|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| |  |  |  |  | | --- | --- | --- | --- | | http://my.lawlex.com.au/alert/pic/spacer.gif | http://my.lawlex.com.au/alert/pic/spacer.gif | http://my.lawlex.com.au/alert/pic/spacer.gif | http://my.lawlex.com.au/alert/pic/spacer.gif | |  | [AI Global](http://www.lawlex.com.au) |  |  | |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
| |  |  |  |  | | --- | --- | --- | --- | | http://my.lawlex.com.au/alert/pic/spacer.gif | 26 April 2012 | **>**  Regulatory Newsfeed | http://my.lawlex.com.au/alert/pic/spacer.gif | |
|  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | SAI Global Corporate Law Bulletin No. 176**>** |  | | | http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif | |  | | --- | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Index** | mail lawlex [helpdesk.asiapac@saiglobal.com](mailto:helpdesk.asiapac@saiglobal.com" \t "_new) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | | http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif | |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  | | --- | | **Bulletin No. 176**  Editor: [Professor Ian Ramsay](mailto:i.ramsay@unimelb.edu.au" \t "_new), Director, Centre for Corporate Law and Securities Regulation  Published by SAI Global on behalf of the [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/" \t "_new), Faculty of Law, The University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/" \t "_new), the [Australian Securities Exchange](http://www.asx.com.au/" \t "_new) and the leading law firms: [Ashurst](http://www.ashurst.com/" \t "_new), [Clayton Utz](http://www.claytonutz.com/" \t "_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/" \t "_new), [DLA Piper](http://www.dlapiper.com/Australia/" \t "_new), [Freehills](http://www.freehills.com/" \t "_new), [King & Wood Mallesons](http://www.mallesons.com/" \t "_new).  1.     [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#h1)  2.     [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#h2)  3.     [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#h3)  4.     [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#h4)  5.     [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#h5)  6.     [Contributions](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#7)  7.     [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new) | | [**Legislation Hotline**](mailto:legislationhotline@saiglobal.com)  [eview my Newsfeed selections](http://my.lawlex.com.au/default.asp?goto=news_sub) [iew past editions of Newsfeeds](http://my.lawlex.com.au/default.asp?goto=news) [iew a list of related Standards](http://infostore.saiglobal.com/store/results2.aspx?searchType=subject&publisher=All&doctype=All&status=Current&sfld1=ICS%20Code&sval1=03.160) [earch all Australian legislation from one website](http://my.lawlex.com.au/default.asp?goto=search_leg) [ree trial our Lawlex Legislative Alerts](http://www.saiglobal.com/Compliance/regulatory-news/asiapac/lawlex-legislative-alert.htm) [ree trial our other regulatory products and services](http://www.saiglobal.com/compliance/regulatory-news/default.htm) [overnance, risk and compliance solutions](http://www.saiglobal.com/compliance/about/) | | |  | | --- | | COPYRIGHT WARNING Use of this product must be in accordance with our licence agreement and the relevant licence fee paid by your organisation. We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | |  | |      |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%231) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | | [1. Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#1)  [1.1  FRC consults on UK Corporate Governance Code, Stewardship Code and Auditing Standards](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#011)  [1.2  Revised governance principles for sporting organisations](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#012) [1.3  Draft legislation to protect workers' entitlements and strengthen director obligations](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#013) [1.4  Government implements G20 commitment on OTC derivatives reforms](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#014)  [1.5  CPSS and IOSCO report on principles for financial market infrastructures](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#015)  [1.6  European Banking Authority publishes results of its survey of the implementation of the CEBS Guidelines on Remuneration Policies and Practices](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#016)  [1.7  Group of Thirty report on the governance of financial institutions](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#017)  [1.8  European Confederation of Directors' Associations' release papers following 'Comply or Explain' conference](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#018) [1.9  Basel Committee on Banking Supervision second progress report on implementation of Basel III](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#019) [1.10  NZ Financial Markets Authority revised draft guidance on effective disclosure](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#110)  [1.11  APRA releases two new superannuation prudential practice guides](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#111) [1.12  Government acknowledges need to clarify shareholder voting on executive remuneration](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#112) [1.13  High Pay Centre report 'The New Closed Shop: Who's Deciding on Pay?'](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#113)  [1.14  IMF global financial stability Report](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#114)  [1.15  APRA releases response to submissions and draft prudential standards on Basel III capital reforms](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#115) [1.16  European Commission consultation on modernising European insolvency law](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#116) [1.17  APB paper on professional scepticism in auditing](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#117) [1.18  Council of Financial Regulators' recommendations for financial market infrastructure reform](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#118) [1.19  FSA consults on changes to its regulatory guide on financial crime](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#119) [1.20  OECD report on related party transactions and minority shareholder rights](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#120) [1.21  EU OTC derivatives legislation](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#121) [1.22  UK BIS response to its consultation on the future of narrative reporting](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#122) [1.23  UK Ownership Commission report on 'Plurality, Stewardship and Engagement'](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#123) [1.24  ESMA consultation on the proxy advisory industry](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#124) [1.25  Financial Stability Board plans to improve financial institution risk disclosures](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#125)  [1.26  Report on fiduciary obligations of investors](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#126) [1.27  EU reform of shadow banking](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#127) [1.28  Audit committee issues conference findings](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#128) [1.29  Report on executive remuneration trends](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#129)  [2. Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#2)  [2.1  Compliance check on information lodged in annual compliance certificates](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#021) [2.2  Update on equity market structure reform proposals](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#022)  [2.3  First enforcement report](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#023)  [2.4  Exchange traded funds report](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#024)  [2.5  Improved disclosure of unlisted property scheme risks](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#025) [2.6  Report on retirement advice shadow shopping research](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#026)  [3. Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#3)  [3.1  Reports](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#031) [3.2  Single Stock ETO Expiry: Response to Market Interruptions](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#032) [3.3  Strengthening Australia's equity capital markets: ASX proposals and consultation](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#033) [3.4  Report on feedback to consultation paper on disclosure rules for mining and oil & gas companies](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#034) [3.5  New ASX Chairman](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#035) [3.6  S&P/ASX Index Consultation: Index Eligibility and Treatment of Unsponsored Depositary Receipts](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#036)  [4. Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#4)  [4.1  Revised Guidance Note 18](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#041)  [4.2  Real Estate Capital Partners USA Property Trust](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#042) [4.3  Careers Australia Group Ltd](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#043)  [5. Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#5)  [5.1  Enforcing foreign arbitral awards in the Federal Court](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#051) [5.2  The power of the Federal Court to dispense with the general rule that a corporation may only appear by way of legal representative](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#052)  [5.3  Administrators seeking orders to borrow funds to investigate a sale as a going concern](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#053)   [5.4  Bonus payment - obligation to pay](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#054)  [5.5  Receivers' and mortgagees' examination powers upheld as constitutionally valid](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#055)  [5.6  Managing director lacks implied authority to dismiss other directors](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#056)  [5.7  Misleading or deceptive conduct in relation to share purchases: the need to establish a causal link](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#057)  [5.8  Winding up applications cannot be commenced before the statutory demand expires](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#058)  [5.9  Can administrators ignore the express terms of a contract when calculating the value of a claim for voting purposes?](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#059) [5.10  Equitable 'fruits of action' liens, registration and companies subject to deeds of company arrangement](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#510) [5.11  Whether a company limited by guarantee should pay legal costs incurred by directors or members in legal proceedings](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#511) [5.12  A section 1321 appeal: form of orders, interest and indemnity costs](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#512) [5.13  Administrators are not 'officers' for the purposes of managed investment schemes; application for relief from financial reporting requirements](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html#513) |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **1. Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1  FRC consults on UK Corporate Governance Code, Stewardship Code and Auditing Standards**  On 20 April 2012, the Financial Reporting Council began consultation on proposed revisions to the UK Corporate Governance Code and International Standards on Auditing (UK and Ireland), to give effect to its Effective Company Stewardship proposals.  The FRC is also consulting on updates to the Stewardship Code.  The UK Corporate Governance Code, which celebrates its twentieth anniversary this year, sets out good practice for UK listed companies on issues such as board composition and effectiveness, risk management, audit committees and relations with shareholders.  The Stewardship Code, first published in 2010, sets out good practice for institutional investors on monitoring and engaging with investee companies and reporting to clients and beneficiaries.  The proposed changes to the UK Corporate Governance Code include:   * requesting FTSE 350 companies to put the external audit contract out to tender at least every ten years; * asking boards to explain why they believe their annual reports are fair and balanced; * encouraging more meaningful reporting by audit committees; and * providing more guidance on explanations that should be provided to shareholders when a company chooses not to follow the Code.   The new Code will also embody provisions previously announced requiring boards to report on their gender diversity policies.  The proposed changes to the Stewardship Code include:   * clarifying what is meant by stewardship, and the respective responsibilities of asset owners and asset managers; and * asking investors to disclose their policy on stock lending, and whether they recall lent stock for voting purposes.   The FRC is also consulting on proposed changes to the Guidance for Audit Committees to support the changes to the UK Corporate Governance Code and to give effect to the FRC's Effective Company Stewardship proposals.  The proposed changes to the auditing standards are mainly directed at:   * enhancing auditor communications by requiring the auditor to communicate to the audit committee information that the auditor believes the committee will need to understand the significant professional judgments made in the audit; and * extending auditor reporting by requiring the auditor to report, by exception, if the board's statement of why the annual report is fair and balanced is inconsistent with the knowledge acquired by the auditor in the course of performing the audit, or if the matters disclosed in the report from the audit committee do not appropriately address matters communicated by the auditor to the committee.   Subject to the outcome of the consultations, all the proposed changes will apply to financial years beginning on or after 1 October 2012.  Further information is available on [FRC website](http://www.frc.org.uk/press/pub2764.html" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.2  Revised governance principles for sporting organisations**  On 19 April 2012 the Australian Government released a revised set of sport governance principles for Australia's National Sporting Organisations (NSOs) to improve their governance arrangements. Many sporting organisations are companies.  The Sports Governance Principles of Best Practice advocate strengthening structures that support good leadership and decision-making, and ensure sound and effective governance. Building on the principles developed in 2007, the revised document will encourage NSOs to focus on their management, planning and reporting practices.  The revised sport governance principles have been developed by the Australian Sports Commission (ASC) after extensive consultation with the industry.  The governance principles include matters such as board composition, roles, powers reporting, performance and processes, governance systems, member relationship and reporting and ethical and responsible decision making.  A copy of the revised governance principles can be found at the Australian Government's [Australian Sports Commission website](http://www.ausport.gov.au/supporting/clubs/governance" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.3  Draft legislation to protect workers' entitlements and strengthen director obligations**  On 18 April 2012, the Australian Government released for public consultation draft legislation which amends the Australian tax law to better protect workers' superannuation entitlements and strengthen director obligations.   The main aspects of these amendments involve:   * expanding the director penalty regime to superannuation guarantee amounts; * ensuring that directors cannot have their director penalties remitted by placing their company into administration or liquidation when unpaid Pay As You Go (PAYG) withholding or superannuation guarantee amounts remain unpaid three months after the due date; and * restricting access to PAYG withholding credits for company directors and their associates where the company has failed to pay withheld amounts to the Commissioner of Taxation.   Under the director penalty regime, which has been in operation since 1993, company directors are personally liable for amounts withheld by their company that have not been remitted to the Australian Taxation Office (ATO). The *Tax Laws Amendment (2012 Measures No. 2) Bill 2012: Companies' non-compliance with PAYG withholding and superannuation guarantee obligations* will extend the regime to cover Superannuation Guarantee amounts.  As well as strengthening directors' obligations to arrange for their companies to meet PAYG withholding and superannuation obligations, the measure will also help counter phoenix behaviour.  Fraudulent directors who use phoenix companies to try and avoid their debts will be held personally liable for their PAYG withholding and superannuation obligations.  The Australian Government held further consultation with industry after withdrawing an earlier version of the legislation in November 2011. Following this consultation, the Australian Government has made amendments to the draft Bill, including to ensure that new directors have time to familiarise themselves with corporate accounts before being held personally liable for corporate debts and requiring the ATO to serve director penalty notices on directors in all cases before commencing action.  The draft legislation also includes a new defence for directors liable to penalties for superannuation debts where, broadly, they reasonably thought the worker was a contractor and not an employee.  Further information is available on the [Treasury website](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Amendments-to-the-director-penalty-regime" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.4  Government implements G20 commitment on OTC derivatives reforms**  On 18 April 2012, the Australian Government released the final report of the Council of Financial Regulators (CFR), outlining its proposed next steps towards the implementation of Australia's G20 commitment to improve risk management and reduce systemic risk in the 'over-the-counter' (OTC) markets for financial derivative products.  Consistent with the advice of the CFR, the Government will consult further with stakeholders in the coming months on legislation for amendments to the [Corporations Act 2011 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) to build a legislative framework for complying with Australia's international obligations.  Accordingly, on 18 April 2012, the Government released a consultation paper which seeks stakeholder views on the detailed design of future regulatory settings.  The global financial crisis highlighted the massive build-up of systemic risk in some advanced countries through the rapid growth of highly complex, leveraged derivative products which were traded outside appropriately regulated and transparent markets.  In September 2009, the G20 endorsed a global transition of derivatives products - which are currently traded through bilateral arrangements between parties, or 'over-the-counter' - towards recognised exchanges or trading platforms where appropriate, in order to boost market transparency. The G20 also agreed that all standardised OTC derivatives should be cleared through a central counterparty and all OTC derivatives should be reported to trade repositories, in order to reduce systemic risk and enhance transparency.  The G20 committed to make this transition by the end of 2012.  The Australian Government and regulators have been working through global forums since the crisis to develop a comprehensive framework for improving transparency and risk management in relation to derivatives trading.  The CFR has engaged extensively with domestic market participants since 2009 to identify the most appropriate policy settings for Australia in meeting its G20 commitments, including the release of a discussion paper in June 2011.  The CFR recommends the development of a legislative framework which allows regulators to take a dynamic approach as the Australian market evolves, and allows for mandated outcomes should these be required for financial stability objectives and to meet Australia's international obligations.  However, the CFR has advised that where possible market driven solutions, in part driven by appropriate regulatory incentives, should be preferred. The CFR advises that it does not consider restrictions should be placed on local participants in accessing domestic or offshore financial infrastructure at this time, subject to appropriate safeguards being in place.  The Treasury, with other CFR agencies, will now engage with stakeholders for a two month period to seek views on the contents of the regulations to be made under the legislative framework, with interested stakeholders also having an opportunity to comment on legislation before introduction.  A copy of the CFR's recommendations, the consultation paper and details on consultation are available on the [Treasury website](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Over-the-counter-derivatives-commitments-consultation-paper" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.5  CPSS and IOSCO report on principles for financial market infrastructures**  On 17 April 2012, the Committee on Payment and Settlement Systems (CPSS) and the International Organization of Securities Commissions (IOSCO) released three documents that promote global efforts to strengthen financial market infrastructures (FMIs):   * a report entitled 'Principles for financial market infrastructures'; * a consultation paper on an 'Assessment methodology' for these new standards; and * a consultation paper on a 'Disclosure framework' for the standards.   **(a)  Principles for financial market infrastructures**   New and more demanding international standards for payment, clearing and settlement systems, including central counterparties, have  been issued by the CPSS and IOSCO in a report titled 'Principles for financial market infrastructures'. Among other things, the principles will provide important support for the G20 strategy to make the financial system more resilient by making central clearing of standardised OTC derivatives mandatory. CPSS and IOSCO members will strive to adopt the new standards by the end of 2012.  Financial market infrastructures (FMIs) are expected to observe the standards as soon as possible.    The new standards (called 'principles') replace the three existing sets of international standards set out in:   * the 'Core principles for systemically important payment systems' (CPSS, 2001); * the 'Recommendations for securities settlement systems' (CPSS-IOSCO, 2001); and * the 'Recommendations for central counterparties' (CPSS-IOSCO, 2004).   CPSS and IOSCO have strengthened and harmonised these three sets of standards by raising minimum requirements, providing more detailed guidance and broadening the scope of the standards to cover new risk-management areas and new types of FMIs.   The new principles are designed to ensure that the infrastructure supporting global financial markets is robust and thus well placed to withstand financial shocks. They apply to all systemically important payment systems, central securities depositories, securities settlement systems, central counterparties and trade repositories (collectively 'financial market infrastructures'). These FMIs collectively clear, settle and record transactions in financial markets.   Compared with the old standards, the new principles introduce new or more demanding requirements in many important areas including:   * the financial resources and risk management procedures an FMI uses to cope with the default of participants; * the mitigation of operational risk; * the links and other interdependencies between FMIs through which operational and financial risks can spread; * achieving the segregation and portability of customer positions and collateral; * tiered participation; and * general business risk.   **(b)  Consultation about assessment and transparency**   At the same time as publishing the finalised principles, CPSS-IOSCO has released two related documents for public consultation:   * An assessment methodology that can be used to assess whether an FMI is observing the new principles; and * A disclosure framework that sets out the information an FMI should publish in order to be transparent about the risks of using the FMI.   Further information is available on the [IOSCO website](http://www.iosco.org/news/pdf/IOSCONEWS230.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.6  European Banking Authority publishes results of its survey of the implementation of the CEBS Guidelines on Remuneration Policies and Practices**   On 13 April 2012, the European Banking Authority published the results of its survey on the implementation of 'CEBS Guidelines on remuneration policies and practices'.   Key findings include:   * The scope of the Guidelines is an area of significant concern. * The governance of remuneration has shown considerable progress. * The risk alignment of remuneration policies and practices remain underdeveloped. * The use of instruments as part of variable remuneration suffers from a feasibility gap. * Disclosure of remuneration policies and practices deserves greater attention.   The survey findings indicate that while considerable progress has been reported with respect to the governance of remuneration, some areas of concern remain.  For example, further supervisory guidance is needed in setting up the criteria for identifying risk takers as well as in the application of the proportionality principle and risk alignment practices.   With regard to the identification of risk takers, the survey has highlighted inconsistencies across institutions in the criteria used to identify staff that have a material impact on the firm's risk profile.  Furthermore, such criteria have not always proved to sufficiently grasp the risk impact aspect of the exercise.     Inconsistencies have also emerged in the application of the proportionality principle with practices varying from predetermined fixed criteria to open case-by-case approaches to determine if the set of specific remuneration rules should be applied to identified staff.  Finally, the survey has showed that risk alignment practices across the industry remain underdeveloped, namely with regard to the interaction of parameters used for risk management and the structure of bonus pools.   The survey is available on the [EBA website](http://www.eba.europa.eu/cebs/media/Publications/Standards%20and%20Guidelines/2010/Remuneration/Implementation-survey-on-CEBS--Guidelines-on-Remuneration--final-.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.7  Group of Thirty report on the governance of financial institutions**   On 12 April 2012, the Group of Thirty (G30), an international forum of public and private sector financial leaders, released a report titled 'Towards Effective Governance of Financial Institutions'.   The report suggests that further improvements in corporate governance at major financial services firms are crucial to securing greater financial stability.  Although many financial services firms have drawn lessons from the 2008-2009 financial crisis and implemented substantial governance reforms, no one should presume that governance in leading financial institutions has been fully addressed.   The G30 report is based on an examination of governance arrangements at 36 of the world's largest financial services firms and interviews with leaders of FIs, regulators and supervisors.   The report argues that boards, managers, supervisors and long-term shareholders need to reassess their approach to governance and, in this regard, provides recommendations regarding what each of these parties needs to do in order to bring about more effective governance.    A major section of the report discusses ways to strengthen the governance functions of the board of directors. The G30 concludes that splitting the roles of CEO and Chairman should be strongly encouraged. A combined role may be acceptable if the board appoints a lead or senior independent director with the responsibility and authority to act as though s/he were the non-executive chairman under circumstances that call for greater independence.   The G30's recommendations to improve governance include the call on managements to strengthen the fabric of checks and balances in their organisations. The board and management reinforce the values that drive good behaviour through the organisation. The G30 also notes that long-term shareholders can and should contribute meaningfully to effective FI governance, although no one should depend on them to steer FIs away from another crisis.  For their part, institutional shareholders should remain active in governance, commensurate with their ownership objectives.   The report stresses that values influence the behaviour of those with governance responsibilities and the key to reform is to promote changes in the ways in which these individuals think about their responsibilities. For example, FI leaders would govern differently if they believed the following:   * Governance is an ongoing process, not a fixed set of guidelines and procedures. * Diversity of governance approaches across FIs is a virtue, not a vice. * To get deeper and deeper into the details of all parts of the business may be a choice some boards will make, but endless detail is not a prerequisite for board effectiveness. Boards will need to dig deep selectively, as necessary for understanding. * Board independence and challenge is not evidenced by the number of times a director says no to management. * Having smaller boards that require greater time commitment from their members is a far better approach than having larger boards that require only modest time commitment. * Non-executive directors, sometimes called "outside board members", must bring an independent, external perspective. * The essence of FI governance is understanding risk.  If a risk is too complicated to understand, it is too complicated to accept.  Effectively balancing risk, return, and resilience takes judgment. * Values and culture are the ultimate "software" that determines the behaviours of people throughout the FI and the effectiveness of its governance arrangements.   The report is available on the [G30 website](http://www.group30.org/images/PDF/TEGFI_ExecSum.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.8  European Confederation of Directors' Associations' release papers following 'Comply or Explain' conference**    On 6 April 2012, the European Confederation of Directors' Associations (ecoDa) released papers following its annual conference, held in Brussels on 27 March 2012.  The theme of the conference was 'Comply or Explain - Preserving Governance Flexibility with Quality Explanations'.   Papers presented at the conference, including reviews of governance practices in some of the European Union Member States, are now available.   The papers are available on the [ecoDa website](http://www.ecoda.org/ecoDa27MarchMaterial.html" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.9  Basel Committee on Banking Supervision second progress report on implementation of Basel III**   On 5 April 2012, the Basel Committee on Banking Supervision released its second progress report on the implementation of Basel III.   The updated 'Progress report on Basel III implementation' provides a high-level view of Basel Committee members' progress in adopting Basel II, Basel 2.5 and Basel III, as of end March 2012.  It focuses on the status of domestic rule-making processes to ensure that the Committee's capital standards are transformed into national law or regulation according to the internationally agreed timeframes.  The Committee believes that disclosure will provide additional incentive for members to fully comply with the international agreements.  The report updates the Committee's [October 2011 progress report](http://www.bis.org/publ/bcbs203.htm" \t "_new).  The report is available on the [Bank for International Settlements website](http://www.bis.org/publ/bcbs215.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.10  NZ Financial Markets Authority revised draft guidance on effective disclosure**  On 5 April 2012, New Zealand's Financial Markets Authority (FMA) published revised draft guidance note for issuers, directors and advisers on preparation of effective disclosure documents. Following publication of the first draft guidance in late January, FMA engaged with industry and consumer groups and received more than 60 submissions.  As a result of that feedback, the second draft guidance note is markedly different to the first.  FMA is now seeking further high level feedback from interested parties before it is finalised.  The revised document clarifies that the guidance does not change or add to existing legal requirements.  It seeks to help issuers comply with those requirements, and have confidence that they understand the FMA's approach, including how it will interpret and apply the law relating to their responsibilities.  Changes have also been made to emphasise that the guidance is not a compliance 'check list' and that not every example given will be relevant to every offer. The guidance emphasises the importance of issuers and their directors assessing what information will be material to an investor's decision about whether or not to invest.  Further information is available on the [FMA website](http://www.fma.govt.nz/keep-updated/newsroom/media-releases/2012/fma-publishes-revised-draft-guidance-on-effective-disclosure/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.11  APRA releases two new superannuation prudential practice guides**  On 4 April 2012, the Australian Prudential Regulation Authority (APRA) released two prudential practice guides for superannuation trustees in the areas of contribution and benefit accrual standards, and payment standards.  The two prudential practice guides are:   * 'Prudential Practice Guide SPG 270 - Contribution and benefit accrual standards for regulated superannuation funds'; and * 'Prudential Practice Guide SPG 280 - Payment standards for regulated superannuation funds and approved deposit funds'.   The prudential practice guides were previously released in draft version in August 2011 and have been revised following industry feedback.   The prudential practice guides do not introduce any new requirements for trustees. They update APRA's existing guidance, issued as Superannuation Circulars in 2006, to reflect legislative changes introduced since then and to adopt the prudential practice guide format that APRA uses for other supervised industries.   The prudential practice guides are final and are effective immediately.  The two prudential practice guides are available on the [APRA website](http://www.apra.gov.au/Super/PrudentialFramework/Pages/superannuation-ppgs.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.12  Government acknowledges need to clarify shareholder voting on executive remuneration**  On 2 April 2012, the Government acknowledged the concerns raised by Chartered Secretaries Australia (CSA) regarding undirected proxy votes cast by the chair on executive remuneration resolutions.  The Government introduced an amendment into Parliament last year through the [Consumer Credit and Corporations Legislation Amendment (Enhancement) Bill 2011](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=126507" \t "_default). The [Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=124604" \t "_default) was passed and addresses the conflicts of interest in the remuneration setting process. This Act prohibits key management personnel from voting on remuneration matters. However, an exception was provided where shareholders give an undirected proxy to the chair of an annual general meeting, and the shareholders provide their informed consent for the chair to exercise the proxy.  CSA's concerns were raised as to whether this exception applies to the non‑binding vote required under section 250R of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).  The Government has sought to clarify this issue by progressing a legislative amendment as part of the existing Consumer Credit Bill.  Further information is available on the [CSA website](http://www.csaust.com/news-media/news/2012/apr/government-losing-the-race-to-amend-executive-remuneration-legislation-before-the-major-agm-season.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.13  High Pay Centre report 'The New Closed Shop: Who's Deciding on Pay?'**    On 2 April 2012, the UK's High Pay Centre released a report titled 'The New Closed Shop: Who's Deciding on Pay?', in which it examines the membership of FTSE 100 company remuneration committees.   The High Pay Centre is an independent non-party think tank established to monitor company remuneration, accountability and business performance.   According to the report, three key trends are apparent:   1.  Indirect interest: Through the common process of benchmarking, current executives may have an indirect financial interest in the increasing pay in other companies.   * 9% of FTSE 100 companies have a current FTSE 100 lead executive on their remuneration committee. * 33% of FTSE 100 companies have a current lead executive on the remuneration committee.   2.  Similar professional backgrounds:  The majority of non-executive directors who sit on remuneration committees come from business or financial intermediation.  A significant minority are current or former lead executives.   * 46% of people sitting on remuneration committees are current or former lead executives. * Of the 366 non-executive directors who sit on remuneration committees, 37 are not from business or financial intermediation - that is just 10%.    3.  Gender makeup:  The majority of people sitting on remuneration committees are male and a significant minority of companies have all-male remuneration committees.   * 45% of the companies in the FTSE 100 survey have all-male remuneration committees. * There are 59 women sitting on the remuneration committees of the FTSE 100 companies.  This represents 16% of the total.   The report is available on the [High Pay Centre website](http://highpaycentre.org/files/hpc_dp_remco.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.14  IMF global financial stability report**   In April 2012, the International Monetary Fund (IMF) released its 'Global Financial Stability Report: The Quest for Lasting Stability'.     The report assesses changes in risks to financial stability over the past six months, focusing on sovereign vulnerabilities, risks stemming from private sector deleveraging, and the continued resilience of emerging markets. The report probes the implications of recent reforms in the financial system for market perception of safe assets, and investigates the growing public and private costs of increased longevity risk from aging populations.   The report includes the following topics:   Chapter 1:  Global financial stability assessment Chapter 2:  Sovereigns, banks, and emerging markets: detailed analysis and policies Chapter 3:  Safe assets: financial system cornerstone? Chapter 4:  The financial impact of longevity risk.   The report is available on the [IMF website](http://www.imf.org/External/Pubs/FT/GFSR/2012/01/pdf/text.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.15  APRA response to submissions and draft prudential standards on Basel III capital reforms**   On 30 March 2012, the Australian Prudential Regulation Authority (APRA) released for consultation a response paper and a set of five draft prudential standards that give effect to the Basel III capital reforms in Australia.   This package follows the release of a discussion paper in September 2011 on APRA's approach to these global capital reforms, which will raise the level and quality of capital in the global banking system. The response paper provides APRA's comments on key issues raised in the 13 submissions it received in the first-round consultation.  APRA is not intending to change its broad approach to the implementation of the Basel III reforms.  However, in response to issues raised, APRA is proposing to provide some limited flexibility on certain aspects of the reforms and it has provided clarifications on a number of technical elements.  The five draft prudential standards are:   * 'Prudential Standard APS 001 Definitions', which defines terms that apply across ADI prudential standards; * 'Prudential Standard APS 110 Capital Adequacy', which sets out the overall Basel III capital framework, including minimum regulatory capital requirements and two new capital buffers; * 'Prudential Standard APS 111 Capital Adequacy: Measurement of Capital', which provides details on the eligibility criteria for regulatory capital and on regulatory adjustments; * 'Prudential Standard APS 160 Basel III Transitional Arrangements', which outlines transitional arrangements for non-complying capital instruments; and * 'Prudential Standard APS 222 Associations with Related Entities', which now includes Extended Licensed Entity requirements previously included in APS 110.   The response paper and the five draft prudential standards can be found on the [APRA website](http://www.apra.gov.au/adi/PrudentialFramework/Pages/Basel-III-Capital-Reforms-March-2012.aspx" \t "_new).   APRA has also released a letter to ADIs outlining further interim arrangements for capital instruments that are issued before the new prudential standards come into effect on 1 January 2013. These arrangements are additional to the arrangements set out in APRA's letters to ADIs of 17 September 2010 and 27 May 2011, which remain in force.  The latest letter can be found on the [APRA website](http://www.apra.gov.au/adi/Publications/Pages/other-information-for-adis.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.16  European Commission consultation on modernising European insolvency law**   On 30 March 2012, the European Commission launched a public consultation on modernising EU rules governing insolvencies.     The existing rules date from 2000 and set out how bankruptcies - of companies or individuals - should be coordinated between several EU countries.  The results of the consultation will help determine whether and how the existing Insolvency Regulation needs to be revised in order to bolster businesses and strengthen the EU's Single Market.  It forms part of the EU's efforts to preserve jobs and to promote economic recovery, sustainable growth and a higher investment rate, as set out in the Europe 2020 strategy.   According to the European Commission, the Insolvency Regulation of 2000 has improved legal certainty and facilitated judicial cooperation in the treatment of cross-border insolvency cases.  However, after ten years in application, important developments in national insolvency law and considerable changes in the economic and political environment call for a fresh look at the Regulation.   Further information is available on the [European Commission website](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/324&format=HTML&aged=0&language=EN&guiLanguage=en" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.17  APB paper on professional scepticism in auditing**   On 30 March 2012, the UK's Auditing Practices Board (APB) of the Financial Reporting Council (FRC) released a briefing paper setting out its views on the nature of professional scepticism and its role in auditing.   The paper, titled 'Professional Scepticism', builds on the APB Discussion Paper published in 2010, 'Auditor Scepticism: Raising the Bar' and the subsequent Feedback Paper, published in March 2011, which summarised the comments received and outlined the actions that the APB, and other parts of the FRC, intended to take.    The paper is designed to provoke new thinking and broaden the understanding of the need for and meaning of scepticism in the context of auditing.  The APB is seeking to promote the conclusions drawn in the paper by:   * encouraging the auditing profession and the audit firms to consider the implications of the conclusions for their business models and culture; * encouraging Audit Committee members and management to recognise and act on the important contribution that they can make to support the appropriate exercise of professional skepticism in considering the key judgments involved in preparing the financial statements and in responding to the challenges raised in the audit; and * in due course, identifying ways in which the International Standards on Auditing (ISAs) might be further developed in response to these conclusions, as part of the post Clarity ISA implementation review being conducted by the International Auditing and Assurance Standards Board (IAASB).   The paper is available on the [FRC website](http://www.frc.org.uk/apb/publications/pub2752.html" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.18  Council of Financial Regulators' recommendations for financial market infrastructure reform**   On 30 March 2012, Treasury released the Council of Financial Regulators recommendations on reforms to the oversight of Australia's financial market infrastructure. The Council's recommendations include:   * new powers to require certain market infrastructure to have key aspects of their operations located in Australia, where deemed appropriate, and be managed and governed by 'fit and proper' persons; * enhanced 'step in' powers for regulators to intervene in the event of infrastructure experiencing substantial difficulties; and * strengthened and clarified powers for regulators to give directions to operators of key market infrastructure and impose appropriate sanctions where licensees and their officers fail to comply with directions or licence conditions.   The Council, whose members include the Governor of the Reserve Bank, the Secretary of the Treasury, and the Chairs of both APRA and ASIC, advise that these changes are desirable to underwrite the continued stability of Australia's market infrastructure and ensure their strong ability to maintain robust oversight in all market conditions.  In 2011 the Treasury asked the Council to advise on potential reforms, following its decision to prohibit the acquisition of ASX Limited by Singapore Exchange Limited as contrary to the national interest.  According to the Treasury, the proposed acquisition also highlighted the need for reforms to strengthen Australian regulators' oversight of key market infrastructure; particularly in respect of any future commercial arrangement involving ASX and an overseas exchange.  Further information is available on the [Treasury website](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Council-of-Financial-Regulators-Working-Group-on-Financial-Market-Infrastructure-Regulation" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.19  FSA consults on changes to its regulatory guide on financial crime**   On 29 March 2012, the UK's Financial Services Authority released the findings of its thematic review into 'Anti-bribery and corruption (ABC) systems and controls in investment banks'.  In response to those findings, the FSA announced that it will consult on proposed amendments to the FSA's regulatory guidance, 'Financial crime: a guide for firms'.    This proposed new guidance applies to all firms within the scope of the FSA's financial crime rules, not just investment banks.   From August 2011, the FSA visited 15 firms, including eight major global investment banks and a number of smaller operations, to examine how firms mitigate bribery and corruption risk.  Bribery and corruption risk is the risk of the firm, or anyone acting on the firm's behalf, engaging in bribery and corruption.  The FSA found that, despite a long-standing regulatory requirement to mitigate financial crime risk, the majority of firms in its sample had more work to do to implement effective anti-bribery and corruption systems and controls. In particular, the FSA found the following common weaknesses:   * most firms had not properly taken account of the FSA's rules covering bribery and corruption, either before the implementation of the Bribery Act 2010 or after; * nearly half the firms in the FSA's sample did not have an adequate ABC risk assessment; * management information on ABC was poor, making it difficult for the FSA to see how firms' senior management could provide effective oversight; * only two firms had either started or carried out specific ABC internal audits; * there were significant issues in firms' dealings with third parties used to win or retain business; and * though many firms had recently tightened up their gifts, hospitality and expenses policies, few had processes to ensure gifts and expenses in relation to particular clients/projects were reasonable on a cumulative basis.   The proposed guidance, 'Financial crime: a guide for firms', is available on the [FSA website](http://www.fsa.gov.uk/library/policy/guidance_consultations/2012/gc1205" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.20  OECD report on related party transactions and minority shareholder rights**   On 29 March 2012, the OECD released a report titled 'Related Party Transactions and Minority Shareholder Rights'.   The report presents the results of the third thematic peer review based on the OECD Principles of Corporate Governance.  The report is focused on the corporate governance framework that manages related party transactions with the aim to protect minority investors.  It covers 30 jurisdictions, including in-depth reviews of Belgium, France, Israel, Italy and India.   The OECD corporate governance peer review process is designed to facilitate effective implementation of the principles and to assist market participants and policy makers to respond to emerging corporate governance risks.   The report is available on the [OECD website](http://www.oecd.org/dataoecd/28/29/50089215.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.21  EU OTC derivatives legislation approved**   On 29 March 2012, the European Union announced that legislation to make trade in over-the-counter (OTC) derivatives safer and more transparent had received Parliamentary approval.   The regulation provides that OTC derivative contracts have to be cleared through central counterparties (CCPs), thus reducing counterparty credit risk (ie the risk that one party to the contract may default).  There is also a requirement that all derivative contracts (not only OTC derivatives), have to be reported to central data centres or "trade repositories", which would have to publish aggregate positions by class of derivatives, thereby offering market players a clearer view of the market.   The work of trade repositories would be monitored by the European Securities and Markets Authority (ESMA), which would be responsible for granting or withdrawing their registration.  ESMA's role has been strengthened by making it easier for it to block the authorisation of a CCP to operate on the EU's internal market. Parliament also provided for binding mediation by ESMA in disputes among national authorities over the authorisation of CCPs.   For pension schemes, the clearing obligation would not apply for three years, extendable by another two years plus one, subject to proper justification.   CCPs from third countries will be recognised in the EU only if the legal regime of the third country in question provides for an effective equivalent system for recognition.  However, this does not set a precedent for other legislation on the supervision and oversight of financial market infrastructures.   The Council and Commission also agreed to a proposal by Parliament to have the implementation of the legislation evaluated by the Commission.  This evaluation would assess how effectively CCPs are supervised, including supervisory colleges' voting arrangements and the ESMA's role in the process of authorising CCPs.  The Commission will present a report, if necessary accompanied by proposals to Parliament and Council, no later than three years after the regulation's entry into force.   Further information is available on the [EU website](http://www.europarl.europa.eu/news/en/pressroom/content/20120329IPR42137/html/Clamping-down-on-the-derivatives-trade" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.22  UK BIS response to its consultation on the future of narrative reporting**   On 27 March 2012, the UK's Department for Business, Innovation & Skills (BIS) released 'The Future of Narrative Reporting: The Government Response'.   The paper constitutes the Government's summary of responses to its September 2011 consultation, in which it sought views on issues relating to corporate narrative reporting.   The consultation included proposals to change company narrative reports to make the framework clearer for companies and easier for investors to locate the information they need.  It also reviewed the disclosure requirements that the Government places on companies to streamline and remove inconsistencies. The consultation also includes a number of proposals to make the reporting of executive remuneration clearer and more relevant to investors.   The Government's consultation response is available on the [BIS website](http://www.bis.gov.uk/assets/biscore/business-law/docs/f/12-588-future-of-narrative-reporting-government-response" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.23  UK Ownership Commission report on 'Plurality, Stewardship and Engagement'**   On 23 March 2012, The Ownership Commission released its report, titled 'Plurality, Stewardship and Engagement'.   The Commission believes that there are three dimensions to good corporate ownership - plurality, stewardship and engagement.  The Commission suggests that if these can be sufficiently strengthened, a different self-reinforcing dynamic will be created that will drive better ownership and corporate behaviours.     Topics discussed in the report include:   * the philosophy of good ownership * why corporate plurality matters * the public limited company * beyond the public limited company * recommendations.   The Ownership Commission was established in 2010 to review the state of corporate ownership in the UK, to examine the extent to which it supports or inhibits successful, long-term value creation by business in all its ownership guises.  This involves assessing the governance and ownership of Public Limited Companies (PLCs), plus also considering the contribution of non-PLC forms, including family ownership, mutuals, co-operatives and employee ownership.   The report is available on the [Ownership Commission website](http://ownershipcomm.org/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.24  ESMA consultation on the proxy advisory industry**   On 22 March 2012, the European Securities and Markets Authority (ESMA) launched a consultation on the proxy advisory industry.  The discussion paper focuses on the development of the proxy advisory industry in Europe, which mainly serves institutional investors such as asset managers, mutual funds and pension funds.  Following its fact-finding work in 2011, ESMA recognises that the proxy advisory industry within Europe is, or is expected to be, growing in prominence and investors are, or are expected to be, increasingly using proxy advisory services.  In the paper, ESMA identifies several key issues related to the proxy advisory market which may have an impact on the proper functioning of the voting process.  The range of policy options that ESMA will consider, and on which it seeks further input from market participants, consists of four broad areas, including:  1.    No EU-level action at this stage 2.    Encouraging Member States and/or industry to develop standards 3.    Quasi-binding EU-level regulatory instruments  4.    Binding EU-level legislative instruments.  ESMA will consider these options based on the feedback it receives from market participants, and, if appropriate, will undertake further policy action, either directly or by providing an opinion to the European Commission.  The reason to consider policy options is due to the fact that proxy advisors are currently not regulated at a pan-European level.  Nevertheless, there are relevant European rules that apply to investors (eg for UCITS management companies when exercising voting rights).  In addition, there are also well-recognised corporate governance standards that apply to issuers at a national level (based on the 'comply or explain approach') and some complements to improve standards of stewardship among investors.  Further information is available on the [ESMA website](http://www.esma.europa.eu/news/ESMA-launches-consultation-Proxy-Advisors?t=326&o=home" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.25  Financial Stability Board plans to improve financial institution risk disclosures**    On 20 March 2012, the UK's Financial Stability Board (FSB) announced that it would take steps to encourage improved risk disclosure by financial institutions.   This follows the FSB holding a roundtable on risk disclosure in Basel on 9 December 2011, in order to encourage the private sector to jointly take forward development of principles and of leading practice disclosures that will be relevant and informative given current market conditions and risks.  Eighty-two senior officials and other experts from around the world took part in the roundtable, representing investors and analysts, asset managers, credit rating agencies, banks, insurance companies, audit firms, audit regulators, accounting and auditing standard setters, as well as prudential and market authorities.   Taking account of the views expressed at the roundtable and the recommendations set forth in FSB's March 2011 'Thematic Review on Risk Disclosure Practices', the FSB has agreed the following next steps:   * The FSB will facilitate the formation of a task force to develop principles for improved disclosures based on current market conditions and risks, including ways to enhance the comparability of disclosures. The task force will involve investors, financial institutions, and external auditors and will be requested to develop proposed principles later this year for implementation in connection with end-year 2012 annual reports. * The task force will be encouraged to have dialogue with standard-setting bodies, such as the International Organization of Securities Commissions, the Basel Committee on Banking Supervision, the International Association of Insurance Supervisors, the International Accounting Standards Board, the US Financial Accounting Standards Board and the International Auditing and Assurance Standards Board, at key stages as it develops its recommendations and to report to the FSB. * The FSB will also ask the task force to identify leading practice risk disclosures presented in annual reports for end-year 2011 based on broad risk areas such as those identified in the summary of the roundtable. The task force would be asked to report on these leading practice disclosures to the FSB in 2012. * The FSB will consider holding another international roundtable in late 2012 to facilitate further discussion by investors, financial institutions, auditors, standard setters, regulators and supervisors on market conditions and risks at that time and the progress toward improving the transparency of risks and risk management through relevant disclosures.   As the March 2011 FSB report noted, should the follow-up actions by the private sector not result in sufficient progress in this area, the appropriate international standard-setting bodies will be asked to take forward work to consider principles.   The summary of key themes that arose during the FSB roundtable on risk disclosure is available on the [FSB website](http://www.financialstabilityboard.org/press/pr_120320.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.26  Report on fiduciary obligations of investors**   On 19 March 2012, FairPensions, a UK charity established to promote responsible investment practices by pension providers and fund managers, released a report titled 'The Enlightened Shareholder: Clarifying investors' fiduciary duties'.   The report follows the publication by FairPensions in 2011 of a report titled 'Protecting our best interests: Rediscovering fiduciary obligation', which called for a fundamental review of the fiduciary obligations of investors.  It recommended the introduction of a provision parallel to section 172 of the UK Companies Act 2006 for institutional investors.   In its latest report, FairPensions reiterates that statutory clarification of investors' duties is needed, with the recommendation being further explored and refined.      The report is available on the [FairPensions website](http://www.fairpensions.org.uk/sites/default/files/uploaded_files/policy/EnlightenedFiduciaryReport.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.27  EU reform of shadow banking**   On 19 March 2012, the European Union announced that, as part of a range of regulatory reforms being implemented in the banking sector, it would be addressing the growing area of non-bank credit activity, or so-called 'shadow banking'.   According to the Financial Stability Board (FSB), the shadow banking system is 'the system of credit intermediation that involves entities and activities outside the regular banking system'.  Possible shadow banking entities and activities include:   * Money Market Funds (MMFs) and other types of investment funds or products with deposit-like characteristics; * Investment funds that provide credit or are leveraged, including Exchange Traded Funds (ETFs) and hedge funds; * Finance companies and securities entities providing credit or credit guarantees or performing liquidity and/or maturity transformation without being regulated like a bank; * Insurance and reinsurance undertakings which issue or guarantee credit products; and * Securitisation and securities lending and repurchase agreement (repo) transactions.   The EU believes that, to date, 'shadow banking' has not been a prime focus of prudential regulation and supervision.  To a certain extent, shadow banking performs important functions in the financial system.  For example it creates additional sources of funding and offers investors alternatives to bank deposits.  However, it can also pose potential threats to long-term financial stability because unknown sources of risk accumulate in the financial sector and there are potential spill-over effects from the shadow banking sector to the regular banking sector.   In response to invitations by the G20 in Seoul in 2010 and in Cannes in 2011, the FSB is in the process of developing recommendations on the oversight and regulation of these entities and activities.  With the announcement of a consultation in the form of a Green Paper, the Commission is participating actively in the ongoing FSB work.  The EU's Green Paper sets out how existing and proposed EU measures already address shadow banking activities.  For example, off-balance sheet vehicles, such as Special Purpose Vehicles, are regulated indirectly through banking regulation.  Hedge fund managers are regulated directly through the Alternative Investment Fund Managers Directive, which addresses a number of shadow banking issues. Some Member States also have additional national rules for the oversight of financial entities and activities that are not regulated at EU level.  Although these measures go some way towards addressing shadow banking entities and activities, there is still further progress to be made given the continually evolving nature of shadow banking.  In coordination with the FSB, the standard-setting bodies and the relevant EU supervisory and regulatory authorities, the aim of the Commission's current work is to examine existing measures carefully and to propose an appropriate approach to ensure comprehensive supervision of the shadow banking system, coupled with an adequate regulatory framework.  In this context, there are five key areas relating to banking, asset management, securities lending and repurchase agreements, securitisation, and other shadow banking entities where the Commission is further investigating options.  Further information is available on the [EU's website](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/253" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.28  Audit committee issues conference findings**   On 15 March 2012, KPMG released the highlights from its 2012 Audit Committee Issues Conference, titled 'Is Governance Keeping Pace?  Challenges and Priorities Shaping the Audit Committee Agenda'.   The Annual Audit Committee Issues Conference, hosted by KPMG's Audit Committee Institute (ACI), brings together audit committee members to discuss the key challenges, practices and priorities shaping audit committee and board agendas.     The report provides a range of responses from participants, including:   * 83% believed that their company's disclosures - including the MD&A - were overly complex and voluminous, and could be improved to better 'tell the company's story'. * 67% did not believe that an expanded audit committee report (describing in more detail what the committee does) would be beneficial to investors and other users of the company's financial reporting information. * 54% believed that their board's interaction with management had become more robust and collaborative over the past several years, whilst 39% reported no significant change. * In terms of composition, 68% held that additional expertise would most improve their audit committee's effectiveness, while 58% believed it would be improved by bringing 'fresh thinkers' onto the committee.  42% nominated a greater willingness and ability to challenge management, with 28% nominating more-engaged directors. * 63% believed that corporations have a major role to play in helping to solve important social issues and challenges (eg sustainability).   Aside from financial communications, disclosures and related controls, participants were asked to nominate the three issues held to be the greatest concern for audit committees in 2012.  The top concerns were listed as:   * governance processes, controls and risk management * IT risk and emerging technologies * uncertainty (economic, political, social) * information privacy/security and cyber-security * fostering growth and innovation * board composition/skills/expertise (eg IT) * legal/regulatory compliance * leadership/culture/tone at the top * tax risk * interactions with auditors.   The report is available on [KPMG's website](http://www.kpmginstitutes.com/aci/insights/2012/pdf/highlights-aci-issues-conf-2012-web.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1)  **1.29  Report on executive remuneration trends**   On 28 February 2012, Pricewaterhouse Coopers released a report on executive remuneration trends during the 2011 financial year.  PwC analysed FY11 remuneration structures and levels within ASX 100 companies to determine recent market trends.     Key findings include:   * Minimal change to executive remuneration design and amounts between FY10 and FY11. * Fixed pay increased by 7% for CEOs and 5% for other executives (same incumbent), with many executives not receiving an increase (circa 30%). * Enhanced oversight by remuneration committees and extensive stakeholder engagement. * Compulsorily deferred short term incentives have increased slightly and deferral periods are longer. * Options continue their decline as a long term incentive instrument, used as a sole instrument in only 8% of ASX 100 companies.  Relative total shareholder returns remain a hurdle of choice for nearly three-quarters of the ASX 100 (used as either the sole hurdle, or in conjunction with another hurdle). * Remuneration committee fees have increased significantly, reflecting the heightened attention, scope and responsibilities of these committees. * Despite the rhetoric, only 5% of ASX 100 companies received a 'first strike' (that is, a greater than 25% 'no' vote on their remuneration report), down from 7% in FY10.   The report is available on the [PwC website](http://www.pwc.com.au/consulting/assets/publications/Ten-Minutes-28Feb12.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h1) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1   Compliance check on information lodged in annual compliance certificates**   On 3 April 2012, ASIC announced that it would be undertaking a compliance program to check the information lodged by Australian Credit Licensees in their Annual Compliance Certificates.  Holders of an Australian Credit Licence are required to lodge an Annual Compliance Certificate with ASIC within 45 days of the anniversary date of obtaining their licence.  ASIC will be verifying the information in the Annual Compliance Certificate which contains important data about the business activities of the Australian Credit Licensee and senior staff within the entity.  Australian Credit Licence holders are required to certify a number of matters, including that they are acting in accordance with their obligations, every year. The information contained in the Annual Compliance Certificate is also used to determine the annual fee payable by licence holders.  Between 1 April 2012 and 30 June 2012, ASIC will be contacting some Australian Credit Licensees to verify the information contained within lodged Annual Compliance Certificates. ASIC will be assessing and discussing the results of the program with the licence holders concerned and may issue further information to industry on any key problems that arise.  Australian Credit Licensees are required to provide information about their business activities, money held in trust, compliance obligations and other areas in the Annual Compliance Certificate.   Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-62AD+ASIC+checks+information+contained+in+annual+compliance+certificates?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h2)  **2.2   Update on equity market structure reform proposals**  On 3 April 2012, ASIC announced that it had refined its proposals for market structure reform and issued a timetable for implementing the regulatory framework.  Based on feedback on the key issues impacting market structure outlined in Consultation Paper 168 'Australian equity market structure: Further proposals', ASIC has revised its proposals to:   * On automated trading - make no new rule on algorithm testing, make a new rule for kill switch capabilities, amend existing rules to require annual review of systems; and publish guidance clarifying ASIC's expectations on trading system controls, testing of systems and additional minimum standards for direct market access. * On extreme price movements - amend existing anomalous order threshold and extreme cancellation range rules, and extend those amended rules (as adopted) to the ASX SPI 200 index futures contract. * On enhanced data for surveillance - make a new rule requiring identification of some information (but not all of the information mentioned in CP 168, recognising cost to industry); make no change to current clock synchronisation rules; publish guidance on format of information provided to ASIC. * On best execution - make no change to current obligations. * On pre-trade transparency - make the new rule on price improvement and alter the block sizes as proposed and make no new rule on a minimum size threshold for dark orders. However, ASIC plans to consult further with industry on these plans and potential triggers for future application of a minimum size threshold for dark orders.   The timetable for implementing the regulatory framework is:   * April/May 2012:  Continue industry consultation and prepare draft market integrity rules and guidance * June 2012:  Release revised draft market integrity rules and guidance for four week consultation with an analysis of potential impacts; publish feedback report to CP 168 * September/October 2012:  Make final market integrity rules and release final guidance and regulation impact statement (subject to Ministerial consent) * Staggered implementation to end Q1 2014:   Final rules take effect   Consultation paper 168 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp168" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h2)  **2.3   First enforcement report**  On 29 March 2012, ASIC released its first report detailing ASIC enforcement actions for the period 1 July to 31 December 2011.  ASIC's strategic priorities are to ensure investors and financial consumers are confident and informed, markets are fair and efficient and registration and licensing systems are efficient. Holding the 'gatekeepers' of the financial system to account is an important part of how ASIC achieves its priorities. Investors and financial consumers rely on them to promote sound investment practices, prevent or detect market failures and promote market integrity.  The report outlines categories of gatekeepers against whom ASIC has taken action including financial advisers, responsible entities, credit licensees, market participants, directors, company officers, insolvency practitioners and auditors.  ASIC states that there are four principles of conduct gatekeepers must observe: They must display honesty by respecting other people's property and not using a position of trust for self-advantage; diligence by applying due care and skill to advice or decision making; competence by meeting any applicable conduct, licensing, registration and training obligations; and independence by managing conflicts of interest appropriately.  The enforcement outcomes set out in the report relate to a wide range of matters from offences attracting significant penalties to record-keeping type offences grouped under the heading compliance and deterrence. They include 355 enforcement outcomes, including 252 criminal actions, in the six-month period.  Appendix one of Report 281 'ASIC enforcement outcomes: July to December 2011' sets out statistics about ASIC's enforcement activities.  The enforcement outcomes represent formal actions taken to secure compliance about which ASIC has made a public announcement (with the exception of a number of matters relating to ASIC's registration and licensing function). The report does not address enforcement outcomes from ASIC's market supervisory functions.  Key outcomes for that area are set out in Report 277 'ASIC supervision of markets and participants: July to December 2011'.   It is anticipated that similar reports on ASIC's enforcement activity will be released every six months.   Reports 281 and 277 are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep281" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h2)  **2.4   Exchange traded funds report**  On 29 March 2012, ASIC released a report on exchange traded funds (ETFs) which outlines how this growing industry is regulated in Australia and the impact of proposed international principles to address concerns by overseas regulators.    Report 282 'Regulation of Exchange Traded Funds' explains ASIC's current understanding about the operation of ETFs and ongoing work in this area.  ETFs can provide a convenient and low-cost way for investors to diversify and receive returns close to the performance of market indexes or other assets, often with lower fees than traditional managed funds. But while standard, 'physical' ETFs generally invest in the underlying investments they are designed to track, 'synthetic' ETFs also use derivatives, such as swap agreements, to achieve similar outcomes. Benefits to investors of synthetic ETFs may include access to new and varied asset classes and low performance 'tracking error'. Downsides include increased complexity and counterparty risk.  The ETF industry attracts significant funds. As at 2012, approximately $4.3 billion, based on ASX data, is invested in ETFs in Australia, with a high level of retail participation (50-75% across most types of ETFs). The ETF industry continues to expand at a rapid rate in Australia, with new types of ETFs and new issuers continuing to emerge.  ASIC has been monitoring the ETF industry closely, which is consistent with the approach taken by regulators in other key jurisdictions. The report explains how the domestic regulatory framework covers proposed principles that the International Organisation of Securities Commissions (IOSCO) has issued for consultation.  Report 282 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep282" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h2)  **2.5  Improved disclosure of unlisted property scheme risks**  On 28 March 2012, ASIC announced the introduction of a new disclosure principle and six new disclosure benchmarks for unlisted property schemes to improve investors' awareness of the risks of investing in these products.  Regulatory Guide 46 'Unlisted property schemes: Improving disclosure for retail investors' has been revised as ASIC was concerned there was insufficient consistency or comparability in the form of disclosure applied by responsible entities and, as a result, important information was not being adequately disclosed to investors. ASIC consulted with the industry and has updated the existing disclosure principles and introduced disclosure benchmarks based on industry feedback.  Unlisted property schemes must disclose whether they meet the benchmarks and if not, why not.  This means they must explain how they will deal with the business factor or the issue underlying the benchmark.     RG 46 is the next in the series of the 'if not, why not' benchmark model of disclosure for sectors that pose particular risk to investors and financial consumers. It follows the issue of disclosure benchmarks for the infrastructure and over-the-counter contracts for difference sectors in Regulatory Guide 231 'Infrastructure entities: Improving disclosure for retail investors', Regulatory Guide 227 'Over-the-counter contracts for difference: Improving disclosure for retail investors' and Regulatory Guide 232 'Agribusiness managed investment schemes: Improving disclosure for retail investors'.  RG 46 also outlines the standards ASIC expects responsible entities to meet when advertising unlisted property schemes to retail investors as to clear, concise and effective disclosure of benchmark and disclosure principle information.  Responsible entities of existing unlisted property schemes should disclose the benchmark and updated disclosure principle information to investors by 1 November 2012.  For new product disclosure statements, prominent and clear disclosure of the benchmark and disclosure principle information should be included in those issued on or after 1 November 2012.   Regulatory Guide 46 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg46" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h2)  **2.6  Report on retirement advice shadow shopping research**  On 27 March 2012, ASIC released the full findings of its 'shadow shopping' research, which examined financial advice given to people to help them plan for retirement.  The purpose of Report 279 'Shadow shopping study of financial advice' was to investigate the quality of retirement advice provided and people's experience of obtaining financial advice.  ASIC's research found that:   * over a third of the advice examples were poor (39%) * there were only two examples of good quality advice (3%) * the majority of advice examples reviewed (58%) were adequate.   ASIC's research also found that people have difficulty in assessing the quality of the financial advice they received. Participants in the study rated their advisers and the advice they received highly, even when they received poor advice.  The project looked at 64 examples of personal financial advice given to real consumers. Participants sought advice of their own initiative and found their own adviser. ASIC's sample included advice examples from 36 different Australian Financial Services licensees.  A 12-person expert reference group comprised of industry representatives, a representative of the Financial Ombudsman Service and a representative of ASIC's Consumer Advisory Panel provided guidance and oversight of the advice assessment process. ASIC analysed the advice examples in the research using quality of advice benchmarks developed in consultation with this expert reference group. Each advice example was graded good, adequate or poor based on these benchmarks.  The following problems were common in the advice ASIC graded as poor or adequate:   * Inaccurate or incomplete investigation of the client's personal circumstances * Recommended strategies did not address the client's needs or objectives - this included the failure of advisers to address areas that did not directly involve the sale of investment products. * Examples of conflicted remuneration structures, such as product commissions and percentage asset-based fees, impacting on the advice and recommendations, and on the quality of advice. * Poor scoping of advice - some advisers excluded crucial topics, such as clients' debts, from the scope of the advice, or failed to clearly explain the limitations of the advice. * Failing to provide appropriate justification for switching recommendations - sometimes the features that the client would lose as a result of changing products were not disclosed. In other instances the 'benefits' of the new product were not actually advantageous or useful for the client. * Poor communication in the Statement of Advice. * While in some cases there were valid reasons, approximately one third of advice did not provide cash flow projections to show how the recommended strategy would meet the client's income and expenditure objectives. And approximately 44% of the advice statements did not consider how long the client's money would last in retirement.   Advice rated as adequate also had good elements, but fell short due to significant weaknesses in the recommended strategy or products. Poor quality financial advice failed to meet the requirements of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) that the adviser must have a reasonable basis for their advice. The report includes real examples of both good and poor advice, providing useful guidance to industry.   Report 279 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep279" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h2) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1  Reports**   On 5 April 2012, ASX released:   * the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Group_Monthly_Activity_Report_-_Mar_2012_-_FINAL.pdf" \t "_new); * the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2012/notice2012_090.pdf" \t "_new); and * the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Compliance_Monthly_Activity_Report__-_March_2012_FINAL.pdf" \t "_new).   for March 2012.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h3)  **3.2  Single Stock ETO Expiry: Response to Market Interruptions**   On 3 April 2012, ASX issued a consultation paper: 'Single Stock ETO Expiry: Response to Market Interruptions', relating to the management of exchange traded option (ETO) expiry in the event of a market interruption on expiry day.   Comments are invited by 25 May 2012.   The consultation paper is available on the [ASXGroup.com.au](http://www.asxgroup.com.au/media/consultationpaper_single_stock_eto_expiry.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h3)  **3.3  Strengthening Australia's equity capital markets: ASX proposals and consultation**   On 2 April 2012, ASX released 'Strengthening Australia's equity capital markets: ASX proposals and consultation', setting out a number of proposals designed to facilitate capital raising for mid to small caps and updating ASX's admission requirements.  This package is the first phase of the listing initiatives that ASX is rolling out in 2012 to strengthen Australia's equity capital markets.   Comments are invited by 14 May 2012.   The consultation paper is available on the [ASXGroup.com.au](http://www.asxgroup.com.au/media/strengthening_australias_equity_capital_markets_2Apr12.PDF" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h3)  **3.4  Report on feedback to consultation paper on disclosure rules for mining and oil & gas companies**   On 2 April 2012, ASX released a 'Report on Consultation Feedback', summarising the feedback received in response to ASX's consultation paper on 'Reserves and Resources Disclosure Rules for Mining and Oil & Gas Companies'.     The consultation process has confirmed broad support for ASX's proposals to facilitate greater transparency and consistency in reserves and resources reporting.   ASX intends to release detailed rules on its proposals for an enhanced reporting framework for the disclosure of reserves and resources information by mining and oil and gas companies in the second half of 2012.  ASX is continuing to consult with industry stakeholders, including JORC and ASIC, to develop this enhanced reporting framework.   The [Report on Consultation Feedback](http://www.asxgroup.com.au/media/reserves_resources_disclosure_rules_report_consultation_feedback.pdf" \t "_new) and the [original consultation paper](http://www.asxgroup.com.au/media/PDFs/ASX_LRs_Review_Issues_Paper_mining_and_oil_gas_reserve_and_resource_reporting_20111005.pdf" \t "_new) can both be found on the ASXGroup.com.au website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h3)  **3.5  New ASX Chairman**   On 28 March 2012, ASX announced that the ASX Board had elected Mr Roderic (Rick) Holliday-Smith to succeed Mr David Gonski as Chairman of Directors.     Mr Gonski resigned as a director of ASX on 28 March 2012 and took up his appointment as Chair of the Future Fund Board of Guardians on 3 April 2012.   Mr Holliday-Smith was appointed a director of ASX in July 2006.  Prior to the merger of ASX and SFE in July 2006, he was Chairman of SFE Corporation Limited from 1998.   The market announcement is available on the [ASXGroup.com.au](http://www.asxgroup.com.au/media/PDFs/New_ASX_Chairman_March_2012.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h3)  **3.6  S&P/ASX Index Consultation: Index Eligibility and Treatment of Unsponsored Depositary Receipts**   On 20 March 2012, ASX and Standard & Poor's released a consultation paper concerning index eligibility of Unsponsored Depositary Receipts (UDRs).     ASX proposes to broaden the range of international equities available on ASX by quoting UDRs.  UDRs are conceptually similar to Chess Depositary Interests (CDIs), and will allow investors in the Australian market to obtain an equitable interest in international securities though a security that is traded, cleared and settled on the ASX market.   The introduction of the UDR program has given rise to the question of the index eligibility of UDRs.  Current index methodology requires index constituents to be listed on ASX.  UDRs would be quoted rather than listed and hence would be ineligible for index inclusion under the current methodology.  Responses to the consultation will inform the decision as to whether to amend the current index methodology such that UDRs become eligible for inclusion in the index (subject to other existing index eligibility criteria being met).   The consultation paper can be found on [ASXGroup.com.au](http://www.asxgroup.com.au/media/SP_ASX_UDR_Index_Consultation.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h3) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1  Revised Guidance Note 18**  On 20 April 2012, the Takeovers Panel published a revised version of Guidance Note 18: Bidders' Statements (renamed 'Takeover Documents' to reflect its broadened content).  On 7 December 2011, the Panel issued a consultation draft of Guidance Note 18.  It received a submission from ASIC and has taken it into account and made further changes.  This is the last guidance note to be rewritten under the program of reviewing and simplifying the Panel guidance, which included a review of the currency and consistency of the guidance notes. Some of the more important changes include:   * the note has been extended to include targets' statements, experts' reports, premia, and intention statements; * the note recognises that 'Wraps' are now less common and, while it retains a paragraph on Wraps, generally, the note talks about 'marketing information'; and * the note contains a new section on 'Accessibility', stating that the Panel's general approach to information is that it should be accessible to the intended audience.   Further information is available on the [Takeovers Panel website](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance_notes/current/018.htm&pageID=&Year" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h4)  **4.2  Real Estate Capital Partners USA Property Trust**   On 28 March 2012, the Takeovers Panel announced that it had made a declaration of unacceptable circumstances and final orders in relation to an application dated 9 March 2012 by Intelligent Investor Funds Pty Ltd, in relation to the affairs of Real Estate Capital Partners USA Property Trust,  The orders include the making of a further offer to unit holders.  The application concerned a 0.98 for 1 renounceable rights issue by Real Estate to raise approximately $20 million at 40 cents per unit.  The rights issue is fully underwritten by Frost Holdings Pty Ltd and has the potential to increase Frost's voting power in Real Estate from 19.82% up to 59.51% (assuming no other unitholders take up any of their entitlement).  Intelligent Investor has voting power of 8% in Real Estate.  The Panel considered that all reasonable steps to minimise the potential control effects of the rights issue were not taken.  The Panel has made orders, including orders to the effect that:  1.  Frost not rely on any right it may have to terminate the underwriting arrangement, as a consequence of the application to the Panel, the declaration or the orders; 2.  Frost divest units it receives as underwriter of the Real Estate rights issue so that unitholders who were originally entitled to participate in the rights issue are offered:              a)  as many units as is necessary for them to take up what was their full original entitlement in the rights issue (if applicable) and              b)  units in excess of their entitlement 3.  applications to participate in the excess units may be scaled back by Real Estate; and 4.  Real Estate must extend the rights issue by at least 2 business days.  The reasons for the decision are available on the [Takeovers Panel website](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=reasons_for_decisions/2012/006.htm&pageID=&Year" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h4)  **4.3  Careers Australia Group Ltd**  On 15 March 2012, the Takeovers Panel announced that it had accepted an undertaking from Cirrus Business Investments Limited and declined to make a declaration of unacceptable circumstances in response to an application dated 24 February 2012 from Jiggi Investments Pty Ltd and others, in relation to the affairs of Careers Australia Group Limited.  The applicants submitted, among other things, that Cirrus (and White Cloud Capital Advisors Limited as advisor of White Cloud Capital Fund Limited) intentionally undertook a strategy of reducing the number of Careers Australia shareholders to 50 or less to avoid the requirements of Chapter 6 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).  The Panel was concerned with the circumstances surrounding the strategy employed by Cirrus, including that the offers were selectively made to some Careers Australia shareholders and were made while Cirrus held (but had not converted) convertible notes which could give it a voting power of 45.29% in Careers Australia.  The Panel is satisfied that performance of the undertaking by Cirrus will adequately address its concerns.  The Panel noted that there is no suggestion of any further proposal designed to remove Careers Australia from the ambit of Chapter 6.  The reasons for the decision are available on the [Takeovers Panel website](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=reasons_for_decisions/2012/005.htm&pageID=&Year" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h4) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%237) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **5.1  Enforcing foreign arbitral awards in the Federal Court**   (By Alexandra Eggerking, Freehills)   Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2) [2012] FCA 276, Federal Court of Australia, Foster J, 23 March 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/276.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/276.html" \t "_new)    **(a)  Summary**   The Federal Court (the Court) held that the applicant (Traxys) could enforce a foreign award against the first respondent (Balaji) in Australia.  It held that the Court was required to enter judgment or make orders before the award could be enforced, that it was not a pre-requisite to entry of judgment that Balaji have assets in Australia and that it would not be against public policy in this case to enforce the award.   **(b)  Facts**    Traxys and Balaji entered into a contract for the sale of metallurgical coke. In short, Balaji failed to pay for the coke and Traxys sold the coke shipment to a third party. Under a dispute resolution clause contained in the contract, Traxys and Balaji referred their dispute to arbitration under the Rules of the London Court of International Arbitration (LCIA), which provide that awards are final and binding on the parties to them. In an award dated 22 June 2011 (the Award), the arbitrators ordered Balaji to pay to Traxys the sums of US$2,576,250.38 and ?260,668.58 plus interest, the fees and expenses of the arbitration and costs.  Balaji did not pay any amount.   In early July 2011, Balaji brought proceedings in India seeking to have the Award set aside, or alternatively to have its operation stayed. The Court of the District Judge at Alipore in the South District of India (the Indian District Court) refused Balaji's application for an interim stay.  Balaji appealed to the High Court of Kolkata (Civil Appellate Jurisdiction) (the Indian High Court) which, on 29 July 2011, granted an injunction ex parte restraining Traxys from putting the Award into execution.    Meanwhile, on 26 July 2011, the High Court of Justice, Queen's Bench Division, Commercial Court in England (the English Commercial Court) ordered that Traxys could enforce the Award and granted interim freezing injunctions and an interim anti-suit injunction against Balaji, restraining it from continuing with the Indian District Court proceedings.  On 1 September 2011, the English Commercial Court gave permission to Traxys to make an application in Australia for freezing orders.  The Court granted freezing orders on 2 September 2011. Traxys then applied to the Court for orders recognising and enforcing the Award.   There was a dispute about whether Balaji had assets in Australia.  Evidence showed that Balaji was the registered holder of the whole of the issued share capital in the second respondent (Booyan).  Balaji adduced evidence to show that the beneficial ownership in the shares had passed to another company who was in the process of buying those shares from Balaji.   **(c)  Decision**    There were three issues for determination by the Court:   * first, whether the [International Arbitration Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7653" \t "_default) (the Act) authorises the Court to enter judgment or make orders giving effect to the Award, and whether those are necessary steps in the enforcement process contemplated by the Act; * secondly, whether it was a pre-requisite to enforcement for Traxys to prove that Balaji had assets in Australia; and * thirdly, whether enforcing the Award would be contrary to public policy.   **(i) Does the Act authorise the Federal Court to enter judgment? Is that a necessary step in the enforcement process contemplated by the Act?**   Foster J held that the Court did have power to enter judgment or make orders in terms of the Award, and was required either to do so or dismiss the application.  He reasoned that his result was consistent with the objects of the Act and Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention).  Foster J followed the remarks he made in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (No 2)* (2011) 277 ALR 441 to the effect that the appropriate way of recognising and enforcing a foreign award is to enter judgment or make appropriate orders.  He noted that the emphasis in the Act is on 'enforcement' of awards, and that there is no separate procedure for merely 'recognising' a foreign award.  Further, he reasoned that section 8(3), which provides that 'a foreign award may be enforced in the Federal Court ... as if the award were a judgment or order of that Court' does not deem an award to be a judgment (a notion which he doubted could be possible in the Federal Court), but has the effect that the Court should treat a foreign award as it would be if it were a judgment or order of the Court. Steps have to be taken to enter judgment or make appropriate orders.  Further, he reasoned that the [Federal Court of Australia Act 1976 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "_default) requires that there be a judgment before any remedies may be pursued by way of enforcement, and the constitutional requirement that the Court be seised of a controversy which must be quelled before it can be regarded as exercising the judicial power of the Commonwealth also requires the entry of judgment or making of orders either in terms of the award or dismissing the application.   **(ii)  Was it a pre-requisite to enforcement for Traxys to prove that Balaji had assets in Australia?**   Foster J held that it was not a pre-requisite to enforcement for Traxys to prove that Balaji had assets in Australia.  He reasoned that there is nothing in the Act that, as a matter of law, prevents an Australian court from directing the entry of judgment or the making of appropriate orders if there is evidence which shows that there are, or may be, no assets in Australia against which enforcement can be levied.  First, the entitlement of a person who is successful in litigation is not dependent on proving that there are likely to be assets available to the judgment creditor in the jurisdiction. Further, a judgment creditor is entitled to levy execution against assets which come in to the jurisdiction after judgment is entered.  In this case, and according to records kept by the Australian Securities and Investments Commission, Balaji was the registered holder of the issued share capital in Booyan and the beneficial owner.  Although Balaji contended, and there was some evidence to suggest, that it had transferred beneficial ownership to another company, even if the pre-requisite contended for by Balaji existed, the legal estate remained a sufficient interest to support the relief claimed by Traxys.   **(iii)  Would enforcement of the Award be contrary to public policy?**   Foster J held that enforcement of the Award in this case would not be contrary to public policy for the purposes of section 8(7)(b) of the Act.  Section 8(7)(b) of the Act provides that an enforcing court may refuse to enforce a foreign award on the ground that to do so would be contrary to public policy.  Section 8(7A) provides that enforcement would be contrary to public policy if the making of the award was induced or affected by fraud or corruption or if a breach of the rules of natural justice occurred in connection with the making of the award.   Foster J held that section 8(7)(b) requires the Court to consider those aspects of Australian public policy that go to the fundamental, core notions of justice and morality such that Australian courts feel obliged to give effect to them even in respect of claims which are based fundamentally on foreign elements such as foreign awards under the Act.  He reasoned that this is consistent with the language of sub-sections 8(7) and 8(7A) of the Act, the text of Article V(2) of the Convention (which is in similar terms to section 8(7)), and the fundamental objects of the Convention and the Act.  He also found it to be reinforced by similar approaches taken by courts in the United States and in Hong Kong.  He reasoned that too rigid an application of 'public policy' runs the risk of undermining the very purpose of the Act, being the facilitation of enforcement and the maintenance of certainty of foreign arbitral awards.    Foster J rejected Balaji's submission that it would be contrary to the public policy of Australia to enforce the Award in the absence of proof that Balaji had assets in Australia, for similar reasons to those cited in relation to issue two above. Foster J also rejected Balaji's submission that it would be contrary to public policy for the Court to enforce the Award in circumstances of the unresolved proceedings in India and where an interim injunction issued ex parte by the Indian High Court was in place.  He gave no weight to the fact that there was an appeal on foot in India and an interim injunction in place and held that the core of justice and morals in Australia were not engaged in the circumstances.  In particular, he formed the view that Balaji's appeal in the Indian High Court appeared to be hopeless, noted that Balaji sought and obtained its interim injunction in breach of the anti-suit injunction granted by the English Commercial Court, and observed that Balaji's conduct in instituting and maintaining the proceedings in India amounted to a tactic designed to out-manoeuvre Traxys and avoid its obligations under the Award.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h5)  **5.2  The power of the Federal Court to dispense with the general rule that a corporation may only appear by way of legal representative**    (By Katrina Sleiman and Daniel Hobbs, Corrs Chambers Westgarth)    Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 12) [2012] FCA 289, Federal Court of Australia, Flick J, 23 March 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/289.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/289.html" \t "_new)     **(a)  Summary**   Australian Naturopathics Pty Ltd was a group member involved in the Pan Pharmaceutical class action against the Commonwealth.  Shortly before the final approval of a settlement scheme was due to be made by the Federal Court, Australian Naturopathics filed an interlocutory application challenging the assessment of its claim under the settlement scheme.   A director of Australian Naturopathics sought leave to appear on behalf of the company, and when alerted to rule 4.01(2) of the [Federal Court Rules 2011 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=125286" \t "_default) which forbids this, the director again sought leave to appear, making an oral application seeking an order that rule 4.01(2) be dispensed with under the power conferred by rule 1.34 of the Federal Court Rules 2011.   Flick J had to consider the principles upon which the dispensing power could be exercised and then apply the principles to the oral application, noting the substantive issues which may arise in the interlocutory application.  His Honour dismissed the application.   **(b)  Facts**    Pharm-a-Care Laboratories and a large group of other sponsors, suppliers and distributors of Pan Pharmaceuticals products brought a class action against the Commonwealth in late 2008 in the Federal Court.  In March 2011, a Settlement Distribution Scheme (the Scheme) for the settlement of the action was approved by the Court.  After that time, the Court made several decisions which varied or corrected the terms of the Scheme, or granted approval for costs and expenses incurred in the administration of the Scheme.  A final approval which would permit monies to be distributed to group members was listed for hearing on 4 April 2012.   In advance of that hearing, a group member named Australian Naturopathics Pty Ltd (Australian Naturopathics) filed an interlocutory application on 12 March 2012, challenging the assessment of its claim under the Scheme.  The application asserted 'procedural errors, inconsistencies and negation of natural justice' which resulted in Australian Naturopathics suffering a 'substantial miscarriage of justice'.     On 19 March 2012, Mr Marevich, a director of Australian Naturopathics, sought leave to appear on behalf of Australian Naturopathics, seeking relief consistent with the interlocutory application.  On that occasion, Mr Marevich was told that he faced at least two potential problems.  First, rule 4.01(2) of the Federal Court Rules 2011 (the Rules) provides that 'A corporation must not proceed in the Court other than by a lawyer'.  Second, the power of the Court to grant the relief sought was not beyond question.  The matter was adjourned to the following day for Mr Marevich to decide whether he wished to seek legal representation, and to obtain it if he so decided.   On 20 March 2012, Mr Marevich again sought leave to appear on behalf of Australian Naturopathics and made an oral application seeking an order pursuant to rule 1.34 of the Rules dispensing with compliance with rule 4.01(2).     **(c)  Decision**    **(i)  Principles applicable to the use of rule 1.34**   Flick J first satisfied himself that there was no relevant distinction between the current rule 4.01(2) of the Rules and the former Order 9 rule 1(3) of the now repealed Federal Court Rules.     His Honour reviewed case law dealing with Order 9 rule 1(3), which applied the requirement for a corporation to be represented by a lawyer in court consistently and strictly.  However, his Honour noted that Order 9 rule 1(3) was not construed as imposing any threshold requirement of special or exceptional circumstances.   His Honour applied this approach to rule 1.34 of the Rules, and added that the power to dispense should be exercised by reference to all relevant considerations.  His Honour referred to *Damjanovic v Maley* [2002] NSWCA 230 for a distillation of these relevant considerations ([69]-[83], Stein J, Mason P and Sheller JA agreeing), which were:   * the complexity of the case; * genuine difficulties of the unrepresented party; * the unavailability of disciplinary measures and a duty to the court by lay advocates; * protection of the client and the opponent; * the level of the court of tribunal; and * the interests of justice.   His Honour also noted that in the case of a corporation, a further consideration may be whether a director who is seeking to appear is the 'the real force behind the company' (at [2012] FCA 289, [21], citing *Helmhout v Apostoloff* [2011] ACTSC 2, [46], Refshauge J).   **(ii)  Application of the principles to Australian Naturopathics**   Mr Marevich and his wife were the two directors of Australian Naturopathics.  Mr Marevich was not a lawyer.   Mr Marevich argued that rule 4.01(2) should be dispensed with because of the constrained financial circumstances of Australian Naturopathics.  He led evidence that although Australian Naturopathics estimated its losses at $3,745,166, its claim was assessed in the sum of $346,317, and Mr Marevich had received advice from the Administrator of the Scheme that Australian Naturopathics would ultimately receive about $130,000.  A financial statement of Australian Naturopathics showed that it had retained profit of $37,933.02 for the year ending 30 June 2011, but no more current financial statements had been provided.   Mr Marevich estimated legal costs at $50,000 but did not provide any evidence of the basis upon which the estimate was made.  Mr Marevich further noted the speculative nature of Australian Naturopathics' prospects of success.   Flick J found that the financial position of Australian Naturopathics did not preclude it from retaining legal counsel.  His Honour noted that the forthcoming payment of $130,000 was an amount against which monies could presumably be borrowed.  His Honour also noted that Australian Naturopathics had retained profits at its disposal, and was of the opinion that, without further substantiation, the estimate of legal costs was high.   Flick J also noted that if Australian Naturopathics was successful, it could expect a payment well in excess of $1,000,000.  His Honour further rejected any argument regarding the prospects of success of Australian Naturopathics, as this did not place Australian Naturopathics in a different position to any other corporation wishing to bring proceedings in a court.   **(iii)  Assessing the merits of a claim made by a group member**   In addition to the above, Flick J also noted that there were a number of potential legal difficulties which may be encountered in resolving the interlocutory application.  His Honour noted that it was unclear whether the Court had the power to revisit decisions made pursuant to the Scheme.  His Honour further noted that even if the Court did have such a power, assessing the merits of a claim made by a group member could be both legally and factually complex.   Flick J was of the opinion that the manner in which the claims of Australian Naturopathics may be resolved may have financial repercussions upon other group members whose claims were being administered pursuant to the Scheme.  Further, any resolution of the application of Australian Naturopathics may have significance to the administration of other settlements approved pursuant to Part IVA of the [Federal Court of Australia Act 1976 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "_default).   In light of these complexities, Flick J considered that irrespective of the financial ability of Australian Naturopathics to retain legal representation, the Court required the assistance of an independent legal representative to resolve the application.  His Honour therefore ordered that the oral application seeking dispensation from the requirement imposed by rule 4.01(2) of the Rules be dismissed.   Flick J noted that Australian Naturopathics remained able to appear at the 4 April 2012 hearing, but must appear in a manner approved by the Rules.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h5)  **5.3  Administrators seeking orders to borrow funds to investigate a sale as a going concern**    (By Steven Grant, Minter Ellison)   Gould Bros & Co Pty Ltd (administrators appointed), in the matter of Gould Bros & Co Pty Ltd (administrators appointed) [2012] FCA 285, Federal Court of Australia, Yates J, 22 March 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/285.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/285.html" \t "_new)   **(a)  Summary**   This case demonstrates the reasoning of the Court in balancing the interests of current and potential, and secured and unsecured, creditors when determining whether administrators should be permitted to borrow funds from shareholders in order to investigate whether all, or any, of the business and assets of the company can be sold as a going concern.   **(b)  Facts**   The second plaintiffs, Stephen Parbery and Jack Bournelis, in their capacity as joint and several administrators of Gould Bros & Co Pty Limited (the Company), sought an order pursuant to section 447A(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) as to how Part 5.3A of the Act was to operate in relation to the first plaintiff (the Company) concerning the borrowing of certain funds to enable the Company to continue to operate while the second plaintiffs investigated whether all, or any, of its business and assets could be sold as a going concern.  More specifically, the orders concern the operation of section 443A(1) of the Act and the extent to which the second plaintiffs would be personally liable for funds advanced, and to be advanced, to the Company under a funding arrangement with third parties (being two members of the Company), and the priority of the repayment of the debts represented by those funds.    Section 447A(1) enables the Court to make such order as it thinks appropriate about how Part 5.3A is to operate in relation to a particular company.  Section 443 provides that the administrator of a company under administration is liable for debts he or she incurs, in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator for (amongst other things) the repayment of money borrowed.   In accordance with Part 5.3A of the Act, the first meeting of the Company's creditors was convened for the day following this judgment.  Mr Bournelis gave evidence that it was his intention to report to creditors at that meeting about the application that was the subject of these proceedings and its outcome, and to make available to creditors a copy of his affidavit in these proceedings for inspection at that meeting.   In his affidavit Mr Bournelis expressed the view that, as at the date of his appointment, the Company was either insolvent or likely to become insolvent in the near future and that the sale of the Company's business and assets as a going concern would lead to the best possible result for the Company's employees and creditors.  This would, most likely, result in the creditors receiving a better return than would be the case if the Company were to be immediately liquidated.   Mr Bournelis also expressed the view that there was a risk that, if a going-concern sale of the business of the Company was not achieved and he and his co-administrator were forced to close the business, the assets of the company may be insufficient to satisfy the indemnity provided under section 443D of the Act and cover the personal liabilities that would be incurred by them during the period of ongoing trading.  Section 443D provides that the administrator of a company under administration is entitled to be indemnified out of the company's property in certain circumstances.  In short, Mr Bournelis expressed a concern that the indemnity contained in section 443D of the Act may, in all likelihood, be of very limited value.      On that basis, Mr Bournelis formed the view that, without the benefit of the orders sought in these proceedings, he would be forced to immediately close the Company's business and if that were to happen, any possibility of achieving a sale of the business and assets on a going concern basis would be destroyed.   **(c)  Decision**   Having reviewed a draft of the Funding Deed which was proposed by the two shareholders, Yates J noted that there were no preconditions to the execution of the Funding Deed.  However, the second plaintiffs would only enter into the Funding Deed upon the Court making the orders they sought in these proceedings.  The funds that would be provided would permit the second plaintiffs to continue to trade the business and meet all accruing liabilities while investigations for the possible sale of the business and assets could continue.    Yates J noted that the immediate closure of the Company's business would be likely to have the following consequences:   * the valuable assets of the Company, being essentially its long-term assets such as real estate, may take a significant time to sell, during which time the liabilities of the Company would increase; * the immediate termination of all employees; and * the suppliers who had supplied stock, subject to retention of title terms, would seek to recover that stock, or otherwise attach to the proceeds of that stock.   In contrast, Yates J noted that the sale of the business and the assets on a going-concern basis was likely to lead to a better result for creditors, particularly in respect of the pre-appointment unsecured creditors, compared to their position should the Company be immediately liquidated.   For example, if a going concern sale were to be agreed, it was possible that:   * the value of the real property assets of the Company would increase; * the Company's employees would be transferred to a purchaser of the business and would retain their roles.  Accordingly, certain employee entitlements for which the Company would otherwise be liable, such as redundancy payments, would not crystallise; and * agreements with suppliers may be assigned, together with stock and the Company's liability to those suppliers.   Yates J also agreed with Mr Bournelis view that the post-appointment unsecured creditors would not be prejudiced by the contemplated arrangements because the provision of the funding would permit those creditors to be paid on a timely basis during the administration period.   This would also assist with the trading of the business and the payment of employees.    Yates J also noted that the Company's only secured creditor, Westpac, had been notified of the application and had indicated, through its solicitors, that it did not oppose the proposed orders being made.    On this basis, Yates J concluded that the endeavours of the second plaintiffs to seek to have the Company's business and assets, or at least some part of them, sold on a going concern basis provided a real possibility of a better return to the Company's creditors and members than would result from an immediate winding up of the Company.  Accordingly, Yates J ordered that, inter alia, Part 5.3A of the Act was to operate in respect to the Company as if section 443A(1) of the Act provided that:   * the money advanced by way of a loan to the Company under the Funding Deed comprised debts incurred by the second plaintiffs in the performance and exercise of their functions and powers as administrators of the Company; and * notwithstanding that order:   + if the second plaintiffs' indemnity under section 443D of the Act was insufficient to meet those debts, the second plaintiffs would not be personally liable to repay such debt to the extent of that insufficiency; and   + as to the repayment of such debt to the shareholders providing the funding under the Funding Deed, the debt was given the same priority in the payment of any debt of the Company during its administration as if it had been in liquidation and the debt had the priority governed and provided for under sections 556(1)(a), (c), (dd) and section 560 of the Act.  The practical effect would be that the funding shareholders would stand in the position of the second plaintiffs to recover any amounts that may be available under the indemnity provided in section 443D of the Act.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h5)  **5.4  Bonus payment - obligation to pay**   (By Tim Jeffrie, King & Wood Mallesons)   O'Sullivan Partners (Advisory) Pty Ltd v Foggo [2012] NSWCA 40, New South Wales Court of Appeal, Campbell JA, Macfarlan JA and Young JA, 19 March 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWCA/2012/40.html](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2012/40.html" \t "_new)   **(a)  Summary**   This case considers the scope of a contractual right to exercise discretion in the context of a company paying bonuses under an employment contract.  The court confirmed that an exercise by a company of its discretion in these circumstances is a unilateral decision which binds both the company and employee, rather than a separate contractual offer requiring acceptance by an employee to become contractually binding.     The case also analyses whether a contractual right can be effectively disclaimed by the party who derives a benefit from that right.  The court distinguished cases of property being gifted under a deed, which can be disclaimed, with a contractual benefit which cannot be.     **(b)  Facts**    O'Sullivan Partners (Advisory) Pty Ltd ('O'Sullivan' or 'firm') operated a corporate advisory business of which Mr Foggo was an employee.  Foggo's employment contract contained a performance incentive clause which provided that all staff were eligible to participate in the bonus pool determined by the firm annually, and that payment of any bonus was at the sole discretion of the firm's remuneration committee.     In April 2010, in the course of a performance review discussion, two partners of the firm and Foggo first discussed potential payment of a bonus to Foggo and the conditions that would attach to such a bonus.  On 28 May 2010, after a number of meetings between the parties, the firm notified Foggo in a letter that he would be paid a cash bonus of $300,000, payable in two instalments.  Half the bonus was to be paid in June 2010 and the balance in the June 2011, conditional upon Foggo remaining in employment with O'Sullivan at the time the bonus was due to be paid.  Further, the bonus was subject to a claw-back, whereby Foggo would have to repay the first half of the bonus paid to him if he resigned from employment with the firm and sought employment with a competitor before June 2011.   At the same time, Foggo was asked to sign and return prior to the June payroll a new employment agreement, which included a clause that the bonus scheme may be subject to conditions, including a claw-back.  Following the letter of 28 May 2010, the parties had a number of discussions about the bonus conditions and the new employment agreement. Ultimately, Foggo did not sign the new contract, and on the date of the June payroll, when the bonus was due to be paid, the firm did not pay the bonus.  In subsequent correspondence, O'Sullivan stated that Foggo had rejected the conditions of the bonus and therefore no bonus would be paid to him.  Foggo claimed that the non-payment of the bonus was a breach of his contract of employment which amounted to repudiation and purported to terminate the contract by letter to O'Sullivan.  O'Sullivan in turn rejected Foggo's right to terminate and treated his letter as a resignation.    Foggo launched a claim against O'Sullivan for breach of contract.  He was successful in the first instance in front of Schmidt J.  O'Sullivan appealed the decision.   **(c)  Decision**    The Court of Appeal held that:   * there was a discretion to pay the bonus, but once the firm's remuneration committee had made that decision to pay a bonus, Foggo had a contractual right to be paid the bonus; * the bonus could not be disclaimed by Foggo as it was a contractual right; and * even if the bonus could be disclaimed, Foggo did not effectively disclaim the contractual right.   The Court therefore dismissed the appeal and upheld the original decision of Justice Schmidt that O'Sullivan had breached its contractual obligation to pay Foggo the bonus.    **(i)  Discretion to pay**   Campbell JA, writing for the majority, accepted the position of the trial judge that O'Sullivan had a number of discretions relating to the payment of the bonus to Foggo:   * a discretion on whether to allocate a bonus; * a discretion on the amount of the bonus; and * a discretion as to whether to impose conditions on the bonus.   O'Sullivan argued that the letter of 28 May 2010 was an offer from the firm to Foggo, and it was only contractually binding once it was accepted.  Therefore, O'Sullivan argued that Foggo's acts in disputing the conditions of the bonus and attempting to terminate his employment were a rejection of that offer.  His Honour rejected that argument, stating that the remuneration committee's decision that was notified to Foggo by the letter of 28 May 2010 was not an offer, and that it had contractual effect without needing to be accepted.   His Honour compared the decision of the remuneration committee in these circumstances with the unilateral act of a company declaring a dividend, which creates a legal right of the company's shareholders to be paid the dividend that has been declared.  Accordingly, Campbell JA held that the letter of 28 May 2010 evidenced a unilateral decision by O'Sullivan to pay a bonus to Foggo which it had the contractual power to make, and once it was made it produced contractual consequences; namely, it gave rise to Foggo's contractual right to receive the bonus.     Interestingly, Young JA in a separate judgment, while agreeing with Campbell JA on the decision, noted that the trial judge's finding that the decision of the remuneration committee to allocate the bonus could not be revoked was not challenged in the appeal.  Young JA pointed out in obiter that there may be circumstances where such a decision can be revoked before the recipient acts on it; for example, where the contract expressly or impliedly gives that power or where the recipient has asked for a benefit for which he or she provides no consideration, and that an undertaking to provide the benefit can usually be withdrawn before it is acted upon.    **(ii)  Can a contractual right be disclaimed?**   O'Sullivan argued, based on several cases, that a party to a contract was able to disclaim its contractual rights.  His Honour found that there was no support in the authorities for a principle that a contractual right could be disclaimed.  In reaching this conclusion, Campbell JA relied on the decision in *Agricultural and Rural Finance v Gardiner* (2008) 238 CLR 570, in which the High Court held that there was no doctrine of waiver or forbearance from exercising a contractual right distinct and separate from cases of contractual variation, election between inconsistent rights or estoppel.   Campbell JA considered decisions where a transfer of property was legally disclaimed.  His Honour noted that those decisions were not analogous as they concerned a benefit arising under a deed as opposed to a contractual right.     **(iii)  Disclaiming the bonus**   His Honour also considered whether Foggo effectively disclaimed his right to the bonus, if a party were able to disclaim a contractual right (while noting that such analysis departs from his Honour's view that such a disclaimer was not possible).  His Honour held that there was no communication between the parties that could amount to a disclaimer by Foggo.  While Foggo raised his dissatisfaction with the conditions of the bonus, he did not decisively reject either the bonus, or the conditions.  The purported termination of the contract of employment by Foggo could not constitute a disclaimer as it occurred after the due date for payment and there was no consensual postponement of payment until that time.  In any event, his Honour found that Foggo did not reject the bonus or the conditions of the bonus, but rather he simply claimed that O'Sullivan was in breach of his employment contract by not paying the bonus on the due date.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h5)  **5.5  Receivers' and mortgagees' examination powers upheld as constitutionally valid**   (By Adrian Chai and Paul Walker, Ashurst)   Saraceni v Jones [2012] WASCA 59, Court of Appeal of the Supreme Court of Western Australia, Martin CJ, McLure P and Newnes JA, 16 March 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/wa/WASCA/2012/59.html](http://www.austlii.edu.au/au/cases/wa/WASCA/2012/59.html" \t "_new)   **(a)  Summary**   The decision in Saraceni v Jones is the first time an Australian appellate court has considered and upheld the constitutional validity of the compulsory examination powers in Part 5.9 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), as they apply to corporations whose assets are controlled by receivers or mortgagees in possession.   The applicant (Mr Saraceni) argued that section 596A of the Corporations Act was constitutionally invalid in connection with corporations whose assets are subject to possession by a Controller, because the examination power in such a context involves neither the exercise of judicial power or power that is incidental to a judicial power. If accepted, this argument would have meant that compulsory examinations would not be available to receivers or mortgagees (and their agents) in possession.   The Court of Appeal of the Supreme Court of Western Australia unanimously upheld the constitutional validity of section 596A in the context of corporations whose assets are in the control of receivers, or in possession of mortgagees (and their agents).   **(b)  Facts**   The Bank of Western Australia Ltd (Bankwest) held various securities over assets of three companies, of which Mr Luke Saraceni was a director.  The companies were Newport Securities Pty Ltd, Mayport Nominees Pty Ltd and Seaport Pty Ltd.    In early 2011, Bankwest appointed Ferrier Hodgson as receivers and managers of certain assets of each of the companies. In addition, Bankwest entered into possession of certain real property owned by Newport as mortgagee, and appointed Ferrier Hodgson as its agents.    Subsequent to their appointment, Ferrier Hodgson applied to ASIC for authorisation to seek the issue of examination summonses against Mr Saraceni. ASIC granted that authorisation, and Ferrier Hodgson obtained orders from the Supreme Court of Western Australia for the issue of examination summonses to Mr Saraceni under section 596A of the Corporations Act.   Mr Saraceni applied to set aside the examination summonses on a number of grounds. One of the grounds was that it was unconstitutional for the Supreme Court of Western Australia to issue the examination summons, and to supervise and conduct a compulsory examination in connection with corporations in private receivership or in relation to which a mortgagee had entered into possession.    Mr Saraceni alleged that compulsory examination, in this context, could not be conferred on the Supreme Court of Western Australia because it was not a judicial power or a power incidental to judicial power within the meaning of Chapter III of the Constitution.  This legal issue was referred to the Court of Appeal for resolution.   **(c)  Decision**    The Court of Appeal unanimously rejected the constitutional challenge and upheld the validity of the compulsory examination powers contained in sections 596A and 597 of the Corporations Act.   **(i)  How did this decision fit with previous constitutional challenges to the examination powers?**   The examination powers in sections 596A and 596B of the Corporations Act have been the subject of constitutional challenges previously.  However, those challenges were not in the context of corporations whose assets were in the hands of a controller under Part 5.2 of the Corporations Act.   * In *Gould v Brown* (1998) 193 CLR 346, the High Court held that the examination powers were constitutionally valid in connection with a court-ordered winding up. * In *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) FCR 501, French J (then a justice of the Federal Court) considered that the examination powers would only be valid in relation to a corporation in some form of external administration under Chapter 5 of the Corporations Act, although French J left open the issue of whether any form of external administration was sufficient. * In *Re Sons of Gwalia Ltd; ex parte Love* (2008) FLR 49, Le Miere J regarded it as constitutionally valid for an examination to take place in relation to a company subject to a deed of company arrangement. * In *Ariff v Fong* (2010) FLR 300, Barrett J approved the decision of Le Miere J in Re Sons of Gwalia Ltd.   Mr Saraceni sought to distinguish each of these cases on the basis that receiverships and possession of assets by mortgagees (and their agents) was not relevantly similar to the other form of external administration considered in those earlier decisions.   **(ii)  What was the reasoning of the Court of Appeal?**   There were two substantive judgments delivered by the Court - Martin CJ and McLure P.  Their Honours reached largely the same conclusions, with the main difference being that Martin CJ was prepared to uphold the constitutional validity of compulsory examinations on a wider basis than McLure P.   Under the Commonwealth Constitution, the Commonwealth Parliament can only confer functions on a court if those functions involve "judicial power", or are incidental to it.  This is an aspect of the separation of powers. The reasoning of the Court in *Saraceni v Jones* focused on the proper subjects of judicial power.   The Court unanimously accepted that the examination power was "part of" judicial power.  Their reasoning, in summary, was as follows:   * Compulsory examination powers had existed, in one form or another, for centuries, dating back to their origins in bankruptcy law.  Examination powers became available for court-ordered liquidations and voluntary liquidations of corporations in the mid-19th century, but it was only since the 1960s that those powers could be accessed in connection with forms of external administration other than liquidation (such as private receiverships). * The courts traditionally had been involved in supervising compulsory examinations in connection with liquidations, because courts were well equipped to perform that task and to ensure that the examination powers were not abused.  The same reasoning applied to newer forms of external administration, such as receiverships. * The use of the examination powers in connection with forms of external administration other than liquidation, was closely analogous to the nature, scope and purpose of compulsory examination powers in connection with liquidations. The extension of the examination powers beyond liquidation, to receiverships and other types of external administration, simply reflected modern developments in the law to cater for newer types of external corporate administration. * Judicial powers and functions could not be precisely defined. There are some powers and functions which can only be exercised by courts, and which can never be exercised by courts.  There are also some powers which might be given to a court, or alternatively, to an administrative decision-maker or body (such as ASIC). If given to a court, it is expected that courts will exercise these kinds of powers with objectivity and detachment, and guard against abuses of process. The examination power was of this type.   There was a 2:1 split on a secondary issue of whether or not the examination powers were also 'incidental' to other judicial powers; namely, the general supervisory role of the courts over all external administrations.  Martin CJ considered that the examination powers were also incidental.  McLure P (with whom Newnes JA agreed) took a contrary view. This issue did not change the outcome, because it was enough that the examination power was itself judicial in nature.   **(iii)  What is the significance of the decision?**   Although *Saraceni v Jones* is a decision of the Court of Appeal of the Supreme Court of Western Australia, it concerns an issue of national importance relating to the Corporations Act and the regulation of the affairs of corporations.   Unless and until the High Court decides otherwise, it must now be accepted that powers of compulsory examination in sections 596A and 597 of the Corporations Act are constitutionally valid in connection with corporations in private receivership and in respect of which a mortgagee has entered into possession.   In addition, the reasoning of the Court in *Saraceni v Jones* is applicable to other types of external administration, such as companies subject to voluntary administration or companies subject to a deed of company arrangement, and to the examination powers under section 596B of the Act. The decision should be seen as resolving the constitutional validity of the examination powers in Part 5.9 of the Act, as they apply to any type of external administration in Chapter 5 of the Corporations Act.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h5)  **5.6  Managing director lacks implied authority to dismiss other directors**   (By James Brownstein, DLA Piper Australia)   Smith v Butler [2012] EWCA Civ 314, England and Wales Court of Appeal (Civil Division), Arden and Rimer LJJ, Ryder J, 15 March 2012   The full text of this judgment is available at:  [http://www.bailii.org/ew/cases/EWCA/Civ/2012/314.html](http://www.bailii.org/ew/cases/EWCA/Civ/2012/314.html" \t "_new)   **(a)  Summary**   An English court has held that in the absence of an express conferral of such power, a managing director does not have an implicit power to remove other directors from their positions, or take other action that would ordinarily require board approval.   **(b) Facts**    Mr Smith and Mr Butler were both directors of Contact Holdings Limited ('the Company') along with Mr Harris.  Mr Smith, the chairman of the board, owned 68.8% of the shares in the Company, and Mr Butler, the managing director, owned the remainder.   On 1 July 2011, Mr Butler suspended Mr Smith from the role of chairman and excluded him from the company premises, on the basis of information suggesting Mr Smith had used a company credit card to pay for £78,000 of personal expenses.  Mr Butler and Mr Harris later signed a board resolution effecting Mr Smith's suspension, but the resolution was not effective without Mr Smith's signature.   Mr Smith made two applications to the Court, seeking:   * a declaration that Mr Butler's actions went beyond his powers as the managing director; and * approval for a meeting with a quorum of one for the purpose of removing Mr Butler and Mr Harris as directors (Mr Butler had previously told Mr Smith he would not attend such a meeting, which meant there would not be a quorum of members present and any resolutions passed would be ineffective).   The trial judge granted both applications, and ordered Mr Butler to indemnify the Company for costs incurred in resisting Mr Smith's applications.  Mr Butler appealed on all three parts of that decision.   **(c)  Decision**    **(i) The powers of a managing director**   The Court held that a managing director's powers are rooted primarily in a company's articles of association, and any express conferral of authority. This Company had adopted the 'Table A' regulations, which are a UK equivalent to the replaceable rules, as its article of association. Regulation 72 of Table A grants companies the ability to appoint a managing director, with 'such of their power as they consider desirable to be exercised by him...either collaterally with or to the exclusion of their own powers.'   While Mr Butler had a contract of employment appointing him to the position of managing director, there was no express delegation of any power in that contract. The Court accepted that it was 'clearly intended that some powers should be implicitly delegated' to Mr Butler, and that managing directors generally have implied authority to carry out the day to day management of their companies.  However, the appointment or dismissal of directors fell outside of day to day management.   The Court noted that officers such as managing directors and chief executive officers are appointed to implement company strategy, and must obtain board authority 'on matters on which the board has not clearly laid out the company's strategy'. This Company had clearly demonstrated a strategy that Mr Smith should be its chairman, so the decision to remove him from this role was a matter for the board, not the managing director.   The Court also noted that as a shareholder concerned about Mr Smith's inappropriate use of finances, Mr Butler had a number of other options including a statutory derivative action, or an application for relief against unfairly prejudicial conduct by the majority shareholder.   **(ii) Company meeting with a quorum of one**   Section 306 of the Companies Act 2006 allows a court to order a meeting in circumstances where it is 'impracticable' to hold a meeting in accordance with the articles of association, and that the presence of one member at this meeting can be deemed a quorum.    The Company's articles of association required a quorum of two at all meetings, with one of the two being Mr Smith. The Court held that because Mr Smith and Mr Butler were the only two members of the Company, Mr Butler's threatened boycott of the meeting made a meeting 'impracticable', and it was appropriate to order a meeting under section 306.    The Court also held that to deny Mr Smith's application for a quorum of one at the meeting would prevent the majority shareholder from exercising his ordinary voting right to appoint and remove directors, and create a right in favour of the minority shareholder that was not part of the bargain between the shareholders, as contemplated in the articles of association.   **(iii) Indemnification of the Company's costs**   The Court held that because Mr Butler lacked authority to suspend Mr Smith from the role of chairman, he also lacked authority to direct the Company to defend against Mr Smith's applications. Accordingly, the order that Mr Butler indemnify the Company for all legal costs incurred was a valid exercise of the trial judge's discretion.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h5)  **5.7  Misleading or deceptive conduct in relation to share purchases: the need to establish a causal link**    (By Jessica Bounds, King & Wood Mallesons)   De Bortoli Wines Pty Ltd v HIH Insurance Limited (in liq) [2012] FCAFC 28, Federal Court of Australia, Full Court, Jacobson, Siopis and Nicholas JJ, 15 March 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCAFC/2012/28.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2012/28.html" \t "_new)   **(a)  Summary**   De Bortoli Wines Pty Ltd (DBW) brought a claim against HIH Insurance Limited (HIH) for damages for misleading or deceptive conduct, alleging HIH had made misrepresentations about its financial status which led DBW to purchase $7.1 million of shares in HIH.  The Federal Court upheld the findings of the primary judge that there was no evidence that DBW had relied on any misrepresentation by HIH.   **(b) Facts**   Over a four month period between 11 August 2000 and 22 December 2000, DBW purchased approximately 20 million shares in HIH at a total cost of more than $7.1 million.    On 15 March 2001, HIH was placed into provisional liquidation.  DBW lodged a proof of debt with the liquidators of HIH in February 2009 (nearly 8 years later) for the total cost of the shares it had purchased.   DBW asserted that it had a cause of action for damages under section 82 of the then [Trade Practices Act 1975 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=52804" \t "_default) because HIH had engaged in misleading or deceptive conduct in breach of section 52 of the Act.   The principal evidence in support of DBW's claim was a statutory declaration by Mr De Bortoli (the managing director of DBW).  Mr De Bortoli asserted that he was induced to purchase shares in HIH on behalf of DBW because of three categories of misleading information:   (1)  HIH's financial reports, including HIH's interim results for the 6 months ending 31 December 1999 and HIH's Concise Annual Report for the financial year ending 30 June 2000, associated media releases issued by HIH to the ASX, and statements made by the Chief Executive and Chairman of HIH;   (2)  'Stockbroker Advices' which were based on HIH's published financial statements and announcements; and   (3)  oral statements made to Mr De Bortoli by two former officers of HIH  to the effect that HIH was a 'profitable company'.   DBW claimed that it relied on each of these categories of information when purchasing shares over the four month period and would not have bought the shares had the true financial position of HIH been known or disclosed.   Portions of the documents submitted to the Court were highlighted in yellow to identify statements DBW alleged were misleading.  However, Mr De Bortoli conceded that he did not make any markings or notations on the documents when he read them - rather, the highlighting was made by his solicitors in 2009 after they had read the HIH Royal Commission Report.   The liquidators of HIH rejected DBW's proof of debt on the basis that there was insufficient evidence to show Mr De Bortoli had relied on any misleading information from HIH.  DBW appealed against the decision to reject the proof of debt.  The primary judge, Stone J, dismissed the appeal on the basis that DBW had not established the necessary causal link between the loss claimed and the statements made by HIH.   At first instance, Stone J held that where an applicant claims to have suffered loss from a misrepresentation, they must establish reliance.  For DBW to succeed in its claim, it needed to show that it was induced to enter into the share purchase transactions by the misrepresentations.   DBW submitted that the Court could fairly infer reliance from the fact that HIH had made misleading statements with a view to inducing DBW to purchase shares. However, on the facts, Stone J held that no causal link between the purchases and the representations could be found and that the 'fair inference of fact' was rebutted.   Stone J held that little weight should be given to Mr De Bortoli's evidence that he relied on specific statements in documents since 'he could not recall when he read them' and the credibility of his evidence was undermined by his assertion that he was unaware of negative media coverage about HIH.  Her Honour found that DBW had not relied on external information from HIH, the Stockbroker Advices or any other source, but on Mr De Bortoli's own strategic plan.   DBW appealed on two grounds.  First, that Stone J, in finding there had been no reliance on a misrepresentation, had failed to give proper weight to the 'fair inference of fact' principle, and second, that her Honour had applied an artificial or unrealistic test in determining whether to accept Mr De Bortoli's evidence of reliance.   **(c)  Decision**   The Full Court of the Federal Court held on appeal that there was no error in Stone J's ultimate finding that DBW did not rely on any misleading statement made by HIH.   Further, Stone J did not erect an 'artificial barrier' to acceptance of Mr De Bortoli's evidence.  Her consideration of the yellow highlighting of the documents was a step in her overall rejection of Mr De Bortoli's evidence.   The Federal Court found that there were five reasons that Stone J's finding of an absence of reliance was supported by the evidence.   First, Mr De Bortoli conceded that the initial purchase of shares was prompted by a rumour that Mr Rodney Adler (a director of HIH) was buying shares and that the financial information on which he claimed to rely was 'stale' by the time DBW made the purchases.  The Federal Court agreed that, given the 'vague nature' of Mr De Bortoli's evidence about having read the documents in question, it was open to Stone J to find that Mr De Bortoli did not read the statements or, even if he did, the information about Mr Adler's purchases of shares could be given more weight.  Therefore, the statements in the documents were not a cause of the decision to buy the shares.   Second, DBW continued to purchase shares despite a fall in the HIH share price, on the basis that Mr De Bortoli knew better than the market.  It was open to Stone J to find that this was inconsistent with a claim of reliance on misleading documents.  The Federal Court agreed that the evidence revealed that Mr De Bortoli's strategy was not relevantly linked to the financial accounts.   Third, there was negative media coverage regarding HIH and there were inconsistencies in Mr De Bortoli's evidence on this topic.  Mr De Bortoli claimed that he was unaware of this negative press even though he had the Australian Financial Review 'specifically' delivered to him.  It was therefore open to Stone J to find the credibility of Mr De Bortoli's evidence undermined by his assertion that he was unaware of the negative publicity.   Fourth, Mr De Bortoli's evidence was very general and he did not give evidence of how the statements made in HIH's accounts related to his assessment of the value of HIH shares.  Rather, he gave evidence that he made the investment decision on the basis of his own strategy.   Finally, Mr De Bortoli conceded that when the share price fell, he sought out comments from HIH officers about the position of the company.  One of the oral statements made by the HIH officer in response was that HIH was a 'profitable company'.  It was open to Stone J to find that the statements should not be afforded much weight as they were 'bland, general statements' and not 'a hook' on which a person would expect to base an investment decision.   Accordingly, Jacobson, Siopis and Nicholas JJ dismissed the appeal with costs.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h5)  **5.8  Winding up applications cannot be commenced before the statutory demand expires**   (By Amanda Loftus and Campbell Unsworth, Corrs Chambers Westgarth)    Surdex Steel Pty Ltd v GB Manufacturing Pty Ltd [2012] VSC 90, Supreme Court of Victoria, Gardiner AsJ, 13 March 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2012/90.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/90.html" \t "_new)   **(a)  Summary**   This case confirms that in Victoria, a creditor cannot apply to wind up a company relying on a statutory presumption of insolvency provided by section 459C(2)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) before the creditor's statutory demand expires.  Surdex Steel Pty Ltd (the Plaintiff) applied for orders that GB Manufacturing Pty Ltd (the Defendant) be wound up in insolvency because the Defendant had failed to comply with a statutory demand served on it.  In the meantime, the Defendant was involved in a separate proceeding applying for the statutory demand to be set aside.  Consequently, time for compliance with the statutory demand had not expired by the time the Plaintiff made the application for winding up.   Gardiner AsJ considered both a broad and narrow reading of the provisions in the Corporations Act, but ultimately favoured a narrow construction of the relevant sections.  His Honour held that to allow an applicant to commence a proceeding prior to the event giving rise to the presumption amounts to permission to commence an application in the Court which has no grounds.  The application was dismissed.    **(b)  Facts**   The Plaintiff applied on 1 February 2012 for orders that the Defendant be wound up in insolvency pursuant to sections 459A and 459P of the Corporations Act.  The Plaintiff sought to rely on failure by the Defendant to comply with a statutory demand it had been served with on 7 October 2011.    However, in a separate proceeding, the Defendant (as plaintiff) had applied for the statutory demand to be set aside under section 459G of the Corporations Act, and on 31 January 2012 the parties filed consent orders that the application be dismissed with no order as to costs.    Under section 459F(2)(a)(ii) of the Corporations Act, in a situation where the Court has not extended the period for compliance with a statutory demand, the period for compliance is 'the period beginning on the day when the demand is served and ending 7 days after the application under section 459G is finally determined or otherwise disposed of.'   In this case, pursuant to section 459F(2)(a)(ii), the period for compliance with the statutory demand ended seven days after 31 January 2012 (7 February 2012). The Plaintiff's application for winding up in insolvency was made before the expiry of time for compliance with the statutory demand.  However, by the return date of the originating process on 7 March 2012, the expiry of time had occurred.  In other words, time for compliance with the statutory demand had not expired when the application for winding up was filed, but it had expired by the time the application came on for hearing.   **(c)  Decision**    Gardiner AsJ considered two lines of authority in reaching the decision, namely the reasoning of Santow J in *Pinn v Barroleg Pty Ltd* (1997) 23 ASCR 541 (Pinn) and Palmer J in *Woodgate (as the trustee for the bankrupt estate of Fenton) v Garard* (2010) 78 ACSR 468 (Woodgate).    In Pinn, Santow J held that a winding up application may still be granted, notwithstanding that the period for compliance with the statutory demand expired after the filing of the application.    Santow J's main discussion was around the construction of section 459C(2)(a) of the Corporations Act.  This section provides:   "The court must presume that the company is insolvent if, during or after the three months ending on the day when the application was made:             a)      The company failed (as defined by section 459F) to comply with a statutory demand; ..."  His Honour identified the apparent contradiction of the words 'during or after' the three months limitation. On its face, this could mean that there was no time limitation at all.  However, his Honour took a broad reading of the section and stated that the section 459C(2) event goes 'stale' after three months as the basis for a winding up application.  Where the application is made at a date preceding the event, but based on the event, it may still be granted.    Pinn addressed the question of whether the date of compliance with the demand had expired before the filing of the winding up application, rather than after the filing of the winding up application, which was the scenario in this case. However, Gardiner AsJ stated that Santow J's position in Pinn is a clear expression of the fact that a winding up application may still be granted notwithstanding that the period for compliance with the statutory demand expired after the filing of the application.  Pinn has been referred to in a number of subsequent decisions, namely: Sim v Ravenswood Resort Pty Ltd (receivers and managers appointed) [2003] WASC 121; *Sheslow v Diamond Rose NL* (2005) 54 ACSR 376; *The Missing Link Network Integration Pty Ltd v Keene Consulting International Pty Ltd* [2007] NSWSC 1377; and *Gryst v Dromana Estate Limited* (2008) FCA 1148.    Gardiner AsJ then considered the decision of Palmer J in Woodgate. Palmer J's analysis was concerned with reconciling the phrase 'during or after' in section 459C(2) of the Corporations Act with section 459Q of the Corporations Act.    Section 459Q(a) provides that the application for a company to be wound up in insolvency relying on a failure to comply with a statutory demand 'must set out the particulars of service of the demand on the company and of the failure to comply with the demand.'   Palmer J stated that section 459C must be read as being qualified by section 459Q. His Honour said that section 459C 'deals with an evidentiary presumption in a variety of different circumstances,' and that the phrase 'during or after' should be read as applying distributively across the six events in the section so that the phrase only applies to the events that can be 'relied on having regard to the provisions of section 459Q.'   Therefore, reliance on failure to comply with a statutory demand can only occur if the time for compliance has expired during the three months, but reliance on any of the other five events specified in section 459C(2)(b) to (f) can occur if the event is either during the three month period or after filing and before the hearing.    His Honour stated that this construction 'avoids absurdity and inconvenience' and deals reasonably with a situation where a creditor could first file a winding up application relying on failure to comply with a statutory demand and only later serve the statutory demand.    Palmer J and Gardiner AsJ both remarked that in Pinn, Santow J's attention was not drawn to section 459Q and his Honour did not consider it at all in the judgment.  Palmer J's decision in Woodgate has been subsequently supported by Barrett J in *Golden Plantation Pty Ltd v TQM Design and Construct Pty Ltd; KCL Developments Pty Ltd v TQM Design and Construct Pty Ltd* [2010] NSWSC 143.   Gardiner AsJ ultimately preferred the analysis of Palmer J in Woodgate. His Honour stated that 'to allow applicants seeking an order for winding up in insolvency relying on failure to comply with statutory demands to file such applications before those demands have expired has the obvious potential to give rise to an abuse of the statutory demand regime.'  To adopt an alternative construction would effectively impose the timing requirements early, and would 'allow an applicant to commence a proceeding...which has no grounds.'   His Honour held that the plaintiff was not in a position to prove that the defendant had failed to comply with a statutory demand within the three months ending on the day when the application was made, and consequently dismissed the application.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h5)  **5.9  Can administrators ignore the express terms of a contract when calculating the value of a claim for voting purposes?**   (By Nicole Schaillee and Alistair Fleming, Clayton Utz)   In the matter of Free Wesleyan Church of Tonga in Australia Inc (administrators appointed); Phoenix Lacquers & Paints Pty Limited v Free Wesleyan Church of Tonga in Australia Inc (administrators appointed) [2012] NSWSC 214, Supreme Court of New South Wales, Black J, 13 March 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/214.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/214.html" \t "_new)   **(a)  Summary**   According to the Supreme Court of New South Wales, it would appear that, in certain circumstances, administrators can ignore the express terms of a contract when calculating the value of a claim for voting purposes.  The Court rejected an application by a creditor to challenge the decision of an administrator to admit a claim for voting purposes at a 'just estimate', substantially less than the full amount of the claim calculated according to the express terms of a loan agreement.   The Court held that the administrator was justified in having regard to the characteristics of the contract and the surrounding circumstances in determining that the claim was not presently established for voting purposes.   **(b)  Facts**   Between August and November 2008, Free Wesleyan Church of Tonga in Australia Inc (Church) borrowed approximately $900,000 from Phoenix Lacquers & Paints Pty Limited (Phoenix).  Under the terms of the loan agreement, Church was liable to pay interest on the borrowings to Phoenix at the rate of 22% per month (approximately 142% per annum).   Church was placed in voluntary administration on 12 January 2012.    For voting purposes at the first meeting of creditors, Phoenix lodged a proof of debt for $9,795,217.27 comprising principal of $950,000 and interest of $8,845,217.27.    The voluntary administrators admitted Phoenix's claim for voting purposes at a 'just estimate' of $1,480,504.11 (a discount of $8,314,713.16), deviating from the express terms of the loan agreement and instead applying a simple interest rate of 15% per annum.  This decision was made based on legal advice and also the fact that there were concurrent proceedings on foot by Church challenging the interest rate payable under the loan agreement.   A motion was made for the removal of the administrators at the first meeting of creditors.  A majority in number of creditors voted for the resolution.  A majority in value, calculated on the 'just estimate' of Phoenix's claim, voted against it.  The administrators exercised their casting vote to defeat the resolution.   **(c)  Decision**   Phoenix left no stone unturned in its application to the Court but was ultimately unsuccessful on all points.   Phoenix argued:   * the value of the debt was established on the express terms of the loan agreement; * the proceedings challenging the interest rate did not impeach the terms of the loan agreement and in any event, were bound to fail; and * the decision to admit the proof at a 'just estimate'  should be set aside by reason of error.   Justice Black acknowledged that it will be a rare case where the value of a debt which is capable of being calculated from the express terms of a contract cannot be ascertained or established because of doubts as to the enforceability of its terms.  However, in his view, this was one of those cases.   His Honour found that once the characteristics of the loan and the fact that Church had brought proceedings challenging the terms of the loan were taken into account, the value of the loan could not be ascertained by reference to the express terms alone.  Accordingly, the administrators were justified in their decision that the claim had not been established and were entitled to make a 'just estimate' of the claim for voting purposes.   His Honour was not satisfied that Church's challenge to the terms of the loan was bound to fail.  In any event, his Honour did not consider that the administrators were obliged to take steps such as personally reviewing the defence filed by Phoenix and the evidence in the proceeding to make an assessment of Church's claim.  It was sufficient that the administrators had taken legal advice and there was nothing to suggest their concerns were not well-founded or that the approach they proposed to take was not reasonable.   Phoenix also sought unsuccessfully to:   * challenge the exercise of the casting vote on the basis the administrators had an interest in the outcome, given the proposed resolution involved their removal; and * have the administrators removed for an apparent or actual conflict of interest.   His Honour, confirming the position in *Commonwealth Bank of Australia v Fernandez* [2010] FCA 1487, found that the administrator was entitled to exercise his casting vote in respect of the removal resolution.  His Honour was satisfied, on the evidence before him, that the administrator properly held the view that it was in the best interests of the creditors for the administrators to remain in office.   In relation to the allegation of conflict, his Honour was not satisfied that the mere fact that the administrators and their appointor shared the same solicitor for a very short period of time was sufficient to establish a lack of objectivity on the part of the administrators.   This decision serves as a good reminder to insolvency practitioners not to rely solely on the express terms of a contract when calculating the value of a claim for voting purposes and instead to have regard to other circumstances and factors which may impact upon the value of the claim.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h5)  **5.10  Equitable 'fruits of action' liens, registration and companies subject to deeds of company arrangement**   (By Hunter Drew, Freehills)   Australian Receivables Ltd v Tekitu Pty Ltd (Subject to Deed of Company Arrangement) (Deed Administrators Appointed) [2012] NSWSC 170, Supreme Court of New South Wales, Ward J, 5 March 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/170.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/170.html" \t "_new)   **(a)  Summary**   Peters, a solicitor, brought an application for declaratory and other relief in relation to, among other things, an equitable 'fruits of the action' lien over moneys held in Court that were formerly held by Peters in a controlled moneys account. The equitable lien was created in relation to services Peters provided as a solicitor to Tekitu Pty Ltd (Tekitu) and its directors. It was held that Peters had a valid equitable lien and that such a lien was not a registrable charge under section 262(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) and accordingly was enforceable against the deed administrator.   **(b)  Facts**    Peters represented Tekitu (at the time of the judgment, subject to a Deed of Company Arrangement) and its directors for 20 months prior to proceedings between Tekitu and Australian Receivables, in relation to Tekitu's sale of a debt collection business to Australian Receivables (the 'Principal Proceedings'). Due to a breakdown in the relationship between Peters and Tekitu, Tekitu engaged new legal representation (the 'New Solicitor') prior to the commencement of the Principal Proceedings.    The Principal Proceedings concluded with a successful claim by Australian Receivables and a successful cross-claim by Tekitu.   A dispute arose in relation to unpaid fees claimed by Peters, which caused Peters, Tekitu, the directors of Tekitu and the New Solicitor to enter into a File Transfer Deed. Under the terms of the File Transfer Deed, the unpaid fees of Peters were to be paid out of moneys recovered by Tekitu in the Principal Proceedings.    Importantly, the terms of the File Transfer Deed expressly preserved the lien that Peters held 'over the files and any monies paid or payable' to Tekitu, which included the money still held by Peters in a controlled moneys account. Ward J ordered that this money be paid into Court pending the determination of Peters' claim.   Peters claimed an entitlement to the money held in Court in respect of unpaid costs, interest and the costs of enforcement of his claim in the following forms:   * an equitable lien ('fruits of the action lien'); * an equitable charge under the terms of the File Transfer Deed; * a trust under the terms of the File Transfer Deed; * an irrevocable authority granted by Tekitu to the New Solicitor; and * a personal claim against the directors of Tekitu.   **(c)  Decision**    Ward J held that Peters had an equitable 'fruits of the action' lien over the funds held in Court to secure the payment of his costs of acting for the Tekitu parties. Ward J also held that the terms of the File Transfer Deed did create an equitable charge but that charge was not enforceable against the deed administrator due to non-registration. It was important for Ward J that the File Transfer Deed expressly preserved the equitable lien so that the findings in relation to the equitable charge did not adversely affect the findings in relation to the equitable lien.   **(i) Equitable 'fruits of the action' lien**   Ward J discussed *Ex Parte Patience; Makinson v Minister* (1940) 40 SR (NSW) 96 and *Firth v Centrelink* [2002] NSWSC 564 and, in concluding that Peters held an equitable lien over the funds held in Court, addressed the following issues:   * first, whether the moneys were recovered rather than preserved; * second, whether there was a sufficient causal connection between Peters' labour and the fruits of the litigation; * third, whether the equitable lien was required to be registered under section 262(1) of the Corporations Act; and * fourth, whether Peters' equitable lien was subject to the administrator's lien.   Ward J held in the positive in relation to both the first and second issues.  First, Ward J held that the moneys were recovered rather than preserved by reason of Tekitu's successful cross-claim in the Principal Proceedings. Second, Ward J held that there was a sufficient causal connection because Peters had, among other things, acted for the Tekitu parties for around 20 months, pleaded the defence and cross-claim, briefed counsel and attended to discovery.    In relation to the third issue, the Tekitu parties argued that the equitable lien was a registrable charge under section 262(1) of the Corporations Act and accordingly would be void as a security against the deed administrator for non-registration.    Section 262(1) lists the range of charges that are registrable under the Corporations Act and section 262(2) lists the types of securities that are not required to be registered:         262(2):  [Where no registration required] The provisions of this Chapter mentioned in subsection (1) do not apply in relation to:        (a)  a charge, or a lien over property, arising by operation of law; or        (b)  a pledge of a personal chattel or of a marketable security; or        (c)  a charge created in relation to a negotiable instrument or a document of title to goods, being a charge by way of pledge, deposit, letter of hypothecation or trust receipt; or        (d)  a transfer of goods in the ordinary course of the practice of any profession or the carrying on of any trade or business; or        (e)  a dealing, in the ordinary course of the practice of any profession or the carrying on of any trade or business, in respect of goods outside Australia.    Ward J held that as Peters' equitable lien arose by operation of law and under section 262(2)(a), it did not need to be registered.  Accordingly, the equitable lien was enforceable against the deed administrator. (Note that section 262 was repealed on 30 January 2012 by the [Personal Property Securities (Corporations and Other Amendments) Act 2010 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=115904" \t "_default).  However, under section 1502 of the Corporations Act, the repeal of section 262 and other sections in Chapter 2K does not apply to charges created before 30 January 2012.)   In relation to the fourth issue, Ward J held that Peters' equitable lien was not subject to the administrator's lien because Peter's lien arose by reference to work preformed prior to the administration of Tekitu.    **(ii) Equitable charge**   Ward J held that the terms of the File Transfer Deed did create an equitable charge over the moneys recovered in the Principle Proceedings by Tekitu.  However, Ward J also held that such a charge was registrable under section 262(1) and was accordingly void against the deed administrator for non-registration.    **(iii)  Trust**   Ward J held that a trust was not created under the terms of the File Transfer Deed as the language of the File Transfer Deed did not express an intention to create a trust in the circumstances.    **(iv) Irrevocable authority**   Ward J held that the irrevocable authority Tekitu granted to the New Solicitor under the File Transfer Deed did not amount to Tekitu giving up an entitlement to the funds in question.  Rather it was an early direction to pay the funds on the occurrence of certain circumstances.    **(v) Personal claim against directors of Tekitu**   Ward J held that had the equitable lien not been valid, the directors of Tekitu would not have been personally liable under the terms of the File Transfer Deed but would have been liable for the costs claimed by Peters pursuant to the costs agreements entered into by them jointly with Tekitu.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h5)  **5.11 Whether a company limited by guarantee should pay legal costs incurred by directors or members in legal proceedings**   (By Noah Obradovic and Kathy Ge, Ashurst)   Ananda Marga Pracaraka Samgha Ltd v Tomar (No 3) [2012] FCA 184, Federal Court of Australia, Dodds-Streeton J, 5 March 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/184.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/184.html" \t "_new)   **(a)  Summary**   The Federal Court considered whether a company limited by guarantee should pay legal costs and disbursements incurred, or to be incurred, by directors or members of the company in legal proceedings.     The decision:   * reaffirms the rule that company funds should not be used in legal proceedings except to the extent necessary to protect its own valid interests; and * held that leave to bring proceedings on behalf of a company pursuant to section 237 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) will not be in the best interests of the company when the essential issues in dispute are primarily personal rights vesting in members.   **(b)  Facts**   An application was brought prior to trial by Devendhran Vadiveloo Pillay and Prabanjamurthi Pillai (the Plaintiffs) to seek an order that Ananda Marga Pracaraka Samgha Ltd (the Company) should fund from its corporate resources the costs of all parties in the legal proceedings. The proceedings were brought by the Plaintiffs and concern the validity of the Company's general meeting held on 20 March 2010. The Plaintiffs claimed that the notice for the meeting was invalid and thus they remained as directors of the Company and the appointment of new directors and members as a result of the meeting was therefore invalid.    The Plaintiffs in *Ananda Marga Pracaraka Samgha Ltd v Tomar* (No 2) [2010] FCA 1342 had sought orders to prevent the defendants (the members and directors of the Company after the 20 March 2010 general meeting) from calling meetings, operating company bank accounts and dealing with company properties.    The law firm that was retained after the 20 March 2010 general meeting to provide advice about the validity of the meeting had billed $438,087.17 for fees and disbursements to date, and estimated a further $550,000 due to the complexity of the litigation and a six week trial.     The defendants objected to the application by the Plaintiffs to include the Company as a plaintiff in the legal proceedings and to the expenditure of company funds to support the litigation.  The defendants also claimed that corporate funds should not be expended just because the Plaintiffs were impecunious.   The Plaintiffs deposed that they had commenced the litigation in good faith and that the proceedings were in the best interests of the company. They also claimed that the resolution of the dispute over the Company's constitution and comprehensive declaration of membership and directorship would benefit the entire Company. The Plaintiffs argued that they had no money and in the absence of a cost order only one side of the dispute would be adequately represented at trial.    In the alternative, the Plaintiffs also sought leave to bring the proceedings on behalf of the Company pursuant to section 237 of the Act, and consequently, that the costs order be made pursuant to section 242 of the Act. The Plaintiffs submitted that they had standing under section 236 of the Act and as the conditions of section 237 (2) were satisfied, the court must grant the application.   **(c)  Decision**   Justice Dodds-Streeton denied the application by the Plaintiffs to include the Company as a plaintiff and to use corporate resources to fund the litigation.  Although the Court acknowledged that it was regrettable that the Plaintiffs did not have money to be legally represented, her honour held that it would be deleterious for the Company to pay for the litigation costs as it would be a significant reduction of the Company's assets.  Dodds-Streeton J held that in the context of oppression proceedings and derivative actions primarily involving a dispute between members, the company's funds should not be applied in the litigation, save to the extent necessary to protect its own valid interests.      Her Honour acknowledged that the outcome of the litigation could entitle particular members to an indemnity from the Company for their costs.  Such an indemnity would ultimately depend on the Plaintiffs' success in the legal proceedings to establish that they were invalidly removed as directors.   Her Honour also denied leave for the Plaintiffs to bring an action on behalf of the Company under section 237 of the Act. Her Honour read sections 236(1) and 237(1) to contemplate a derivative proceeding in which the Company has a cause of action and/or a level of independent action.  Her Honour held that in this matter, the essential issues in dispute were not rights of action belonging solely to or vesting in the Company which must be vindicated or defended by a member intervening in or commencing a derivative proceeding.    Going through the criteria of section 237 of the Act, her Honour was not persuaded that, pursuant to section 237(2)(c), it is in the best interests of the Company that the Plaintiffs be granted leave. A number of factors were considered to determine the best interests of the company.  These include the nature of the company in question, the effect of leave on its business and operations, whether the redress can be achieved by other means and whether the defendants can meet any judgment in the company's favour.   Her Honour concluded that the substantial legal costs could result in an extremely detrimental impact on the operations of the Company (particularly as it is not a trading company and nor is it conducted for charitable or religious purposes). Denying leave under section 237 does not mean that the Plaintiffs could not begin or continue with their case, it just means that the Plaintiffs cannot rely on the Company to fund the litigation.   The Plaintiffs' application was refused by the Court.  It was held that no order for the Company to pay litigation costs should be made.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h5)  **5.12  A section 1321 appeal: form of orders, interest and indemnity costs**   (By Kathleen McNally and Yvette Fenton, Clayton Utz)   White v Norman; In the Matter of Forest Enterprises Australia Limited (Receivers and Managers Appointed) (in Administration) (No 2) [2012] FCA 163, Federal Court of Australia, Besanko J, 2 March 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/163.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/163.html" \t "_new)   **(a)  Summary**   In this case, the Federal Court held:   * that a declaration was sufficient (and declined to make an order directing the receivers to pay certain employee entitlements); * it did not have power to award interest in priority; and * costs should be assessed on a party-party basis.   **(b)  Facts**    The defendants were the receivers appointed to Forest Enterprises Australia Ltd (FEA). The plaintiff was an ex-employee of FEA. The plaintiff appealed against the defendants' decision not to pay certain entitlements to him in priority pursuant to section 433 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).     In the main proceeding, Justice Besanko held that amounts described as 'non-discretionary remuneration' (NDR) and 'discretionary remuneration' (DR) were entitled to section 433(3) priority but that the other two amounts (being annual leave and long service leave) were not.   In deciding the final form of the orders, Besanko J was required to consider:   * was the plaintiff entitled to a court order directing the defendants to pay the NDR and DR (rather than a declaration only); * was the plaintiff entitled to interest; and * was the plaintiff entitled to costs on an indemnity basis?   **(c)  Decision**    Besanko J declined to make orders in the terms sought by the plaintiff.    Regarding the form of the order, the defendants submitted that a declaration was sufficient because first, there was no suggestion that they would not abide by the declaration, and second, there was a danger that an order for payment would not be framed with sufficient precision to take into account their other obligations under the Act.  Besanko J analogised the position of a receiver to that of a liquidator and commented that the usual order is to direct the liquidator to admit the proof of debt and then leave matters of implementation to the liquidator.   Regarding interest, Besanko J noted that the employment contract did not provide for payment of interest on the NDR and DR amounts, and that by virtue of section 563B of the Act in a winding up (which this was not), interest is generally payable last after all other payments.  Besanko J considered, amongst other things, section 1321(1) of the Act and section 51A of the [Federal Court of Australia Act 1976 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "_default), and held that the court did not have power to award interest in priority.   Regarding indemnity costs, Besanko J rejected the plaintiff's argument that indemnity costs were appropriate because the proceeding concerned the proper administration of a fund and that it was not an adversarial proceeding. Besanko J found that the plaintiff was pursuing his own interests and not acting on behalf of a group of potential claimants.  He analogised the plaintiff's appeal to an appeal of a liquidator's rejection of a proof of debt, and held that the usual order based on his review of the authorities was that costs be paid on a party-party basis.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%23h5)  **5.13  Administrators are not 'officers' for the purposes of managed investment schemes; application for relief from financial reporting requirements**    (By Sophie Payton, DLA Piper Australia)   Owen, in the matter of RiverCity Motorway Pty Limited (Administrators Appointed) (Receivers and Managers Appointed) v Madden (No 3) [2012] FCA 313, Federal Court of Australia, Logan J, 14 February 2012    The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2012/313.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/313.html" \t "_new)   **(a) Summary**   The Federal Court confirmed that administrators are not 'officers' for the purposes of managed investment schemes, and are therefore exempt from the duties imposed on officers of responsible entities by the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ('the Act').   The Court held that it had power under section 447A(1) of the Act to relieve administrators from requiring entities under administration to comply with their financial reporting obligations under the Act.     The Court held that such compliance would be unduly onerous and unnecessary in this case and that relief from the financial reporting obligations under the Act would not materially prejudice members of the relevant managed investment schemes.   **(b)  Facts**    On 25 February 2011, Mr Michael Owen, Mr Stephen Parbery and Mr Christopher Hill ('the Administrators') were appointed as the joint and several administrators of RiverCity Motorway Pty Limited and related companies ('the Group').    Pursuant to section 447A(1) or section 447D(1) of the Act, the Administrators sought an order or a direction from the Court that:   * they are entitled to rely on the authority of *Norman v FEA Plantations Ltd* (2010) 191 FCR 39 ('Norman's Case') for the proposition that they are not 'officers' of RiverCity Motorway Management Limited ('RCMML') for the purposes of managed investment schemes under Chapter 5C of the Act; and * when exercising their powers under Part 5.3A of the Act in relation to the administration of company affairs, the Administrators need not cause RCMML, the RiverCity Investment Trust ('RCMIT') or the RiverCity Holding Trust ('RCMHT') to comply with their financial reporting obligations under Part 2M.3 of the Act.   **(c)  Decision**    The case concerned the following three issues:   * whether an administrator is an 'officer' for the purposes of managed investment schemes; * whether the Court has power under either or each of section 447A and section 447D of the Act to grant relief from financial reporting obligations; and * if the Court does have such power, whether the relief should be granted in whole or in part.   **(i)  Is an administrator an officer for the purposes of managed investment schemes?**   Logan J held that administrators are not officers for the purposes of managed investment schemes.  Following the reasoning in Norman's Case, he found that, when the definition of 'officer' under section 9 of the Act was amended by the [Corporate Law Economic Reform Program Act 1999 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=18039" \t "_default) ('CLERP Act') to include administrators and receivers, Parliament did not intend the definition to apply to managed investment schemes.  This conclusion was supported by the fact that:   * None of the secondary materials which underpinned the CLERP Act, including the CLERP reviews and recommendations which were adopted by the CLERP Act, indicate that Parliament considered how the new definition of 'officer' would interact with Part 5.3A of the Act in relation to a responsible entity being placed under administration; and * Section 601FD(1) of the Act imposes duties on persons who control the responsible entity's activities in the administration of a managed investment scheme.  A receiver plays no part in the administration of such a scheme and therefore there is no reason to bring them under the operation of section 601FD.   Logan J also held that the obligations owed by officers of responsible entities under section 601FD of the Act may conflict with administrators' duties to creditors and their obligation of control over the business, property and affairs of a company under administration under section 437A of the Act.   **(ii)  Did the Court have power under either or each of section 447A and section 447D to grant relief from financial reporting obligations?**   Under section 447D(1) of the Act, an administrator may apply to the Court for directions about a matter arising in connection with the performance or exercise of any of the administrator's functions and powers.   Logan J held that section 447D(1) of the Act allows the Court to provide administrators with advice as to what is a legal or appropriate course to follow in exercising their functions and powers.  However it does not allow the Court to excuse an administrator from performing obligations to which he or she is subject under the Act or other legislation.   Under section 447A(1) of the Act, a Court may make an order that it thinks appropriate about how Part 5.3A of the Act, in relation to a responsible entity being placed under administration, is to operate in relation to a particular company.    Logan J held that an order made under section 447A(1) of the Act must have a nexus with how Part 5.3A of the Act is to operate in relation to a particular company (citing Nicholson J in *Re New Tel Ltd (in liq); Application of Wainter Pty Ltd* [2004] FCA 1154; (2004) 210 ALR 270).     Logan J held that in this case the nexus requirement is satisfied by section 437A of the Act, which provides that an administrator may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration.  Logan J held that it is a necessary feature of Part 5.3A of the Act that a Court may give directions as to how each provision of Part 5.3A is to operate in relation to a particular company.  In other words, the Court may provide for a particular way in which an administration is to be conducted, including whether financial reporting obligations under the Act are required to be met.   **(iii) Should relief from financial reporting obligations be granted in whole or in part?**   Pursuant to section 447A(1) of the Act, Logan J held that the Administrators need not cause RCMML, RCMIT or RCMHT to comply with their financial reporting obligations under Part 2M.3 of the Act.  He pointed to the following factors in concluding that such compliance would be unduly onerous and unnecessary in these circumstances:   * Mr Owen estimated that the total cost to the Group to prepare and audit financial accounts would include at least approximately $50,000 in external account fees per set of reports prepared. * There was no utility in preparing financial reports for the Group as this cost would ultimately be borne by the banking syndicate who represented over 99.9% of the Group's total known indebtedness. * A number of transactions within the Group were not fully documented.  It would be a difficult, time-consuming and costly process to reconstruct those transactions in order to prepare financial accounts that represented a true and fair view of the Group's position. * There were no end users for financial reports.  The major party interested in the administration was the banking syndicate which was able to command the preparation of whatever financial information it required in relation to the Group from information which was readily available to the receivers.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/176-April-2012.html%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/176-April-2012.html%23h1) | | | http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |  |  |  |
| --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif | |  | | --- | | **DISCLAIMER** This email alert is not intended to be and is not a complete or definitive statement of the law on the relevant subject matter. No person should take any action or refrain from taking any action in reliance upon the contents of this alert without first obtaining advice from a qualified practitioner. SAI Global expressly disclaims liability for any loss or damage suffered howsoever caused whether due to negligence or otherwise arising from the use of this information. For further information or if you have received this notice in error or believe that the email has been forwarded to you in breach of our licence terms, please notify SAI Global immediately by telephone on 03 9278 1555 or email [helpdesk.asiapac@saiglobal.com](mailto:helpdesk.asiapac@saiglobal.com). | | http://my.lawlex.com.au/alert/pic/spacer.gif |
|  | | |
| |  |  |  | | --- | --- | --- | | http://my.lawlex.com.au/alert/pic/spacer.gif | Copyright © 2012, Anstat Pty Ltd an SAI Global Company ACN 115 133 152. All rights reserved. | http://my.lawlex.com.au/alert/pic/spacer.gif | | | |

Sent to : i.ramsay@unimelb.edu.au