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We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | |  | |      |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%231) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1 APRA releases consolidated prudential standards**  On 12 September 2011, the Australian Prudential Regulation Authority (APRA) released in final form four prudential standards on governance, fitness and propriety, outsourcing and business continuity management that will consolidate and replace 12 existing standards across the authorised deposit-taking (ADI), general insurance and life insurance industries.  The consolidated standards closely reflect the existing industry-specific prudential standards, with minor amendments to clarify requirements and ensure consistent application across industries.  The consolidated standards recognise that, on behavioural matters, the risks facing regulated institutions in each of these industries are very similar.  APRA has long sought to apply a consistent, harmonised approach to the setting of prudential requirements for regulated institutions, where appropriate. Harmonisation simplifies compliance, particularly for groups that operate across regulated industries. Stakeholder surveys conducted by APRA in 2009 and 2011 also highlighted the importance industry places on a harmonised prudential framework.  The consolidated standards will be effective from 1 July 2012 and can be found on the APRA website under the 'Prudential Framework' page for each industry:  [Authorised deposit-taking institutions](http://www.apra.gov.au/adi/PrudentialFramework/Pages/adi-prudential-standards-and-guidance-notes.aspx" \t "_new);  [General insurers](http://www.apra.gov.au/GI/Pages/General-Insurance-Prudential-Standards-and-Guidance-Notes.aspx" \t "_new); and  [Life companies](http://www.apra.gov.au/lifs/Pages/prudential-standards.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.2 UK Independent Commission on Banking: publication of final report**  On 12 September 2011, the UK Independent Commission on Banking published its Final Report. In June 2010, the Commission was asked to consider structural and related non-structural reforms to the UK banking sector to promote financial stability and competition, and to make recommendations to the Government.  The objectives of the recommendations in the report are stated as follows: "The recommendations in this report aim to create a more stable and competitive basis for UK banking in the longer term. That means much more than greater resilience against future financial crises and removing risks from banks to the public finances. It also means a banking system that is effective and efficient at providing the basic banking services of safeguarding retail deposits, operating secure payments systems, efficiently channelling savings to productive investments, and managing financial risk. To those ends there should be vigorous competition among banks to deliver the services required by well-informed customers".  A key focus of the report is on structural separation: "A number of UK banks combine domestic retail services with global wholesale and investment banking operations. Both sets of activities are economically valuable while both also entail risks - for example, relating to residential property values in the case of retail banking. Their unstructured combination does, however, give rise to public policy concerns, which structural reform proposals - notably forms of separation between retail banking and wholesale/investment banking - seek to address".  The Commission's recommendations are in three areas:  retail ring-fence;  loss-absorbency; and  competition.  It is stated in the report that the recommendations should apply to all UK banks and building societies.  **(a) Retail ring-fence**  The Commission recommends the implementation of a retail ring-fence. The purpose of the retail ring-fence is to isolate those banking activities where continuous provision of service is vital to the economy and to a bank's customers in order to ensure, first, that this provision is not threatened as a result of activities which are incidental to it and, second, that such provision can be maintained in the event of the bank's failure without government solvency support. A retail ring-fence should be designed to achieve the following objectives at the lowest possible cost to the economy:  make it easier to sort out both ring-fenced banks and non-ring-fenced banks which get into trouble, without the provision of taxpayer-funded solvency support;  insulate vital banking services on which households and SMEs depend from problems elsewhere in the financial system; and  curtail government guarantees, reducing the risk to the public finances and making it less likely that banks will run excessive risks in the first place.  The Commission outlines five principles to achieve ring-fencing and these include:  **Mandated services.** Only ring-fenced banks should be granted permission by the UK regulator to provide mandated services. Mandated services should be those banking services where:  (a) even a temporary interruption to the provision of service resulting from the failure of a bank has significant economic costs; and  (b) customers are not well equipped to plan for such an interruption.  Mandated services currently comprise the taking of deposits from, and the provision of overdrafts to, individuals and small and medium-sized organisations.  **Prohibited services.** Ring-fenced banks should be prohibited from providing certain services. Prohibited services should be those banking services which meet any of the following criteria:  (a) make it significantly harder and/or more costly to resolve the ring-fenced bank;  (b) directly increase the exposure of the ring-fenced bank to global financial markets;  (c) involve the ring-fenced bank taking risk and are not integral to the provision of payments services to customers, or the direct intermediation of funds between savers and borrowers within the non-financial sector; or  (d) in any other way threaten the objectives of the ring-fence.  As a result prohibited services should include (though need not be limited to):  (a) any service which is not provided to customers within the European Economic Area;  (b) any service which results in an exposure to a non-ring-fenced bank or a non-bank financial organisation, except those associated with the provision of payments services where the regulator has deemed this appropriate;  (c) any service which would result in a trading book asset;  (d) any service which would result in a requirement to hold regulatory capital against market risk;  (e) the purchase or origination of derivatives or other contracts which would result in a requirement to hold regulatory capital against counterparty credit risk; and  (f) services relating to secondary markets activity including the purchase of loans or securities.  Other principles to achieve ring-fencing are ancillary services, legal and operational links (ring-fenced banks should be separate legal entities) and economic links.  **(b) Loss-absorbency**  The Commission makes a series of recommendations on loss-absorbency which deal with the required ratio of risk-weighted assets to UK GDP; leverage ratio; depositor preference; primary loss-absorbing capacity; and resolution buffer.  **(c) Competition**  The Commission makes a series of recommendations on competition which deal with market structure; barriers to entry; switching of accounts; and transparency for banking products and the cost of bank services.  The final report is available on the [Independent Commission on Banking website](http://bankingcommission.independent.gov.uk/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.3 Code of private equity governance**  On 7 September 2011, the Australian Private Equity and Venture Capital Association (AVCAL) released its Governance Code for the private equity industry.  The Governance Code has been drafted with reference to other corporate governance codes around the world, including the ASX Corporate Governance Principles and Recommendations. AVCAL members will be obliged to implement the code in a similar manner to the way ASX listed companies are obliged to implement the ASX Corporate Governance Principles and Recommendations, in that, if they elect not to adopt any aspect of the code, they must be in a position to explain why not - the "if not, why not" approach.  The Governance Code contains 7 principles:  Principle 1: Promote and safeguard the interests of the fund's investors, recognising the diverse nature of those interests  Principle 2: Embed ethical, responsible and rigorous decision-making by general partners and portfolio company boards and management  Principle 3: Promote effective portfolio company board composition and structures  Principle 4: Respect the interests of stakeholders at both fund and portfolio company levels  Principle 5: Ensure the integrity and utility of reporting by portfolio companies to general partners, limited partners and other stakeholders (private disclosure)  Principle 6: Be transparent in dealings with other key stakeholders in portfolio companies (public disclosure)  Principle 7: Align financial reward with financial performance.  The Governance Code is available on the [AVCAL website](http://www.avcal.com.au/sites/default/files/uploads/news/AVCAL_PECofC_FA_ForWebDownload_LR.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.4 APRA discussion paper on implementation of Basel III capital reforms**  On 6 September 2011, the Australian Prudential Regulation Authority (APRA) released for consultation a discussion paper outlining its proposed implementation of the Basel III capital reforms in Australia. The discussion paper is a response to a package of measures released by the Basel Committee on Banking Supervision in December 2010, and revised in June 2011, to raise the level and quality of capital in the global banking system.  APRA has been actively involved in developing these global capital reforms and fully supports their implementation in Australia.  Accordingly, APRA proposes to broadly adopt the minimum Basel III requirements for the definition and measurement of capital for authorised deposit-taking institutions (ADIs).  Alignment will require APRA to amend its current policies in a number of areas, taking a stricter approach than at present in some but a less conservative approach in others.  In certain areas, however, there are strong in-principle reasons to continue APRA's current policies; these involve the treatment of deferred tax assets, investments in non-consolidated financial institutions and investments in commercial institutions.  APRA also proposes to introduce the new Basel III capital buffer regimes and the leverage ratio.  Following consideration of submissions received on the paper, APRA will undertake a second consultation in early 2012 on the detailed prudential and reporting requirements that will give effect to the Basel III capital reforms in Australia.  In APRA's view, ADIs in Australia are well placed to meet the new minimum capital requirements and APRA is therefore proposing to accelerate aspects of the Basel Committee's timetable.  It is proposing to require ADIs to meet the revised Basel III minimum capital ratios and regulatory adjustments in full from 1 January 2013, and to meet the capital conservation buffer in full from 1 January 2016.  APRA will adopt transitional arrangements for capital instruments that no longer qualify as Additional Tier 1 capital or Tier 2 capital.  For ADIs that wish to issue capital instruments prior to the new capital standards being finalised and implemented, APRA confirms that its existing guidance (as set out in its letters to ADIs of 17 September 2010 and 27 May 2011) is unaffected by these proposals and remains in force.  The discussion paper is available on the [APRA website](http://www.apra.gov.au/adi/Pages/adi-consultation-packages.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.5 Australian CEO pay study**  On 5 September 2011, the Australian Council of Superannuation Investors (ACSI) published a study of CEO pay in 2001 and 2010 for companies in the S&P/ASX 100.  The decade to 2010 saw median CEO fixed pay in the Top 100 ASX Australian companies increase 131% and the median bonus increase 190%, far outstripping the 31% increase in the S&P/ASX 100 over the 10 years to 30 June 2010.  The findings of the study also indicate that while CEO cash pay (the value of pay disclosed excluding share based payments) has fallen from the peak of 2008 it remains much higher than any year before 2007. This is despite the S&P/ASX 100 declining 30% over the three years to 30 June 2010.  Median cash pay for Top 100 CEOs in 2010 was $2.786 million, down 2.4% from 2009 and 4.1% from the record peak of $2.904 million in 2008. Despite this decline, median cash pay for a CEO of a Top 100 company in 2010 was 12% higher than any year prior to 2007.  **Selected median CEO pay data: 2001 and 2010**  **Year         Median CEO fixed pay                  Median CEO bonus                  Median CEO cash pay** 2010          $1.823 million                                  $1.122 million                              $2.786 million 2001          $781,000                                         $387,000                                     $1.423 million  For the 2010 year, median CEO pay in the S&P/ASX 100 was either flat or lower than 2009 as new and relatively low paid CEOs joined the sample, and bonuses fell after boards responded to market turmoil and poor economic conditions.  Median fixed pay in 2010 rose just under 1% to $1.823 million (average fixed pay fell), the median bonus fell 7% to $1.122 million (the average bonus also fell) although total disclosed pay, including the value of share grants disclosed under accounting standards, rose 8.6% to $4.388 million, the highest recorded in the history of the ACSI study (total average pay also rose).  According to ACSI, in the wake of the global financial crisis, there is an indication that regulatory and shareholder efforts to reduce the potential for executives to receive cash-based windfall gains, based on unsustainable performance, have been successful in many large Australian companies. ACSI has witnessed an increasing number of companies deferring significant proportions of annual bonuses into equity vesting over time, particularly in the financial sector.  The decline in bonus sizes masked an increase in the proportion of Top 100 CEOs receiving a bonus: in 2010, 90% of CEOs in office for a full financial year received a cash bonus up from 82% in 2009, the only year since 2004 when less than 85% of Top 100 CEOs have received a cash bonus. For 2010, incumbent CEO's in the study received higher average and median fixed pay, bonuses, cash pay and total pay relative to the sample as a whole. Incumbent median fixed pay was 4.1% higher than the general sample; median bonuses were 21.4% higher (excluding those who did not receive a bonus); median cash pay was 20.6% higher and median total disclosed pay among the incumbents was 13.4% higher than the general sample. As in past years, incumbents were also more likely to receive a bonus than non-incumbents with 93% of incumbents receiving a cash bonus compared with 82.6% of newcomers to the sample.  The study is available on the [ACSI website](http://www.acsi.org.au/ceo-pay-in-the-top-100-companies/ceo-pay-in-the-top-100-companies-2010.html" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.6 Report on executive pay and performance in the UK**  On 5 September 2011, the UK High Pay Commission released its latest report titled 'What are we paying for? Exploring executive pay and performance'. The report reveals that in the past 10 years, both monetary and share-based rewards for FTSE 350 directors have grown rapidly, outstripping company performance. The report also indicates that:  In 2002, for on-target performance, FTSE 100 lead executives received a bonus worth 48% of salary. In 2010, for the same level of performance, a FTSE 100 lead executive's bonus was worth 90% of salary.  The increase in bonuses has not come at the expense of absolute rises in salary with salaries increasing 63.9% over the last 10 years.  In 2002, the median maximum grant of shares that a FTSE 100 lead executive could be awarded was 100% of salary. In 2010, this has risen to 200% of salary.  The average value of Long Term Incentive Plan (LTIP) awards paid out to lead executives across the FTSE 350 has gone up over 700% since 2000.  The High Pay Commission is an independent inquiry into high pay and boardroom pay across the public and private sectors in the UK.  The report is available on the [High Commission website](http://highpaycommission.co.uk/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.7 UK Financial Reporting Council proposes increased transparency in corporate reporting**  On 1 September 2011, the UK Financial Reporting Council (FRC) published two reports which indicate that companies should improve the way they report to investors on the key strategic risks facing their businesses. The two reports are titled 'Effective Company Stewardship: Next Steps' and 'Boards and Risk'.  As a result of detailed consultations with companies, investors, auditors and other interested parties, the FRC proposes to ensure that company narrative reports focus primarily on strategic and major operational risks, rather than indiscriminate lists of risks that all companies face.  The FRC's proposals on risk are part of a wide-ranging set of measures aimed at improving the quality of company reporting, and increasing the information provided by audit committees and auditors about the work that they have done and the judgements or decisions they have made. These include:  a proposal that the audit committee's remit should be extended to include consideration of the whole annual report and to ensure the report, viewed as a whole, is fair and balanced;  amending auditing standards to ensure that auditors always report the outcome of their review of the whole annual report, rather than, as at present, only when they encounter information that is inconsistent with the information contained in the financial statements;  establishing a new Financial Reporting Laboratory to remove roadblocks to effective reporting and promote innovation; and  a proposal to require companies to put their audits out to tender at least once in every ten years, or explain why they have not done so.  These proposals form part of the FRC's response to the financial crisis of 2007 and 2008 and are the result of an extensive process of consultation with market participants since January this year.  'Effective Company Stewardship: Next Steps' is the FRC's response to over 100 submissions to its consultation published in January 2011. 'Boards and Risk' summarises detailed discussions the FRC has held over the past six months with directors and specialists from listed companies.  According to the FRC, a recurring theme in the responses to the earlier consultation paper has been the importance of providing greater insight into the key judgments that underlie financial statements. Under the proposals, in future audit committees will report the key judgments and decisions made in the course of preparing and finalising financial statements, and auditors will report whether their review of the annual report as a whole - and not just the financial statements - has revealed any information that is inaccurate, or any other material that is inconsistent with information they obtained in the course of their audit.  The 'Effective Company Stewardship' report is available [here](http://www.frc.org.uk/publications/pub2631.html" \t "_new) and the 'Boards and Risk' report is available [here](http://www.frc.org.uk/publications/pub2630.html" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.8 APRA releases new draft superannuation prudential practice guides**  On 31 August 2011, the Australian Prudential Regulation Authority (APRA) released a discussion paper and two draft prudential practice guides for superannuation trustees in the areas of contribution and benefit accrual standards, and payment standards. The draft guides do not introduce any new requirements. They update APRA's existing guidance, issued in 2006, to reflect legislative changes introduced since then, and adopt the prudential practice guide format that APRA uses for other supervised industries. The two guides are:  Superannuation Prudential Practice Guide Draft SPG 270 - Contribution and benefit accrual standards for regulated superannuation funds; and  Superannuation Prudential Practice Guide Draft SPG 280 - Payment standards for regulated superannuation funds and approved deposit funds.  APRA's discussion paper and the draft guides are available on the [APRA website](http://www.apra.gov.au/Super/Pages/August-2011-Super-PPGs-Consultation.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.9 US Securities and Exchange developments**  **(a) SEC seeks comment on use of derivatives by mutual funds and other investment companies**  On 31 August 2011, the United States Securities and Exchange Commission (SEC) voted unanimously to seek public comment on a wide range of issues raised by the use of derivatives by mutual funds and other investment companies regulated under the Investment Company Act. The SEC is seeking public input through a concept release, which is a Commission-approved document that poses an idea or ideas to the public to get their views.  The concept release is a continuation of the SEC's ongoing review of mutual funds' use of derivatives announced last year. The concept release requests public input on the issues that the SEC staff has been examining for potential ways to improve the regulation of mutual funds' use of derivatives.  The Concept Release asks for information on how different types of funds use various types of derivatives as well as the benefits, risks and costs of using derivatives, among other things. Additionally, it asks for comment on several specific issues under the Investment Company Act implicated by funds' use of derivatives, such as:  **Restrictions on leverage -** The Investment Company Act restricts the manner in which, and the extent to which, funds may incur indebtedness and may leverage their portfolios. The Concept Release discusses the treatment of derivatives under these restrictions. The Concept Release asks, among other things, how to measure the amount of leverage that a fund incurs when it invests in a derivative.  **Fund portfolio diversification -** The Investment Company Act does not require the portfolios of funds to be diversified, but does require them to disclose in their registration statements whether they are diversified or not. The Act also prohibits a fund from changing its classification from diversified to non-diversified without shareholder approval. The Concept Release asks, among other things, how a fund should value a derivative to determine the percentage of the fund's assets invested in a particular company for diversification purposes.  **Fund investments in certain securities-related issuers -** The Investment Company Act generally prohibits funds from acquiring any security issued by, or any other interest in, the business of a broker, dealer, underwriter or investment adviser. However, funds that meet certain conditions may acquire some securities issued by companies engaged in such business. The Concept Release asks, among other things, how investing in a derivative issued by a broker-dealer may be different from, or similar to, investing in the broker-dealer's stock or bond.  **Fund portfolio concentration -** The Investment Company Act does not prohibit funds from concentrating their investments in a particular industry, but does require funds to disclose their industry concentration policies in their registration statements. It also prohibits funds from deviating from those policies without shareholder approval. The Concept Release asks, among other things, how funds determine the industry or industries to which they may be exposed through a derivative investment.  **Valuation of fund assets -** The Investment Company Act specifies how funds must determine the value of their assets. The Concept Release asks, among other things, whether the Commission should issue guidance on how funds should value derivatives in their portfolios.  The concept release is available on the [SEC website](http://www.sec.gov/rules/concept/2011/ic-29776.pdf" \t "_new).  **(b) SEC seeks comment on asset-backed issuers and mortgage-related pools under Investment Company Act**  On 31 August 2011, the SEC voted unanimously to request public comment on the treatment of asset-backed issuers as well as real estate investment trusts (REITs) and other mortgage-related pools under the Investment Company Act. Through an advance notice of proposed rulemaking, the SEC is seeking public input on possible amendments the agency might consider proposing to Rule 3a-7, which excludes certain issuers of asset-backed securities from having to comply with the requirements of the Investment Company Act. An advance notice of proposed rulemaking provides the public the opportunity to comment even before the SEC develops a formal rule proposal.  Through a separate concept release, the SEC is seeking public comment on interpretations of a provision in the Investment Company Act, section 3(c)(5)(C), that may be used by some companies engaged in the business of acquiring mortgages and mortgage-related instruments such as some REITs.  The advance notice of proposed rulemaking is available [here](http://www.sec.gov/rules/concept/2011/ic-29779.pdf" \t "_new) and the concept release is available [here](http://www.sec.gov/rules/concept/2011/ic-29778.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.10 Reports on Australian hedge funds and banking industries**  On 30 August 2011, the Australian Trade Commission (Austrade) released two financial services publications relevant to Australia's financial services sector. The 'Australian Hedge Funds report' profiles Australia's hedge funds industry, one of the largest in the Asia-Pacific and comprising A$32.6 billion managed by more than 85 Australian investment managers.  The 'Australian Banking Industry report' shows that the financial sector is the largest contributor to Australia's national output, constituting around 11% of Australian output or A$135 billion of real gross value added in 2010. Total assets of Australia's banks, defined as Authorised Deposit-taking Institutions (ADIs), were A$2.7 trillion.  The reports are available on the [Austrade website](http://www.austrade.gov.au/Invest/Investor-Updates/2011/0830-Austrade-reports-on-hedge-funds-and-banking-industries-released" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.11 Financial advice reforms - draft legislation published**  On 29 August 2011, the Australian Assistant Treasurer and Minister for Financial Services and Superannuation, the Hon Bill Shorten MP, released the first tranche of draft legislation of the Future of Financial Advice (FOFA) reforms for public consultation.  **(a) Overview of reforms**  The first tranche of the draft Bill covers a number of key components of the FOFA reforms, including opt-in, the best interest duty and the increase in ASIC's powers to enforce the new elements of these reforms.  The second tranche, which will be released for public consultation shortly, will include the ban on conflicted remuneration (covering commissions and volume payments), the ban on 'soft dollar' benefits, the ban on asset-based fees (where there is gearing), and the definition of intra-fund advice.  The best interest duty requires financial planners and advisers to act in the best interests of the client, and to give priority to the interests of the client in the event of conflict between the interests of the client and the interests of the individual providing the advice, or their employer.  The 'opt-in' measure requires a financial adviser or planner to send a renewal ('opt-in') notice every two years to new clients, as well as an annual fee disclosure statement to all clients. There will be significant flexibility in terms of how advisers are able to discharge the opt-in obligation. According to the Assistant Treasurer, the cost of opt-in is estimated to be around $11 per client. This includes set-up costs and the cost of chasing up clients who are charged on-going fees but who advisers may not be in regular contact with.  The extension of ASIC's powers will give the regulator the capacity to act at an earlier stage if it has concerns about individuals or a licensee. For example, it enables the Commission to ban a person who is not of good fame and character or not adequately trained or competent to provide financial services (in essence they are not a fit and proper person).  The ban on risk insurance commissions will apply to commissions on group life insurance in all superannuation products, and to commissions on any life insurance policies in a default or MySuper product from 1 July 2013.  The ban on conflicted remuneration (including the ban on commissions) will not apply to existing contractual rights of an adviser to receive ongoing product commissions. This means that, in relation to trail commissions on individual products or accounts, any existing contract where the adviser has a right to receive a trail commission will continue after 1 July 2012, or in the case of certain risk insurance policies in superannuation, 1 July 2013.  Treasury will release a public consultation paper by the end of the year on restricting the term 'financial planner' in the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  **(b) Further details of measures contained in the draft Bill**  **(i) Best interest obligation**  The draft Bill proposes to require a person when providing personal advice to a retail client to act in the best interests of the client, and to give priority to the interests of the client in the event of conflict between the interests of the client and the interests of the individual providing the advice, the licensee and the authorised representative (where different).  The principle guiding the application of the best interests obligations is that the objectives, financial situation and needs of the client must be the paramount consideration when providing advice. The duty includes steps that advisers must follow in acting in the best interests of the client. The penalty for breaches of the obligations will rest with the authorised representative or licensee with a maximum penalty of $250,000 for individuals and $1 million of corporate entities.  Amendments are also made to the existing requirements in the Corporations Act to have a reasonable basis for advice and to warn clients in particular situations. These amendments are necessary to make these existing requirements consistent with the proposed best interest obligations. The amendments include de-criminalising these requirements, so they have the same penalty as the best interest obligations.  The draft Bill also includes an obligation on licensees to take reasonable steps to ensure their representatives' compliance with the best interests obligations. Further, there is an exemption created for authorised representatives, so they do not breach the obligations in situations where the breach resulted from reasonable reliance by the authorised representative on information or material provided by the licensee.  **(ii) Opt-in**  Under the final formulation of the compulsory renewal requirement, if an adviser is to charge an ongoing fee to a retail client, the adviser must provide a renewal ('opt-in') notice every two years to the client, as well as an annual fee disclosure statement including the dollar amount of fees. The opt-in will apply to new clients from 1 July 2012.  There will be significant flexibility in terms of how advisers are able to discharge the opt-in obligation. One way for an adviser to renew their services, would be to raise the matter in a face to face meeting. Many advice practices already use this method.  Those advisers who charge on-going fees but do not have regular face to face meetings with their clients can use electronic channels such as phone or internet and could potentially use a record of advice to record the renewal. For example, the client could fill a short form online and clicking a "send" button (that sends the email).  If the client does not renew the adviser's services by 'opting in' to the renewal notice, they are assumed to have opted out and an ongoing advice fee can no longer be charged. The client is also entitled to recoup any ongoing fees that are charged in the event that the adviser fails to send either a fee disclosure or renewal notice. Only those advisers intending to charge ongoing advice fees to retail clients need to provide the notices.  There will also be flexibility in how advisers construct the disclosure and renewal notices, and the method by which clients can opt-in. For example, the fee disclosure statement is not intended to be complex or lengthy and could be as simple as one page.  Where an adviser continues to charge an ongoing fee after a fee arrangement terminates as a result of the renewal notice obligation (either after a client chooses not to renew, or does not respond to the renewal notice), they will be subject to a civil penalty. Because a breach of opt-in is likely to be relatively less serious than, for example, a breach of the best interests duty, it is subject to a lower maximum penalty ($50,000 for an individual and $250,000 for a body corporate) and would be proportionate (to the extent any action is taken at all). ASIC would have the ability to look at the gravity of the breach.  **(iii) Enhancements to ASIC's powers**  The draft Bill contains provisions to enhance the ability of the Australian Securities and Investments Commission (ASIC) to supervise the financial services industry through changes to its licensing and banning powers. These amendments include:  a change to the licensing threshold so that ASIC can refuse or cancel/suspend a licence where a person is likely to contravene its obligations. This sets a higher standard than the current threshold which is that ASIC can refuse or cancel/suspend a licence where a person will not comply with its obligations;  an extension to the statutory tests so that ASIC can ban a person who is not of good fame and character or not adequately trained or competent to provide financial services (in essence they are not a fit and proper person);  a change to the banning threshold so that ASIC can ban a person if they are likely to contravene a financial services law. This sets a higher standard than the current threshold which is that ASIC can ban a person if they will not comply with a financial services law; and  clarification that ASIC can ban a person who is involved, or is likely to be involved, in a contravention of obligations by another person.  **(c) Clarification of other FOFA elements**  **(i) Treatment of insurance commissions**  In April 2011, Minister Shorten announced the government would ban up-front and trailing commissions and like payments for both individual and group risk (life) insurance within superannuation from 1 July 2013. The ban would not extend to risk insurance outside of superannuation.  Following extensive consultation and feedback from industry since this announcement, the government has decided to modify the final position such that the ban will apply to commissions on group life insurance in all superannuation products (including both Default/MySuper products and Choice products) and to commissions on any life insurance policies in a Default/MySuper product from 1 July 2013.  This means that commissions on individual life insurance policies within superannuation would only be allowable on Self Managed Superannuation Funds and Choice products.  By 1 July 2013, the industry will be required to unbundle disclosure so the dollar and percentage value of commissions are disclosed for all new and renewed policies. This will enable customers to see the impact of commissions on their premiums.  A claw-back provision enables life insurance companies to recover some or all of the commission paid if a policy turns over early. The government will work with industry and consumer groups to introduce uniform "claw-back" provisions to remove the incentive for some advisers to shop around for the most generous claw-back arrangements.  High upfront commissions have the potential to increase churn. Level commissions on replacement polices are an effective way of addressing this issue. The government will work with industry and consumer groups on the most effective way of implementing this reform.  Conflicted remuneration, including the treatment of life insurance commissions, will be covered in the second tranche of FOFA legislation.  **(ii) Extension of ban on soft dollar benefits**  Advisers should not accept benefits that have the potential to influence their advice, including overseas trips or expensive business equipment. As part of the proposed reforms, the government has announced an extension of the ban on soft dollar benefits to include non investment linked life insurance outside of superannuation (but not general insurance).  The April 2011 announcement stated that the ban would apply to the same products as the broader ban on conflicted remuneration. This meant the ban would apply to retail investment financial products and life insurance within superannuation, but did not apply to risk insurance outside of superannuation (including both life and general insurance).  Following further consultation, the government has decided the ban on soft dollar benefits will apply more broadly to include non investment linked life insurance outside of superannuation (but not general insurance). This would mean that an adviser could not accept a soft dollar benefit unless it explicitly relates to a general insurance product, or is otherwise permissible according to legislation and/or regulations.  The bans on conflicted remuneration, including the ban on soft dollar benefits, are expected to be covered in the second tranche of FOFA legislation.  **(iii) Application of the reforms to stockbrokers**  The core activities of the stockbroking industry will not be unduly impacted by the FOFA reforms.  The Assistant Treasurer clarified that there will be a carve-out to allow "stamping fees" or similar payments relating to capital raising in order to preserve an important channel for companies to continue accessing the retail investor market in order to raise capital.  The remuneration of brokers employed by broking firms will not be unfairly impacted so that employee brokers can continue to be remunerated on the brokerage they generate, including where their remuneration is set as a percentage share of the firm's income from broking fees.  The Assistant Treasurer confirmed that other aspects of the reforms, including the obligation to act in the best interests of clients, would have full application to brokers where they provide financial advice to retail clients.  **(iv) Grandfathering of existing arrangements**  Following legal advice from the Australian Government Solicitor, the government has determined that the ban on conflicted remuneration (including the ban on commissions) will not apply to existing contractual rights of an adviser to receive ongoing product commissions.  This means that, in relation to trail commissions on individual products or accounts, any existing contract where the adviser has a right to receive a trail commission will continue after 1 July 2012, or in the case of certain risk insurance policies in superannuation, 1 July 2013. This means that trail commissions will continue to be paid in these circumstances.  However, it is proposed that the ban on conflicted remuneration (including volume payments) would have some application to existing trail arrangements from platform operators to licensees or dealer groups. The reforms will prohibit future payments to licensees (or their representatives) in respect of new investments through a platform, but will grandfather future payments to licensees (or their representatives) in respect of investments in a platform accumulated prior to 1 July 2012. In short, this means that the level of volume payments from platform providers to dealer groups will 'crystallise', and should not increase in size after the commencement of the reforms on 1 July 2012.  In relation to the ongoing fee (or 'opt-in') arrangements, this measure will apply prospectively to new arrangements with new clients entered into after 1 July 2012. This means that opt-in will not apply at all to existing clients.  The best interest duty will have full application to anyone providing personal financial advice to retail clients from 1 July 2012.  **(v) Restriction of use of the term 'financial planner'**  Treasury will release a public consultation paper by the end of the year on restricting the term 'financial planner'. This is consistent with Minister Shorten's announcement in April 2011 that Treasury will provide the government with a recommendation as to whether the term 'financial planner/adviser' should be defined in the Corporations Act and its use restricted.  The draft legislation is available on the [Treasury website](http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=home.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.12 Proposed changes to market supervision fees**  On 26 August 2011, the Australian Assistant Treasurer released a consultation paper on a proposed market supervision fee methodology and cost recovery arrangements for the recovery of funding provided to the Australian Securities and Investments Commission (ASIC) to perform market supervision functions in a competitive multi-operator market environment. The proposed cost recovery arrangements are intended to replace the current interim cost recovery arrangements from 1 January 2012.  The paper canvasses a proposed cost recovery fee model for cash equities markets based on both trades and messages. Individual market operators and participants such as stockbrokers, will pay a proportional charge based on the number of trades and messages reported from them to the ASIC IT surveillance system. The proposal contemplates that market participants will also be charged a quarterly market supervision fee.  The proposed cost recover model maintains the current fee arrangements for small financial markets. Futures markets will be billed using the same model as before, although the fee will be slightly increased as it is not anticipated that funding will be available from excess compensation funds in future cost recovery periods.  The proposed cost recovery fee arrangements are in line with the government's Cost Recovery Guidelines which seek, through charging a fee on both market operators and participants, to enable the government to achieve a more efficient and equitable allocation of ASIC's market supervision cost burden across industry.  Amendments to the [Corporations (Fees) Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56483" \t "Default) to allow fees to be charged to market participants, in addition to market operators, were introduced into the Parliament on 18 August 2011.  Details of the final cost recovery arrangements will be prescribed in the [Corporations (Fees) Regulations 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56762" \t "Default), and will be released for consultation in the coming months.  Industry feedback to this paper will inform details of the proposed cost recovery arrangements and development of the draft Fees Regulation.  The consultation paper is available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2138" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.13 Parliamentary Committee report on oversight of ASIC**  On 25 August 2011, the Parliamentary Joint Committee on Corporations and Financial Services published its latest report on oversight of ASIC. The matters dealt with in the report include ASIC's strategic framework, ASIC's supervision of the stock market, ASIC's coercive powers, Australian financial services licences, and freezing of investors' funds.  The report is available on the [Committee's website](http://www.aph.gov.au/Senate/committee/corporations_ctte/asic/index.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.14 Managed funds industry report**  On 25 August 2011, the Australian Bureau of Statistics (ABS) published Release No 5655.0 - Managed Funds, Australia June 2011. As at 30 June 2011 the managed funds industry had $1,824.3b funds under management. The main valuation effects that occurred during the June quarter 2011 were as follows: the S&P/ASX 200 decreased 4.8%, the price of foreign shares (represented by the MSCI World Index) decreased 0.3% and the Australian dollar appreciated 4.3% against the US dollar.  The Release is available on the [ABS website](http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyReleaseDate/137177D6D38A87D4CA25761E00246F2B?OpenDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.15 IOSCO-CPSS report on requirements for OTC derivatives data reporting and aggregation**  On 24 August 2011, the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commission (IOSCO) released for comment a report on the OTC derivatives data that should be collected, stored and disseminated by trade repositories (TRs).  The committees support the view that TRs, by collecting such data centrally, would provide the authorities and the public with better and timely information. This would make markets more transparent, help to prevent market abuse, and promote financial stability.  The proposed requirements and data formats will apply to both market participants reporting to TRs and to TRs reporting to the public and to regulators. The report also finds that certain information currently not supported by TRs would be helpful in assessing systemic risk and financial stability, and discusses options for bridging these gaps.  Issues relating to data access for the authorities and reporting entities are discussed, including methods and tools that could provide the authorities with better access to data. Public dissemination of data, it is noted, promotes the understanding of OTC derivatives markets by all stakeholders, underpins investor protection, and facilitates the exercise of market discipline.  The report also covers the mechanisms and tools that the authorities will need to aggregate OTC derivatives data. It advocates a system of standard legal entity identifiers (LEIs) as an essential tool for aggregation of such data. It further recommends that TRs actively participate in the LEI's development and use the system once it becomes available. As the implementation of a universal LEI will require international cooperation, it is noted that further international consultation would be beneficial.  Finally, the report recommends that CPSS-IOSCO or the FSB make a public statement calling for timely industry-led development, in consultation with the authorities, of a standard classification system for OTC derivatives products.  The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD356.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.16 Regulation of companies - extension of the referral of corporations power**  The existing regulation of companies in Australia depends partly on the states referring their powers in relation to aspects of the regulation of companies to the Commonwealth. On 24 August 2011, on behalf of the Legislative and Governance Forum for Corporations (meeting as the Ministerial Council for Corporations), the Honourable David Bradbury MP, Parliamentary Secretary to the Treasurer and Chairman of the Ministerial Council, announced the further extension of the referral of corporations power.  The current arrangements commenced in 2006. The agreement announced on 24 August 2011 extends these arrangements until 2016.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.17 European Securities and Markets Authority consultation paper on supervision of non-European alternative investment fund managers**  On 23 August 2011, the European Securities and Markets Authority (ESMA) published a consultation paper setting out its proposals for the detailed rules on supervision and third country entities underlying the Alternative Investment Fund Managers Directive (AIFMD). These rules reflect the global nature of the alternative investment management industry and the need to put in place a framework for entities outside the EU.  The proposals published in ESMA's consultation paper cover three broad areas.  **(a) Supervisory co-operation and exchange of information**  With a view to ensuring the smooth functioning of the new requirements, the AIFMD puts in place an extensive framework regarding supervisory co-operation and exchange of information. ESMA's draft advice focuses on the relationships between EU competent authorities and third country authorities. ESMA envisages that the arrangements should take the form of written agreements allowing for exchange of information for both supervisory and enforcement purposes. The agreements should also impose a duty on the third country authority to assist the relevant EU authority where it is necessary to enforce EU or national legislation. Finally, ESMA considers it important that the arrangement make provision for exchange of information for the purposes of systemic risk oversight.  **(b) Delegation of portfolio or risk management functions to third country entities**  This part of the advice sets out ESMA's proposals on the additional requirements to be applied when alternative investment fund managers delegate the portfolio or risk management functions to an undertaking in a third country. The proposals focus on the content of the written agreement to be put in place with the competent authority of the third country, which under ESMA's proposals would have to allow for access to information, the possibility of on-site inspections of the entity to which functions are delegated and the carrying out of enforcement actions in the case of a breach of the regulations.  **(c) Assessment of equivalence of third country depositary frameworks**  Under the AIFMD, the depositary of the fund may be established in a third country subject to certain conditions. In this section of the advice, ESMA sets out its proposals on the elements to be taken into account when assessing whether the prudential regulation and supervision applicable to a depositary established in a third country:  has the same effect as the provisions of the AIFMD; and  can be considered as effectively enforced.  ESMA has identified a number of criteria for this purpose, such as the independence of the relevant authority, the requirements on eligibility of entities wishing to act as depositary, equivalence of capital requirements and the existence of sanctions in the case of violations.  Concerning the arrangements to be put in place with third country authorities in general, ESMA notes its preference for a single agreement to be negotiated by ESMA in each case in order to ensure consistency and avoid a proliferation of bilateral agreements. ESMA has also identified two documents produced by the International Organization of Securities Commissions as benchmarks for the written agreements.  The consultation paper is available on the [ESMA website](http://www.esma.europa.eu/popup2.php?id=7702" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.18 Report on Australian and New Zealand senior executive and director remuneration**  On 22 August 2011, Egan Associates published the "Key Management Personnel Report" which examines the remuneration received by the chairs, non-executive directors, chief executive officers, chief financial officers and other key management personnel for the top 100 Australian companies by market capitalisation, total assets, revenue and operating profit, as well as the NZX 50.  The report  provides information on three key elements of annual remuneration which is the fixed remuneration (including salary, superannuation, employee benefits and the grossed up cost of fringe benefits tax), the payment of annual incentives in the form of cash, and earned annual remuneration which is a combination of the fixed remuneration, the cash based annual incentive and any deferred element of an annual incentive where the award has been earned but deferred for a period of up to three years. However, the report does not include data on equity based long term incentives.  In relation to the CEO, the report indicates that the median remuneration totals $2.354 million which includes fixed remuneration of $1.421 million and cash short term incentives of $779,000.  The report is available on the [Egan Associates website](http://eganassociates.com.au/Default.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.19 PCAOB issues concept release on auditor independence and audit firm rotation**  On 16 August 2011, the US Public Company Accounting Oversight Board issued a concept release to solicit public comment on ways that auditor independence, objectivity and professional scepticism can be enhanced, including through mandatory rotation of audit firms.  Mandatory audit firm rotation would limit the number of consecutive years for which a registered public accounting firm could serve as the auditor of a public company.  Audit firm rotation has been discussed at various times since the 1970s. The concept release notes that proponents of rotation believe that setting a term limit on the audit relationship could free the auditor, to a significant degree, from the effects of client pressure and offer an opportunity for a fresh look at the company's financial reporting.  The concept release also notes that opponents have expressed concerns about the costs of changing auditors and believe that audit quality may suffer in the early years of an engagement and that rotation could exacerbate this phenomenon.  The concept release invites responses to specific questions, including, for example, whether the Board should consider a rotation requirement only for audit tenures of more than 10 years or only for the largest issuer audits.  The concept release also seeks comment on whether there are other measures that could meaningfully enhance auditor independence, objectivity and professional scepticism.  The concept release is available on the [PCAOB website](http://pcaobus.org/Rules/Rulemaking/Pages/Docket037.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.20 OECD report on bank competition and financial stability**  The Organisation for Economic Co-operation and Development (OECD) has published a report that examines the interplay between banking competition and financial stability, taking into account the experiences of the recent global crisis and the policy response to date.  Policy makers are faced with striking a balance between sometimes conflicting objectives. Banks need to have sufficient capital and be large and diversified enough to absorb major shocks, whilst remaining sufficiently competitive to provide consumers with reasonably-priced services. According to the report, pre-crisis financial deregulation allowed banks to change their business models in response to competition in a way that has proven negative for financial stability.  The policy response to the global financial crisis to date has not adequately addressed some of the fundamental problems affecting the banking sector and thus the risks to financial stability.  The report is in three parts.  **Part 1: Competition in retail banking and financial stability**  Studies exploring the complex interactions between competition and stability in retail and commercial banking come to the ambiguous conclusion that competition can be both good and bad for stability. Policy measures that strike an acceptable balance remain elusive.  **Part 2: Competition in derivative markets and financial stability**  Today, the large banks that encompass the global derivatives business combine retail and commercial banking with investment bank activities. Product innovation utilising derivatives and high-risk trades has become a key driver of profitability within banks but this leaves them exposed to large risks which in turn pose a threat to global financial stability. Policy makers urgently need to address this issue.  **Part 3: Bank competition and government guarantees**  Using government guarantees to avoid systemic fallout from the crisis distorted competition between banks and further reinforced the perception that systematically important banks enjoy implicit guarantees. To reduce this perception, policy reforms must include provisions for the orderly failure of financial institutions, whatever their size, level of interconnectivity and complexity.  The report is available on the [OECD website](http://www.oecd.org/dataoecd/14/49/48501035.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1)  **1.21 US securities class action filings - 2011 mid-year assessment**  US Federal securities class action activity decreased in the first six months of 2011, according to 'Securities Class Action Filings - 2011 Mid-Year Assessment', a semi-annual report prepared by the Stanford Law School Securities Class Action Clearinghouse in cooperation with Cornerstone Research. A total of 94 federal securities fraud class actions were filed in the first half of the year, representing a 9.6% decrease from the 104 filings in the second half of 2010. This decline includes a drop in credit-crisis filings; there were just two such filings in the first half of 2011.  Twenty-four filings related to Chinese reverse mergers accounted for 25.5% of all filings in the first half of 2011. There were 21 traditional merger and acquisition (M&A) filings in the first half of 2011, which constituted 22.3% of all filings. Taken together, Chinese reverse mergers and traditional M&A filings constituted 47.9% of all securities fraud class action complaints filed during the last six months, up from 32.7% in the last six months of 2010.  Only 8.5% of filings named companies in the S&P 500 Index, down from 15.4% in the second half of 2010. This decrease in the proportion of filings involving S&P 500 companies can be partially explained by an increase in the share of non traditional filings, such as Chinese reverse merger and M&A cases, which predominantly involved smaller firms that were not part of the S&P 500 Index. Overall, eight companies, or approximately one out of every 63 companies in the S&P 500 Index at the beginning of 2011, were defendants in a class action filed in the first half of 2011, compared with about one out of every 19 S&P 500 companies in the full year of 2010. Litigation activity in the S&P 500 Financials and Health Care sectors decreased substantially. The Heat Maps of S&P 500 Securities LitigationT show that only one company in the S&P 500 Financials sector, representing 1.2% of the sector, was named as a defendant in a class action in the first half of 2011, compared with the historical average of 11.7% of Financials sector firms for the 11 years ending December 2010. There were no filings against companies in the S&P 500 Health Care sector in the first half of 2011, reversing the uptick in Health Care sector filings observed in 2010.  The losses in market capitalization associated with the announcements ending the class periods have remained low. Although the total Disclosure Dollar Loss (DDL) of US$48 billion in the first half of 2011 represented a 152.6% increase from the second half of 2010, the market capitalization losses remained well below the historical average of US$64 billion observed between 1997 and 2010. There were two mega DDL filings - filings with more than US$5 billion in end-of-class market capitalization losses - which together represented 47.6% of the DDL Index in the first half of 2011. The market capitalization declines over the entire class periods also remained low in 2011. The total Maximum Dollar Loss (MDL) in the first half of 2011 was $256 billion, a 98.4% increase from the second half of 2010 but still well below the historical average of US$340 billion. Five mega MDL filings, each with more than $10 billion in market capitalization losses, represented 84.4% of the MDL Index in the last six months. The low DDL and MDL levels in the first half of 2011 are consistent with the relatively low number of filings in the recent six-month periods, the high incidence of class actions against Chinese companies that tend to have small market capitalizations, and the continued trend of filings involving M&A activity and private securities.  The report is available on the [Cornerstone website](http://www.cornerstone.com/files/News/cfd65c9e-b053-46b3-a7bf-460709d20109/Presentation/NewsAttachment/96e99171-1960-4434-abdd-3ceff651df19/Cornerstone_Research_Filings_2011_Mid_Year_Assessment.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1 Report on phase one review of financial advice industry practice**  On 13 September 2011, ASIC released a report on the information it received in 2010 from the top 20 financial services licensees on their practices: Report 251 'Review of financial advice industry practice'.  To help monitor the gatekeepers of the financial advice system and improve industry standards, ASIC requested information about the 20 largest Australian financial services licensees that provide financial product advice to retail clients. This covered licensee business models, training of advisers, monitoring and supervision of advisers, product and strategic advice and complaints handling and compensation. ASIC developed a set of risk indicators to assess the information gathered and identify policy and regulatory issues.  The report highlighted the following issues:  Licensee business models - licensees must ensure that they effectively manage conflicts of interest in their business models. Disclosure alone will not always satisfy a licensee's obligations and this needs constant oversight.  Training of advisers - licensees should continue to give training a high priority as this lessens the risk of poor advice being provided.  Monitoring and supervision of advisers - licensees must ensure their advisers comply with their stated procedures. Licensees must check references of new advisers to exclude 'bad apples'. Licensees must report breaches and demonstrate remediation plans are in place. Licensees should retain access to client records at all times.  Product and strategic advice - conflicts of interest need to be managed. It is important to educate clients about risk and return so that their expectations are more realistic.  Complaints handling and compensation - licensees must handle complaints well. Licensees must ensure that their compensation arrangements (including PI insurance) adequately cover all the products and services they advise upon.  ASIC will approach the 30 next largest AFS licensees that provide financial product advice to retail clients with a reduced and more targeted questionnaire, which has been informed by the results of the first questionnaire. It is expected this second phase review will commence by the end of 2011. ASIC will not use its information-gathering powers to seek this information, unless requested to do so by the licensee, as feedback from the first questionnaire indicated that most licensees are willing to participate voluntarily.  Report 251 is available on the [ASIC website](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Reports" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h2)  **2.2 ASIC's information-gathering powers**  On 2 September 2011, ASIC published Information Sheet 145 'ASIC's compulsory information-gathering powers', which reviews how and why ASIC gathers information and how it uses the information it gathers.  Information Sheet 145 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/ASIC%27s+compulsory+information-gathering+powers?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h2)  **2.3 Amended guidance on mortgage exit fees**  On 31 August 2011, ASIC released a new version of Regulatory Guide 220 'Early termination fees for residential loans: unconscionable fees and unfair contract terms'. The updated guidance takes into account the effect of the [National Consumer Credit Protection Regulations 2010](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=112653" \t "Default) which prohibit termination fees for residential loans, subject to some exceptions. The effect of the regulations on RG 220 is that the guidance in RG 220 is now only relevant to credit contracts for residential loans:  with early termination fees, that were entered into before 1 July 2011; or  that contain early termination fees which are not prohibited by the regulations (e.g. break fees).  The amendments to RG 220 do not represent substantive changes in ASIC's policy, rather they reflect a change in the scope of ASIC's guidance as a result of the regulations.  Regulatory Guide 220 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h2)  **2.4 Consultation paper and draft regulatory guide containing best practice guidance for the advertising of financial products and financial advice**  On 30 August 2011, ASIC released a consultation paper and draft regulatory guide containing best practice guidance for the advertising of financial products and financial advice. Consultation Paper 167 'Advertising financial products and advice services: Good practice guidance' contains real examples of where ASIC has raised concerns with promoters of financial products or services and as a result their advertisement has been changed.  The good practice guidance deals with matters such as nature of the product, returns, benefits and risks, warnings, disclaimers, qualifications and fine print, fees and costs, comparisons, past performance and forecasts, use of certain terms and phrases,  the advertisement's target audience, consistency with disclosure documents, photographs, diagrams, images and nature and scope of advice. The media-specific issues dealt with in the good practice guidance include mass media, audio advertisements, film and video advertisements, Internet advertising and outdoor advertising.  Consultation Paper 167 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h2)  **2.5 Consultation on consequential market integrity rules for ASX and Chi-X markets**  On 17 August 2011, ASIC released Consultation Paper 166 'Market integrity rules: non-AFS licence foreign participants and consequential amendments'. Consultation Paper 166 proposes market integrity rules for the ASX and Chi-X markets, and seeks views on:  certain minimum presence requirements for foreign participants not required to hold an Australian financial services (AFS) licence (non-AFS licence foreign participants) trading on the ASX and/ or Chi-X markets; and  minor consequential amendments to the ASIC Market Integrity Rules (ASX Market) 2010 and the ASIC Market Integrity Rules (Chi-X Australia Market) 2011, resulting from the introduction of the competition market integrity rules, in particular amendments relating to:                - restrictions on crossings and trading outside of normal trading hours during takeovers and buybacks to ensure that existing restrictions operate effectively;                - the prohibition on dealing during a trading suspension; and                - market participant restrictions relating to client instructions.  The need for consequential amendments as proposed in CP 166 was foreshadowed in the timetable issued by ASIC in March 2011 for the introduction of competition in market service.  The proposal on the minimum requirements for non-AFS licence foreign participants, for example foreign participants that trade as principal only, was previously consulted on for the Chi-X market in Consultation Paper 148 'Proposed market integrity rules: Chi-X market', in March 2011.  In April 2011, ASIC made market integrity rules to deal with the introduction of competition between exchange markets: see ASIC Market Integrity Rules (Competition in Exchange Markets) 2011. Participants in ASX and Chi-X markets need to comply with the market integrity rules for competition in exchange markets, and the rules for the ASX and Chi-X markets respectively.  The rules proposed in CP 166 amend the market integrity rules for the ASX and Chi-X markets to take effect from 31 October 2011. The proposed consequential amendments are intended to ensure that consistent terminology applies to the market integrity rules for the ASX and Chi-X markets and those rules made for competition in exchange markets.  Consultation Paper 166 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h2) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1 ASX Limited appoints new Managing Director and CEO**   On 26 August 2011, ASX Chairman David Gonski AC announced the appointment of Elmer Funke Kupper as ASX's new Managing Director and CEO. Mr Gonski welcomed Mr Funke Kupper to ASX, stating that:    "The ASX Board is delighted with Elmer's appointment and believes he is the right candidate to lead ASX into a new era. Elmer has enormous experience as a CEO of a major Australian listed company, and extensive involvement in the financial services industry as well as in industries that are highly regulated with important and diverse stakeholders. We also believe he has the personal qualities and vision to ensure that ASX continues to embrace and benefit from the dynamic developments occurring in financial markets, both in Australia and overseas."    Mr Funke Kupper is expected to begin at ASX on 6 October 2011.   This is the [media release](http://www.asxgroup.com.au/media/PDFs/asx_md_ceo_announcement.pdf" \t "_new) and the transcript of the [media briefing](http://www.asxgroup.com.au/media/PDFs/110830Elmer_Funke_Kupper_appointment_media_briefing_edited_transcript.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h3)  **3.2 ASX Limited Annual Report**   On 18 August 2011, ASX released its full-year result for the year ending 30 June 2011.  ASX Managing Director and CEO Robert Elstone said:   "The ASX Group of companies achieved sound financial, operational and compliance performance in FY11, a year dominated by geopolitical and natural disaster events of local, regional and global significance. While we were disappointed that the attempted combination with the Singapore Exchange did not proceed, ASX maintained its focus on preparing for competition and a multi-market environment. ASX is mindful of the technical, regulatory and operational challenges presented by the impending new market structure, and continues to develop solutions for participants, their clients and other market users. These include initiatives that allow participants to access liquidity and market information across multiple venues, not just from those venues operated by ASX.   "During the recent period of dramatic market volatility, driven by sovereign debt concerns in the US and Europe, ASX's systems and processes continued to provide consistent service availability for its many users. This consistency, coupled with the new product and service initiatives, demonstrate the resilience and versatility of the ASX Group - we are a business providing exchange services beyond traditional cash equity trade execution. This breadth is vital as Australia's market structure becomes more complex."   Here is the the [media release](http://www.asxgroup.com.au/media/PDFs/110818mrASXFY11Full-YearResultsMediaReleaseFinal.pdf" \t "_new); the [ASX Ltd Annual Report](http://www.asxgroup.com.au/media/PDFs/ASX_Limited_Annual_Report_2011.pdf" \t "_new); the transcript of the [media briefing](http://www.asxgroup.com.au/media/PDFs/110818Edited_Transcript_of_ASX_FY_2011_Media_Briefing_Final.pdf" \t "_new); and the transcript of the [analyst briefing](http://www.asxgroup.com.au/media/PDFs/110818Edited_Transcript_of_ASX_FY11_Analysts_QandA_Final.pdf" \t "_new); along with a presentation and the Appendix 4E Preliminary Final Report.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h3)  **3.3 ASX and Clearstream to develop collateral management system**   On 29 August 2011, ASX and Clearstream (part of the Deutsche Borse Group) announced the signing of a letter of intent to develop a new collateral management service for the Australian market. An automated, centralised collateral management service for the Australian market directly linked to CHESS and Austraclear will help ASX participants manage their short-term funding requirements, and their bilateral and central counterpark risk.   For more information about this new initiative, see the [media release](http://www.asxgroup.com.au/media/PDFs/110829mrASX_and_Clearstream_CMI_Final.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h3)  **3.4 ASX launches 'Options Ready' program**   On 30 August 2011, ASX launched 'ASX Options Ready', an education program designed for funds managers interested in trading equity options on ASX. This program will be delivered in two streams. The first stream, designed for super funds, focuses on the portfolio optimisation benefits that options can deliver, and provides an overview of the way that the ASX equity options market functions. The second stream, designed for managed funds, reviews popular trading strategies, provides details on the mechanics of dealing into the ASX equity options market, and explains the operation of Tailor Made Combinations.   More information about both streams is available on the [ASX website](http://www.asx.com.au/professionals/exchange-traded-options-institutional-investors.htm" \t "_new), as well as in the [media release](http://www.asxgroup.com.au/media/PDFs/110829mrOptions_Ready_final.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h3)  **3.5 PureMatch Rules and Procedures**   ASX intends to launch a new order book, PureMatch, on 28 November 2011, subject to regulatory approval. The proposed [Rules](http://www.asxgroup.com.au/media/PureMatch_Rules.pdf" \t "_new) and [Procedures](http://www.asxgroup.com.au/media/PureMatch_Procedures.pdf" \t "_new) have been made available for the information of Participants. Please note that the Rules are subject to Ministerial disallowance.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h3)  **3.6 Reports**   On 6 September 2011, ASX released:  the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/110906ASX_Group_Monthly_Activity_Report_-_Aug_2011_-_final.pdf" \t "_new);  the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2011/notice2011_163.pdf" \t "_new); and  the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/110906ASX_Compliance_Monthly_Activity_Report_August_2011.pdf" \t "_new)  for August 2011.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h3) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1 Foster's Group Limited - Panel declines to conduct proceedings**   On 8 September 2011, the Takeovers Panel announced that it has declined to conduct proceedings on an application dated 1 September 2011 from SABMiller Beverage Investments Pty Limited, a wholly owned subsidiary of SABMiller plc, in relation to the affairs of Foster's Group Limited.  On 17 August 2011, SABMiller announced that it intends to make a conditional off-market takeover offer for all the issued shares in Foster's.  The application related to the FY2011 full year results presentation lodged on ASX by Foster's on 23 August 2011. SABMiller's application raised issues about certain forward-looking statements (Financial Objectives Statements) and a pro forma net debt figure (Net Debt Statement) in the results presentation.  The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances in relation to the Financial Objectives Statements. The Panel had some concerns with the Net Debt Statement; however, these concerns were allayed by Foster's volunteering to make an announcement clarifying the basis for reaching a pro forma net debt figure. Accordingly, the Panel declined to conduct proceedings.   The reasons for the decision are available on the [Takeovers Panel website](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=reasons_for_decisions/2011/015.htm&pageID=&Year" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h4) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%237) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **5.1 Claim for legal professional privilege by receivers and managers of a company**   (By Laura Loftus, DLA Piper Australia)   Carey v Korda & Winterbottom (No 2) [2011] WASC 220, Supreme Court of Western Australia, Edelman J, 26 August 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/wa/WASC/2011/220.html](http://www.austlii.edu.au/au/cases/wa/WASC/2011/220.html" \t "_new)   **(a) Summary**   The case concerned a claim for legal professional privilege by the receivers and managers ('Receivers') of eight companies forming part of the Westpoint Group ('Companies').  The claim for privilege was asserted over two types of documents: bills of costs from a firm of solicitors and schedules of costs ('Recharge Schedules') incurred by the Receivers.     The Court held that the Receivers were entitled to assert privilege and that there was sufficient evidence to maintain the privilege.  Further, the Court determined that the privilege had not been waived and was not displaced by any statute or statutory policy.     **(b) Facts**   The first plaintiff was a director of seven of the eight Companies (all except Westpoint Management Limited) and was a member of one of them.  The second plaintiff was a member of Westpoint Management Limited.  The plaintiffs commenced proceedings on 30 August 2010 and Le Miere J ordered that there be a trial of seven issues.  One of those issues was whether any rights that the plaintiffs had to inspect records under section 290 and section 421(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Act') were subject to any proper claim for legal professional privilege by the Receivers.     Le Miere J held that the plaintiffs' right to inspect the financial records was subject to the issue of legal professional privilege but he did not determine whether privilege applied.  That question was determined in this proceeding.     The plaintiffs opposed the claim by the Receivers for legal professional privilege, and raised four issues:  Who was the client of the solicitors ('Solicitors') and therefore entitled to claim privilege?  Had the Receivers discharged their onus of showing that the information contained in the bills of costs and Recharge Schedules attracted a claim of privilege?  Was the privilege waived by the disclosure of the bills of costs and Recharge Schedules to the Companies?  Had the privilege been abrogated by statute?  **(c) Decision**    Edelman J considered each of the issues raised by the plaintiffs in turn.     **(i) Who was the party entitled to claim privilege?**   Edelman J confirmed that legal professional privilege resides with the client of the Solicitors.  The plaintiffs claimed that the Companies were the client and therefore that the Receivers had no right to assert privilege.     His Honour considered that there were four reasons why the Receivers received advice from the Solicitors in their capacity as receivers and not as general agents for the Company:  When the Receivers sought advice from the Solicitors concerning the exercise of any of these powers, that advice was given to the Receivers in their capacity as receivers and managers.  When the Solicitors provided the advice, they did so in circumstances where the Receivers has been threatened with litigation concerning their management of the Companies.  The Solicitors confirmed that Mr Zohar (one of the Receivers) instructed the firm 'to act on behalf of the Receivers ... and the Companies'.  The engagement letters were addressed to the Receivers personally.  **(ii) Had the Receivers discharged their onus of showing that the information contained in the bills of costs and Recharge Schedules attracted a claim of privilege?**   The Receivers asserted privilege over the entirety of the bills of costs (as redacted) and supporting narratives, in addition to identified entries in the Recharge Schedules where they claimed that those entries would disclose (directly or indirectly) the nature of privileged communications.     His Honour considered the general principle that solicitors' time sheets, memoranda of fees and costs agreements do not usually attract privilege, because the communication is not usually brought into existence for the dominant purpose of giving or obtaining legal advice or for use in existing or anticipated litigation.  However, Edelman J considered the situation to be different where a bill of costs or Recharge Schedule goes further than recording the costs incurred and instead discloses (through a recital or narrative) the nature of the legal advice provided or repeats the instructions given by a client.  The instructions given or the advice provided may have been brought about for the dominant purpose of obtaining legal advice or for use in existing or anticipated litigation.  If the court was to deny the privilege to the communication disclosed in the bill of costs, it would undermine the privilege.    In these proceedings, the material in the bill of costs that Edelman J considered attracted a claim of privilege was:  a summary which contained narrations of the work done by the Solicitors in relation to specific issues;  a detailed list of narrations for work done by individual legal practitioners and article clerks; and  similar narrations in invoices from counsel, mostly referrable to actual or threatened litigation.  The Recharge Schedules set out timesheet entries extracted from the time recording system used by the Receivers' firm.  The material in the Recharge Schedules that Edelman J considered attracted a claim of privilege included descriptions of oral or written communications between the Receivers and the Solicitors or counsel, or tasks undertaken by the Receivers, both of which disclosed the nature of the instructions or advice sought or given or in relation to anticipated, pending or actual litigation.   **(iii) Did the Receivers waive privilege by disclosing the bills of costs and the Recharge Schedules to the Companies?**    The plaintiffs submitted that the Receivers waived any privilege to which they were entitled by disclosing the bills of costs and the Recharge Schedules to the Companies.     His Honour confirmed that the appropriate test is whether the conduct of the Receivers was inconsistent with the maintenance of the confidentiality of the communication.  Edelman J did not consider the disclosure by the Receivers was inconsistent with the maintenance of the confidentiality of the privileged documents, because the disclosure by the Receivers was for a limited and particular purpose.  The purpose for disclosure to the Companies was to allocate the relevant costs and disbursements between the Companies, and to provide an explanation to the Companies of the purpose for which payment was required.     **(iv) Was the privilege abrogated by statute or policy?**    The plaintiffs submitted that the privilege had been abrogated by the Legal Practice Act and the Legal Profession Act.  The plaintiffs argued that because the Companies had paid the bills and were therefore 'parties charged' under the Legal Practice Act, the Companies had a right to require the Solicitors to tax their bills of costs.  If the bill of costs did not have sufficient material to enable the taxing officer to tax the bill, the taxing officer may order the solicitor to lodge a more detailed bill of costs.  The plaintiffs submitted that because the Companies had a right to demand that the bill of costs be taxed, the Legal Practice Act must have abrogated legal professional privilege.     Edelman J rejected this argument, determining that as a matter of construction, the Legal Practice Act and the Legal Profession Act do not abrogate privilege and further, that there are strong indications in those Acts that privilege should be maintained.     Further, Edelman J rejected any abrogation of privilege for any policy reasons in this context.  Accordingly, his Honour concluded that the Receivers could maintain the privilege and that it had not been waived or abrogated.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h5)  **5.2 Application by liquidators for directions pursuant to section 511 of the Corporations Act**    (By Sabrina Ng, Corrs Chambers Westgarth)   Saker, in the matter of Great Southern Managers Australia Ltd (receivers and managers appointed) (in liquidation) (No 2) [2011] FCA 958, Federal Court of Australia, McKerracher J, 23 August 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/958.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/958.html" \t "_new)    **(a) Summary**   This judgment involved an application for directions pursuant to section 511 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act) by the liquidators of Great Southern Managers Australia Ltd (Receivers and Managers Appointed) (in liquidation) (GSMA) as to whether funds in its control as responsible entity (RE) of various managed investment schemes (MIS) should be paid to the new RE.   The first issue for determination by the court was whether GSMA was entitled to an indemnity for funds that it had paid in for making distributions to members. That payment was required due to an inadvertent error that GSMA had made in an initial distribution to members.  The court decided in GSMA's favour on the basis that inadvertence did not amount to the dishonest or inequitable conduct required to disentitle a trustee of its right to an indemnity.   The second issue for determination was whether the new RE was entitled to set off against the amounts of the indemnity claimed, the total quantum of losses suffered by members of the MIS as a result of non-performance by GSMA of its management obligations at a later point in time.  The court declined to determine the issue on the basis that the new RE did not have an adequate opportunity to address GSMA's arguments on this issue.  The court foreshadowed the possibility that an application for directions may not be the appropriate forum for the question to be answered and that there are some questions for which the appropriate order may be that the claimant "proceed in the ordinary courts in the ordinary way for the determination of a dispute".   **(b) Facts**    GSMA is the wholly owned subsidiary of Great Southern Limited (Receivers and Managers Appointed) (in liquidation), which with its subsidiaries engaged in the promotion and conduct of a variety of agricultural MIS.   The liquidators of GSMA sought directions pursuant to section 511 of the Act as to whether it should release funds in accounts which were formerly under the control of GSMA in its capacity as the RE of various MIS to the new RE, Primary Securities Ltd (PSL).   There were two issues to be determined by the court:   **(i) Insurance**   GSMA received insurance proceeds for a fire which caused loss and damage to pine trees in a certain plantation.  GSMA erroneously distributed the first tranche of those proceeds only to the woodlot holders who were directly affected by the fire.  However, the constitution of the MIS required the insurance proceeds to be distributed amongst all members of the MIS.     GSMA received advice that it should contribute some of its own funds to enable a distribution to be made to those members who had not received distributions and recover the overpaid portions paid to those members directly affected by the fire.  It contributed those funds for distribution in 2005 and 2008. Some of those monies were recovered.   GSMA resisted the payment of the funds in the accounts to PSL on the basis that it had a right to indemnity or reimbursement for the funds that it had contributed for the distribution to members.   PSL argued that the expenditure was not reasonably, honestly or properly incurred by GSMA in its role as RE, due to its failure to properly familiarise itself with the constituting documents of the MIS.   **(ii) Set off**    PSL argued that it is otherwise entitled to set off against the amounts of the indemnity claimed, the total quantum of losses suffered by members of the MIS as a result of non-performance by GSMA from about May 2009 of maintenance and management services in relation to the MIS.    GSMA argued that there was neither the mutuality nor the "close connection" required to entitle a claim in set off.   **(c) Decision**    **(i) Insurance**   On the issue of insurance, McKerracher J accepted that the error in making payments to only the holders of the burnt woodlots was an honest one, and the conduct was not unreasonable, dishonest or improper.   His Honour found that there was no proper basis for drawing an inference other than that the conduct was as a result of a belief, arguably reasonable, that the payments should be made to those who had actually suffered the loss.   Having surveyed a number of cases on a trustee's entitlement to indemnification, his Honour was of the view that for GSMA to be disentitled to the indemnity, the conduct must have been dishonest or inequitable, and that it cannot be said that inadvertence would qualify.   His Honour was of the view that it would be inequitable for GSMA not to be indemnified in respect of the payment that it made from its own funds for distribution to members.   **(ii) Set off**    His Honour declined to decide whether PSL was entitled to the set off on the basis that PSL had not had sufficient opportunity to adequately respond to the detailed submissions put by the liquidators on the issue, and it was not possible to simply accept or reject those arguments.  His Honour made provision for PSL to file its arguments in response within 21 days, should it chose to do so.   His Honour also foreshadowed that it may be that the issue should not be determined as an application for directions and that the appropriate order may be that the liquidator "proceed in the ordinary courts in the ordinary way for the determination of a dispute".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h5)  **5.3 The circumstances giving rise to a reasonable suspicion of insolvency pursuant to section 588FG of the Corporations Act**   (Monali Pandey, Corrs Chambers Westgarth)   Chicago Boot Co P/L v Davies & McIntosh as Joint & Several Liquidators of Harris Scarfe Ltd [2011] SASCFC 92 (23 August 2011), Supreme Court of South Australia, Full Court, Nyland J, Anderson J, and White J, 23 August 2011    The full text of this judgment is available at:   [http://www.austlii.edu.au/au/cases/sa/SASCFC/2011/92.html](http://www.austlii.edu.au/au/cases/sa/SASCFC/2011/92.html" \t "_new)   **(a) Summary**   This case concerned an appeal by Chicago Boot Co P/L (Chicago Boot) against a decision at first instance that Chicago Boot had not made out a defence pursuant to section 588FG(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) with respect to six payments made by Harris Scarfe. Chicago Boot brought the appeal on a number of grounds, including that the trial judge had erred in considering the circumstances that give rise to a reasonable suspicion of insolvency, which, it was submitted, the trial judge had done in a global fashion, rather than by considering the circumstances in existence as at the date that each payment was made.    This aspect of the appeal was upheld. White J held that section 588FG(2)(b) of the Act clearly states that the time at which the existence or otherwise of reasonable grounds to suspect insolvency is to be assessed at the time that the payment is made.   White J, with whom Nyland J and Anderson J agreed, held that Chicago Boot had no reasonable grounds to suspect insolvency with respect to payments made on 4 October 2000 and 2 January 2001. Chicago Boot's appeal was otherwise dismissed.   **(b) Facts**    Chicago Boot was a supplier of footwear to Harris Scarfe Wholesale Pty Ltd (HSW) and Harris Scarfe Limited (HSL), (collectively referred to as Harris Scarfe), members of a group of which Harris Scarfe Holdings Limited (HSHL) was the parent company. In accordance with the contract for supply, Chicago Boot required payment to be made within 60 days of the date of delivery. For a long period of time, Harris Scarfe did not make payment in compliance with those terms.   On 3 April 2001, administrators were appointed to Harris Scarfe. On 3 June 2002, the administrators were appointed as liquidators. At an unspecified later date, the liquidators were replaced with the liquidator respondents to the present appeal. In the six month period ending on 3 April 2001, Harris Scarfe made six payments to Chicago Boot in the sum of $316,801.33 (the Chicago Boot Payments).    **(i) The relevant law**   Section 588FF of the Act allows the court to make orders with respect to transactions that are 'voidable' by virtue of section 588FE of the Act. Amongst the orders that a court can make pursuant to section 588FF are orders directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction. 'Voidable transactions' are defined by section 588FE of the Act to include, in circumstances where the company is insolvent, a transaction that was entered into during the six months ending on the relation-back day. The relation back day in the present case was 3 April 2001, being the date that administrators were appointed to Harris Scarfe.    Chicago Boot sought to rely on section 588FG(2) to prevent the court from making an order pursuant to section 588FF of the Act. Section 588FG(2) of the Act states:   (2) A court is not to make under section 588FF an order materially prejudicing a right or interest of a person if the transaction is not an unfair loan to the company, or an unreasonable director-related transaction of the company, and it is proved that:   (a) the person became a party to the transaction in good faith; and (b) at the time when the person became such a party:       (i) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and       (ii) a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and (c) the person has provided valuable consideration under the transaction or has changed his, her or its position in reliance on the transaction.   Chicago Boot had the onus of satisfying the court of four things:  it had received the payment in good faith;  at the time it received the payment, it did not have reasonable grounds for suspecting that Harris Scarfe was insolvent or would become insolvent by making the payment;  at the time that each payment was made, a reasonable person in Chicago Boot's circumstances would not have had reasonable grounds for such a suspicion; and  Chicago Boot had provided valuable consideration for the payments.  At trial, the respondents accepted that Chicago Boot had acted in good faith and had provided valuable consideration.   **(ii) Decision at first instance**   Evidence at first instance included:  correspondence between employees of Harris Scarfe and Chicago Boot in relation to the payments sought by Chicago Boot. Some of this correspondence included two emails from Mr Palmer of Harris Scarfe on 25 and 30 January 2001 to the effect that Harris Scarfe was having a 'problem with payment issues', and 'at this stage, we only have funds to finance our catalogue program';  evidence from Leanne Mance, one of two active directors of Chicago Boot, going to the 30 year business dealing history between Chicago Boot and Harris Scarfe and that Harris Scarfe's record of paying Chicago Boot's invoices had, for many years, been poor; and  media articles going to Harris Scarfe's planned expansion initiatives and other articles which, in Chicago Boot's submission, did not raise any questions about the financial viability of Harris Scarfe.  The trial judge held that the Chicago Boot Payments constituted an unfair preference within the meaning of section 588FA of the the Act, finding that although Chicago Boot had received the payments in good faith, it had reasonable grounds for suspecting that Harris Scarfe was insolvent and that a reasonable person in Chicago Boot's circumstances would have had reasonable grounds for such a suspicion. On the basis of these findings, the trial judge rejected Chicago Boot's defence pursuant to section 588FG of the Act.   **(c) Decision**    On appeal, Chicago Boot accepted that each of the payments made by Harris Scarfe were insolvent transactions for the purpose of section 588FC of the Act. Chicago Boot also accepted on appeal that each of the payments were 'unfair preferences' within the meaning of section 588FA of the Act, as the transactions resulted in Chicago Boot receiving more than it would otherwise have received if it had had to prove its debt in the winding up of Harris Scarfe.   The question to be decided by the Full Court of the Supreme Court of South Australia was whether the trial judge had erred in:  assessing the circumstances of the payments made by Harris Scarfe to Chicago Boot in a global fashion, rather than separately considering the circumstances, at the time of each payment to determine whether there were reasonable grounds for suspicion of Harris Scarfe's insolvency;  placing undue weight on the content of communications between Chicago Boot and Harris Scarfe;  giving insufficient weight to evidence that Harris Scarfe's own board of directors and auditors had been unaware of the financial predicament of Harris Scarfe and Chicago Boot's continued supply of footwear to Harris Scarfe; and  rejecting aspects of evidence given by Chicago Boot's directors.  White J, with whom Nyland J and Anderson J agreed, held that the existence or otherwise of a reasonable suspicion to suspect insolvency is to be assessed by reference to the circumstances which existed at the time of each payment. White J considered the circumstances that existed at the time that each payment was made by Harris Scarfe. In doing so, White J stated that the circumstances have to be considered in the context of the trading relationship between the companies, citing *Jonas & Lanpac International Pty Ltd v Automation House Pty Ltd* [1998] VSC 9.   White J held that the trial judge had erred in his assessment of the circumstances existing at the time of three of the payments made by Harris Scarfe, being payments made on 4 October 2000 and 2 January 2001.    On 16 January 2001, Chicago Boot served a statutory demand on Harris Scarfe, demanding payment for $286,152.76. In evidence, Ms Mance stated that she intended, when giving the instructions for a statutory demand, that Chicago Boot would issue proceedings for the winding up of Harris Scarfe. In this context, White J held that a reasonable person in Chicago Boot's position would have suspected that it was likely that other creditors were being treated in the same way and that Harris Scarfe's problems were becoming endemic. Accordingly Chicago Boot had not made out its defence with respect to the 19 January 2001 payment.   In the context of Mr Palmer's emails to Chicago Boot clearly expressing financial difficulty, the first of which was sent on 25 January 2001, White J held that, at least by 25 January 2001, Chicago Boot had reasonable grounds to suspect insolvency. Therefore Chicago Boot had not discharged its onus with respect to the two further payments made by Harris Scarfe on 2 and 22 February 2001. The appeal was otherwise dismissed.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h5)  **5.4 Redeemable preference shares can validly subsist without reference to other issued shares**   (By Lucy Hall, Freehills)   Weinstock v Beck [2011] NSWCA 228, New South Wales Court of Appeal, Giles JA, Young JA and Handley AJA, 17 August 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWCA/2011/228.html](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2011/228.html" \t "_new)    **(a) Summary**   This case was an appeal from a judgment of Hamilton AJ in the NSW Supreme Court. In that case, the court was asked to consider whether certain shares were redeemable preference shares and if so, whether those shares had been validly redeemed.   His Honour found that the shares in question were not redeemable preference shares. The appellants dispute this finding.  **(b) Facts**    Mrs Hedy Weinstock (Weinstock) held 8 C Class Shares (C Class Shares) in LW Furniture Consolidated (Aust) Pty Ltd (Company) which, on her death, the directors of the Company purported to redeem for $8. The respondent, an executor of Weinstock's estate, claimed that the true value of the C Class Shares on a winding up of the Company would have been $7,266,000.   The Company's Articles of Association permitted the issue of both preference shares and ordinary shares, however only 3 classes of preference shares (A, C and D class shares) were ever issued, and no ordinary shares were issued.   The original subscribers to the Company subscribed for "A" 5% Convertible Preference Shares, which conferred on their holders defined rights in priority to all other shares in the Company. Following the issue of the "A" Convertible Preference Shares, the directors allotted "C" and "D" Redeemable Preference Shares, which conferred on their holders defined rights pari passu next after the "A" shares, but "in priority to all other shares in the capital of the Company."    However, no other shares in the Company were ever issued and it was submitted at first instance that the C Class Shares could not properly be considered redeemable preference shares when there were no ordinary shares on issue which would give practical content to the C Class Shares' potential preferential rights.   At first instance, Hamilton AJ determined that the C Class Shares were not redeemable preference shares within the meaning of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) and therefore could not be redeemed.   The current appeal challenged this determination and focussed on whether a preference must be a differentiation from issued shares, rather than from unissued shares and if so, if that differentiation must be from ordinary shares, as opposed to another class of preference share.   **(c) Decision**   The New South Wales Court of Appeal held by a majority (Young JA dissenting) that the C Class Shares were redeemable preference shares which were validly redeemed by the Company.   Handley AJA considered that this appeal concerned "the legal consequences of the tension between the state of the Company's share register and its articles of association."    Article 4 of the Company's Articles of Association provided "[T]he shares of the [C]ompany for the time being unissued ... shall be under the control of the directors who may allot or otherwise dispose of the same to such persons on such terms and conditions and at such times as the directors think fit".   It was suggested that the C Class Shares would only become redeemable preference shares if and when the Company issued ordinary shares but this was rejected by Handley AJA. His Honour also rejected the respondents' argument that the directors could issue ordinary shares in the Company, followed by the C Class Shares, but could not validly issue C Class shares, and then the ordinary shares.   Handley AJA (with whom Giles JA agreed) found that the power in Article 4 to issue new shares from the available nominal capital was exercisable at all times, was fiduciary in nature, and was not affected by the state of the Company's share register. The directors validly in office could have issued ordinary shares at any time, and could still do so.    His Honour found that the C Class Shares were validly issued and conferred on their holders the preferential rights described in the Company's Articles of Association. According to Handley AJA, it was of no consequence that the C Class Shares' preferential rights would remain potential only, and without effective content, unless and until ordinary shares were issued.    In fact, his Honour declared that such a position was not unusual, and discussed the qualities of potential rights, not yet realised. He said: "[T]he preferential right to a dividend is dependent on the company earning divisible profits and a decision of the directors to declare a dividend. Until then the right is potential only. A preferential right to the return of capital in a winding up is dependent on a winding up, and on assets available for a return of capital to shareholders. Until then the right is potential only."   In reaching his decision, his Honour distinguished *Re Capel Finance Ltd* [2005] NSWSC 286, 52 ACSR 601 on which Hamilton AJ had relied.   According to Barrett J in that case, "[I]t is not possible for 'preference shares' to exist except as a result of a process of differentiation from shares which are not 'preference shares' which sees the 'preference shares' entitled to some comparative advantage."    In distinguishing Re Capel, Handley AJA noted that, in that case, Barrett J focussed on "the rights" attached to the proposed shares, finding that preferential rights had not been appropriately conferred as the shares carried no priority in respect of the matters referred to in section 254A(2) of the Corporations Act, and therefore "failed as preference shares at the first hurdle". His Honour distinguished the case on the basis that in the current factual matrix, appropriate preferential rights were conferred on the C Class Shares, but those rights lacked effective content due to the absence of ordinary shares.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h5)  **5.5 Security for costs - delay on the part of the applicant and the respondent's obligation to disclose its financial position**    (By Steven Grant, Minter Ellison)   Christou v Stanton Partners Australasia Pty Ltd [2011] WASCA 176, Supreme Court of Western Australia, Court of Appeal, Newnes JA and Murphy JA, 10 August 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/wa/WASCA/2011/176.html](http://www.austlii.edu.au/au/cases/wa/WASCA/2011/176.html" \t "_new)   **(a) Summary**   This is an appeal from a decision of Master Sanderson dismissing an application by the appellants (the defendants in the action), Nick Christou (First Appellant) and Corporate Systems Publishing Pty Ltd (Second Appellant) for security for costs.  Master Sanderson had refused the application on two grounds, namely the appellants' delay in seeking security and their failure to comply with case management directions in the action.  This appeal reviews the factors the court will consider when exercising its discretion to order security for costs under section 1355 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).   **(b) Facts**  The appeal was part of a broader web of litigation which included a decision in the matter of *Corporate Systems Publishing Pty Ltd v Lingard [No 4]* [2008] WASC 21 in which Beech J ordered (relevantly) that:  Stanton Partners Australasia Pty Ltd (the First Respondent) pay the First Appellant the sum of $122,399.38 and interest on that sum in an amount of $42,212.70.  Stanton Accountants & Advisors Pty Ltd (the Second Respondent) pay the Second Appellant the sum of $98,676.66 and interest on that sum in an amount of $34,031.28.  The payment of the amount in the first paragraph discharges the debt in the second paragraph and payment of the amount in the second paragraph discharges, to the extent of the payment, the debt in the first paragraph.  The appellants are entitled to a distribution from trusts controlled by the respondents in the total sum of $747,954.19.  The First Appellant pay the sum of $150,000 and interest on that sum in an amount of $50,523.29 to two entities controlled by directors of the respondents.  The appellants pay 80% of the respondents' costs of the action.  It was common ground that none of the amounts payable under that judgment have been paid.   The action which was the subject of the appeal was commenced by the respondents on 10 July 2009 and was listed before Registrar Dixon for a case management conference on 25 August 2009.  The following ensued:  Registrar Dixon ordered that the respondents file and serve a statement of claim by 8 September 2009 and the appellants file and serve a defence by 22 September 2009.  The statement of claim was filed and served on 8 September 2009, however, the defence was not filed until 2 October 2009.  On 21 December 2009, the respondents filed and served a reply.  At a status conference on 22 December 2009, Registrar Dixon ordered the parties to give discovery by 1 March 2010.  Neither side complied with that order and a series of extensions of time were given and ultimately the respondents provided their discovery to the appellants on 14 May 2010.  Ten days after receiving the respondents' discovery, the appellants requested a further seven day extension to provide their discovery.  The respondents consented and the time for the appellants to provide discovery was extended to 1 June 2010 but the deadline was not met.  On 11 June 2010 the respondents filed a notice of non-compliance with case management directions.  The notice dealt with the appellants' failure to provide both discovery and particulars of its statement of claim against a third party in the proceedings.  On 15 June 2010 the parties attended a status conference before Registrar Dixon.  The appellants were ordered to provide discovery by 21 June 2010.  The matter was otherwise adjourned as the appellants had advised the court that they were going to bring a security for costs application within seven days of the status conference.  The appellants again failed to give discovery as ordered and no application for security for costs was made.  The matter came before Registrar Dixon on 20 July 2010 and the appellants were ordered to provide discovery by 30 July 2010, but the appellants failed to comply with the order.  The respondents subsequently invited the appellants to submit a proposed revised timetable for discovery but the appellants did not respond.  On 16 August 2010 the respondents wrote to the appellants to say that unless discovery was provided by 20 August 2010 the respondents would apply for a springing order.  The appellants did not respond to the letter but filed an application for security for costs on 20 August 2010, supported by an affidavit of their solicitor.  The respondents wrote again inviting the appellants to provide a revised timetable for discovery but that request was also ignored.  On 24 August 2010 Registrar Dixon made an order that the respondents have leave to apply to enter judgment if discovery was not given by 6 September 2010.  On 2 September 2010 that order was suspended pending determination of the application for security for costs.  Master Sanderson found there was no evidence as to the financial position of the Second Respondent, noting that the appellants' affidavit evidence and submissions had been directed entirely to the First Respondent.  In weighing up the factors bearing upon the exercise of his discretion, the Master noted that whilst the First Respondent was impecunious, an order for security would not stultify the action as there was evidence that a director of the First Respondent would provide any security ordered.  However, the Master found that the appellants' delay in bringing the application had not been satisfactorily explained and that the appellants had been guilty of inexcusable conduct in repeatedly failing to comply with case management directions.  Master Sanderson concluded that in light of those factors it was not an appropriate case to order security for costs and dismissed the application.   On appeal, the appellants contended that it followed from the findings of fact made by the Master that security for costs should have been ordered and an error was inferred from the dismissal of the application.  The appellants also contended, in effect, that the Master erred in taking into account an irrelevant factor, namely, the appellants' failure to comply with case management directions.    In addition, the appellants' counsel sought leave to amend the grounds of appeal that the Master erred in concluding there was no evidence as to the financial position of the Second Respondent, in particular, that there was no credible evidence that there was reason to believe that the Second Respondent would be unable to meet an order for costs if it were unsuccessful in the action.  The appellants submitted, in effect, that in so finding the master overlooked two matters, namely the failure of the Second Respondent to pay the amounts for which it was liable pursuant to the orders of Beech J and evidence that the First Respondent controlled the Second Respondent.  **(c) Decision**   Newnes JA delivered the decision of the Court with whom Murphy JA agreed.   **(i) Application for leave**   Newnes JA noted that the principles which apply to an application for leave to appeal against an interlocutory decision are well-settled, namely that the appellant must show that the original decision was wrong, or at least attended by sufficient doubt to warrant the grant of leave, and that substantial injustice would be done if the decision was not reversed.  The purpose of an order for security for costs is to protect the defendant, if successful, against the risk of being deprived of the benefit of a costs order through the plaintiff's inability to pay.  Whilst the inability of a plaintiff to meet an order for costs is not decisive, it is an important consideration in the exercise of the discretion.  The policy of section 1335 is to protect a defendant against the risk of the plaintiff's impecuniosity and it equips the court with the means to require that the defendant be secured against that risk.  However, it is incumbent upon a defendant who wishes to obtain security for its costs to apply promptly for that relief once it is, or ought reasonably be, aware that the plaintiff would be unable to meet an order for costs and delay is an important consideration in the determination of an application for security for costs because it is capable of causing prejudice or unfairness to the plaintiff.  The circumstances of the delay are also important.   Whilst the appellants first became aware of the first respondent's financial position on or about 11 September 2009, there was no intimation that an application for security for costs might be made until the directions hearing before Registrar Dixon on 15 June 2010.  The application for security for costs was not made until 20 August 2010, some nine weeks after the directions hearing and the only explanation offered for that delay was the workload of the appellants' solicitor.   Newnes JA held that in the circumstances of this case the Master erred in concluding that the appellants' non-compliance with case management orders was itself a relevant factor. There may well be cases where a defendant's non-compliance with procedural orders will be relevant in determining whether or not an order for security for costs should be made. However, this was not such a case. While the appellants' non-compliance undoubtedly contributed to the slow progress of the action, it was not relevant to the purpose for which an order for security for costs is made, namely to ensure that, if successful, the defendant can recover costs which the plaintiff is ordered to pay.  The discretion to order security for costs is not a means by which a defendant may be punished for its non-compliance with case management directions.  Accordingly, Newnes JA held that the Master's decision should be reversed.    However, Newnes JA held that whilst security is appropriate for future costs, security was not appropriate for costs incurred prior to the application.  In relation to future costs, Newnes JA found that the appellants' costs of providing discovery should be excluded, as their discovery was not provided before the application was made only because they continually failed to comply with the orders of the case management registrar.   **(ii) Application to amend the appeal**   In this respect it was submitted that:  The evidence established that the Second Respondent provided services for a fee to the First Respondent's accounting practice.  The First Respondent had ceased to trade after 2008 and was impecunious.  The Second Respondent could not therefore have derived income from providing services to the First Respondent.  The appellants contended that a party resisting an application for security for costs should provide the court with full and frank disclosure of its financial position and the Second Respondent had failed to do so.  Having regard to those matters and the failure of the Second Respondent to pay the amounts for which it was liable pursuant to the orders of Beech J, the appellants contended that there was a clear inference that the Second Respondent was impecunious.   Newnes JA did not consider that any inference can reasonably be drawn as to the Second Respondent's financial position simply from the fact that it had not paid the amounts ordered by Beech J.  This could be due to a variety of reasons including the absence of a demand for payment by the appellants or any attempt made to enforce the judgment.    Furthermore, Newnes JA did not accept the contention that the filing by the appellants of an application for security for costs gave rise to some obligation on the second respondent to provide a full account of its financial position.   In order to enliven the court's discretion there must be material before it which is sufficiently persuasive to permit a rational belief to be formed that, if ordered to do so, the Second Respondent would be unable to pay the appellants' costs if the Second Respondent were to be unsuccessful in the action.  In circumstances where the appellants had not troubled themselves to put any material before the court relating to the Second Respondent's financial position, it was not incumbent upon the Second Respondent to fill that gap. The Second Respondent apparently took the view (rightly, in the opinion of Newnes JA) that the discretion had not been enlivened and was content to leave the matter at that.  It was entitled to do so.   **(iii) Orders**   Accordingly Newnes JA made the following orders:  the application to amend the grounds of appeal was dismissed;  the application for leave to appeal was dismissed, so far as it related to the Second Respondent;  the appellants had leave to appeal and the appeal be allowed, so far as it related to the First Respondent;  the decision of the Master be set aside so far as it related to the First Respondent;  the First Respondent provide security for the appellants' costs of the action from the date of filing the application for security for costs, but excluding the appellants' costs of giving discovery; and  the application for security for costs be remitted to the Master to determine the amount of the security, and the time and manner in which it is to be provided.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h5)  **5.6 Australian judgments readily enforceable in the UK - taking a universal approach to insolvency proceedings**   (By Tian Xu, Mallesons Stephen Jaques)   New Cap Reinsurance Corporation Ltd (in liquidation) v Grant [2011] EWCA Civ 971, England and Wales Court of Appeal (Civil Division), Mummery, Lloyd and Macfarlane LJJ, 9 August 2011   The full text of this judgment is available at:  [http://www.bailii.org/ew/cases/EWCA/Civ/2011/971.htmlhttp://www.bailii.org/ew/cases/EWCA/Civ/2011/971.html](http://www.bailii.org/ew/cases/EWCA/Civ/2011/971.html" \t "_new)   **(a) Summary**   This case concerned the enforcement in England of an Australian judgment for recovery of voidable preferences against defendants resident in the UK.  The English Court of Appeal interpreted the UK foreign judgment and insolvency legislation in favour of the Australian liquidator, holding that the liquidators should be allowed to enforce the Australian judgment in the UK.   **(b) Facts**    New Cap is an Australian reinsurance company.  The defendants are members of a Lloyd's syndicate which placed reinsurance with New Cap and received payments from it over two years.   New Cap went into liquidation and the liquidator obtained a judgment in New South Wales against the defendants for the recovery of the payments to the syndicate as preferences on the basis that New Cap had been insolvent when they were made.  However, the defendants are resident in the UK and did not accept service of the proceedings or formally submit to the jurisdiction of the New South Wales court.  The court allowed the proceedings to continue against the syndicate on the basis of an order for substituted service.   At trial, Barrett J of the NSW Supreme Court declared that the two payments were voidable and ordered that the amounts be repaid by the syndicate with interest.  Barrett J also requested the assistance of the English court, asking it to exercise its jurisdiction to enforce the orders, or to allow the liquidator to bring proceedings in the English court to set aside the payments as preferences.   The liquidator tried to enforce the New South Wales judgment against the defendants in the UK on three basis:   under the UK Foreign Judgments (Reciprocal Enforcement) Act 1933 (the "1933 Act");   under section 426 of the Insolvency Act 1986 (the "Insolvency Act"); and   under common law.  At first instance the UK Companies Court held that section 426 of the Insolvency Act applied and therefore the orders sought by the liquidators should be made. The court held that while the common law jurisdiction would also enable the court to make the same orders, the 1933 Act did not apply to orders made in insolvency proceedings.  The defendants appealed.   **(c) Decision on appeal**    The England and Wales Court of Appeal unanimously decided that the judgment was enforceable under the 1933 Act and section 426 of the Insolvency Act, but not under common law.   **(i) The 1933 Act**   Under 1933 Act, the judgments of recognised foreign courts can be registered with the English High Court and are then enforceable as an English judgment.  Such registration can be set aside if, among other things, the relevant foreign court had no jurisdiction over the matter.   The Court of Appeal therefore had to determine whether the New South Wales court was a recognised foreign court and whether it had jurisdiction over the matter.   Australian courts are recognised foreign courts under the 1933 Act in relation to judgements for the payment of money in respect of a 'civil or commercial matter'.  The Court looked at case law and several international Conventions and concluded that there is no internationally acceptable definition of 'civil or commercial matter', as the term has different meanings in different jurisdictions.  However, as between two common law jurisdictions, the phrase would encompass any proceedings which would be regarded as civil under common law.  Therefore it covers insolvency.   Further, the Court found that, in the absence of cogent reasons to the contrary, an English court will generally recognise the jurisdiction of the court of the insolvent entity's domicile.  In forming this conclusion, it had regard to the general principles of private international law that insolvency proceedings should all take place in the jurisdiction where the insolvent entity is domiciled and the judgments of its courts should receive world-wide recognition.  The judgment of the New South Wales court was therefore enforceable under the 1933 Act.   **(ii) Section 426 of the Insolvency Act**   Section 426 of the Insolvency Act authorises a UK court to provide assistance to a recognised foreign court in relation to insolvency proceedings where that foreign court has sent a request for such assistance.  In this case, the New South Wales court sent the request.     The section vests a broad discretion in the court. The relevant question was whether the discretion extended to enforcing a foreign judgment arising from insolvency proceedings or merely entitled the liquidator to bring proceedings against the defendants in an English court, to be determined according to Australian law.   The defendants argued that the 1933 Act excludes proceedings for recovery of a sum payable under a foreign judgment when Part I of the 1933 Act applies (that is, the 1933 Act already provides for a regime for enforcing the foreign judgment, and therefore section 426 should not apply).   However, the Court held that the 1933 Act only excludes recovery of a sum under a foreign judgment.  It does not prevent the Court, under section 426, from giving and then enforcing an English judgment in the same terms.  While the economic effects of the two were very similar, the results were "not quite the same in legal terms".  It noted that, in relation to some foreign jurisdictions, only one of the regimes will apply and alternative methods should be available in the interest of liquidators and other insolvency administrators.  However, where both regimes apply, the court needs to ensure the two regimes are applied consistently.   The Court of Appeal therefore held that the judge's exercise of his discretion under section 426 was not at fault.   **(iii) Common law**   The 1933 Act expressly excludes the operation of the common law where the 1933 Act applies.  Therefore, the common law rules regarding enforcement of foreign judgments did not apply in this case.   The Court of Appeal therefore dismissed the appeal.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h5)  **5.7 A short stay in Australia: adjournment of international arbitration enforcement proceedings in Australia pending conclusion of appeal of confirmation in a foreign jurisdiction**   (By Alexandra Phelan, Mallesons Stephen Jaques)   ESCO Corporation v Bradken Resources Pty Ltd [2011] FCA 905, Federal Court of Australia, Foster J, 9 August 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/905.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/905.html" \t "_new)   **(a) Summary**   ESCO Corporation sought enforcement of a foreign arbitration award against Bradken Resources Pty Ltd in the Federal Court of Australia.  Bradken sought an adjournment of the Federal Court proceedings under the [International Arbitration Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7653" \t "Default) ("IAA") until an appeal of confirmation of the award in the US was determined.  The Court held that an adjournment was appropriate under the IAA, and ordered security be provided in the amount equal to the outstanding award monies (legal costs under the award).   **(b) Facts**   Bradken Resources Pty Ltd ("Bradken") was licensed to manufacture ESCO Corporation ("ESCO") products in Australia, New Zealand and Papua New Guinea under a July 1999 contract ("Licence Agreement") and subsequent assignment from the original licensee.  A series of disputes arose between Bradken and ESCO, including antitrust claims by Bradken, that were ultimately referred to arbitration in the United States of America under an arbitration clause in the Licence Agreement.     The arbitration was conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce ("ICC Rules"), and in June 2010 the confidential determination of the disputes was published ("Award").  Only two orders were made by the arbitrator (Gerald W Ghikas QC) for the payment of money:  an order for Bradken to reimburse ESCO for procedural costs of US$210,000, as fixed by the ICC Court for administrative expenses and arbitrator's remuneration; and  an order for Bradken to pay ESCO for legal costs of US$7,747,087.88 incurred.  Bradken paid the first of the sums (procedural costs).     ESCO sought to have the Award confirmed in the United States District Court, District of Oregon, Portland Division ("US District Court").  Bradken resisted confirmation of the order to pay the amount of ESCO's legal costs attributable to the antitrust claims (approximately US$6,000,000).  However, the US District Court confirmed the Award, ordering Bradken to pay the remaining costs with post-judgment interest (from 11 May 2011) at the US Federal interest rate.   On 24 May 2011, Bradken appealed the orders made by the US District Court, seeking to set aside the part of the Award and the judgment ordering it to pay the antitrust legal costs.  The appeal is likely to be heard in 2013.   On 9 June 2011, ESCO commenced proceedings in the Federal Court of Australia ("Court"), seeking enforcement of the Award pursuant to section 8(3) of the IAA, with interest as provided by the [Federal Court Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "Default).  Bradken applied for an order that the application brought by ESCO be adjourned until final determination of the proceedings brought by ESCO in the US District Court, and any appeals arising out of the proceedings.   **(c) Decision**    The Court adjourned the ESCO-initiated proceedings until early in 2012, conditional on Bradken providing security.  In substantially granting Bradken's motion, the Court described its findings as "the grant of an indulgence by the Court".     **(i) Enforcement of the Award in Australia**   Section 8 of the IAA provides that a foreign award may be enforced in the Federal Court of Australia "as if the award were a judgment or order of that court" (at [52]).  The Court confirmed that the Award was a 'foreign award' within the meaning of section 3 of the IAA because:  the Award was made pursuant to an arbitration agreement (clause 24 of the Licence Agreement);  the Award was made in relation to a country other than Australia (the USA); and  the Award was an arbitral award to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") applies (the USA is a Convention country).  As the Award satisfied these requirements, it was prima facie able to be enforced in Australia.    However, Bradken sought an adjournment of the proceedings on the basis of section 8(8) of the IAA, which permits the court to adjourn proceedings for enforcement of a foreign award where the court is satisfied that a bona fide application to set aside the award has been made in the country of the award.   The Court noted that subsections (9), (10) and (11) of section 8 of the IAA provide the Court with "significant power to monitor and supervise the enforcement proceeding during any period of adjournment granted under [s8(8)]" (at [56]).   The Court was satisfied that Bradken had made a bona fide application to the US District Court and the US Appeals Court for an order setting aside the Award in part.  The Court's discretion was therefore engaged.   **(ii) Security to be provided by Bradken**   If the Court exercises its discretion, it also has power to order "suitable security" if the party seeking enforcement of the award requests it.  ESCO applied for an order for the provision of security should an adjournment be granted.   The parties were unable to agree to the terms of the security to be given by Bradken.  ESCO sought for the security to include the pre-judgment and post-judgment interest (totalling US$2,573,415.30) ordered by the US District Court.  However Bradken contended that a letter of credit covering the remainder of the Award ordered to be paid by Bradken (totalling US$7,747,087.88) was sufficient.   In determining this issue, the Court considered the "leading [UK] authority" relating to similar provisions under UK law, *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208 ("Soleh").  In that case, Staughton LJ held that "the enforcing court should examine for itself the strength of the arguments in the foreign jurisdiction" (at [76]).  Where the arguments are strong, adjournment without security should be granted, and where weak, adjournment should be refused or granted with security.     In this case, the US District Court found that Bradken's arguments were not frivolous but "plainly arguable".  The Court therefore accepted the bona fide application of Bradken in the US District Court and US Appeals Court, and weighed the impact of an adjournment with or without security upon each of the parties.   The Court concluded that ESCO would be adequately protected by substantial security from Bradken.    The Court therefore adjourned the proceedings on condition that "suitable security" was provided by Bradken by the end of August 2011.  The Court required Bradken to provide security in a form readily accessible by ESCO (such as a letter of credit or irrevocable bank guarantee from an acceptable institution), should it become entitled to call on it. Further, ESCO must be permitted to immediately access the security upon the Award becoming a judgment of the Court. The Court determined that a suitable amount of security in the present case was the amount outstanding under the award (being US$7,747,087.88, which excluded the US District Court interest in dispute) and legal costs ordered to be paid by Bradken under the Award and any judgment based on it.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h5)  **5.8 Access to company documents granted to a member where a breach of directors' duties was reasonably suspected**   (By Gabrielle Metherall, Blake Dawson)   Hanks v Admiralty Resources NL [2011] FCA 891, Federal Court of Australia, Gordon J, 8 August 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/891.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/891.html" \t "_new)    **(a) Summary**   Mr Hanks (Plaintiff), a minor member of the respondent company, Admiralty Resources NL (Admiralty), sought an order pursuant to section 247A of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) permitting him and his solicitor to inspect specified books of Admiralty.  The Plaintiff also sought an order to limit disclosure of the documents to himself and his legal advisors while he decided whether to apply for leave under section 237 of the Corporations Act to launch a derivative action alleging breaches of directors' duties.   Justice Gordon upheld the application, granting the Plaintiff the right to inspect specified documents subject to an order limiting access to the Plaintiff and his legal advisors.  However, her Honour did not include all of the document categories sought by the Plaintiff.   **(b) Facts**   The Plaintiff became a member of Admiralty in May 2010 and held 0.00005% of the shares with a value of approximately $1,710.00. The Plaintiff made the application because he alleged he had reasonable suspicions that the Admiralty board had breached their directors' duties, in particular disclosure obligations and the duty to act with due care and diligence.    The circumstances that gave rise to the Plaintiff's suspicions related to the sale of a wholly owned Admiralty entity, Sociedad Contractual Minera Vallenor Iron Company (VIC), to an investment company, Icarus Derivatives Ltd (Icarus).  Admiralty announced the sale of VIC via share sale agreement to the market in September 2010, subject to approval by shareholders.  The board of Admiralty recommended the offer from Icarus to shareholders at an EGM and AGM without, the Plaintiff alleges, considering or properly disclosing to shareholders a competing and superior offer from Hebei Wenfeng Iron and Steel Co Ltd (HWF).   The majority of the consideration under the share transfer agreement between Admiralty and Icarus consisted of royalty payments, which therefore depended upon the ability of Icarus to run the resources business effectively.  Concerned about the royalty payments, the Plaintiff requested information about Icarus from Admiralty, and raised questions at the EGM and AGM.  Shareholders of Admiralty later received a letter directly from HWF alleging that the board failed to properly consider their offer for VIC, which was 50% higher than Icarus' offer.  The Plaintiff was dissatisfied with Admiralty's responses to his questions, and so requested company books from Admiralty, as well as complaining to ASIC about the content of the explanatory memorandum.  ASIC declined to pursue the matter, and Admiralty refused to provide access to documents.   Admiralty asserted that the Plaintiff had not established that he was acting in good faith, that there was a case for investigation nor that he was seeking to protect a personal right.  In response to the Plaintiff's suspicions, Admiralty argued that they were constrained by a "no shop no talk" exclusivity clause in the Icarus share sale agreement which only allowed them to consider whether HWF's offer was "more favourable".  They maintained that Icarus' offer was more favourable because Admiralty was in a weak cash position and could not afford the time to begin new negotiations, despite HWF's offer of 50% more consideration.     **(c) Decision**   Section 247A of the Corporations Act, as set out in the decision, provides:   "(1) On application by a member of a company ... the Court may make an order:        (a) authorising the applicant to inspect books of the company or scheme; or        (b) authorising another person (whether a member or not) to inspect books of the company or scheme on the applicant's behalf.  The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.    The court therefore considered whether:  the Plaintiff acted in good faith;  the inspection was for a proper purpose; and if so,  whether there was any other reason why the Court should, in the exercise of its discretion, refuse to grant the orders.  **(i) Good faith and proper purpose**   Justice Gordon restated 17 factors going towards good faith and proper purpose, many set out in *Acehill Investments Pty Ltd v Incitec Ltd* [2002] SASC 344.  For example:  the good faith and proper purpose requirements must be established by the applicant, and are assessed by applying an objective test;  the section operates where the applicant seeks to protect some specific or personal right by the making of the order, including "where a shareholder reasonably takes the view that a transaction could adversely affect his investment and he seeks to investigate ... for the purpose of determining what action he should take";  if the applicant's primary or dominant purpose is a proper purpose, it is irrelevant that inspection may benefit another purpose; and  section 247A does not alter the basic company law rule that a shareholder should not ordinarily have recourse to the courts to challenge a managerial decision made by or with the approval of the directors.  The court did not consider whether the Admiralty directors breached their duties.  However, her Honour held that it was relevant to assess whether the Plaintiff's suspicions justified access to Admiralty's books, given the purpose of section 247A as a precursor to a possible derivative action by the company against the directors based on whether they acted with due care and diligence.  Citing Barrett J in *Praetorin Pty Ltd v TZ Ltd* [2009] NSWSC 1237, Gordon J found that the Plaintiff's evidence going towards inadequate consideration of the HWF offer meant "it cannot be said that 'there is no expressed or articulated basis for any apprehension that legal wrong has been done'".   Ultimately, her Honour concluded that the application ought to be granted because despite the Plaintiff having no financial loss, there was "a clear basis for investigation" and a "real concern about corporate governance and such a question is a proper basis for an application under section 247A."  There was also no suggestion that the Plaintiff sought access to the documents merely in order to assess the value of his shares (which would improperly interfere with ASX listing rules on market disclosure).  Admiralty failed to discount the Plaintiff's reasonable suspicions, nor raise anything sufficient to warrant the court exercising its discretion.   **(ii) Orders**   Justice Gordon found in favour of the Plaintiff and awarded him costs.  Her Honour ordered that the Plaintiff and his solicitors be authorised to inspect specific books of Admiralty, but the final order was narrower than the Plaintiff sought.  The order included:  advice from Icarus regarding its financial capacity to develop VIC's mineral assets which was referred to in the explanatory memorandum;  documents recording whether Admiralty considered disclosing the terms of HWF's offer to shareholders, including facts taken into account; and  documents relied upon by the directors to announce that HWF's offer was "not superior".  The Plaintiff was also ordered not to communicate or disclose information obtained as a result of the inspection to any persons except:  the Plaintiff's legal advisers; and  such other persons necessary to enable the Plaintiff to determine whether to apply for leave pursuant to section 237 of the Corporations Act.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h5)  **5.9 Application by ASIC for an injunction against Storm Financial banks not futile**   (By Dylan Barber, Blake Dawson)   Australian Securities and Investments Commission v Storm Financial Ltd (receivers and managers appointed) (in liquidation) [2011] FCA 858, Federal Court of Australia, Reeves J, 2 August 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/858.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/858.html" \t "_new)   **(a) Summary**   The Federal Court of Australia dismissed motions to strike out proceedings brought against the Commonwealth Bank, Bank of Queensland and Macquarie Bank relating to their involvement with Storm Financial (which is now in liquidation).  ASIC brought the proceedings seeking an injunction against the Banks pursuant to section 1324 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) on the basis that the Banks were knowingly concerned in a contravention of the Corporations Act in respect of investment schemes operated by Storm Financial.  ASIC contended that Storm Financial contravened the Corporations Act by operating unregistered managed investment schemes.  Reeves J determined that there was a "real controversy" as to the liability of the Banks in relation to the alleged contravention of the Corporations Act in dismissing the motions to strike out the proceedings.  Contrary to the contention of the Banks, seeking an injunction against the Banks was not futile, and may instead mark a court's disapproval of the conduct involved and deter similar conduct in the future.   **(b) Facts**   **(i) Storm Financial**   Storm Financial Limited ("Storm Financial") was a financial advice company that was placed in liquidation in March 2009.  Prior to its insolvency Storm Financial operated a number of investment schemes which it promoted amongst its client base.   **(ii) ASIC proceedings**   The Australian Securities and Investments Commission ("ASIC") brought proceedings in the Federal Court of Australia against Storm Financial on the basis that Storm Financial contravened section 601ED(5) of the Corporations Act 2001 (Cth).  ASIC contended that that the investment schemes operated by Storm Financial were managed investment schemes and that Storm Financial contravened the Corporations Act which required such managed investment schemes to be registered.  ASIC also brought proceedings against the Commonwealth Bank, Bank of Queensland and Macquarie Bank (together, "Banks").  Storm Financial and the liquidators of Storm Financial did not play an active role in the proceedings.   ASIC asked the Court to consider whether the Banks were knowingly concerned in the failure of Storm Financial to register the managed investment schemes.  Section 1324 of the Corporations Act provides that where a person has engaged in conduct that constituted being in any way, directly or indirectly, knowingly concerned in the contravention by a person of the Corporations Act, a court may, on the application of ASIC or a person whose interests are affected by the conduct, grant an injunction on such terms as the court considers appropriate.   The Banks filed notices of motion to have the proceedings struck out.  They argued that the application by ASIC to obtain an injunction was futile on the basis that Storm Financial was in liquidation, the relevant investment schemes had been wound up and there was no likelihood of similar conduct occurring in the future.   The Banks applied pursuant to section 31A(2) of the [Federal Court of Australia Act 1976 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "Default) which provides that a court may give judgment for the defendants where the court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding.  The Banks also relied on Order 20 rule 5(1) and (2) of the Federal Court Rules which allows the court to stay or dismiss proceedings generally or in relation to the claim for relief if the court is satisfied that the proceedings are frivolous, vexatious or an abuse of process.   **(c) Decision**   **(i) Motions to strike out proceedings**   The notices of motion filed by the Banks to have the proceedings struck out were dismissed.  Justice Reeves found that there was no basis whereby the Banks could obtain summary judgment, dismissal or a stay of the proceedings.  Instead section 1324 of the Corporations Act gave ASIC the necessary power to seek an injunction against persons who were, directly or indirectly, knowingly concerned in a contravention of the Corporations Act.  In addition, there was a "real controversy" regarding the Banks' liability in respect of the alleged contravention of section 601ED(5) of the Corporations Act by Storm Financial.   Despite the contentions of senior counsel for one of the Banks, Reeves J found that a court may order an injunction pursuant to section 1324 of the Corporations Act even where there was no likelihood of the conduct being repeated.  An injunction, in those circumstances, may be employed to signal the court's disapproval of the conduct as well as to deter similar behaviour in the future.  In contrast to the principles that are considered in relation to the grant of an equitable injunction (including the principle that such an injunction should not be ordered where there is no likelihood of the conduct recurring in the future), those restrictions were not applicable in respect of an injunction granted pursuant to a statutory provision such as section 1324.   As such ASIC had made a justiciable claim for relief pursuant to section 1324 of the Corporations Act.   **(ii) Procedural context**   Justice Reeves paid particular attention to the procedural context of the decision.  Although ASIC amended its statement of claim to have the proceedings determined under section 1324 of the Corporations Act, ASIC had initially stated its purpose in commencing proceedings was in order to facilitate a means whereby investors in Storm Financial may seek compensation from the Banks pursuant to section 1325 of the Corporations Act.  Section 1325 of the Corporations Act provides that where a person has suffered loss or damage because of the conduct of another person that was in contravention of certain sections of the Corporations Act (including section 601ED(5)), an application may be made either by that person or ASIC on behalf of that person, in order to compensate that person for the loss or damage.   Reeves J acknowledged that although these proceedings in their final form focussed squarely on whether ASIC had made a valid and justiciable claim under section 1324 of the Corporations Act, the door was still open in respect of proceedings pursuant to section 1325.  With regards to this, Reeves J opined that there did not appear to be any basis, based on the current proceedings, whereby any proceedings pursuant to section 1325 of the Corporations Act could be struck out in a similar manner.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h5)  **5.10 UK Supreme Court rules in favour of flip clauses**  Belmont Park Investments Pty Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc [2011] UKSC 38, United Kingdom Supreme Court, Lord Phillips, President, Lord Hope, Deputy President, Lord Walker, Lady Hale, Lord Mance, Lord Collins and Lord Clarke, 27 July 2011   (By Clayton Utz)   The full text of this judgment is available at:  [http://www.bailii.org/uk/cases/UKSC/2011/38.html](http://www.bailii.org/uk/cases/UKSC/2011/38.html" \t "_new)   **(a) Summary**    The UK Supreme Court, which is the UK's highest court, has handed down its long-awaited decision in *Belmont Park Investments Pty Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc*, in which the Court considered the validity and enforceability of so-called "flip" clauses under English bankruptcy law.    Flip clauses are common in rated structured finance and securitisation transactions, and effectively reverse or flip a party's priority in the relevant payment waterfall below the payment of obligations owed to other creditors following certain events. The UK Supreme Court reaffirmed the earlier decisions of the English High Court and Court of Appeal that the flip clause under consideration was valid and enforceable in the circumstances and did not offend the anti-deprivation principle under English bankruptcy law.    **(b) Facts**   Credit-linked notes were issued by a special purpose vehicle established by Lehman Brothers as issuer. The proceeds of issue were used to purchase collateral comprising "AAA" rated securities. The collateral was charged by the issuer in favour of BNY Corporate Trustee Services Limited as trustee to secure the issuer's obligations under the notes and under a related credit default swap entered into with Lehman Brothers Special Financing Inc. as swap counterparty. Lehman Brothers Holdings Inc., as guarantor, guaranteed the obligations of the swap counterparty under the credit default swap.   The related transaction documents contained a flip clause whereby the swap counterparty's priority over the noteholders in relation to the proceeds of enforcement in respect of the collateral would reverse or flip if there was an event of default under the swap transaction and the swap counterparty was the defaulting party.   On 15 September 2008, the guarantor filed for Chapter 11 protection under the US Bankruptcy Code and the swap counterparty did the same on 3 October 2008. Chapter 11 bankruptcy proceedings involving either the guarantor or the swap counterparty was an event of default under the swap transaction in relation to which the swap counterparty was the defaulting party.   The swap counterparty claimed that the flip clause giving noteholders priority to the proceeds of enforcement of the charge over the collateral ahead of the swap counterparty was void, as it offended the "anti-deprivation" principle under English bankruptcy law. The swap counterparty argued that by modifying its right of priority to the proceeds of enforcement following its bankruptcy, the flip clause unlawfully deprived it of property to which it was entitled in its bankruptcy.    The English High Court, in the first instance, found that the flip clause as a matter of English law was effective and did not offend the anti-deprivation rule. Alternatively, if the clause was capable of offending the anti-deprivation rule, the rule did not apply in this case.    The flip clause took effect when the guarantor filed for Chapter 11 protection and not when the swap counterparty subsequently filed for Chapter 11 protection, therefore the effect of the clause did not deprive the swap counterparty of any property as a result of its own Chapter 11 filing. The decision of the High Court was subsequently upheld by the Court of Appeal.   **(c) Decision**   In considering the enforceability of the flip clause, the UK Supreme Court identified the following essential elements for the anti-deprivation rule to apply:  there must be a deliberate intention to evade the insolvency laws i.e. a court could go behind a transaction if it was satisfied that it had been created deliberately in order to provide for a different distribution of an insolvent's property from that prescribed by law. However, a commercially sensible transaction entered into in good faith without the aim of evading the insolvency laws should not infringe the rule; and  the deprivation must take place as a result of bankruptcy i.e. the rule will not apply if the deprivation takes place for reasons other than bankruptcy.  Focusing on the essential elements of the anti-deprivation principle, the Court held that the current transaction (including the application of the flip clause) was a commercial transaction entered into in good faith and there was no suggestion that the flip clause was deliberately intended to evade insolvency laws.    In particular, the flip clause could have applied in any number of other non-bankruptcy events that would have constituted an event of default under the swap transaction and was intended to deal with credit risk on the swap counterparty, which was a material factor in the notes obtaining a "AAA" rating.   **(d) Implications for structured finance and securitisation transactions**  The Supreme Court decision lays to rest some of the uncertainty surrounding the effectiveness under English law of flip clauses used in structured finance and securitisation transactions since the original case was heard in the UK courts in 2009.  At the same time, the decision remains in conflict with the US bankruptcy court's decision in a similar case decided in January 2010 which found that the flip clause, being an ipso facto clause, was unenforceable under US bankruptcy law. Unfortunately, while leave was granted by the US District Court to appeal the US bankruptcy court decision, the case was settled and the appeal was subsequently withdrawn.    Accordingly, the US bankruptcy court decision remains law in the US and continues to generate considerable uncertainty over the enforceability of flip clauses used in structured finance and securitisation transactions with a US nexus.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h5)  **5.11 Unitholder meeting invalid for notice irregularity**   (By Warrick Louey, Clayton Utz)   Wellington Capital Limited, in the matter of Premium Income Fund v Premium Income Fund Action Group [2011] FCA 781, Federal Court of Australia, Dowsett J, 25 July 2011   The full text of this judgment is available at:   [http://www.austlii.edu.au/au/cases/cth/FCA/2011/781.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/781.html" \t "_new)   **(a) Summary**   In this case, the Court declared that a unitholder meeting was invalid pursuant to section 1322 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act), on grounds that a failure to provide all unitholders with notice of the meeting was an irregularity that caused, or may cause, substantial injustice which cannot be remedied by any order of the Court.       **(b) Facts**    **(i) Background**   Wellington Capital Limited (Plaintiff) was the responsible entity of the Premium Income Fund (Fund), a registered investment scheme under the Corporations Act.    The Premium Income Fund Action Group, Charles Robert Hodges and Peter Grenadier (together, the Defendants) were involved in a requisition by certain unitholders of the Fund (Requisitioning Unitholders) to remove the Plaintiff as the responsible entity of the Fund.     On 16 May 2011, unitholders of the Fund (Unitholders) were given notice (Notice) of a requisitioned meeting of Unitholders (Unitholders Meeting) to, amongst other things, remove the Plaintiff as the responsible entity of the Fund.  The Unitholders Meeting was scheduled for 16 June 2011 and Notice was given to those Unitholders on the register (Register) as at 10 February 2011.       The Unitholders Meeting on 16 June 2011 was adjourned to 23 June 2011 (by agreement between the parties), so that unrelated legal proceedings involving a number of the parties could be resolved.  The particulars of that proceeding are not directly relevant to this case.     The Unitholders Meeting on 23 June 2011 was adjourned to 14 July 2011.  The circumstances surrounding the meeting and the adjournment are unclear, save that the Plaintiff opposed the adjournment and that the circumstances had become unduly partisan and marked by conflict.     **(ii) Application**   The Plaintiff filed an application to the Court on 20 June 2011, seeking a declaration that the Notice was invalid and an order restraining the Defendants (amongst others) from proceeding with the Unitholders Meeting.    The Plaintiff relevantly alleged that:  notice was not given to all Unitholders entitled to vote at the Unitholders Meeting; and  the Unitholders Meeting on 23 June 2011 lacked a quorum and was thereby dissolved pursuant to the constitution of the Fund (Constitution).  The Defendants disputed such allegations and relevantly asserted that:  the failure to give Notice to certain Unitholders may and should be remedied pursuant to section 1322 of the Corporations Act; and  the existence of a quorum should not be determined by reference to clauses 10.2 and 10.3 of the Constitution and, in any event, those clauses are invalid.  **(c) Decision**   **(i) Notice requirements not satisfied**   The Court observed that the Notice was dated 16 May 2011, but that the Notice was sent to Unitholders on the Register as at 10 February 2011 (being the date on which the Requisitioning Unitholders obtained a copy of the Register).  The Court found that both persons who became Unitholders between 10 February 2011 and the date of the Notice, and Unitholders whose address had changed during that period had not received the Notice.     The Defendants submitted that those Unitholders, or certain of them, may have known of the Unitholders Meeting by reason of materials sent by the Plaintiff to Unitholders on 27 May 2011.  The Court did not accept this proposition, on grounds that the Corporations Act and the Constitution require a meeting to be called by giving notice.  The Court at [47] said that "the notice must be a document issued by, or on behalf of those who are calling the meeting.  That some other person provides similar information may go to the question of whether or not particular unit holders have become aware of the meeting, but it does not go to the question of whether there has been compliance with the requirements concerning the calling of the meeting".     The Defendants also sought to rely on clause 9.4 of the Constitution, which provides that non-receipt of a notice of general meeting by, or the accidental omission to give notice to, any person does not invalidate any resolution passed at a meeting.  The Court did not accept this argument, on the basis that clause 9.4 relates only to non-receipt of a notice which has actually been sent or to an accidental omission to send such a notice.  The Court found that clause 9.4 did not apply in the circumstances.   **(ii) Unitholders meeting invalid**   The key matter before the Court was whether an order should be made to invalidate or remedy the Unitholders Meeting pursuant to section 1322 of the Corporations Act.     Section 1322(2) provides that a proceeding is not invalidated because of any procedural irregularity, unless the Court believes the irregularity has caused, or may cause, substantial injustice which cannot be remedied by any order of the Court.     Section 1322(3) provides that a meeting, or a notice of meeting, is not invalidated only because of an accidental omission to give notice of the meeting or the non-receipt by any person of the notice, unless the Court declares proceedings at the meeting to be void.     An order may only be made pursuant to sections 1322(2) and 1322(3) if the Court is satisfied that no substantial injustice has been, or is likely to be, caused to any person.     Under section 1322(4), the Court may declare that any matter in relation to a corporation is not invalid by reason of any contravention of the Corporations Act or the corporation's constitution.    As a preliminary matter, the Court decided that a failure to give Notice to certain Unitholders was a procedural irregularity to which section 1322 of the Corporations Act may apply.    The Defendants submitted that no injustice had been, or might have been, caused to anybody as a result of the irregularities concerning the Notice.  The Court did not accept this proposition.  The Court found that the failure to give Notice to certain Unitholders, in addition to the significant delays and inconvenience caused by the adjournments to the Unitholders Meeting and the overall conduct of the parties, caused, or might have caused, substantial injustice which could not be remedied by any order of the Court.  The Court said at [54] that "I accept that the unit holders are, themselves, best equipped to make decisions affecting their investments.  In general it is desirable that a meeting, once called, proceed, and that those entitled to vote have the opportunity to do so.  However the circumstances in this case are most unusual and, at least to some extent, appear to have been produced by the way in which the meeting was called, as well as by the conduct of the parties to these proceedings."   The Court decided that the irregularity in giving the Notice caused, or might have caused, substantial injustice which could not be remedied by any order of the Court.  The Court declared the Unitholders Meeting to be invalid pursuant to section 1322 of the Corporations Act, and declined to remedy the Unitholders Meeting pursuant to section 1322(4) of the Corporations Act.    **(iii) Absence of quorum**   The Plaintiff submitted that, pursuant to clauses 10.2 and 10.3 of the Constitution, there was no quorum at the Unitholders Meeting on 23 June 2011.  As there was no quorum within 15 minutes of the time specified for the meeting, the Plaintiff submitted that the Unitholders Meeting was dissolved pursuant to clause 10.6 of the Constitution.    The Defendants argued that those clauses of the Constitution were invalid, because they were inconsistent with section 601FM of the Corporations Act, which states that a responsible entity may be removed by vote of 50% plus one.  The Court did not accept this proposition, on grounds that such an approach would exclude any provision for a quorum.     In addition, the Court did not accept the Defendant's claim that the Chairman of the Unitholders Meeting had a residual power to adjourn the meeting, which he exercised within 15 minutes of the time specified for the meeting.  The Court said at [61] that "[e]ven if it be accepted that at common law the Chairman might have adjourned the meeting in the circumstances ... some effect must be given to the provisions such as those in cl 10.6 of the Constitution".  The Court held that the Chairman did not have the power to adjourn the meeting.  An inference was also drawn by the Court, based on available evidence, that any purported adjournment of the Unitholders Meeting did not occur within 15 minutes of the time specified for the meeting.     The Court concluded that, had the meeting not been declared invalid pursuant to section 1322 of the Corporations Act, the Court would have declared the Unitholders Meeting to be dissolved at 11.15am on 23 June 2011 (15 minutes after the time specified for the meeting).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h5)  **5.12 Judicial approval of liquidators' funding agreements**  (By Lara O'Rorke, Clayton Utz)  Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher [2011] FCAFC 89, Federal Court of Australia, Full Court, Emmett, Nicholas and Robertson JJ, 25 July 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/89.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/89.html" \t "_new)   **(a) Summary**  In this case, Fortress Credit Corporation (Fortress) was granted leave to appeal from orders approving two funding agreements between the liquidators of Octaviar Ltd, one of Fortress' debtors, and Octaviar Administration Pty Ltd, a subsidiary of Octaviar Ltd.  Under the agreements, Octaviar Administration Pty Ltd (the Funder) agreed to provide Octaviar Ltd (the Claimant) with the funds it required to publicly examine officers of Fortress and to commence proceedings against Fortress.  Fortress required leave to appeal as it was not a party to the original proceedings in which the two agreements were approved.  The court granted leave to appeal and, in so doing, held that when approving a liquidator's funding agreement, courts must consider whether the agreement is in the best interests of creditors and whether it is expedient to the winding up of the company and the distribution of its property.  **(b) Facts**  The Claimant is the ultimate holding company of a complex group of companies within which the Funder performs treasury functions.  The Claimant went into voluntary administration and liquidators were appointed to both the Claimant and the Funder.  Fortress is a creditor of the Claimant for approximately $71 million and claims to be a secured creditor by virtue of a fixed and floating charge over the Claimant's assets.  In turn, the Claimant is a creditor of the Funder for approximately $500 million.  If valid, the Fortress charge will cover that debt.  As part of the winding up of the Claimant, the liquidators obtained orders to examine certain Fortress officers in relation to the affairs of the Claimant.  The Claimant lacked the funds to investigate possible claims against Fortress.  As the Funder had assets in excess of $120 million, the Funder agreed to finance the liquidators' investigation of possible claims against Fortress (the Investigation Agreement).  Following these investigations, the liquidators decided that it is in the interests of the Claimant's creditors to pursue certain claims against Fortress, including impugning the validity of the charge.  The liquidators also concluded that it is in the interests of the Funder's creditors to enter into a second agreement whereby the Funder will provide the Claimant with the funds necessary to commence proceedings against Fortress (the Funding Agreement).  As consideration for providing the funding, the Funder will receive a share of any amount received by the Claimant in proceedings against Fortress.  In the event that such amounts are not sufficient to reimburse the Funder for the amounts paid by it under the Funding Agreement, the liquidators may apply any dividend otherwise payable to the Claimant in the winding up of the Funder towards reimbursing the Funder.  If the Fortress charge is valid, this will diminish the assets over which the Fortress charge subsists.  Section 477(2)(m) provides that a liquidator may do all such things necessary for winding up the affairs of the company and distributing its property.  Under section 477(2B) of the Act, however, a liquidator must not enter into an agreement on a company's behalf without court approval if the term of the agreement may end, or the obligations of a party to the agreement may be discharged by performance, more than 3 months after the agreement is entered into.  As the obligations of the parties under the Investigation Agreement and Funding Agreement had the potential to extend beyond 3 months from their commencement, the liquidators sought and were granted court approval under section 477(2B).  Fortress appealed from these orders.  **(c) Decision**  The central issue on appeal was whether the Funding Agreement is necessary for winding up the affairs of the Funder and distributing its property as required by section 477(2)(m) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  The Full Court held that the term "necessary" in section 477(2)(m) does not mean essential but expedient.  Accordingly, the liquidator can do anything expedient or conducive to the winding up of the affairs of the company and the distribution of its property.  The Court further held that "[i]n considering whether to give approval under section 477(2B) ... the court must consider whether the contract is in the best interests of the creditors" but that such a conclusion does not necessarily mean that the contract is necessary for the winding up of the affairs of the company and distributing its property within the meaning of section 477(2)(m).  According to the Court, section 477(2)(m) does not allow a liquidator to provide litigation funding to an entirely unrelated litigant simply because of the prospect of obtaining a return as such arrangements are not necessary for the winding up of the affairs of the company and distributing its property - there needs to be something over and above the possibility of a commercial return from arrangements, for example, where the funding company is a creditor of the accommodated company or is also a prospective claimant.  The Full Court found that the trial judge had failed to consider whether the Funding Agreement was expedient for winding up the affairs of the Funder and distributing its property and had not concluded that there was a benefit to the Funder's creditors beyond the possible commercial return to be earned as consideration for lending money.  On this basis, the Court granted Fortress leave to appeal and ordered that the proceedings be remitted for further consideration of the question as to whether the entry into and performance of the obligations under the Investigation and Funding Agreements are necessary for the winding up of the affairs of the Funder and distributing its property within the meaning of section 477(2)(m).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h5)  **5.13 Applications for extension of time to bring claims relating to voidable transactions under section 588FF(3)(b) of the Corporations Act**  (By Glen Wright, Freehills)  In the matter of Clarecastle Pty Ltd (in liquidation) [2011] NSWSC 857, Supreme Court of New South Wales, Ward J, 22 July 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/857.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/857.html" \t "_new)  **(a) Summary**  Two companies were in liquidation and the liquidator sought an extension of time under section 588FF(3)(b) of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) in order to make claims in relation to voidable transactions, in circumstances where the liquidators' investigation was not complete as at the time which proceedings by the liquidators in relation to alleged voidable transactions were required to be brought.  The liquidator claimed it had been delayed in bringing these claim and the Court considered whether leave should be granted for the extension and, if so, whether it should be granted in the broad terms in which it was sought.  **(b) Facts**  Clarecastle Pty Ltd (Clarecastle) and Ladycare Services Pty Ltd (Ladycare) were placed into liquidation on 5 April 2007, that being the relation-back day as defined under section 9 of the Corporations Act. The time within which proceedings by the liquidators in relation to alleged voidable transactions were required to be brought, absent leave of the Court, expired on 5 April 2010 (Expiry Date).  The liquidators sought leave to make claims in relation to voidable transactions, in circumstances where the liquidators' investigation was not complete as at the Expiry Date. The liquidators sought a broad extension, in the Brown format (*BP Australia v Brown* [2003] NSWCA 216; (2003) 58 NSWLR 322), to the effect that "the period prescribed by s 588(3)(b) of the Corporations Law within which any application in respect to voidable transactions of [the company in liquidation] under s 588FF be extended to [a specified date]" (at 94).  It was argued that the decision in Brown is somewhat ambiguous and that it was incorrect insofar as it enabled 'blanket' extensions to be sought.  In seeking the extension, the liquidator argued that its delay in investigating the matters was explicable due to:  lack of funding;  complexity of the companies affairs;  lack of information available to the liquidator; and  lack of cooperation.  The Court considered whether leave should be granted for the extension of time in the Clarecastle and Ladycare proceedings and, if so, whether it should be granted in the broad terms in which it was sought.  **(c) Decision**  The Court considered that it was bound by Brown, a Court of Appeal judgment, but that in any case it had been accepted in a number of subsequent cases to be correct, and is also generally accepted in the academic literature.  In relation to the delay in investigation, the court considered *New Cap Reinsurance Corp v Reaseguros Alianza SA* [2004] NSWSC 787; (2004) 186 FLR 175, stating that "in assessing what is fair and just in all the circumstances, in the context of an application under s 588FF(3)(b) to extend the time for the bringing of claims, regard must be had to the public policy underlying the imposition of limitation periods both generally and in relation to s 588FF(3)(b) in particular" (at 129). The Court also noted the decision in *Arthur Andersen Corporate Finance Pty Ltd v Buzzle Operations Pty Ltd (in liq)* [2009] NSWCA 104 (at 91) that "a deliberate decision to allow a statutory limitation period to expire would be a powerful factor against the grant of leave, noting that any prejudice suffered in such circumstances, were the writ not to be extended, would be self-inflicted" (at 140).  The Court held that:  the claimed lack of funding had not prevented the commencement of proceedings in these matters, since the liquidators were able to secure speculative fee agreements, and that the liquidator had not taken any meaningful steps to investigate the matters. As such, although delaying investigation until funding is in place is a legitimate decision, it is one that must be taken into account in determining whether an extension should be granted;  no real attempt had been made to investigate the companies and that the principal reason for this was not, on the evidence, due to a lack of cooperation; and  although there was a level of complexity as to the companies' affairs, had action been taken to investigate the matters sooner the liquidators may not have been in a position where they required an extension.  The Court briefly considered the merits of the claims for which the extension was sought. The Court also considered the issue of prejudice and concluded that, since other proceedings were already underway in relation to the transactions in question, the prejudice likely to be suffers was considerably diminished.  The Court therefore dismissed the application to extend the time for the bringing of the claims except for one claim where the court allowed an extension of time.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h5)  **5.14 Right to assign claims against a director for breaches of sections 180 to 184 of the Corporations Act**  (By Celeste Koravos, DLA Piper)  Re Novaline Pty Ltd (in liq) [2011] FCA 898, Federal Court of Australia, North J, 14 July 2011  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/898.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/898.html" \t "_new)  **(a) Summary**  Anthony Robert Cant ('the Plaintiff') applied as liquidator of Novaline Pty Ltd ('the Company') for a court order under section 479(3) of the [Corporations Act 2011 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act'), that he and the Company may enter into a deed of assignment of particular causes of action belonging to the Company.  The Court held that claims that a director has breached his or her statutory duty under sections 180 to 184 of the Act can be assigned in certain circumstances, including the present circumstances.  **(b) Facts**  **(i) Background**  The Company operated in the cleaning products industry.  The Company had two directors and shareholders, Mr Cosoleto and Mr Adams.  On 5 October 2007, the Company was wound up on the just and equitable ground under section 461(1)(k) of the Act.  The winding up order was a result of a dispute between the two directors. Mr Cosoleto said that Mr Adams excluded him from the business, and in May 2007, Mr Adams set up Novaline Engineering (New South Wales) Pty Ltd ('NE').  The Plaintiff advised Mr Cosoleto and Mr Adams that the Company may have claims against Mr Adams and NE.  He suspected that:  Mr Adams had banked funds of the Company into the bank account of NE;  liabilities of the Company were paid from the NE bank account;  transactions with clients of the Company were conducted by Mr Adams in the name of NE; and  some Company funds were banked by Mr Adams in his personal account.  The Plaintiff also advised that he had $50,000 of Company funds on account.  The directors responded to the Plaintiff's correspondence as follows:  Mr Adams proposed that he be paid $20,00 together with the release from any action against him; and  Mr Cosoleto proposed that the $50,000 be split equally between himself and Mr Adams, and that he take an assignment of the cause of action belonging to the Company against Mr Adams and NE.  **(ii) The application**  The Plaintiff considered that the causes of action should be assigned to Mr Cosoleto.  As Mr Adams was likely to oppose the assignment, it was desirable for the Plaintiff to seek directions from the Court.  Further, Court approval was necessary under section 477(2B) of the Act because the proposed assignment was likely to continue for more than three months.  The proposed deed of assignment provided that the Company assign to Mr Cosoleto the Company's interest in the 'claims', with this term defined very broadly to include, among other things, claims against:  Mr Adams for breaches of his statutory and common law directors duties;  Mr Adams for banking moneys due and payable to the Company into his own personal account;  NE for the banking of moneys due and payable to the Company which were banked into the account of NE;  NE for the issuing of invoices for work undertaken by the Company; and  Mrs Adams and third parties related to, arising from, or in connection with, those matters.  Mr Adams opposed the application on the following grounds:  as a matter of discretion the Court should not approve an assignment where the subject matter was not clear; and  statutory causes of action are not capable of assignment.  **(c) Decision**  **(i) Subject matter of the assignment**  Mr Adams argued that in order to clarify the subject matter, the Plaintiff needed to identify the causes of action intended to be assigned, the allegations on which the causes of action were based and the advice relied upon to conclude that the causes of action are available.  The Court rejected this ground of opposition, explaining that:  it could not be said that the deed failed to identify the subject matter of the assignment;  in many cases in this area, assignments are in the most general terms, such as claims arising out of or connected with a particular contract;  less criticism could be made of the description of the claims by reference to conduct; and  no criticism could be made of the description of the causes of action.  **(ii) Power to assign statutory causes of action**  Mr Adams argued that it was not possible for the Plaintiff to assign claims against Mr Adams for breaches of his statutory duties as a director under sections 180 to 184 of the Act, relying upon the judgment of Hansen J in *UTSA Pty Ltd (in liquidation) v Ultra Tune Australia Pty Ltd* (1997) 1 VR 667 ('Ultra Tune').  After considering the authorities, North J held that the right to enforce directors' duties is not confined in the way that section 588FB, 588FC and 588FF claims were confined in Ultra Tune.  North J noted that a remedy for a breach of sections 180 to 184 of the Act is found in section 1317H of the Act, which provides for situations where a court may order a person to compensate a corporation for damage suffered by the corporation.  While the bare right to litigate under that section is not assignable under the general law, North J confirmed that the statutory causes of action under sections 180 to 184 are capable of being assigned by a liquidator under section 477(2)(c), being the statutory power of the liquidator to sell or dispose of the company's property.  Finally, North J noted that there is an exception to the prohibition on the assignment of a bare right to litigate where the assignee has a genuine commercial interest in the enforcement of the claim of another and is enforcing it for his own benefit  Here, Mr Cosoleto had a genuine commercial interest in the enforcement of the Company's claim for his own benefit.  The proceeds of a successful claim would be paid to the Company and form part of its assets for distribution to the contributories in the liquidation, so Mr Cosoleto would be entitled to 50 percent of those assets.  **(iii) Discretionary factors**  North J noted that the Court must consider discretionary factors relevant to the application, and that it will not approve an assignment that would lead to frivolous or oppressive litigation.  His Honour confirmed that the Court must be satisfied that the cause of action has a reasonable prospect of success, and that in this context there was a sufficient basis for the claims against Mr Adams and NE for the Court to approve the assignment.  **(d) Order**  The Court consequently ordered that the Plaintiff and the Company may enter into the assignment in the terms of the draft deed of assignment submitted by the Plaintiff.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h5) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Contributions** |  |  | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/169-September-2011.htm%23h1) | | | http://my.lawlex.com.au/alert/pic/spacer.gif |

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