Summary**   Besanko J made an order that a meeting be convened between ABB Grain Ltd ("ABB Grain") and its members to consider a proposed scheme of arrangement under section 411(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act").  Following such meeting, his Honour made an order approving of the scheme of arrangement under section 411(4)(b) of the Act.            **(b)  Facts**    A body, creditor or member of the body may make an application to the court for the approval of a proposed scheme of arrangement under section 411(1).     In the present case, Viterra Australia Pty Ltd ("Viterra"), a proprietary company registered under the law of Victoria, made an application for the approval of a proposed scheme of arrangement to acquire all the ordinary shares of ABB Grain, a public company registered in South Australia and limited by shares ("the Scheme").  Under the Scheme, consideration of (1) cash ($8.70 per ABB Grain share to a cap of $1.13b); (2) scrip (0.9062 Viterra shares or CDIs per ABB Grain share to a cap of 78.3m shares); or (3) cash and scrip ($4.35 and 0.4531 Viterra shares or CDIs per ABB Grain share) was available.  A special provision was made for foreign investors.     If the Scheme was implemented it would result in ABB Grain becoming a wholly owned subsidiary of Viterra with a fully franked dividend ($0.41 per ABB Grain share) to be paid.   **(c) Decision**    The court may order that a scheme meeting be convened under section 411(1).  Following a successful scheme meeting, the court may approve a proposed scheme of arrangement under section 411(4)(b).    **(i) The first hearing - 30 July 2009**   At the first hearing, Besanko J ordered that a meeting between ABB Grain and its members, being all the holders of its fully paid ordinary shares ("the Scheme Shareholders"), be convened.   The preliminary requirements of section 411(1) were satisfied and it was considered that the Scheme was likely to be approved by the court if the statutory majority agreed as per section 411(4)(a)(ii), that the explanatory statement ("the Scheme Booklet") detailed material needed to be disclosed as per sections 411 and 412 and that ASIC had a reasonable opportunity to examine the terms of the Scheme and make submissions in relation to those matters.     The formal requirements of section 411(1) were established thereby enlivening the discretion of the court to approve the arrangement reached under section 411(4)(b).  His Honour considered the following matters in the exercise of his discretion:  Credit or performance risk.  Adequate protection against credit or performance risk was provided by the various scheme of arrangement clauses requiring (1) Viterra to pay consideration to be held on trust for the scheme shareholders; and (2) Viterra to procure that the name and address of each of the Scheme Shareholders is entitled to receive Viterra shares, amongst other things.  The deemed warranty.  Satisfactory attention was drawn to the deemed warranty in the Scheme Booklet.  No shop and no talk arrangements.  The no shop and no talk provisions were (1) of a reasonable period being a little under four months; (2) framed so that it was subject to an overriding obligation not to breach directors' duties by soliciting a competing proposal; and (3) given adequate prominence under dedicated headings in the Scheme Booklet.  Break fee arrangement.  The break fee, being only 1% of the equity value of ABB Grain, was given clear disclosure in the Scheme Booklet and was not of such magnitude that it could influence voting. Evidence demonstrated that the fee was the result of an arm's length commercial negotiation between parties and was commercially reasonable in the circumstances.  Section 411(17) of the Act.  There was no evidence which indicated that the Scheme was for the purpose of avoiding the operation of any of the provisions of Chapter 6.  Section 3(a)(10) of the US Securities Act 1933.  No objection was raised as to ABB Grain and Viterra intending to rely on an exemption from the registration requirements of section 3(a)(10) as the court was informed of this fact before any hearing at which the Scheme was approved.  **(i) The second hearing - 10 September 2009**   At the second hearing, Besanko J made an order approving of the Scheme pursuant to the Scheme Meeting where 60.45% of the Scheme Shareholders, representing 83.57% of ABB Grain's share capital, voted in favour of the Scheme in satisfaction of the requirements under the Act.  His Honour's reasons extended to the following:  Revision of 2009 earnings guidance.  An independent expert considered that the revised earnings guidance did not affect their opinion that the Scheme was fair and reasonable and in the best interests of the ABB Grain Scheme Shareholders.  Conditions precedent.  Conditions precedent to the effectiveness of the Scheme were either satisfied or waived.  Approval of the Scheme.  There was compliance with the orders made by the court at the first hearing.  The Scheme Booklets, together with voting forms, election forms, reply paid envelopes and fly sheets were distributed, notwithstanding the delay of one day.  The Scheme was supported by all the directors of ABB Grain, was at a 47% to 51% premium and was endorsed by an independent expert and was therefore considered fair and reasonable.  The Scheme Booklet was registered with ASIC and not objected to.  His Honour was also satisfied that all other pre-conditions were satisfied and found it appropriate to make an order approving of the Scheme.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h5)  **5.4 When will a person be a de facto director in circumstances where the person is a director of a corporate director and the corporate director is the only listed director of a company?**  (By Morgan Spain and Kristian Rodd, Blake Dawson)  Holland (Respondant) v The Commissioner for Her Majesty's Revenue and Customs (Appellant) [2010] UKSC 51, United Kingdom Supreme Court, Lord Hope (Deputy President), Lords Walker, Lord Collins, Lord Clarke and Lord Saville, 24 November 2010   The full text judgment is available at:  [http://www.bailii.org/uk/cases/UKSC/2010/51.html](http://www.bailii.org/uk/cases/UKSC/2010/51.html" \t "_new)   **(a)  Summary**    In the UK, the crucial question in determining whether a person is a de facto director is whether that person assumed the duties of a director.  The decision relates to circumstances where a company's sole director is a corporate director, and liability is sought to be imposed on a director of that corporate director. In such circumstances, liability will not be imposed on the director of the corporate director when all his relevant acts were done as a director of the corporate director and can be attributed in law solely to the activities of the corporate director.   **(b)  Facts**   In 1999, Mr Holland set up a complex structure of companies including 42 companies (Composite Companies) of whom their sole director was a company called Paycheck Directors, of which Mr Holland was a director. This company structure was designed to provide tax advantages to the sole shareholders of the 42 Composite Companies.  The sole shareholders of the 42 Composite Companies were contractors, which as shareholders, enabled the contractors to receive payments by way of both salary and dividends.  Between 24 April 2002 and 19 October 2004, the shareholders of the Composite Companies received regular dividends. The authority for the payment of the dividends was computer generated containing a copy of Mr Holland's signature, stating that they were made pursuant to directors' meetings and purportedly signed "for and on behalf of" Paycheck Directors.  In 2003 it was revealed that the Composite Companies' shareholders continued to receive dividends when the Composite Companies' tax liabilities were substantially greater than anticipated, which pushed the Composite Companies into insolvency.  The Composite Companies had insufficient funds to pay their only creditor, HM Revenue and Customs (HMRC).   HMRC claimed that Mr Holland should be made liable pursuant to the Insolvency Act 1986 (UK) section 212 (IA) to account for the funds paid out by the insolvent Composite Companies on the basis that as a de facto director of the Composite Companies, Mr Holland was guilty of misfeasance or in breach of his fiduciary duty not to misapply their funds by paying unlawful dividends.     At first instance, the Deputy Judge held that Mr Holland was a de facto director and had been guilty of misfeasance and breach of duty in relation to the Composite Companies pursuant to section 212 of the IA.  Mr Holland appealed this decision to the Court of Appeal.  This case is an appeal to the United Kingdom Supreme Court by HMRC following the decision of the Court of Appeal which dismissed the originating applications and dismissed a cross-appeal by HMRC.    The primary issue for determination was whether Mr Holland was a de facto director of the Composite Companies by virtue of discharging his duties as the director of the corporate director of the Composite Companies.  If Mr Holland was a de facto director of the Composite Companies, then liability could be imposed on him pursuant to section 212 of the IA.  Consideration of a number of other issues was contingent upon an affirmative finding on the primary issue.   **(c)  Decision**   The UK Supreme Court dismissed the appeal by HMRC by a majority of three to two.     The court discussed the definition of de facto director, noting that a de facto director is a person who assumes to act as a director, is held out by the company as a director, and who claims and purports to be a director, although is never validly appointed as such.     The court considered the decision in Re Hydrodam (Corby) Ltd [1994] 2 BCLC 180 which held that "attendance at board meetings and voting, with others, may in certain limited circumstances expose a director to personal liability to the company of which he is a director or its creditors.  But it does not, without more, constitute him a director of any company of which his company is a director."  The court noted that the "without more" requirement would not be satisfied by evidence that the individual directors of the body corporate were giving instructions in their capacity as individual directors to the subject company and the subject company was accustomed to act in accordance with those directions.   The court held that the crucial question in determining whether a person is a de facto director is whether that person assumed the duties of a director.  Therefore, the court considered whether Mr Holland was part of the corporate governing structure of the Composite Companies and whether he assumed a role in those companies which imposed on him the fiduciary duties of a director.  The court noted that one must look at what the person actually did to see whether he assumed those responsibilities in relation to the subject company.   The court noted that although Mr Holland was the guiding mind behind the sole corporate director of the Composite Companies and the natural person who decided that the Composite Companies should pay the dividends, he did this in the course of directing the corporate director, and not as acting or purporting to act as a director of the Composite Companies.     The court noted that there was no evidence that anything Mr Holland did was other than what was done in his capacity as a director of the corporate director.    The court held that all of Mr Holland's relevant acts were done as a director of the corporate director and could be attributed in law solely to the activities of the corporate director.   The court held that so long as the relevant acts are done by the individual entirely within the ambit of the discharge of his duties and responsibilities as a director of the corporate director, it is to that capacity that his acts must be attributed.  For liability to be imposed, the individual must be shown to have been a director, not just of the corporate director but of the subject company too.     The court concluded that Mr Holland's actions were not enough to make him a de facto director of the Composite Companies.  Therefore he was not responsible for the misuse of their assets when directing payments by the Composite Companies of the unlawful dividends.   The court noted that it would be an unjustifiable judicial extension of the concept of de facto director to impose fiduciary duties on Mr Holland in relation to the Composite Companies, when all of his acts could be attributed in law solely to the activities of the corporate director of the Composite Companies.     Lord Walker and Lord Clarke, both dissenting, rejected the reasoning of the majority.  They stated that there is no reason in principle why it cannot be held that Mr Holland decided to pay the dividends both as a director of the corporate director of the Composite Companies and as a de facto director of each Composite Company.  Lord Walker and Lord Clarke were of the opinion that in order to establish that a person was a de facto director, it is necessary to plead and prove that he undertook functions in relation to a company which could properly be carried out only by a director.  A director must have done "something more" than merely participate in decisions by the corporate director in relation to the actions of the subject company in order to be deemed a de facto director.  They held that Mr Holland's actions amounted to taking all important decisions affecting the relevant company and that he should be held to be a de facto director of the Composite Companies.   Readers should note that this issue is unlikely to arise in the future in light of the 2006 UK legislation requiring at least one director of a company be a natural person (Companies Act 2006 UK section 155(1)).  The purpose of this legislation was to ensure that every company would have at least one individual who could if necessary, be held to account for the company's actions.  Further, in Australia, section 201B of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) requires that all directors be natural persons.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h5)  **5.5 Creditor's right of recovery under section 588M against a company in the deregistration process**  (By Laura Keily and Annika Holden, Corrs Chambers Westgarth)   International Greetings UK Ltd v Stansfield [2010] NSWSC 1357, New South Wales Supreme Court, Barrett J, 24 November 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1357.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1357.html" \t "_new)   **(a) Summary**   This decision involved a creditor claiming compensation for loss or damage suffered as a result of insolvent trading under section 588M(3). At the time the creditor commenced proceedings for recovery, the company against which the claim was made was in the process of being deregistered and the final step had been taken by the liquidator (but not by ASIC). Barrett J held that the fact that the liquidator had lodged an application for deregistration when the creditor commenced proceedings meant that the company was not 'being wound up' within the meaning of section 588M(1)(d). This failure to satisfy the conditions for recovery specified in section 588M(1) meant that the creditor was precluded from claiming compensation under section 588M(3).    The decision leaves open several questions about how the provision should be applied at various stages in the winding up process.  In particular, his Honour left open the question at what point a company ceases to be 'being wound up.'    **(b) Facts**    Oz Wrap (International) Pty Ltd (Oz Wrap) was a company which had been trading while insolvent within the meaning of section 588G(3) of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). On 26 February 2008, Oz Wrap began a creditors' voluntary winding up under the Corporations Act. On 30 May 2008, after the affairs of the company were fully wound up, the liquidator convened a final meeting of creditors and members under section 509(1), which was adjourned until 20 June 2008 to allow the plaintiff International Greetings UK Ltd (International Greetings), a creditor of the company, to investigate pursuing a preference claim. Following this final meeting, on 26 June 2008, the liquidator made a lodgement with ASIC under section 509(4). After this lodgement, ASIC deregistered the company in accordance with section 509(5) on 26 September 2008. After this deregistration, Oz Wrap ceased to exist as a company.   Rather than pursuing a preference claim, International Greetings elected to apply under section 588M(3) for compensation for loss or damage they had suffered as a result of Oz Wrap trading while insolvent. As is required by section 588R, the liquidator gave their consent to International Greetings to bring these proceedings, and this consent was given on 20 June 2008, just prior to the final meeting of members and creditors. By the time that International Greetings commenced proceedings on 25 August 2008, the final statement required to be lodged by the liquidator in the application for deregistration had already occurred (in the form of the lodgement with ASIC on 26 June 2008).  The deregistration of Oz Wrap had not therefore occurred on 25 August 2008.  However, according to the procedure set down in section 509, the "affairs of the company had been fully wound up".     **(c) Decision**    Section 588M(1) sets out several conditions which must be satisfied before compensation under section 588M(3) can be recovered. The relevant condition in this case was section 588M(1)(d), which imposes a requirement that, in order to recover compensation, it is essential that the company against whom the claim is proceeding 'is being wound up'. The key question for decision was therefore whether section 588M(1)(d) was satisfied in this case, that is, whether the fact that Oz Wrap had ceased to exist by the time proceedings were commenced prevented it from being a company which 'is being wound up'. If Oz Wrap was not a company which 'is being wound up', the conditions for an application under section 588M(3) would not be satisfied and International Greetings would be precluded from recovering compensation.    International Greetings argued that section 588M(1)(d) imposes no requirement for a winding up to continue to be in force when a creditor commences proceedings for recovery under section 588M(3). In particular, it relied on the fact that section 588M(1)(d) does not impose any conditions on recovery beyond the fact that the company 'is being wound up' when proceedings are commenced.  Barrett J noted the merit in this argument, and observed that the scheme set up by section 588M and section 588R, which allows creditors to proceed with a compensation claim outside the administration of the winding up, appeared to be designed to facilitate claims for compensation in situations such as the facts of this case, namely, where the liquidator does not wish to proceed with recovery.   Nonetheless, Barrett J ultimately rejected this interpretation of section 588M(1)(d), on the basis that it was inconsistent with the wording of the legislation.  The opening words of section 588M(1) are that 'this section applies where'.  The words 'the Company is being would up' are one of four conditions set out thereafter.  Accordingly, the wording of section 588M(1)(d) is such that the entitlement of a creditor to recovery under section 588M(3) is available only when a company 'is being wound up'. Conversely, a creditor cannot recover under section 588M(3) when the company is not being wound up. Barrett J then concluded that, as a consequence, Oz Wrap is not now a company that 'is being wound up' and, accordingly, the creditor had no right to claim under section 588M(1)(d).    This was because a lodgement under section 509(4) had been made with ASIC.  Barrett J also noted that as Oz Wrap does not now exist, it will not be open to the court to award International Greetings a remedy under section 588M(3) and, in particular, it will not be possible for the court to award a judgment in the nature of a debt judgment in favour of the plaintiff.     However, Barrett J left open the question at what point a company ceases to be in the state of 'being wound up.' It therefore remains unclear whether a company ceases to be 'being wound up' after the final meeting of creditors under section 509(1) is held when "the affairs of the company are fully wound up", or only after the company is formally deregistered.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h5)  **5.6 The far-reaching consequences associated with breaches of fiduciary and statutory duties**   (By David Saunders, Blake Dawson)   Groeneveld Australia Pty Ltd v Nolten (No 3) [2010] VSC 533, Supreme Court of Victoria, Davies J, 22 November 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2010/533.html](http://www.austlii.edu.au/au/cases/vic/VSC/2010/533.html" \t "_new)   **(a) Summary**   Wouter Nolten, the key defendant in this case, was managing director of Groeneveld Australia Pty Ltd (GA) a company providing automated greasing and lubrication systems and technical support to the transport industry.  Nolten was dismissed in July 2009 for alleged breaches of his duties as a director and employee of GA.   This case concerned claims brought by GA against Nolten for breaches of statutory and fiduciary duties, misleading and deceptive conduct, deceit and breach of an implied term of good faith in share option agreements Nolten had with GA.  GA sought remedies including equitable compensation, accounts of profits and damages.   The plaintiffs also sought declarations that:  under section 1317E of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) Nolten breached his duties under sections 181, 182 and 183 of the Corporations Act; and  Nolten contravened fiduciary duties owed to the plaintiff and his contractual obligation to act honestly and in the best interests of the plaintiff.  **(b) Facts**   The claims against Nolten stemmed from a series of commercial arrangements Nolten and companies controlled by him had with GA.   **(i) Payment of fees to the defendant and associated corporate entities**   Between 2005 and 2009, a New Zealand subsidiary of GA made a series of payments, totalling $137,500 to Nolten and companies controlled by him, for computer services provided by those companies.  Some of the payments went directly to Nolten while others went to his companies.  GA sought an account of profits made by Nolten and his companies from the arrangement, arguing that Nolten had breached his fiduciary and statutory duties as a director by failing to disclose his interest in the companies providing the services to GA's subsidiary.   **(ii) Perth rent claim**   Another company controlled by Nolten - a co-defendant in the case - bought an office/warehouse in Perth in July 2005.  The company leased the premises to GA for a period of five years with two options to renew for further five-year periods.  In November 2006, the company sold the property making a profit of $160,000 from the sale.  Nolten admitted he was a defaulting fiduciary having leased the office to GA without disclosing to GA his interest in the company that owned the property.   GA also alleged that the rent it paid to the defendant company was in excess of the market rate and sought equitable compensation on that basis.  GA claimed an account of profits made by the defendant company under the lease based on market rent, as well as an account of the profit made from the sale of the property.     Nolten and the defendant company, while admitting that GA was entitled to an account of profit from the sale of the property because of Nolten's failure to disclose his interest in the defendant company, disputed the claim that they were also liable to account for profit under the lease, or for equitable compensation.  It was submitted that the account of profits based on the lease would amount to "double dipping", and furthermore would give GA a windfall because of GA's occupancy of the property.  The defendants submitted, citing the High Court of Australia in Warman International Ltd v Dwyer (1995) 182 CLR 544, that the fiduciary's liability should not be transformed into a vehicle for the unjust enrichment of the plaintiff.   In relation to the equitable compensation claim, the defendant argued that the loss suffered by GA was not a loss in any recognised sense and that the appropriate remedy was the account of profits, for which it had already conceded liability.   **(iii) Rental of flat owned by defendant**   Nolten, through yet another company controlled by him, owned a flat in Sunbury, which was rented to GA for use by GA's visiting employees and guests.  GA had paid $37,180 in rent to the company.  However, Nolten failed to disclose to GA's board his connection with the company that owned the flat, which GA alleged was in breach of fiduciary and statutory duties owed by Nolten.   Nolten and his company conceded liability for an account of profits made from the rental arrangement.  However, in contention was whether that liability should be reduced by making an allowance for accommodation fees GA would have incurred had it used alternative accommodation.  Nolten submitted that the plaintiff had effectively known of the connection between the defendant and the company that owned the flat and therefore acquiesced to the arrangement. Second, the non-disclosure of the arrangement was not deliberate. Third the defendant submitted that an account of profits would result in a windfall to the plaintiff which would be improper.  The court rejected all of these arguments.   **(iv) Put and call options**   GA also made claims against Nolten in relation to put and call options exercised by Nolten over shares in GA.  Nolten exercised his contractual rights to call on the shares in October 2008 and again in July 2009, which was shortly before his dismissal from GA as a result of setting up a company in competition with GA.  He exercised the put options in August 2009.   GA refused to issue the shares pursuant to the second call.  GBV, another plaintiff in the case, refused to honour its purchase obligations under the put option agreement.  They also sought orders that he transfer his shares back to GA for no consideration.  GA and GBV argued that the exercise of Nolten's rights was void and of no effect because at the time the board passed the resolution granting Nolten the shares under the first agreement, Nolten had not disclosed to the board that he had engaged in conduct in breach of his duties as a director of GA. Had they known of his misconduct the board would not have authorised the resolution.   GA further alleged that Nolten was guilty of misleading and deceptive conduct in breach of section 9 of the [Fair Trading Act 1999 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12938" \t "Default).  The company submitted that between 2005 and 2009 Nolten falsely represented to GA that he was performing his duties as managing director consistently with his statutory and fiduciary obligations.    GA also alleged that Nolten was guilty of deceit and of breaching an implied contractual term of good faith.   **(c) Decision**    Davies J found each claim against Nolten and his companies was made out.  Her Honour held that Nolten had sought to profit personally from arrangements he and companies under his control had in place with GA and its subsidiaries.  He had failed to disclose his interest in those companies and his conduct in approving the issue of shares pursuant to option agreements was a misuse of his position within GA.  He was therefore in breach of his fiduciary and statutory duties to GA.    Furthermore, her Honour held that Nolten, by representing that he was discharging his functions and responsibilities as managing director of GA in accordance with those duties, had deliberately misled and deceived GA and that GA was induced by those representations to approve the share issue. The deceit claim was also made out against Nolten. Her Honour found that the resolution approving the share issue to Nolten was invalid and that GA and GBV were entitled to relief under their general law claim.   Finally it was held that a good faith term was found within the call option agreement and that Nolten by his conduct breached the term.   GA was awarded accounts of profits in relation to:  the fees paid to Nolten's companies for the computer services;  the sale of the office property rented by GA from Nolten's company;  the rent paid over the market rate on that property; and  the rent paid by GA for use of the Sunbury flat owned by Nolten.  GA was also awarded equitable compensation for its loss in relation to the rental of the office.   Davies J held that there was no utility in granting the declarations sought and that compensatory remedies awarded were sufficient.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h5)  **5.7 The obligation of good faith in pre-contractual negotiations**  (By Keara Stretton, Mallesons Stephen Jaques)   Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd, [2010] WASCA 222, Supreme Court of Western Australia, Court of Appeal, Pullin JA, Newnes JA, and Murphy JA, 22 November 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/wa/WASCA/2010/222.html](http://www.austlii.edu.au/au/cases/wa/WASCA/2010/222.html" \t "_new)   **(a) Summary**   In this decision the Western Australia Court of Appeal considered the obligation to deal in good faith.  Specifically, the court considered whether during negotiations good faith requires proposals put by the parties to be objectively reasonable.   The court held that in negotiations, the obligation does not impose fiduciary duties requiring that one party give in to the demands of another, or act in the interests of the other party.  Parties are free to act in their self-interest so long as they do so honestly, with an open mind, and in a manner allowing negotiations to proceed.  Merely making a proposal which may be considered unreasonable does not evidence bad faith, particularly where the proposing party is willing to negotiate.   **(b) Facts**   Cable Sands Pty Ltd ("Cable Sands") owned land containing radioactive material.  Strzelecki Holdings Pty Ltd ("Strzelecki") wished to purchase and develop the land.  The parties signed a Memorandum of Understanding ("MOU") to govern the due diligence process and the negotiation of the contract. It was an express term of the MOU that the parties deal with each other in good faith.    During negotiations, Cable Sands proposed that Strzelecki be responsible for the radioactive remediation work and provide an indemnity to Cable Sands secured by a $25 million, 20 year bank guarantee.  Strzelecki removed the indemnity and guarantee, and sent the contract back as an offer.  Cable Sands replied that they were willing to further negotiate the terms relating to the bank guarantee and the indemnity.  Strzelecki did not reply and Cable Sands eventually gave notice that the negotiating period under the MOU had expired, without a contract being concluded.  Strzelecki then requested that Cable Sands execute Strzelecki's original offer and instituted proceedings when Cable Sands refused.   On appeal Strzelecki argued that Cable Sands had failed to act in good faith, as the "demand" for an indemnity and $25 million bank guarantee were unreasonable.   **(c) Decision**   "Good faith" is not a precise term, but it embraces three related notions:  cooperation in achieving the contractual objectives;  honest standards of conduct; and  standards of conduct which are reasonable having regard to the interests of the parties.  During negotiations, the obligation to deal in good faith does not impose fiduciary duties requiring that one party give in to the demands of another, or act in the interests of the other party.  Parties are free to act in their self-interest so long as they do so honestly, with an open mind, and in a manner allowing negotiations to proceed.  Merely making a proposal which may be considered unreasonable does not evidence bad faith, particularly where the proposing party is willing to negotiate.   The court dismissed the appeal, holding that Cable Sands had acted in good faith and that its demands had been reasonable.    The court stated in the alternative that even if Cable Sands had not been reasonable, there was no objective requirement of reasonableness that a demand needs to satisfy.  Parties would be acting in good faith so long as they honestly remained open to the negotiation process, which Cable Sands evidenced through its willingness to continue negotiations on the terms of the indemnity and guarantee.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h5)  **5.8 No breach of contract, oppression or winding up remedy**  (By Jiaying Zhang, Freehills)   Trust Company Ltd v Noosa Venture 1 Pty Ltd [2010] NSWSC 1334, New South Wales Supreme Court, Windeyer AJ, 19 November 2010  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1334.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1334.html" \t "_new)   **(a) Summary**   The first plaintiff, Trust Company Ltd ('TCL'), and the second defendant, Valad Commercial Management Ltd ('Valad'), entered into a joint venture agreement to acquire and develop the Starwood Hotel in Noosa through the first defendant, Noosa Venture 1 Pty Ltd ('NV1'). Price and Hurley, directors of NV1 appointed by Valad, were the fourth and fifth defendants.    TCL acted as a custodian for Ashington Capital Pty Ltd ('Ashington'). Project delays, a downturn in the market and concerns about Ashington's financial stability caused the parties to enter into deadlock over matters regarding equity contributions, service fee payments and approval of an updated project plan.   TCL brought claims against Valad, NV1, Price and Hurley for, inter alia, breach of contract, breaches of directors' duties under section 181 (good faith) and section 182 (improper use of position) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act'), oppressive conduct under section 232 of the Act, declaration of breach and damages under section 1324 of the Act, and a winding up order under section 461 of the Act.   Windeyer AJ dismissed each of TCL's claims on the basis that:  There was no breach of contract since the defendants had acted reasonably in fulfilling their obligations under the agreement. In any case, the plaintiffs were not ready and willing to perform, so were not entitled to make a claim for breach of contract.  There was no breach of sections 181 and 182 of the Act, or oppressive conduct under section 232 of the Act, for the same reasons given for the finding of no breach of contract.  Claims for orders and damages under section 1324 of the Act cannot be made unless an injunction has also been sought.  A winding up order will only be made as a 'last resort'.  **(b) Facts**   TCL and Valad embarked on a project to acquire and develop a hotel through a sole purpose joint venture vehicle, NV1. NV1 conducted its operations through Noosa Venture Trust ('Trust'), a unit trust. TCL acted as custodian of Ashington.   TCL and Valad each owned half the units in the Trust, and Ashington and Valad each held half the shares of NV1. Both Ashington and Valad appointed directors to the board of NV1: Valad appointed Hurley and Price, and Ashington appointed Anderson and Minahan. In the case of a deadlock between the directors, the Unit Holders' Agreement ('UHA') allowed for:  The decision to be referred to the Chairman of each unit holder for resolution.  If the Chairmen are unable to agree, the unit holders may engage the dispute resolution provisions, which require the parties to negotiate a resolution within 20 days; if that fails, either unit holder may serve a transfer notice on the other so that the interest in the project solely belongs to one party.  A project control group was also established under the UHA to make decisions relating to the project. However, its resolutions were 'subject to the overriding direction and control of the Board.'   By 27 February 2009:  the project had experienced delay;  there was a significant downturn in the Noosa market; and  there were concerns about Ashington's ability to meet its equity contribution obligations under the UHA.  NV1's board considered whether it should continue with the project, or abort it. Disputes arose between TCL and Valad over the amount of equity contributions to be made under the UHA. A revised project plan was proposed by the project control group, but this was rejected by Hurley and Price.   A deadlock arose between TCL and Valad on the matters of equity contributions, payments to be made to the service provider of the project, AMPL (an entity related to Ashington), and whether the updated project plan should be adopted. The dispute resolution provisions were triggered, and after 20 days of failing to resolve the deadlock, Valad sent a notice requiring Ashington to transfer its interest in the joint venture to Valad at the transfer price. A completion fee of $20 million was payable on completion of the transfer by Ashington.   TCL (as Ashington's custodian) made, inter alia, the following claims:  Damages for breach of the UHA by the Valad companies, since they did not take proper steps to advance the project, and Price and Hurley had suspended payments to AMPL.  That NV1 be wound up on the 'just and equitable' ground or for oppression under section 461 of the Act.  An order for oppression under sections 232 and 233 of the Act that Valad purchase the shareholding and unit holding of Ashington.  A declaration that there were breaches of sections 181 (duty of good faith) and 182 (that directors cannot improperly use their position) of the Act by Hurley and Price.  **(c) Decision**  **(i) No breach of contract**  Windeyer AJ found that there was no breach of contract since:  There was no obligation under the UHA for Valad to adopt the revised project plan proposed by the project control group.  Valad had not failed to 'progress the project' by delaying negotiations with the hotel management company, since it was still to be decided whether and in what form the project should be pursued.  There was a reasonable basis for Valad to claim a readjustment of AMPL's service fees under the contract, since the fees had been calculated over the original term, which needed to be extended. On the other hand, had the purpose of the non-payment been to force TCL out of the project, there may have been a breach of contract.  The deadlock situation was not a breach of contract, since there was no element of dishonesty by the directors.  The transfer notice served by Hurley and Price was legitimate considering the 'uncertain economic future and the proper doubts about the ability of [Ashington] to contribute funds to the project'.  Furthermore, a party cannot sue for damages for breach of contract unless they are ready and willing to perform the contract: *Foran v Wright* (1989) 168 CLR 385. In this case, it was necessary for TCL to show that it was able to make the necessary contributions of equity; however, such evidence was not provided. TCL had not established that it was ready and willing to perform.   **(ii) No breach of the duty of good faith or improper use of position**   There was no breach by Hurley and Price of sections 181(1) and 182(1) of the Act for the same reasons given for the finding that there was no breach of contract. Thus, no declaration of breach was made. Furthermore, TCL failed to make a claim for an injunction under section 1324 of the Act. Windeyer AJ held that unless the plaintiff seeks an injunctive order, neither damages nor a declaration of breach can be awarded.   **(iii) Relief against a section 233 oppression order**   Section 232 of the Act provides that if the conduct of the affairs of a company is oppressive, unfairly prejudicial or unfairly discriminatory against a member, the court can make an order under section 233 of the Act preventing or rectifying that conduct.   In this case, there was no oppressive conduct by NV1 for the same reasons given for the finding that there was no breach of contract.    In obiter, Windeyer AJ commented that the powers under sections 232 and 233 may not be used to deal with oppression in a company that holds its assets as a trustee, and the court is unable to make orders in respect of the trust assets. This is because section 233(1) of the Act allows orders to be made 'in relation to the company', rather than 'in relation to the affairs of the company' per section 53 of the Act. Here, NV1 held the project on trust for TCL and Valad; therefore, an oppression order requiring Valad to purchase TCL's units in the trust cannot be made.   **(iv) Application for a winding up order**   While there were deadlock provisions in this case, Windeyer AJ found, in obiter, that where there are no deadlock provisions and no alternative means of dealing with the situation (e.g. an oppression order under section 233 of the Act), the court may make a winding up order under section 461 of the Act. However in this case, the winding up of NV1 would empower Suncorp-Metway Ltd, a creditor of the project, to call up its loan to NV1, which would be contrary to the interests of TCL. Furthermore, a winding up order should only be made as a 'last resort'.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h5)  **5.9 The legality of postponing an extraordinary general meeting convened by a member of a company**  (By Jane Campbell, Clayton Utz)   Carpathian Resources Limited v Highmoor Business Corporation [2010] FCA 1294, Federal Court of Australia, Barker J, 19 November 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2010/1294.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/1294.html" \t "_new)   **(a) Summary**  The court granted an injunction restraining a member of a company from holding an extraordinary general meeting convened under section 249F of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act").    The court held that the powers granted in the company's constitution to postpone or vary the date and venue of a meeting applied to meetings held pursuant to section 249F of the Act, but that the powers were limited and should only be exercised sparingly and for a proper purpose. The board's decision to postpone the meeting, so that further determination could be made on an injunction restraining certain members of the company from exercising their voting rights, was considered by the court to be reasonable and a proper purpose.   To a lesser extent, the court considered the validity of a third party being responsible for receiving a company's proxy votes.   **(b) Facts**   The first respondent, Highmoor Business Corporation ("Highmoor"), is a member of the applicant, Carpathian Resources Limited ("Carpathian"). On 22 October 2010, Highmoor purported to issue a notice convening an extraordinary general meeting ("EGM") of the members of Carpathian, pursuant to section 249F of the Act. Section 249F provides that members of a company with at least 5% of the votes that may be cast at a general meeting may call and arrange to hold a general meeting.   The notice of  meeting stated that the EGM was to be held in Sydney on 23 November 2010 and comprised the following resolutions:  the removal of the directors of Carpathian;  the appointment of new directors; and  authority to raise capital by a placement of shares.  On 3 November 2010, Carpathian's board resolved to postpone the EGM until 16 December 2010 and to hold the meeting in Perth.  Such a change meant that the EGM was to be held on the same day and at the same place as the annual general meeting ("AGM"). As it was not possible for the requisite 28 days notice to be given to members for the AGM to be held on 16 December 2010, the board later resolved to hold the AGM on 17 December 2010.    When the EGM was called, legal proceedings had commenced in the Nevis Circuit of the Eastern Caribbean Supreme Court, by a company associated with the second respondent, against Energo Incorporated ("Energo") ("Nevis proceedings"). At the time of the Nevis proceedings, Energo was a member of Carpathian.  Energo's shares have been distributed to International Investments Ltd and OAG Fund Ltd, who together hold approximately 47% of Carpathian's issued share capital.  An interim injunction was obtained by the claimant in the Nevis proceedings which purported to restrain Energo, as well as International Investments Ltd and OAG Fund Ltd (and others), from exercising the voting rights associated with their Carpathian shares.  Highmoor argued that Carpathian was bound by the injunction in the Nevis proceedings.   In light of the Nevis proceedings, the Carpathian board resolved to postpone the EGM to 16 December 2010. Energo had an application pending to discharge the injunction from the Nevis proceedings, which was to be heard on 26 November 2010. The board believed the postponement would allow an opportunity for a further ruling to be made in relation to the injunction restraining Energo from voting at the EGM on 23 November 2010.   Highmoor refused to accept the validity of the board's decision to postpone the EGM and sent a letter on 12 November 2010 to all Carpathian's members informing them that it intended to proceed with the meeting on 23 November 2010. Carpathian then instituted proceedings in the Federal Court to obtain:  an injunction restraining Highmoor from holding the EGM on 23 November 2010; and  an injunction restraining the respondents from making any statements to the effect that the meeting of Carpathian members was not validly postponed by Carpathian.  **(c) Decision**    Justice Baker granted both injunctions sought by Carpathian.   **(i) Validity of postponement of EGM**   Carpathian argued that the EGM was postponed pursuant to the company's constitution, which provides that the board may postpone a proposed general meeting for a period not exceeding 28 days, or vary the venue of the proposed general meeting.   Highmoor argued that the provisions of the constitution do not apply in circumstances where a member has called a general meeting under section 249F of the Act.  Highmoor claimed that the Act overrides the company's constitution and that unless the postponement and variation power is located in the Act, it cannot apply to section 249F meetings. Furthermore, Highmoor argued in the alternative, that the constitution does not confer power to both postpone and vary the venue of a meeting. The board can either postpone or vary, but not both.   Barker J followed the judgement of Emmett J in Central Exchange v Rivkin Financial Services Ltd [2004] FCA 1546 and held that the powers created by the constitution of a company may continue to operate in relation to a meeting called under section 249F of the Act. The powers in the constitution to postpone or vary a general meeting were not inconsistent with the statutory rights conferred by section 249F of the Act. Baker J did note however that the power to postpone or vary a section 249F meeting will be limited and should only be exercised extremely sparingly and for a proper purpose so as not to frustrate the statutory rights conferred under the Act.    It was held that there was nothing improper in the board exercising its power to postpone the EGM. Insisting that the EGM scheduled for 23 November 2010 go ahead when it may prevent approximately 47% of the voting rights from being exercised would not be conducive to the proper management of Carpathian. Barker J noted that it was entirely reasonable for the board to postpone the EGM to a time following the consideration of the interlocutory injunction granted in the Nevis proceedings. Further, the change in venue was considered only sensible as it meant that the AGM and EGM could be conducted in the same place and at the same time.   The court rejected Highmoor's alternative argument that a literal construction of the constitution limited the board from both postponing and varying the EGM. It was held that the constitution clearly allowed the board to exercise both of these powers at one time.   The court considered it fair and equitable to grant an interlocutory injunction to ensure that all members of Carpathian were given the opportunity to vote on the matters to be considered at the EGM.   **(ii) Validity of proxy forms**   In support of its application for an injunction, Carpathian also raised the issue of the validity of proxy forms which were issued for the EGM. The notice of meeting given by Highmoor provided that proxy forms could be returned to Link Market Services Ltd ("Link"). Carpathian argued that it was not open to Highmoor to arrange for a third party to receive the proxies under section 250B(3) of the Act and that they should have obtained the consent of Carpathian to take such action. The decision of Bisan Ltd v Cellante [2002] VSC 430 ("Bisan") was relied upon in support of this argument.    Section 250B(3) of the Act provides that a company receives a proxy vote if it is received at the company's registered office, sent to a fax number at the company's registered office, or at a place specified in the notice of meeting.   Highmoor argued that where a member calls and arranges an EGM under section 249F of the Act, it should also include the power to indicate where the proxies are sent as provided for by section 250B(3)(iii) of the Act.   In the case of Bisan Ltd v Cellante [2002] VSC 430 ("Bisan"), Dodds-Stretton J prevented a general meeting from occurring under the predecessor to section 249F of the Act because the proxy forms were to be received by a third party that had an interest in the proceedings of the meeting. It was held that this defect in the notice of general meeting may cause substantial injustice in the electoral process. The court did not hold that this defect should operate to invalidate proxy votes, but rather that the proposed meeting as a whole should not occur.    Baker J distinguished the present case from Bisan on a number of points. Specifically:  Carpathian had only sought to postpone the EGM and not prevent it from occurring; and  there was no suggestion of corruption in the electoral process or that Link would not properly record the proxy votes as was suggested about the third party receivers in Bisan.  The court was not satisfied that there would be any actual prejudice to Carpathian by Link receiving the proxy votes for the EGM, whether it was held on 23 November or 17 December 2010.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h5)  **5.10 Gaining access to company books**    (By Marc Fauvrelle, Mallesons Stephen Jaques)   Yarra Australia Pty Ltd v Burrup Holdings Limited [2010] FCA 1273, Federal Court of Australia, Barker J, 18 November 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2010/1273.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/1273.html" \t "_new)   **(a) Summary**   The Federal Court considered three different grounds for providing the applicant shareholder with access to the respondent companies' books.  The court declined to grant an interlocutory injunction under the shareholders deed, as to do so would have the practical effect of finally determining the matter, depriving the respondents of a trial they could potentially win.  It also refused to grant an interim injunction under section 1324(4) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), as there was an insufficient nexus between the orders sought and the final relief claimed under section 1324(1).  The court was however willing to order a limited inspection of the respondents' books under section 247A of the Corporations Act.   **(b) Facts**   The applicant holds 35% of the shares in the first respondent.  The second respondent is a wholly owned subsidiary of the first.  The applicant was concerned about the respondents' failure to pay dividends, their failure to prepare and file financial and other reports as required under the Corporations Act, and a number of unauthorised related party transactions.   The applicant sought access to the respondents' books pursuant to clause 6 of the shareholders deed.  The respondents refused on the basis that the applicant had not given proper notice or signed an approved confidentiality agreement, as required under that clause.  The applicant then brought proceedings to compel the respondents to provide access to the books on three alternative bases:  an interlocutory injunction to enforce clause 6 of the shareholders deed;  an interim injunction under section 1324(4) of the Corporations Act; and  orders for inspection pursuant to section 247A of the Corporations Act.  **(c) Decision**    **(i) Interlocutory injunction under the shareholders deed**   The court conceded that there was a serious issue to be tried, in that it was arguable that the applicant had satisfied the notice and confidentiality requirements under clause 6 of the shareholders deed.  However, the court noted that this was not a case where granting an interlocutory injunction would preserve the status quo pending final determination.  Rather, the applicant would gain access to the respondents' books without full consideration of all the facts and circumstances of the case, making a final determination unnecessary.  The court did not find the applicant's case overwhelming, and therefore declined the injunction on the basis that to do so would deprive the respondents of a trial they could likely win.   **(ii) Interim injunction under section 1324(4) of the Corporations Act**   Section 1324(1) of the Corporations Act enables the court to grant an injunction restraining a person from engaging in conduct in contravention of the Corporations Act.  Section 1324(4) provides that 'where in the opinion of the court it is desirable to do so, the court may grant an interim injunction pending determination of an application under subsection (1).'  The respondents had contravened the Corporations Act by failing to prepare, approve, audit and publish financial accounts.  The final injunction sought by the applicant was an order that the respondents get their financial accounts up to date.  However the applicant also sought an interim injunction providing for access to the respondents' books.   The court said it did not have the power to grant the interim injunction because there was an insufficient nexus between the orders sought and the final relief claimed.  The court did not see how providing access to the respondents' books would, for instance, maintain any status quo, or preserve any property pending the rectification of the respondents' financial accounts.   **(iii) Orders under section 247A of the Corporations Act**   Section 247A(1) of the Corporations Act provides that on the application of a shareholder the court may make orders authorising the shareholder to inspect the books of the company.  The court may only make such orders if it is satisfied that the applicant is acting in good faith and for a proper purpose.  The court recognised that this is a composite notion.  The court also noted that it has a discretion as to whether it orders inspection, even where these criteria are met.  However the court did not think it should refrain from exercising that discretion in favour of the applicant simply because the orders sought were the same as the access sought under the shareholders agreement.   Ultimately the court found that the applicant was acting in good faith and for a proper purpose in seeking to inspect the respondents' books.  It reached this conclusion based on the respondents' failure to pay dividends, failure to maintain financial accounts, and failure to respond to the applicant's inquiries about both these matters and the unauthorised related party transactions.  The court acknowledged that the orders sought by the applicant were too broad, and therefore tailored its orders to meet the applicant's specific concerns.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h5)  **5.11 Meaning of "officer" read down: Receivers not "officers" for the purpose of section 601FD**   (By Scott Sharry and Emily Absolon, Clayton Utz)   Norman, in the matter of Forest Enterprises Australia Limited (Administrators Appointed) (Receivers & Managers Appointed) v FEA Plantations Ltd (Administrators Appointed) (Receivers Appointed) [2010] FCA 1274, Federal Court of Australia, Finkelstein J, 18 November 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2010/1274.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/1274.html" \t "_new)   **(a) Summary**   Section 601FC of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) requires a responsible entity of a managed investment scheme to "act in the best interests of the members and, if there is a conflict between the members' interests and its own interest, give priority to the members' interests." By section 601FD this obligation is extended to "officers" of the responsible entity.   Section 9 of the Corporations Act defines "officer" to include receivers.   In this case, Justice Finkelstein held that receivers appointed to the responsible entity of a managed investment scheme are not "officers" for the purpose of section 601FD and are therefore not required to act in the best interests of members.    **(b) Facts**   From 1993 to 2009 the FEA group of companies operated some 19 managed investment schemes in the forestry sector.    Under the schemes, an FEA group company would purchase a plantation (or an interest in a plantation) and grant scheme members a lease or profit a prendre over an allotment.    FEA Plantations Ltd (FEAP) was the responsible entity for each scheme. Members entered into a management agreement with FEAP requiring FEAP to manage the plantation and harvest and market the timber on behalf of the members. FEAP in turn subcontracted these duties to Forest Enterprises Australia Ltd (FEA).    The applicants (Messrs Norman and Algeri) were appointed as receivers and managers of FEA and receivers of FEAP.   State legislation imposes obligations on occupiers of land (including privately appointed receivers) to take fire prevention measures and adopt particular forestry practices. Conscious of these obligations, the receivers became concerned about their personal liability in respect of the plantations and sought the court's permission to "terminate, surrender, abandon, assign or otherwise deal with" the leases and profits so as to eliminate the risk of liability.    FEA Growers Group Inc was joined as a party to represent the interests of the scheme members. The Growers relied on section 601FD of the Corporations Act to argue that the receivers should not be permitted to deal with the leases and profits.    The Growers argued that:  the receivers were "officers" as defined in section 9 of the Act;  the receivers were therefore "officers" for the purpose of section 601FD and were required to act in the best interests of the members; and  it was not in the interests of the members for the receivers to deal with the leases or profits.  **(c) Decision**   Justice Finkelstein held that the definition of "officer" in section 9 of the Corporations Act does not apply to section 601FD without modification.   His Honour reached this conclusion by reference to the legislative history of the relevant provisions. When section 601FD was introduced in 1998, the definition of "officer" in section 9 made it clear that the "officers" of a responsible entity were the director, secretary and executive officers. This definition ensured that receivers were not subject to the duties in section 601FD.   The definition of "officer" was amended by the *Corporate Law Economic Reform Act 1999 (Cth)* to include "a receiver, or receiver and manager, of the property of the corporation."    His Honour was satisfied that, by amending the definition of "officer" in section 9, the legislature did not intend to bring about a change in the regulation of managed investment schemes. The CLERP amendments were directed at clarifying the duties of directors and officers and were not concerned with the regulation of managed investment schemes. His Honour did "not accept that such an important change as is here suggested would be made to Chapter 5C effectively by a sidewind."   His Honour held that the object of section 601FD was to complement the duties owed by the responsible entity to members of the scheme. That object was not served by imposing duties on a receiver who plays no part in the administration of the scheme nor in the decisions regarding the investment of scheme assets.    The role of a receiver is to take possession of and realise charged assets. His Honour saw "no reason" to bring such persons under the operation of section 601FD and thereby subordinate the interests of secured creditors to scheme members.    Having found that the receivers were not subject to the duties in section 601FD, Finkelstein J went on to comment on the scope of section 601FD.   His Honour held that section 601FD only applies to an officer of a responsible entity when they are acting in that capacity. The duty does not apply to actions taken by an officer in some other capacity. As such, the applicants' proposed actions as receivers of FEA fell outside the ambit of section 601FD, as FEA was not the responsible entity of the scheme.   Finally, Finkelstein J did not accept that dealing with the leases and profits was contrary to section 601FD. His Honour held that the obligation to act in the interests of scheme members does not permit the responsible entity (or its officers) to breach obligations owed to a third party. In circumstances where the bank held security for a debt, section 601FD could not be used to prevent realisation of that security.    **(d) Orders**   Although Finklestein J rejected the Growers' arguments and found that the receivers were not bound by section 601FD, his Honour declined to make the directions sought by the receivers.    By the time of hearing, the administrators of FEAP had undertaken to carry out the works required to comply with the occupier's duties under State law. This answered the receivers concerns about personal liability. As the receivers were merely required to act in accordance with their usual obligations, his Honour did not consider that they required any protection from the court.   His Honour also considered that the application was premature as the receivers had not yet decided on a specific course of conduct. Only then could they receive court sanction.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h5)  **5.12 Court orders in relation to a meeting of shareholders in a scheme of arrangement**   (By Jiayue Li, DLA Phillips Fox)   The MAC Services Group Limited [2010] NSWSC 1316, New South Wales Supreme Court, Barrett J, 15 November 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1316.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/1316.html" \t "_new)   **(a) Summary**   The MAC Services Group Ltd ('MSL'), a public company registered under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Act') and listed on the Australian Securities Exchange ('ASX') was the subject of a takeover proposal from Oil States International Inc ('OSI').  The takeover was to be effected by a scheme of arrangement between MSL and all its shareholders other than OSI and its associates ('Scheme Shareholders').   Barrett J made orders on 9 November 2010 in relation to MSL's application pursuant to section 411 of the Act (seeking orders for the convening of a meeting of the Scheme Shareholders for the purposes of approving the scheme of arrangement).  In considering the application, the following three issues arose:  whether the circumstances created different classes of shareholders such that assent from each class of shareholders was required;  the definition of members' voting rights for the purposes of a meeting of members convened pursuant to a section 411(1) order; and  the need to make an order in relation to the cut off time for determining members' entitlement to vote at the meeting.  **(b) Facts**   Pursuant to the scheme of arrangement and certain collateral documents, if the scheme of arrangement became binding on the Scheme Shareholders and on MSL, the MSL shares held by all Scheme Shareholders would be compulsorily transferred to a subsidiary of OSI, OSI-SPV and those shareholders would receive, in return, cash provided by OSI.   Marley Holdings Pty Ltd ('Marley') held 52% of the issued shares in MSL. Under a contract between Marley and OSI-SPV, OSI-SPV acquired an option to purchase approximately 38% of Marley's shareholdings ('the Option Contract'). The option would only be exercisable if a third party made a competing proposal to MSL and OSI-SPV in turn publicly announced a counter-proposal which the board of MSL determined in good faith to be more favourable to MSL shareholders than the third party competing proposal.  The exercise price payable to Marley if OSI-SPV announced a more favourable counter-proposal would be the price provided for in OSI-SPV's counter proposal (which presumably would be higher than the scheme offer price).  This gave rise to a question of whether Marley constituted a separate shareholder class for the purposes of the scheme meeting.   Separately, MSL asked the court to make certain orders for the purposes of convening the meeting of Scheme Shareholders.  Barrett J refrained from making one of the orders sought by MSL (that 'at the Scheme Meeting, a Scheme Shareholder will be entitled to one vote for each ordinary share in the capital of the Plaintiff they are registered as holding at 7.00pm on 11 December 2010') on the basis that the order was not necessary.   **(c) Decision**   After confirming Davies J's statement in Re Orica Ltd [2010] VSC 231 that the court's role on an application to convene a scheme meeting did not extend to considering the business or commercial efficacy of the proposed scheme, Barrett J held that:  the Option Contract did not place Marley in a different class of shareholders;  the court does not have power to seek to prescribe the voting rights of members; and  it is the role of the convenor of the meeting, and not the court to stipulate a cut off time for the recognition of Scheme Shareholders and their shareholdings for the purposes of voting at the scheme meeting.  **(i) The option contract did not create a different class of shareholders**   Barrett J stated that the constitution of classes of shareholders depended upon the 'similarity or dissimilarity of their rights against the company and the way in which those rights are affected by the Scheme, and not upon the similarity or dissimilarity of their private interests arising from matters extraneous to such rights'.   The authorities which concerned options to purchase indicated that shareholders who were a party to such option contracts were generally not considered as constituting a class distinct from all other Scheme Shareholders as the option did not affect the rights and obligations of those shareholders in relation to the company.   The fact that the option was exercisable at a price above the purchase price under the scheme of arrangement did not result in Marley constituting a different class of shareholder.  Barrett J held that: 'the rights of Marley against MSL and the way in which those rights will be affected by the proposed scheme of arrangement are not different from those of other Scheme Shareholders; and this is so despite any remote possibility of divergence of interests arising from aspects of the wider context'.   **(ii) Voting entitlements of Scheme Shareholders**   Barrett J held that the voting rights or voting entitlements of Scheme Shareholders at a scheme meeting are to be determined in accordance with the meeting provisions of the Act or the provisions of the company's constitution which are not inconsistent with the Act.   In the present case, MSL's constitution had displaced the operation of the replaceable rule in section 250E of the Act and therefore the relevant provisions of MSL's constitution would govern the voting rights or voting entitlements of Scheme Shareholders.   The court does not have the power to determine the voting rights or voting entitlements of Scheme Shareholders at a scheme meeting and must take them as it finds them.   **(iii) Convenor of scheme meeting determines time frames**   Barrett J also confirmed that it would have been inappropriate for the court orders to fix a cut-off time for recognition of Scheme Shareholders and their shareholdings for the purposes of voting at the scheme meeting.   By virtue of section 1073A(1)(a) of the Act and regulation 7.11.03(1)(a) of the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default), the MSL shares are considered Division 4 financial products.  Accordingly, pursuant to regulation 7.11.37, MSL as the convenor of the meeting is granted supreme power to determine the matter of a cut-off time for the purposes of the scheme meeting.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/160%20December%202010.htm%23h5)  **5.13 Directors' duties: remuneration, shareholder distributions and transactions to maintain control**  (By Steven Grant, Minter Ellison)   Carr v Resources Equity Ltd [2010] NSWCA 286, New South Wales Court of Appeal, Spigelman CJ, Macfarlan JA and Sackville AJA, 2 November 2010   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/286.html](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/286.html" \t "_new)   **(a) Summary**   The case concerns an appeal from the Supreme Court of New South Wales in relation to the breach of directors' duties in four transactions by two of three directors of Resources Equity Limited (REL).   **(b) Facts**   The appellants, Mr Carr and Mr Purves, were directors of the first respondent, REL, as was the second respondent, Mr Thomas.  REL's claims against Mr Carr and Mr Purves were for breach of director's duties under sections 180, 181 and 182 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) and breach of fiduciary duty while directors of REL.  At first instance, McDougall J found that they had breached their duties with respect to four transactions:  an overpayments of directors' fees in the amount of $368,500.  The appeal referred only to the overpayment of $167,000 to Mr Carr over and above what McDougall J found to be a reasonable amount namely $33,000;  breach of statutory and fiduciary duties by making an investment, by way of equity and loans, in Fox Technologies Pty Ltd (Fox) (the Fox transaction).  Amounts of $2,547,000 were advanced pursuant to this investment.  On disposal of its interest in Fox, REL received an amount of $1,865,000.  McDougall J ordered the payment of the balance, with interest;  causing REL to sell shares held by REL in Asia Iron Pty Ltd (Asia Iron) and to distribute an amount of approximately $858,000 to the shareholders.  Of this sum $810,700 was distributed by the directors of REL and an amount of approximately $47,400 was distributed by an administrator of REL.  McDougall J held that the payments were unlawful and that, in causing REL to make the payments, the appellants breached their statutory and fiduciary duties; and  causing REL to pay certain legal costs in relation to proceedings in the Supreme Court of Western Australia.  In addition, certain costs were incurred in the appointment by REL of an administrator.  The board of REL had issued seven million REL shares to Cosmos E-C Pty Ltd (Cosmos), which would enable the directors to maintain their control of REL.  The litigation expenses were approximately $191,000 and the administration expenses were in the amount of $25,000.  McDougall J held that these expenses had been incurred by the appellants in breach of their statutory and fiduciary obligations in order to maintain their control of the corporation.  Additionally, McDougall J held that Mr Thomas was not liable to contribute with respect to the alleged overpayment to directors and the Fox transaction.  The appellants challenged the findings of McDougall J in each of these respects.   **(c) Decision**  The decision of the New South Wales Court of Appeal was delivered by Spigelman CJ with whom Macfarlan JA and Sackville AJA agreed.  The appeal was dismissed with costs.   **(i) Overpayment of directors' fees**   The shareholders of REL had passed a resolution that directors' fees be capped at $200,000 per annum and the board of REL had also passed a resolution which, on one interpretation, imposed a further limit on directors' fees.  Mr Carr relied on clause 13.10 of REL's Constitution which provided that, in addition to remuneration for services as directors, directors could be compensated if they were called upon 'to perform extra services or make any special exertions on behalf of the company or the business thereof'.  This reliance was based in part on his own evidence, which was rejected by McDougall J and solicitors' invoices.  The solicitors' costs were also rejected by McDougall J on the basis that the solicitors' work did not indicate work by Mr Carr. Furthermore, a substantial amount of the solicitors' work was undertaken for the Fox transaction for which Mr Carr was found to breach his duties as a director.  There was nothing in the appellants' written submissions identifying how McDougall J erred in drawing any of these conclusions.  Spigleman CJ rejected this basis of appeal.   **(ii) The Fox transaction**   In their written submission, the appellants submitted that:  they did not breach did not breach their statutory duties and/or fiduciary duties as directors of REL;  the business judgment rule in section 181(2) of the Corporations Act should have been applied;  the appellants ought to be excused pursuant to section 1318 of the Corporations Act; and  any loss was occasioned by the fact that the ultimate sale price was less than the original investment and that the appellants had nothing to do with that transaction.  The appellants relied upon the following facts and matters to support their submissions:  the technology was in an advanced developmental stage and had strong potential to make significant profits;  in March 2003, Fox was in an advanced stage of negotiation with Westpac for licensing the Fox technology, which occurred in April 2004;  Mr Thomas, by his actions, particularly by investing his own money, affirmed the possible success of the technology; and  the Fox investment was eventually sold on an arms' length basis for a substantial amount, albeit at a loss.  Firstly, Spigelman CJ noted that:  except in relation to the evidence of the second respondent and his confidence in the Fox technology, the appellants relied exclusively on their own evidence, which was rejected by McDougall J; and  McDougall J found each of the appellants was in a position of conflict of interest in that Mr Carr was both an investment adviser to, and an agent of, Cosmos, which was a clear conflict with his statutory and fiduciary obligations to REL with respect to the Fox transaction and Mr Purves also became a director of Cosmos which also created a relevant conflict.  Secondly, Spigelman CJ noted that the two reports prepared by the firm of chartered accountants engaged to review the financial statements of Fox could not be relied upon for any purpose and that there were significant doubts about several aspects of them.  Accordingly, Spigelman CJ rejected the evidence of Mr Carr and Mr Purves with respect to the deficiencies identified in these reports.  Thirdly, Spigelman CJ noted that McDougall J also held that, as at the date of the signing of the final agreement, there was no reason to believe that the technology would be developed and marketable before the time that REL's cash investment would be exhausted and that this was another example of why the Fox transaction was, from REL's perspective, 'improvident'.    Accordingly, Spigelman CJ noted that no basis was advanced in the appellants' submissions with respect to the impropriety of the motives of each appellant or to challenge the findings of McDougall J that:  the Fox transaction was not undertaken in good faith and for a proper purpose within the meaning of section 181 of the Corporations Act; or  the appellants improperly used their position to gain an advantage for themselves or for Cosmos within the meaning of section 182 of the Corporations Act.  Given the findings of McDougall J, Spigelman CJ concluded that exoneration under section 1318 of the Corporations Act should not be granted.    **(iii) Asia Iron proceeds**   The appellants contended in their written submissions that:  no loss was caused to REL, because REL would be liquidated and its creditors paid and, accordingly, the only consequence was that monies would have been distributed to shareholders sooner than would otherwise have been the case;  McDougall J erred in finding that the distribution to shareholders had the effect of making REL insolvent;  McDougall J erred in refusing the application of the appellants to agitate an issue of causation with respect to the alleged loss; and  if there was any loss, REL acted unreasonably in not seeking to recover payments from shareholders and the appellants should not be held liable for the amounts paid to shareholders.  The appellants also submitted that they should be exonerated under section 1318 of the Corporations Act on the basis that:  they were innocent of any knowing breach of the law, believing on reasonable grounds they were giving effect to the lawful wishes of shareholders;  there was no prejudice to REL because it was 'in winding up mode and the surplus money available on payment of creditors will be distributed to shareholders who will therefore be paid the same money twice'; and  there was no prejudice to any previous creditors because REL was solvent at the time the distributions were made.  Spigleman CJ rejected the appellants' submissions based on the following findings of McDougall J inter alia:  the payments could only be justified if they were a dividend or a return of capital.  The payments were neither and accordingly they were not lawful;  the administrator's report provided evidence that the payments did cause REL's insolvency;  there was no objection to McDougall J's reliance on the reasoning of Giles J in *Segenhoe Ltd v Akins* (1990) 29 NSWLR 569 with respect to the causation of loss;  there was no evidence that REL would be liquidated; and  the appellants' had not acted honestly and accordingly could not be exonerated under section 1318.  **(iv) Litigation expenses**   The appellants submitted that McDougall J's finding was based on the proposition that the issue of shares in REL to Cosmos was a sham and that if it was established that the transaction was not a sham then the basis of McDougall J's findings 'falls away'.  However, Spigelman CJ held that the submission was wrong.  McDougall J was not using the word 'sham' in the technical sense for which the appellants contended.  There was no other challenge to any of McDougall J's findings in this respect, nor to the causal link his Honour identified between the wrongful conduct involved in distributing the Asia Iron share sale proceeds and the expenditure incurred with respect to the administration.    **(v) Contribution by Mr Thomas**   Spigelman CJ found that the appellants' case for contribution by Mr Thomas should be rejected for three alternative reasons:  the appellants had not established that Mr Thomas breached his duties to REL;  the appellants had not established that any breach of duty by Mr Thomas caused a loss to REL; and  it would, in all the circumstances, be inequitable to make any such order.  With respect to breach of duty, the case run by the appellants at trial was not primarily directed to establishing a breach of duty by Mr Thomas but rather to establishing their own innocence of any breach of duty.  Accordingly McDougall J was not required to make detailed findings of fact that would ordinarily be required in order to establish a breach of duty on the part of Mr Thomas himself and the appellants were reliant on findings made in relation to their own conduct in order to establish that Mr Thomas breached his duties to REL.  Although Mr Thomas did not require a detailed assessment of the technology, its prospects and the timing of its delivery, Spigelman CJ was not, in all of the circumstances, prepared to hold that he was in breach of his obligation of care and diligence under section 180.    Alternatively, the appellants did not make any submissions to the court as to how it could be said that Mr Thomas' breach of duty, if any, caused any loss, in the sense of making a material contribution to the decision to invest.  By reason of the determination of the majority of the board of directors to invest in the Fox transaction there was no reason to believe that if Mr Thomas opposed the transaction there would have been any effect on the decision.    Finally, the appellants sought an order by way of equitable contribution from Mr Thomas.  Noting the well established equitable maxim that 'he who comes to equity must come with clean hands', Spigelman CJ found that unlike the appellants Mr Thomas was not in a position of conflict of interest and there were no findings in relation to Mr Thomas of the same character as the findings in relation to the appellants.  The appellants were plainly motivated by self-interest and their actions were marked by conspicuous dishonesty, having regard in particular to their conflicts of duty (or duty and interest).  Accordingly Spigelman CJ considered that the court should, even if an order for contribution was otherwise available, decline to make any such order in the exercise of its discretion.  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