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We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | |  | |      |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%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/168%20August%202011.htm#1)  [1.1 Voting on the remuneration report resolution in the 2011 annual general meeting season](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#011) [1.2 Short selling restrictions imposed in Europe](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#012) [1.3 New Zealand Financial Markets Conduct Bill - exposure draft](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#013) [1.4 Consultation on hedge fund standards](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#014) [1.5 Guidance for environmental, social and governance reporting by companies](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#015) [1.6 Standard risk measure to provide greater transparency for superannuation investors](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#016) [1.7 OECD consultation: Draft high-level principles on financial consumer protection](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#017) [1.8 APRA releases results of second stakeholder survey](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#018) [1.9 Consultation on draft changes to the shorter product disclosure statement regulations](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#019)  [1.10 Report on assessing possible sources of systemic risk from hedge funds](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#0110) [1.11 OECD report on pension funds](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#0111) [1.12 The role of the 'comply or explain' principle in corporate governance](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#0112)  [1.13 House of Lords Committee report on credit rating agencies and sovereign debt](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#0113) [1.14 Proposed EU banking sector reforms - including liquidity and governance reforms](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#0114) [1.15 Report on the first US 'say-on-pay' proxy season](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#0115) [1.16 US Securities and Exchange Commission developments (report of sweep examination of structured products sold to retail investors;  re-proposal of new shelf eligibility requirements for asset-backed securities; new short form criteria to replace credit ratings; and large trader reporting regime adopted)](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#0116) [1.17 Flexible university administrative/research position in corporate law and corporate governance](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#0117)  [2. Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#2)  [2.1 Greater CFD disclosure](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#021) [2.2 Remuneration report resolutions at AGMs](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#022) [2.3 Training for home loan credit assistance](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#023) [2.4 Rules for capital and related requirements for ASX and ASX 24 markets](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#024) [2.5 Consultation on how to scale advice](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#025) [2.6 ASIC reports completion of credit licensing and publishes data on the consumer credit industry](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#026) [2.7 Changes to lodging company charges - the personal property securities register](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#027)  [3. Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#3)  [3.1 ASX Listing Rules - new capital raising rules](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#031) [3.2 ASX Best multi-market trading application to be provided by Fidessa](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#032) [3.3 Listing Rules concerning the composition of the remuneration committee for listed entities](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#033) [3.4 Reports](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#034)  [4. Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#4)  [4.1 Bentley Capital Limited 01R - Applications for judicial review](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#041)  [5. Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#5)  [5.1 Evidence of insolvency - assessing the financial picture as a whole](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#051) [5.2 Director's breach of fiduciary duties for acceptance of undisclosed and unapproved free loan of equipment from customer](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#052) [5.3 Liability for the lost profit and lost goodwill of a company arising from a breach of fiduciary duties or oppressive conduct](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#053) [5.4 Liquidator's lien over funds realised from company property ranks ahead of the secured creditor](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#054) [5.5 Court validation of administrators' appointment - is it just and equitable?](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#055) [5.6 Application for judicial advice regarding remuneration of trustees of a creditors' trust following a deed of company arrangement](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#056) [5.7 Defects in meeting notices cured by Federal Court](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#057)  [5.8 The circumstances in which a court will give directions to administrators in relation to a commercial decision](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#058)  [5.9 The running account defence explained](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#059) [5.10 The absence of a liquidator's power to assign a chose of action that is expressly unassignable](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#0510) [5.11 Granting access to transcripts and documents from an examination by a liquidator](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#0511) |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **1. Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1 Voting on the remuneration report resolution in the 2011 annual general meeting season**   (By Daniel Hickman, Senior Associate, and Dennis Batur, Lawyer, Minter Ellison Lawyers)   The recent introduction of section 250R(4) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Corporations Act) technically prohibits a chairperson at the annual general meeting (AGM) of a listed company, whose remuneration details are included in the Company's remuneration report, from voting undirected proxies on the resolution to adopt the remuneration report required by section 250R(2).  This prohibition will apply at the AGMs of most listed companies being held on or after 1 August 2011: Corporations Act section 1523.   Although the government has indicated that it proposes to amend the Corporations Act to remove this prohibition, provided that shareholders expressly authorise the chairperson to vote undirected proxies, listed companies need to consider how they will comply with section 250(4) until the proposed amendment comes into effect.   In order to assist companies with their compliance requirements, the Australian Securities and Investments Commission (ASIC) has issued ASIC Information Sheet 144 'Annual General Meetings: Voting on the Remuneration Report Resolution' (IS 144).   The first option for compliance considered by IS 144 is companies providing that the chairperson will not vote any undirected proxies on the remuneration report resolution.   While this approach is simple, it may not be suitable for companies with a small shareholder base whose shares are largely held by its key management personnel and their closely related parties.  Such companies face an increased risk of incurring a first strike under the new two strikes rule regime in Part 2G.2 of the Corporations Act, which may require them to put a board spill resolution to a vote at their following AGM, if they receive a second strike on the remuneration report resolution at that following AGM: Corporations Act section 250V.   The second option for compliance considered by IS 144 is for companies to alter their proxy forms so that in the case of remuneration resolutions the failure to give voting instructions by ticking either a 'for' or 'against' box on the proxy appointment form will not mean that shareholder votes are undirected and therefore not be counted: ISS 144.    One proposed way of doing this is to include 'clear, prominent and express wording in the proxy form to the effect that, unless the shareholder indicates otherwise by ticking either the 'for' or 'against' box, the shareholder will be directing the chairperson to vote in accordance with the chairperson's clearly stated voting intention': IS 144.   Any changes to a company's proxy form required to adopt this approach will require close consultation with the company's share registry to determine what is technically feasible and its impact on the processing of the proxy forms in an expeditious manner.   Taking this approach will reduce the chances of a company inadvertently receiving a strike under the two strikes rule and ensure that a larger number of shareholder votes are counted.   Although ASIC does not object to this approach, there is a possibility that the validity of deeming proxies to be directed proxies may be challenged as failing to comply with section 250R(5) which requires that the proxy form specify how the proxy holder is to vote on the proposed remuneration resolution if section 250R(4) is not to apply.   The third option for compliance considered by IS 144 is that companies 'suggest that their shareholders consider nominating as their proxy for the purpose of the resolution on the remuneration report, a proxy who is not a member of the company's key management personnel' or a closely related party of the company's key management personnel as there are restrictions on these parties voting on remuneration related resolutions: Corporations Act s 250BD.   While this would ensure compliance with section 250R(4), it will increase the administrative burden on the company's share registry and the risk that a shareholder's vote may not be cast on the remuneration resolution if their nominated proxy is unable to attend the AGM.   The final option for compliance considered by IS 144 is to apply to ASIC for relief from compliance with the requirements of section 250R(4).     Although this would allow companies to hold their AGMs without any changes to their usual AGM processes, they may be unable to obtain such relief due to timing issues (ASIC requests in IS 144 that applications for relief must be made before meeting documents are dispatched to shareholders), or because they are unable to meet the criteria for relief set out in section 250R(6) namely, that granting relief will not cause unfair prejudice to the interests of any member of the company.   The most appropriate method for complying with section 250R(4) will depend on the individual circumstances of each company, although this additional compliance issue could have been mitigated by the inclusion of a provision similar to section 250BD(2) (which allows the chairperson to vote undirected proxies on remuneration related resolutions provided that they are expressly authorised to do so) in section 250R.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.2 Short selling restrictions imposed in Europe**  On 11 August 2011, the European Securities and Markets Authority (ESMA) issued a statement about the recent market volatility and emphasising the requirements in the Market Abuse Directive (MAD) referring to the prohibition of the dissemination of information which gives, or is likely to give, false or misleading signals as to financial instruments, including the dissemination of rumours and false or misleading news. ESMA stated that while short-selling can be a valid trading strategy, when used in combination with spreading false market rumours this is clearly abusive.  ESMA also noted that Belgium, France, Italy and Spain have implemented new bans on short-selling or on short positions. Greece already introduced a ban on short-selling on 8 August 2011.   Information about the European short selling bans is available on the [ESMA website](http://www.esma.europa.eu/popup2.php?id=7696" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.3 New Zealand Financial Markets Conduct Bill - exposure draft**  On 9 August 2011, the New Zealand Ministry of Economic Development published an exposure draft of the Financial Markets Conduct Bill. The draft Bill rewrites a number of pieces of legislation, including the Securities Act, the Securities Markets Act, the Securities Transfer Act, the Unit Trusts Act and the Superannuation Schemes Act.  Some of the key features and changes in the Bill are:  **Definitions of financial products:** The definitions in the draft Bill are aimed to improve on the existing definitions as they focus more on the economic substance of the financial product, and not just its legal form.  **False or misleading conduct generally:** The draft Bill prohibits misleading and deceptive conduct and false representations in trade in relation to dealings in financial products and the provision of financial services. These provisions are not limited to retail dealing, are closely modelled on the Fair Trading Act 1986 and will be enforced by the Financial Markets Authority (FMA) rather than the Commerce Commission. Part 2 contains the main provisions that regulate advertisements of financial products, although specific provisions in subpart 3 of Part 3 apply to advertising and publicity in respect of regulated offers and FMA has stop order powers that apply to advertisements and other communications in subpart 1 of Part 7.  **Offer process and exemptions:** The offer process is clarified, and is modelled more closely on the equivalent Australian legislation. The basic rule is that offers of financial products for issue, and certain offers for sale, need disclosure using a product disclosure statement (PDS) unless the investor or the issuer is exempt under Schedule 1. The exemptions have been changed so that there are more 'bright line' tests. Issuers will be able to rely on self-certification by wholesale investors that they are exempt.  **Managed investment schemes:** One of the most significant changes in this review is that it modernises the regime applying to managed investment schemes offered to retail investors. It seeks to improve governance by setting out the duties that apply to fund managers and trustees and supervisors and providing for appropriate remedies.  **Securities markets:** The draft Bill modifies the current regulatory regime for exchanges by replacing the current registered securities exchange and authorised futures exchange regimes with a licensing regime for significant non-wholesale markets. The substantive law relating to behaviour by participants in public securities markets is largely unchanged. This includes insider trading, market manipulation, substantial security-holder disclosure and continuous disclosure.  **Licensing:** The draft Bill provides for FMA to licence fund managers, derivatives issuers, discretionary investment management services (DIMS) providers, person-to-person loan service providers and the independent trustees of restricted managed investment schemes. Licence criteria and the types of licence conditions that may be imposed for each type of licence will be prescribed in regulations. Cabinet decided that licensing of fund managers will be limited: this will be reflected in the regulations.  **Liability regime:** The criminal law will be reserved for conduct where there is knowing or reckless behaviour. This means that there is greater use of civil remedies, including pecuniary penalties. Rights to compensation have been enhanced in the Bill, particularly where there has been defective disclosure. Under the draft Bill, investors will not have to prove actual reliance on a defective PDS or register entry, and clause 463 sets out a rebuttable presumption that materially adverse misstatements have caused a product's loss in value. This approach is closer to the United States' 'fraud on the market' concept. The draft Bill introduces an infringement notice regime for minor 'compliance' type contraventions. FMA will be able to issue a 'speeding ticket' in these situations, where contravention does not result in conviction. The draft Bill includes offences for serious breaches of certain directors' duties. This proposed amendment may ultimately be included in a separate Bill to amend the Companies Act 1993 rather than this Bill.  The draft Bill is available on the [Ministry of Economic Development website](http://www.med.govt.nz/templates/ContentTopicSummary____46200.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.4 Consultation on hedge fund standards**  On 4 August 2011, the Hedge Fund Standards Board (HFSB) published a consultation paper designed to strengthen its existing Standards. The paper sets out a series of proposed amendments to the Hedge Fund Standards which are designed to achieve two things: to make the Standards more relevant internationally and to strengthen the Standards in the light of a number of issues that became apparent during the financial crisis.  Ensuring that the Standards are appropriate for US managers is a particular focus of the consultation paper. About two-thirds of the global hedge fund industry is based in the United States.  The proposed amendments to the Standards relating to fund governance, in particular, have been designed specifically to cater for the different approach to hedge fund structuring that is typical in the US. It is proposed that where a fund does not have an independent governing body in place to protect investors' interests, there should be an obligation to ask for investor approval before key actions may be taken which may involve a potential conflict of interest between the manager and investors.  Another aspect of the paper comprises a series of proposals to strengthen the Standards in the light of lessons learned from the financial crisis. There are a series of proposed amendments aimed at:  strengthening disclosure to investors;  improving risk management;  ensuring consistency in valuation; and  ensuring policies are in place to prevent market abuse.  The consultation paper is available on the [HFSB website](http://www.hfsb.org/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.5 Guidance for environmental, social and governance reporting by companies**  On 4 August 2011, the Financial Services Council and the Australian Council of Superannuation Investors published a guide for Australian companies to assist them in identifying and reporting their environmental, social and governance (ESG) risks. The guide outlines the essential information and data that investors such as fund managers and superannuation funds require to accurately price, analyse and manage ESG risks. The guide outlines what ESG information should be disclosed, how it should be reported and why it is necessary to investors.  The key reporting topics in the guide are:  Environment (climate change, environmental management systems and compliance, efficiency - such as waste, water, energy, and other environmental issues - such as toxics, biodiversity, etc);  Social (workplace health and safety, human capital management, corporate conduct - such as bribery and corruption, and stakeholder engagement/license to operate); and  Corporate governance.  The guide is available on the [Financial Services Council website](http://www.ifsa.com.au/downloads/file/policyresearch/FSC0024ReportGuide_InteralFA1Rlores.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.6 Standard risk measure to provide greater transparency for superannuation investors**  On 1 August 2011, the Association of Superannuation Funds of Australia (ASFA) and the Financial Services Council announced new industry guidelines to standardise the disclosure of investment risk in superannuation funds. Under the guidelines, superannuation funds will provide a 'Standard Risk Measure' ranging across seven risk bands, from 'very low' to 'very high', for each of the investment options they offer. The objective is to enable consumers to better understand the investment risk in the option they have chosen and make it easier to compare funds on a like for like basis.  From June next year, the Australian Prudential Regulation Authority (APRA) will require superannuation funds to identify and disclose, on a standardised basis, the risk of negative returns over a 20-year period for each of their investment options. At APRA's request, the Financial Services Council and ASFA - representing the funds management and retirement incomes industry respectively - formed a working group to develop guidance for super fund trustees on complying with this requirement.  The guidelines are available on the [ASFA website](http://www.superannuation.asn.au/reports/default.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.7 OECD consultation: Draft high-level principles on financial consumer protection**  On 1 August 2011, the Organisation for Economic Co-operation and Development (OECD) published draft high-level principles on financial consumer protection. The consultation responds to the February 2011 call by the G20 Finance Ministers and Central Bank Governors for the OECD, the Financial Stability Board (FSB) and other relevant international organisations to develop common principles on consumer protection in the field of financial services.  The principles are designed to assist governments and regulators in G20 countries and other interested economies to enhance financial consumer protection. They complement and do not substitute any existing international principles and/or guidelines. In particular they do not address sectoral issues dealt with by other standard setters. The non-binding principles will be applicable across all financial service sectors.  The paper discusses the following 10 principles:  1. Legal and Regulatory Framework 2. Role of Oversight Bodies 3. Equitable and Fair Treatment of Consumers 4. Disclosure and Transparency 5. Financial Education and Awareness 6. Responsible Business Conduct of Financial Services Providers and their Authorised Agents 7. Protection of Consumer Rights 8. Protection of Consumer Data and Privacy 9. Complaints Handling 10. Competition.   The draft principles are available on the [OECD website](http://www.oecd.org/dataoecd/31/9/48473101.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.8 APRA releases results of second stakeholder survey**  On 29 July 2011, the Australian Prudential Regulation Authority (APRA) released the results of its second survey of its stakeholders. Within the questionnaire there were 45 rated items which used a five point rating scale. Some of the rated items dealt with APRA staff's demonstration of integrity, APRA staff's demonstration of professionalism, the level of understanding of the APRA supervisory team responsible for the respondent's organisation, the quality of APRA's supervision, and the value of guidance provided by APRA.  The stakeholder survey is available on the [APRA website](http://www.apra.gov.au/AboutAPRA/Publications/Pages/Stakeholder-Survey.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.9 Consultation on draft changes to the shorter product disclosure statement regulations**  On 28 July 2011, the Assistant Treasurer and Minister for Financial Services and Superannuation, the Hon Bill Shorten released for public comment draft regulations which will provide options for product disclosure statements (PDS) providers moving to the shorter PDS regime.  These changes to the shorter PDS regime were announced on 8 June 2011 to facilitate the introduction and transition to the 8 page PDS regime for regulated superannuation products and simple managed investment schemes.  The draft regulations complement the [Corporations Amendment Regulations 2010 (No 5)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=115102" \t "Default) made last year which introduced the shorter and simpler PDS regime for certain regulated financial products.  In particular, they address a number of concerns related to the timeframe available for PDS providers to transition to the new regime by allowing providers to:  remain in the old regime until 22 June 2012;  continue to issue supplementary PDSs until 22 June 2012; or  opt in to the new shorter PDS regime if they are ready to do so.  The draft regulations also provide clarity to other elements of the regulations to facilitate compliance by providers.  The draft regulations are available on the [Treasury website](http://www.treasury.gov.au/home.asp?ContentID=521" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.10 Report on assessing possible sources of systemic risk from hedge funds**  On 27 July 2011, the UK Financial Services Authority (FSA) published a report titled 'Assessing the possible sources of systemic risk from hedge funds'. The report sets out the results of the Hedge Fund Survey conducted in March 2011 and the Hedge Fund as Counterparty Survey conducted in April 2011.  In general, risks to financial stability from hedge funds could crystallise through two potential channels: market dislocations that disrupt liquidity and pricing (the market channel); and/or, losses in hedge funds leading to losses by banking and other counterparties (the credit channel).  The latest results contained in the report suggest that the leverage of surveyed hedge funds remains largely unchanged and that their footprint remains modest within most markets, so that current risks to financial stability through the market channel seem limited at the time of the latest surveys. In addition, counterparties have increased margining requirements and tightened other conditions on their exposures to hedge funds since the financial crisis, increasing their resilience to hedge fund defaults. However, risks may change rapidly according to market conditions. Some potential risks to hedge funds remain, particularly if they are unable to manage a sudden withdrawal of liabilities during a stressed market environment, potentially resulting in forced asset sales. If this occurs across a number of funds or in one large highly leveraged fund then it may exacerbate pressure on market liquidity and efficient pricing.  The report is available on the [FSA website](http://www.fsa.gov.uk/pubs/other/hedge_fund_report_july2011.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.11 OECD report on pension funds**  On 25 July 2011, the Organisation for Economic Co-operation and Development (OECD) published a report on pension funds in OECD countries. The 2011 edition of the OECD's 'Pension Markets in Focus' shows that in 2010 pension funds in most OECD countries recovered, on average, more than 80% of the money they had lost in 2008. The exceptions were Ireland, Japan, Portugal, Spain and the United States where the losses continued. Net returns grew an average of 2.7% in real terms across OECD countries, led by increases in New Zealand, Chile, Finland, Canada and Poland but flattened somewhat by decreases in Portugal and Greece.  Public pension reserve funds also increased, from US$4.6 trillion in 2009 to US$4.8 trillion in 2010.  Investment returns were, on average, lower in 2010 than in 2009 but still positive.  The report's key findings include:  **Average pension fund performance improves** Pension funds experienced on average a positive net return on investment of 3.5% in real terms (5.4% in nominal terms) in 2010. The best performing pension funds amongst OECD countries were in the Netherlands (18.6%), New Zealand (10.3%), Chile (10.0%), Finland (8.9%), Canada (8.5%) and Poland (7.7%). On the other hand, in countries like Portugal and Greece, pension funds experienced, on average, a negative rate of investment returns (respectively, -2.4% and -7.4%). Until December 2010, pension funds in OECD countries had recovered US$3.0 trillion from the US$3.4 trillion in market value that they lost in 2008.  **Asset levels climb in most countries** Pension fund assets in most OECD countries (in local currency terms) have climbed back above the level managed at the end of 2007. Some countries however have not recovered completely from the 2008 losses. This was the case for Belgium (assets at the end of 2010 were 10% below the December 2007 level), Ireland (13%), Japan (8%), Portugal (12%), Spain (3%) and the United States (3%).  **Bonds are dominant assets** In most of the OECD countries for which the OECD received data, bonds - not equity - remain by far the dominant asset class, accounting for 50% of total assets on average, suggesting an overall conservative stance. Countries like the United States, Australia, Finland and Chile showed significant portfolio allocations to equities, in the range of 40% to 50%. In Austria, Finland, Poland and the Netherlands, the weight of equities in portfolios increased substantially from 2009 to 2010 (in the range 6 to 7 percentage points), while bond allocation fell by a similar amount.  **Asset to GDP ratios increase** The OECD weighted average asset-to-GDP ratio for pension funds increased from 68.0% of GDP in 2009 to 71.6% of GDP in 2010. The United States saw an increase of 5 percentage points in the value of its asset-to-GDP ratio in 2010, equivalent to a gain of US$1 trillion in assets, from US$9.6 trillion to US$10.6 trillion.  **Public pension reserve funds grow** Public pension reserve funds (PPRFs) continued their steady growth throughout 2010. By the end of the year, the total amount of PPRF assets within OECD countries was equivalent to US$4.8 trillion, compared to US$4.6 trillion in 2009. The average growth rate compared to 2009 was 5.0% and the average asset-to-GDP ratio in 2010 was 19.6%.  **Public pension reserve funds still perform well but at a slower pace** Although most PPRFs performed positively in 2010, investment returns were lower than in 2009. PPRFs in countries who submitted data continued to regain the ground lost during the 2008 financial crisis, with positive investment returns over the 2008-2010 period reaching 2.6% in real terms (4.4% in nominal terms) on average. The funds with conservative investment portfolios are still ahead in terms of performance for that period.  The report is available on the [OECD website](http://www.oecd.org/dataoecd/63/61/48438405.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.12 The role of the 'comply or explain' principle in corporate governance**  On 22 July 2011, the UK Financial Reporting Council (FRC) published its response to the European Commission Green Paper on the EU corporate governance framework.  It is stated in the response that the principle of 'comply or explain' plays an essential part in promoting best practice in corporate governance.  In its response to the Commission's green paper, the FRC warns that replacing principles with a series of prescriptive regulations could stifle enterprise at a time when European economies are seeking to promote economic growth.  The paper sets out the arguments for comply or explain as an essential part of an effective governance framework. It identifies a number of ways in which the comply or explain concept can be beneficial. These include:  1. It may be possible to achieve more robust outcomes than are available through negotiation of directives and regulation. An example is the arrangement for audit committees. Before the introduction of the 8th Company Law Directive in 2006, the UK had already achieved virtually universal compliance with Code requirements for listed companies to have fully independent audit committees. Audit committees became a statutory requirement with the introduction of the Directive, but, because member states could not agree on the level of independence required, the Directive only requires one member of the committee to be independent. The UK Code outcome was thus more robust.  2. Codes can be modified regularly to take account of changing market circumstances and to encourage incremental increases in standards, thus promoting continuous improvement. In the UK the FRC normally reviews the Corporate Governance Code every two years. In other member states such as Germany, there is an annual review. It is not possible to amend legislation this frequently and Codes are therefore more adaptable. The FRC's current consultation on amendments relating to board diversity is an indication of the inherent flexibility of this process.  3. Codes frequently focus on behavioural expectations which are difficult to capture in regulation or where regulation would be premature. For example, the practice of board evaluation has been growing in the UK since it was first recommended in the UK Corporate Governance Code in 2003. This is now being extended to encourage regular evaluation by an independent external reviewer, which in turn is encouraging the development of a more professional market in board reviews. The Code has thus brought about a change in culture with regard to board reviews and enabled expectations with regard to standards to be progressively raised. A regulatory approach would have been more difficult, since it would have involved a one-off requirement to conduct board evaluations that would be difficult to impose when the market in board reviews was not yet developed.  4. By identifying a set of general principles and enabling them to be applied flexibly in markets with different cultural and legal backgrounds, Codes are a useful instrument for promoting gradual convergence across the EU. An example is the way in which they have been used to introduce the concept of independent directors throughout the EU.  The paper is available on the [FRC website](http://www.frc.org.uk/images/uploaded/documents/FRC%20response%20to%20the%20Green%20Paper%20on%20the%20EU%20corporate%20governance%20framework%20July%2020111.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.13 House of Lords Committee report on credit rating agencies and sovereign debt**  On 21 July 2011, the UK House of Lords EU, Economic and Financial Affairs and International Trade Sub-Committee published the results of its inquiry into credit rating agencies (CRAs) and EU sovereign debt in a report titled titled 'Sovereign Credit Rating: Shooting the Messenger?'. The report examines the CRAs' influence on the EU's sovereign debt crisis and concludes that their role in the 2008 banking collapse, which was rightly criticised, should not colour assessments of their decisions on EU sovereign debt.  The agencies have caused controversy each time they downgraded further the sovereign debt ratings of Greece, Ireland and Portugal. But the Committee says the downgrades 'merely reflect the seriousness of the problems' in some Member States. The valid charge against the ratings agencies is not that they precipitated or exacerbated the euro area crisis, but rather that they 'failed to identify risks in some Member States' which, in some cases, had been building for many years.  Several recommendations are made in the report. They include:  Market investors must take responsibility for their own decisions. Sovereign credit ratings are ultimately subjective predictions which rely on personal judgments by rating agency staff. It is inappropriate to follow them blindly and use them as the sole basis for investment decisions. Investors should consider a range of market indicators when deciding whether or not to buy EU Member States' debt, and should bear in mind the principle of caveat emptor.  EU Governments should focus on correcting the flawed market structures which give undue weight to the rating agencies' opinions. The committee strongly supports efforts to reduce the role that credit ratings play in regulations, investments mandates and private contracts. Given the role that ratings currently hold in regulation, it is only appropriate that EU governments should co-operate with the credit rating agencies so that sovereign debt ratings are as accurate as possible.  Credit rating agencies must learn from their failure to identify mounting risks in some euro area Member States. The agencies did not challenge rigorously enough the assumptions on which they based their assessments of Member States' sovereign debt. They were not alone in failing to spot the seriousness of the problems building in the euro area, but this does not absolve their failure.  The European Commission should not press forward with proposals to establish a publicly funded European credit rating agency. They should, however, consider launching a thorough competition inquiry into the credit rating industry.  Any publicly-funded European credit rating agency would lack credibility with the markets. Proposals to give sovereigns more advance warning of rating changes are also flawed.  The report is available on the [UK Parliament website](http://www.publications.parliament.uk/pa/ld201012/ldselect/ldeucom/189/189.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.14 Proposed EU banking sector reforms - including liquidity and governance reforms**  On 20 July 2011, the European Commission published proposals for a Directive and Regulation intended to replace the current Capital Requirements Directives (2006/48 and 2006/49). The proposals are intended to implement Basel III but also contain additional provisions concerning bank governance.  According to the Commission, the overarching goal of the proposals is to strengthen the resilience of the EU banking sector while ensuring that banks continue to finance economic activity and growth. The Commission's proposals have three goals:  Requiring banks to hold more and better capital to resist future shocks. Institutions entered the last crisis with capital that was insufficient both in quantity and in quality, leading to unprecedented support from national authorities. With its proposal, the Commission translates in Europe international standards on bank capital agreed at the G20 level (most commonly known as the Basel III agreement). The rules will apply to more than 8000 banks, accounting for 53% of global assets.  Establishing a new governance framework giving supervisors new powers to monitor banks more closely and take action through possible sanctions when they identify risks.  Having a Single Rule Book for banking regulation aimed at improving both transparency and enforcement.  The proposal contains two parts: a directive governing access to deposit-taking activities and a regulation governing how activities of credit institutions and investment firms are carried out. The regulation contains the detailed prudential requirements for credit institutions and investment firms and it covers:  Capital: the Commission's proposal increases the amount of own funds banks need to hold as well as the quality of those funds. It also harmonises the deductions from own funds in order to determine the amount of regulatory capital that is prudent to recognise for regulatory purposes.  Liquidity: to improve short-term resilience of the liquidity risk profile of financial institutions, the Commission proposes the introduction of a Liquidity Coverage Ratio (LCR) - the exact composition and calibration of which will be determined after an observation and review period in 2015.  Leverage ratio: in order to limit an excessive build-up of leverage on credit institutions' and investment firms' balance sheets, the Commission also proposes that a leverage ratio be subject to supervisory review. Implications of a leverage ratio will be closely monitored prior to its possible move to a binding requirement on 1 January 2018.  Counter party credit risk: consistent with the Commission's policy vis-à-vis over the counter (OTC) derivatives (IP/10/1125), changes are made to encourage banks to clear OTC derivatives on CCPs (central counterparties).  Single rule book: the financial crisis highlighted the danger of divergent national rules. A single market needs a single rule book. The Regulation sets a single set of capital rules.  New elements in this directive are:  Eenhanced governance: the proposal strengthens the requirements with regard to corporate governance arrangements and processes and introduces new rules aimed at increasing the effectiveness of risk oversight by boards, improving the status of the risk management function and ensuring effective monitoring by supervisors of risk governance.  Sanctions: if institutions breach EU requirements, the proposal will ensure that all supervisors can apply sanctions that are dissuasive, but also effective and proportionate - for example administrative fines of up to 10% of an institution's annual turnover, or temporary bans on members of the institution's management body.  Capital buffers: it introduces two capital buffers on top of the minimum capital requirements: a capital conservation buffer identical for all banks in the EU and a countercyclical capital buffer to be determined at national level.  Enhanced supervision: the Commission proposes to reinforce the supervisory regime to require the annual preparation of a supervisory program for each supervised institution on the basis of a risk assessment, greater and more systematic use of on-site supervisory examinations, more robust standards and more intrusive and forward-looking supervisory assessments.  Finally, the proposal seeks to reduce to the extent possible reliance by credit institutions on external credit ratings by: (a) requiring that all banks' investment decisions are based not only on ratings but also on their own internal credit opinion, and (b) that banks with a material number of exposures in a given portfolio develop internal ratings for that portfolio instead of relying on external ratings for the calculation of their capital requirements.  Further details are available on the [European Commission website](http://ec.europa.eu/internal_market/bank/regcapital/index_en.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.15 Report on the first US 'say-on-pay' proxy season**  On 13 July 2011, the US Conference Board published a study titled 'Say on pay in the 2011 proxy season: Lessons learned and coming attractions for US public companies'. The report reviews the results of the inaugural season of shareholder advisory votes under the Dodd-Frank Act through to 23 June 2011. It also examines the impact of proxy advisory firm recommendations on shareholder votes and company responses, and offers recommendations for companies in making their compensation and governance decisions to help position them for future say-on-pay votes.  According to the report, while only 2 percent of Russell 3000 companies failed to receive majority approval on their say-on-pay advisory votes, there was an unprecedented number of negative recommendations by proxy advisers. More than 100 companies challenged proxy adviser recommendations and methodologies, especially on purported pay for performance disconnects. Some companies changed outstanding agreements or made commitments to prospectively change their compensation policies to reverse negative adviser recommendations.  While approximately 71 percent of the Russell 3000 companies that reported vote results reported a compensation approval rate of at least 90 percent of voting shares, the report found that every company that failed to receive at least majority approval of its say-on-pay vote had received an 'against' recommendation on the vote from proxy advisory firm Institutional Shareholder Services (ISS). Moreover, even where companies passed their votes with majority support in the face of negative ISS recommendations, shareholder support was, on average, 25 percent lower than for companies that received favourable ISS recommendations. The most prevalent basis for negative recommendations has been proxy advisers' 'pay-for-performance' voting policies and their conclusions that there were 'disconnects' between the company's financial performance and its pay to its executive officers - most importantly, to its CEO.  The report is available on the [Conference Board website](https://www.conference-board.org/governance/index.cfm?id=2439" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.16 US Securities and Exchange Commission developments**  **(a) Report of sweep examination of structured products sold to retail investors**  On 27 July 2011, the SEC issued a report identifying common weaknesses seen in sales of structured securities products and describing measures by broker-dealers to better protect retail investors from fraud and abusive sales practices.  The report summarises the results of a sweep examination of the retail structured securities products business of 11 broker-dealers, covering a cross-section of the industry. Structured securities products generally do not represent ownership of a particular asset (such as stock in a manufacturing company); instead, the products promise returns to investors based on the performance of one or more underlying assets.  Among other things, the staff observed that broker-dealers might have:  recommended unsuitable structured securities products to retail investors;  traded at prices disadvantageous to retail investors;  omitted material facts about structured securities products offered to retail investors; and  engaged in questionable sales practices with customers.  Potential supervisory deficiencies were observed as well. In particular, there appears to have been a lack of training requirements for supervisors and registered representatives that market structured products to their customers. The report contains recommendations for improved surveillance of sales practices and enhanced training for sales and supervisory personnel.  The staff report states that larger broker-dealers should focus on issues such as:  having adequate procedures and controls to prevent and detect possible abuses in the secondary market for structured securities products;  disclosing material facts regarding the structured securities products being offered;  requiring registered representatives and their supervisors to complete specialized training in structured securities products before selling these products to customers;  accurately listing structured securities products on customer statements;  having controls to independently review their desk prices of structured securities products in the secondary market;  having controls to adequately review the suitability of these products for customers; and  having controls to review customer concentrations in the structured securities products it sold.  The staff report states that smaller retail broker-dealers should focus on:  the suitability of structured securities products recommended to retail customers;  establishing, maintaining and enforcing proper supervisory procedures relating to suitability determination for purchasers of structured securities products; and  having adequate training for registered representatives who sell structured securities products and for their supervisors.  The report is available on the [SEC website](http://www.sec.gov/news/studies/2011/ssp-study.pdf" \t "_new).  **(b) Re-proposal of new shelf eligibility requirements for asset-backed securities**  On 26 July 2011, the SEC voted unanimously to re-propose for public comment rules requiring greater accountability and enhanced quality around asset-backed securities (ABS) when issuers seek to use an expedited registration process known as shelf registration.  The SEC initially proposed rules in April 2010 to significantly revise the regulatory regime for ABS. Subsequent to that proposal, the Dodd-Frank Wall Street Reform and Consumer Protection Act was signed into law and addressed some of the same ABS concerns. In light of those Dodd-Frank Act provisions and comments received from the public, the SEC re-evaluated its initial proposals.  The reproposed rules are available on the [SEC website](http://www.sec.gov/rules/proposed/2011/33-9244.pdf" \t "_new).  **(c) New short form criteria to replace credit ratings**  On 26 July 2011, the SEC voted unanimously to adopt new rules in light of the Dodd-Frank Wall Street Reform and Consumer Protection Act to remove credit ratings as eligibility criteria for companies seeking to use "short form" registration when registering securities for public sale.  Forms S-3 and F-3 are the "short forms" used by eligible issuers to register securities offerings under the Securities Act. Companies that qualify for these short forms can offer securities "off the shelf" or on an expedited basis. Companies currently qualify to use these forms if they are registering an offering of non-convertible securities, such as debt securities, that have received an investment grade rating by at least one nationally recognized statistical rating organisation.  The new rules eliminate the credit ratings criteria and replace it with four new tests, one of which must be satisfied for an issuer to use Form S-3 or Form F-3. In order to ease transition for companies, the rules include a temporary, three-year grandfather provision.  The new rules are available on the [SEC website](http://www.sec.gov/news/press/2011/2011-155.htm" \t "_new).  **(d) Large trader reporting regime adopted**  On 26 July 2011, the SEC voted unanimously to adopt a new rule establishing large trader reporting requirements to enhance the agency's ability to identify large market participants, collect information on their trading, and analyse their trading activity.  The new rule requires large traders to identify themselves to the SEC, which will then assign each trader a unique identification number. Large traders will provide this number to their broker-dealers, who will be required to maintain transaction records for each large trader and report that information to the SEC upon request.  The new rule has two primary components:  First, it requires large traders to register with the Commission through a new form, Form 13H.  Second, it imposes recordkeeping, reporting, and limited monitoring requirements on certain registered broker-dealers through whom large traders execute their transactions.  The new rule is available on the [SEC website](http://www.sec.gov/news/press/2011/2011-154.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1)  **1.17 Flexible university administrative/research position in corporate law and corporate governance**  Are you interested in a flexible and interesting position combining both administration and research in the areas of corporate law and corporate governance?  The Centre for Corporate Law and Securities Regulation, part of Melbourne University Law School, has an outstanding reputation for the quality of the research and teaching undertaken by its members. This position has been newly created to combine both high level administrative and research skills.   The successful applicant will have completed a law degree including the successful completion of subjects related to corporate law and legal research methods. They will also possess excellent research and communication skills.  This is a part time (0.6 FTE) continuing position. Salary: $64,978 - $70,336 p.a. (pro rata) plus 17% superannuation.  The closing date is 25 August 2011.  The position description is available on [The University of Melbourne HR website](http://jobs.unimelb.edu.au/jobDetails.asp?sJobIDs=759701&lWorkTypeID=&lLocationID=&lCategoryID=1823&lPayScaleID=&stp=AW&sLanguage=en" \t "_new).  For further information, please contact Professor Ian Ramsay, Director of the Centre for Corporate Law and Securities Regulation, email: [i.ramsay@unimelb.edu.au](mailto:i.ramsay@unimelb.edu.au) or tel: (03) 8344 5332.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h1) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1 Greater CFD disclosure**  On 12 August 2011, ASIC released new disclosure benchmarks for contracts for difference (CFDs) that aim to improve disclosure and investor awareness about risks of these products. The guidance also covers margin foreign exchange contracts.  CFDs are leveraged derivative products that let investors take a position on the change in the market price of an underlying asset, such as a share or commodity, or the value of an index or a currency exchange rate. There are currently around 39,000 active CFD investors in Australia. (Investment Trends, 2010 Australia CFD Report, May 2010). The CFD market has seen growth of over 300% in the last five years, and it is reasonable to infer that this growth will continue. By comparison with the figure of 9,000 CFD traders in Australia reported in Investment Trends, 2005 Contracts for Difference Report: Understanding current and next wave CFD traders, September 2005.  In Australia, most CFDs are issued as over-the-counter (OTC) products, making them increasingly accessible and popular with retail investors. But CFDs are a high-risk financial product and their complexity means they are unlikely to meet the investment needs of many retail investors.  Regulatory Guide 227 'Over-the-counter contracts for difference: Improving disclosure for retail investors' outlines seven benchmarks which aim to help investors understand the risks and benefits of OTC CFDs. Issuers must address these benchmarks in product disclosure statements (PDSs) from 31 March 2012.  The seven benchmarks mean issuers will need to address each issue in their PDSs on an 'if not, why not' basis. The benchmarks are:  client qualification  opening collateral  counterparty risk - hedging  counterparty risk - financial resources  client money  suspended or halted underlying assets  margin calls.  Regulatory Guide 227 also outlines the standards ASIC expects issuers to meet when advertising OTC CFDs to retail investors.  Regulatory Guide 227 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h2)  **2.2 Remuneration report resolutions at AGMs**  On 10 August 2011, ASIC released Information Sheet 144 'Annual general meetings: Voting on the remuneration report resolution on the new provisions on remuneration report resolutions'. The new rules govern when chairpersons at annual general meetings (AGM) can cast proxies on remuneration report resolutions. ASIC has received queries on compliance with the new obligations and the circumstances in which ASIC may provide relief.  Shareholders commonly appoint the chairperson as their proxy to vote on their behalf at the AGM. The chairperson may be directed how to vote on a resolution by ticking a box next to the resolution on the proxy appointment form (commonly known as a directed proxy) or the shareholder may not specify the way the chairperson must vote (commonly known as an undirected proxy).  One of the matters considered at an AGM for a listed company is a non-binding vote to approve the remuneration report. Under the new rules introduced by 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), there is some uncertainty about the circumstances in which a shareholder can appoint a chairperson who is member of the company's key management personnel (which includes a director) to vote as their proxy. Technically, section 250R(4) prohibits the chairperson from voting undirected proxies on the remuneration report resolutions. However the government has clearly indicated its intention that the chairperson should be able to vote undirected proxies in certain circumstances, including on remuneration report resolutions.  During 2011, the government proposes to amend the provisions to make it clear that chairpersons are permitted to vote undirected proxies on remuneration report resolutions. Until the rules are amended to give effect to the government's intention, ASIC's information sheet provides options for companies to consider when complying with the current rules.  These options include:  making no change to the company's usual proxy form and ensuring that the chairperson will not vote any undirected proxies on the remuneration report resolution;  changing the company's proxy form so there are more directed proxies, which can be counted in the vote on the remuneration report;  suggesting shareholders consider nominating a proxy other than a member of the company's key management personnel for the purposes of the remuneration report resolution; and  applying to ASIC for relief in relation to a specific resolution.  Companies that wish to apply for relief must make an application to ASIC and include information as set out in the information sheet. Companies seeking relief will need to do so before dispatching documents to shareholders. Under the law, ASIC can only grant relief if it is satisfied that relief will not cause unfair prejudice to the interests of any member of the company.  The information sheet is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Annual+general+meetings+Voting+on+the+remuneration+report+resolution?openDocument" \t "_new).  [Item 1.1](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm#011) of this Bulletin has further analysis of this issue.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h2)  **2.3 Training for home loan credit assistance**  On 5 August 2011, ASIC released proposals for modifying the training requirements for credit representatives who provide credit assistance to consumers on home loans. The proposals address some recent industry concern about the training requirements.  Consultation Paper 165 'Credit assistance for home loans: Competence and training requirements' outlines proposed modifications of the training requirements for credit representatives who provide mortgage broking services, as currently set out in Regulatory Guide 206 'Credit licensing: Competence and training'.  As the definition of 'mortgage broking services' used in RG 206 is broad, in practice it may capture a wide range of representatives, some of whom may have no involvement in or influence over consumers' decision making on the amount, type or source of a loan. There is concern that training a significant number of such representatives to the Certificate IV level might represent a compliance burden for some parts of industry, which could outweigh the regulatory benefit of this requirement.  CP 165 proposes two possible modifications to RG 206:  refining the definition of 'mortgage broking' in RG 206, so that it is limited to providing credit assistance in the form of 'suggesting', where credit is secured by real property; and/or  allowing those falling within the definition of mortgage broking who provide services on behalf of a particular credit provider to undertake a proportion of the Certificate IV in Finance and Mortgage Broking.  Depending on the feedback received, ASIC proposes to implement one or both of these approaches.  RG 206 sets out ASIC's minimum expectations on how credit licensees must maintain organisational competence and ensure that their representatives are adequately trained.  Generally, ASIC has provided licensees with discretion to determine the appropriate level of training for their representatives. However, ASIC has set a minimum standard for representatives who provide 'mortgage broking services'. RG 206 defines 'mortgage broking services' as 'credit assistance in relation to a credit product where the credit is secured by real property'. This captures both those working in intermediary firms (often referred to as mortgage brokers), as well as those who work within or for credit providers. All those who provide such mortgage broking services need to have at least a Certificate IV in Finance and Mortgage Broking.  Consultation Paper 165 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h2)  **2.4 Rules for capital and related requirements for ASX and ASX 24 markets**  On 1 August 2011, ASIC made market integrity rules for capital and related requirements for the ASX market and the ASX 24 market, formerly known as the Sydney Futures Exchange market. The rules transfer to ASIC ASX's pre-existing capital and related requirements for the two markets. This is consistent with the transition in market supervision responsibility from ASX to ASIC in August 2010.  These rules amend the existing ASIC market integrity rules for the two markets by inserting three new chapters for capital, reporting and margins. Concurrently, ASX's pre-existing capital, reporting and margin requirements in the ASX and ASX 24 Operating Rules have ceased to operate.  ASIC Market Integrity Rules (ASX Market) Amendment 2011 (No 2) has amended the pre-existing ASIC Market Integrity Rules (ASX Market) 2010 and ASIC Market Integrity Rules (ASX 24 Market) Amendment 2011 (No 1) has amended the pre-existing ASIC Market Integrity Rules (ASX 24 Market) 2010.  While ASIC has generally retained the pre-existing status quo, it has made two minor changes:  from 1 January 2012, all ASX 24 market participants must complete daily reconciliations of client money; and  from 1 January 2012, non-clearing ASX 24 market participants must lodge their monthly capital returns within 10 business days (rather than one month) after the end of each calendar month.  ASIC has also released Regulatory Guide 226 'Guidance on ASIC market integrity rules for capital and related requirements: ASX and ASX markets', which provides advice on the operation of these rules.  ASIC has also released Report 244 'Response to submissions on CP 161 Proposed ASIC market integrity rules for capital and related requirements: ASX, ASX 24 and Chi-X markets'. This summarises the feedback ASIC received from industry on Consultation Paper 161 'Proposed ASIC market integrity rules for capital and related requirements: ASX, ASX 24 and Chi-X markets', which was released in June and first proposed making these rules.  ASIC intends to make market integrity rules shortly for capital and related requirements for the Chi-X market, which is anticipated to start operating on or after 31 October. This was proposed in CP 161. ASIC intends to model these rules on the market integrity rules for capital and related requirements for the ASX market to ensure a level playing field for the two equity markets.  On 1 August 2011, ASIC took over general supervision of trading on the ASX and ASX 24 markets and other Australian domestic licensed financial markets. As part of that process, ASIC made market integrity rules for the ASX and ASX 24 markets. At that time ASIC agreed with the ASX that the ASX would continue to impose capital, reporting and margin requirements on non-clearing market participants for a further 12 months until 1 August 2011, after which time, ASIC would take over that responsibility.  The following documents are available on the ASIC website:  [Market integrity rules](http://www.asic.gov.au/asic/asic.nsf/byheadline/Market+integrity+rules?openDocument" \t "_new);  [Regulatory Guide 226 Guidance on ASIC market integrity rules for capital and related requirements: ASX and ASX markets](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg226" \t "_new);  [Report 244 Response to submissions on CP 161 Proposed ASIC market integrity rules for capital and related requirements: ASX, ASX 24 and Chi-X markets](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep244" \t "_new);  [Consultation Paper 161 Proposed ASIC market integrity rules for capital and related requirements: ASX, ASX 24 and Chi-X markets](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp161" \t "_new); and  [Submissions to Consultation Paper 161](http://www.asic.gov.au/asic/asic.nsf/byheadline/CP+161+Proposed+ASIC+market+integrity+rules+for+capital+and+related+requirements+-+submissions?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h2)  **2.5 Consultation on how to scale advice**  On 28 July 2011, ASIC released a consultation paper proposing new guidance for people who give advice to retail clients: Consultation Paper 164 'Additional guidance on how to scale advice'. This builds on ASIC Regulatory Guide 200 'Access to advice for super fund members' and ASIC's Report 224 'Access to Financial Advice in Australia' in December 2010. This report found that one third of Australians now prefer piece-by-piece advice rather than holistic or comprehensive advice.  It also follows the update announcement by the Assistant Treasurer and Minister for Financial Services and Superannuation, Bill Shorten, in April 2011 on the Future of Financial Advice reforms.  ASIC's Consultation Paper 164 gives guidance about how to scale financial product advice to retail clients, and includes eight examples of giving information and advice to clients about:  car insurance;  purchasing shares;  investing an inheritance;  adopting a transition to retirement strategy;  superannuation pension products;  nominating a beneficiary for superannuation savings;  superannuation and Centrelink; and  retirement planning issues.  Consultation Paper 164 also describes the differences between factual information, general advice and personal advice.  This is the first phase of consultation on how to scale advice. Based on feedback to this consultation paper, ASIC will produce further examples of factual information, general advice and scaled personal advice on other topics in phase two.  Section 945A of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) contains a 'suitability rule'. To give suitable advice, an AFS licensee or an authorised representative must:  know their client - determine the relevant personal circumstances in relation to giving the advice and make reasonable inquiries about those personal circumstances;  know their product - having regard to information obtained from the client about their personal circumstances, consider and conduct investigation of the subject matter of the advice as is reasonable in all of the circumstances; and  ensure their advice is appropriate to the client - having regard to consideration and investigation of the subject matter of the advice (section 945A(1)).  The new guidance in Consultation Paper 164 explains how advice can be scaled in a way that complies with section 945A.  Consultation Paper 164 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h2)  **2.6 ASIC reports completion of credit licensing and publishes data on the consumer credit industry**  On 21 July 2011, ASIC reported that it has completed the major initial licensing of consumer credit businesses as part of the transition to the new national consumer credit laws. By 30 June 2011 ASIC had licensed 6081 businesses. Outcomes included:  ASIC formally refused four licence applications.  ASIC imposed additional compliance conditions on 11 licences. These conditions required the licensees to appoint an independent compliance expert to review the internal processes to ensure compliance with relevant legislation.  ASIC required many applicants to submit compliance plans, and amend the plans to ensure that they supported the licensee in meeting their obligations under the [National Consumer Credit Protection Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "Default).  ASIC declined around 400 applications as they were incomplete or inadequate; 637 applicants withdrew their applications before finalisation. Many applicants restructured their businesses in response to concerns raised by ASIC, mostly because of concerns regarding persons nominated by the applicant.  Since July 2010, ASIC has received almost 2500 complaints in relation to credit matters; 105 investigations have commenced. Of matters finalised, ASIC has:  taken action to permanently ban three individuals from engaging in credit activities;  cancelled or suspended five credit registrations or licences and issued one infringement notice; and  reached negotiated outcomes in which people have voluntarily cancelled their registrations, removed unlawful advertising, or agreed to cease engaging in activities.  The majority of ASIC's investigations to date have involved unregistered or unlicensed companies and individuals.  Surveillance and compliance work by ASIC includes:  National program to identify unregistered and unlicensed credit activity. As part of this campaign, ASIC reviewed 5000 advertisements in print, online, and on radio and TV, to identify traders who were advertising that they provided credit, but who were not registered, authorised or licensed to do so.  Current focus on responsible lending in the home loan and payday lending markets, consumer leases for white goods and other domestic goods, and debt reduction and consolidation schemes. A surveillance program in the coming year will identify traders, who were initially registered to provide credit services, but have not as yet, been authorised, or licensed. ASIC is concerned that these people may continue trading when they are not permitted to do so.  As a result of the transition to the new National Consumer Credit Protection Act 2009, and the licensing of consumer credit businesses as part of that, ASIC is able to provide data that reveals the extent of the Australian consumer credit industry. Key points are:  6081 credit businesses licensed at 30 June 2011. The vast majority of licensees are companies. New South Wales and Victoria account for about 60% of the licensees; and  24,005 credit representatives on the ASIC register. Credit representatives are authorised to engage in specified activities on behalf of a licensee. New South Wales and Victoria account for about 58% of credit representatives.  Further details published by ASIC include:  Geographic demographics of Australian credit licence applicants and licensees at 30 June 2011;  Geographic demographics of credit representatives appointed at 30 June 2011;  Australian credit licence applications received by entity type;  Australian credit licence applicants and their industry type/s;  Type of credit provided by licence applicants; and  Amount of credit provided by licence applicants.  This information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byHeadline/11-147MR%20ASIC%20successfully%20completes%20credit%20licensing?opendocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h2)  **2.7 Changes to lodging company charges - the personal property securities register**  On 21 July 2011, ASIC published an information release about the new national Personal Property Security (PPS) Register which is due to commence in October 2011, on a date yet to be determined. After this date the registration of security interests against company assets will be lodged on the PPS Register.  **Lodgement of company charges** After the commencement date of the PPS register, the ASIC Register of Company Charges will be closed and from this date all company charges or security interests (as they will be known) must be lodged on the PPS register. The commencement date will be determined by the Attorney-General later this year. The PPS Register will be an online service and accessible to search and register security interests 24 hours a day, seven days a week.  **Maintenance of the register** The PPS register will be administered by the Insolvency and Trustee Service Australia (ITSA). The PPS Register is the cornerstone of a new Commonwealth law, the [Personal Property Securities Act 2009 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111441" \t "Default) (PPS Act) and will replace numerous existing asset registers of security interests, including state and territory registers of encumbered vehicles and vehicle securities and Australian Government registers including the Australian Register of Company Charges, the Australian Register of Ships (mortgages only) and the Fisheries Register.  The Attorney-General's Department has responsibility for the PPS Act, finalising the legislative arrangements, implementing the new national PPS Register and assisting industry with the transition to the new system.  **What will be included on the PPS Register?** Security interests in personal property to be listed on the PPS Register will include assets that may be used to secure a loan. Personal property is any property other than land or buildings. It includes physical goods such as works of art, furniture, jewellery, cars, boats, farm machinery, business equipment, crops and livestock. It also includes intangible property such as rights under a contract and intellectual property.  **Will the ASIC register retain any charge information after the PPS Register goes live?** Yes, the ASIC company register will retain information on charges that are no longer current, that is, charges that have already been satisfied before the commencement date of the PPS Register in October 2011. This means that to obtain complete details of a company you will need to check:  ASIC's Register of Company Charges for charges satisfied before the commencement date of the PPS register in October 2011; and  the new PPS Register for current and provisional charges.  **Who is affected?** The new PPS Register is part of a reform that will affect the way businesses and consumers deal with secured finance in Australia. Business owners and consumers may be affected by changes to personal property security laws as:  buyers of properties that may be subject to a security interest;  business or consumer borrowers;  providers of credit; or  investors who are contemplating buying into a business.  The PPS Register will also help business owners manage credit risk, check whether property planned for purchase is encumbered and search and register assets used to secure a loan.  Further information about the PPS Register is available on the [PPS Register website](http://www.ppsr.gov.au" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h2) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1 ASX Listing Rules - new capital raising rules**   On 12 August 2011, ASX released an exposure draft of ASX Listing Rule amendments.  These rule amendments:  facilitate common forms of renounceable and non-renounceable capital raisings without the need for listing rule waivers.  These changes were the subject of an earlier public consultation paper (17 January 2011) and have been modified based on stakeholder feedback; and  contemporise the language used in the listing rules, settlement rules, and operating rules in relation to the issue of securities.  In particular, the terms "allot", "allotment" and "despatch" have been replaced with the terms "issue" and "issuance".  These changes have been the subject of targeted consultation with stakeholders.  Comments are requested by Friday 9 September 2011.  The exposure draft is available on the [ASX website](http://www.asxgroup.com.au/media/PDFs/ASX_Exposure_Draft_Capital_Raising_Timetables_FINAL_20110805.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h3)  **3.2 ASX Best multi-market trading application to be provided by Fidessa**   On 13 July 2011, ASX announced that ASX Best, its new smart order routing trading application for a multi-market environment, will be powered by Fidessa, a leading global provider of high-performance trading, investment management and information solutions.   Scheduled for launch in late 2011, ASX Best will offer participants smart order routing and connectivity to all Australian 'lit' venues, including ASX and Chi-X markets, and to ASX 'dark' venues such as VolumeMatch.  The launch of ASX Best will enable participants to meet their best execution obligations in the new multi-market environment by facilitating the routing of orders to all lit trading venues.  ASX Best will also enable participants to control the priority of venues to which orders are routed and direct orders to a specific venue of their choice.   The media release is available on the [ASX website](http://www.asxgroup.com.au/media/PDFs/110713mr_asx_best_and_fidessa.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h3)  **3.3 Listing Rules concerning the composition of the remuneration committee for listed entities**   On 1 July 2011, listing rules concerning the composition of the remuneration committee for listed entities in the S&P/ASX 300 came into effect.  Under Listing Rule 12.8, a listed entity included in the S&P/ASX 300 at the beginning of its financial year must have a remuneration committee comprised solely of non-executive directors for the whole year.  The requirement also applies under Listing Rule 1.1 condition 16 to new listings that will be included in the S&P/ASX 300 from the time of listing.   This amendment was covered by Item 5 of [Listed Entities Update No. 05/11](http://www.asx.com.au/resources/newsletters/companies_update/archive/CompaniesUpdate_20110718_0511_HTML.htm" \t "_new), released on 19 July 2011.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h3)  **3.4 Reports**   On 4 August 2011, ASX released:  the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/110804maMonthlyActivityReportJuly2011Final.pdf" \t "_new);  the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2011/notice2011_142.pdf" \t "_new); and  the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/110804maASXComplianceMonthlyActivityReportJuly2011Final.pdf" \t "_new)  for July 2011.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h3) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1 Bentley Capital Limited 01R - Applications for judicial review**  The Takeovers Panel has announced that it has been served with two Federal Court applications dated 2 August 2011 for judicial review of its decision to accept undertakings in Bentley Capital Limited 01R. The first application for judicial review is by Mrs Ambreen Chaudhri/Data Base Systems Limited and is made under section 5 of the [Administrative Decisions (Judicial Review) Act 1977 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7119" \t "Default) and section 39B(1A) of the [Judiciary Act 1903 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7694" \t "Default). The application seeks review of the decision by the review Panel to accept the undertaking offered by Mrs Chaudhri.  The second application for judicial review is by Mr Azhar Chaudhri and is made under section 5 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) and section 39B(1A) of the Judiciary Act 1903 (Cth). The application seeks review of the decision by the review Panel to accept the undertakings offered by Mrs Ambreen Chaudhri, Data Base Systems Limited and Mr Farooq Khan.  Mr Chaudhri was not a party to the review Panel proceedings. Mr Chaudhri is the husband of Mrs Chaudhri.  Bellwether Investments Pty Ltd and Mr Jim Craig, who brought the Panel applications, ASIC, Mr Khan, Mrs Chaudhri and Data Base are also named as respondents in either one or both of the applications.  In Bentley Capital Limited 01R, the review Panel was minded to declare circumstances unacceptable as it considered that the acquisition of approximately 8% of the shares in Bentley by Data Base in April 2011 resulted in a person's voting power in Bentley increasing otherwise than as permitted by Chapter 6 because:  Mr Farooq Khan, Mrs Chaudhri and Data Base were associated in relation to the affairs of Bentley; and  Mr Azhar Chaudhri and Mrs Chaudhri were associated in relation to the affairs of Queste Communications Ltd.  However, the parties (i.e. Mr Khan, Mrs Chaudhri and Data Base) offered undertakings to remedy the unacceptable circumstances. The review Panel accepted the undertakings to redress the circumstances. In light of these undertakings, the review Panel declined to make a declaration of unacceptable circumstances in relation to the affairs of Bentley.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h4) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%236) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **5.1 Evidence of insolvency - assessing the financial picture as a whole**   (By Nick Russell, Mallesons Stephen Jaques)   Roufeil v Gliderol International Pty Limited [2011] FCA 847, Federal Court of Australia, Jagot J, 29 July 2011   The full text of this judgement is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/847.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/847.html" \t "_new)   **(a) Summary**   This decision concerned a claim that payments made by a debtor to an unsecured creditor were "voidable transactions" on the basis that the debtor was insolvent when the payments were made.  Despite isolated evidence indicating solvency, it was clear from an analysis of the debtor's overall financial position that the payments were made when the debtor was insolvent.   In its defence, the creditor relied on section 588FG(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"), arguing it suspected the debtor was solvent, and that its assumption was reasonable.  However, the Court held that the creditors failed on both the subjective and objective limbs of this test.   The decision is a reminder that:  evidence of a company's solvency should not be considered in isolation; and  a subjective belief that a debtor is solvent must be objectively reasonable in order to rely on the defence in section 588FG(2) of the Act.  **(b) Facts**   Gliderol International Pty Limited ("Gliderol") was a supplier to Austech Garage Door Centre Pty Limited (in liquidation) ("Austech").  Austech had not paid Gliderol's invoices for several months, so Gliderol issued a statutory demand for payment of $29,477.17 and ultimately commenced winding-up proceedings against Austech.   Under an agreement between the parties:  Austech paid Gliderol $21,700 in two instalments in early 2008 ("the Payments"); and  the winding-up proceedings were dismissed in February 2008.  In an unrelated action, the Workers Compensation Nominal Insurer ("WCNI") commenced winding-up proceedings against Austech in May 2008.  Holding only $651.54 and owing $357,762 to unsecured creditors, Austech was wound up and a liquidator was appointed.   Austech, and its liquidator, claimed that the Payments were "voidable transactions" within the meaning of section 588FE(2) of the Act.  Under this section, a transaction will be voidable if it:  is entered into when a company is insolvent;  is an unfair preference (i.e. the creditor received more money from the transaction than it would have received in a winding-up); and  was entered into during the six months prior to the filing of the winding-up application.  Gliderol accepted that the Payments were made within the six month period prior to May 2008.  However it argued that Austech was solvent when the Payments were made, or, in the alternative, that it could rely on the defence outlined in section 588FG(2) of the Act.  In order to establish this defence, Gliderol had to prove that at the time it received the Payments:  it received the Payments in good faith and for valuable consideration;  it had no reasonable grounds to suspect Austech's insolvency; and  a reasonable person in its position would have had no reasonable grounds for such a suspicion.  **(c) Decision**   Jagot J found that Austech was insolvent at the time of the Payments, and as such, the Payments were voidable transactions.  Her Honour also held that Gliderol did not establish a defence under section 588FG(2) of the Act because a reasonable person in its position would have suspected Austech was insolvent at the time of the Payments.   Her Honour ordered that the parties submit proposed minutes of order reflecting the reasons for her Honour's judgment.   **(i) Insolvency issue**   Under section 95A of the Act, a company is insolvent if it cannot pay its debts as and when they become due and payable.  In arguing that Austech was insolvent, the plaintiffs had relied on the following evidence:  a series of dishonoured cheques for large sums of money drawn by Austech;  the non-payment of Gliderol's invoices or statutory demand;  the agreement to pay Gliderol by instalments;  a garnishee notice issued by the Australian Tax Office for a tax debt of $109,652.82;  the winding-up proceedings commenced by the WCNI; and  Austech's failure to keep proper financial records.  In response, Gliderol had argued:  dishonoured cheques did not prove Austech's insolvency because Austech had multiple bank accounts and thus multiple sources of funds;  winding-up applications create a presumption of insolvency only for the purpose of the application, not generally; and  that Austech paid by instalments was irrelevant as it ultimately paid the agreed amounts as required.  The Court accepted the limited purpose for which insolvency is presumed, but stressed that discrete incidents indicating solvency must "not be considered in isolation".  In assessing Austech's "financial position as a whole", Jagot J gave little weight to Gliderol's argument that Austech had multiple sources of funds because it was impossible to verify, given the state of Austech's financial records.   **(ii) Gliderol's defence**   The Court reiterated that the test in section 588FG(2) of the Act contains both a subjective and objective requirement (citing *Cook's Construction Pty Ltd v Brown* (2004) 49 ACSR 62).   With respect to the subjective limb, Gliderol failed to prove it had no reasonable grounds to suspect Austech's insolvency.  This is primarily because it called to give evidence its current credit manager, not the credit manager employed at the time of the Payments.   In any event, the Court found that Gliderol failed the objective limb.  Despite Austech satisfying its debt by making the Payments, this was done in the face of winding-up proceedings.  Relying on many of the plaintiffs' arguments used to establish Austech's insolvency, in addition to Gliderol's "history of dealings" with Austech, the Court held that a reasonable person in Gliderol's position would have suspected Austech was insolvent at the time of the Payments.    [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h5)  **5.2 Director's breach of fiduciary duties for acceptance of undisclosed and unapproved free loan of equipment from customer**   (By Celeste Koravos, DLA Piper)   Towers v Premier Waste Management Ltd [2011] EWCA Civ 923, England and Wales Court of Appeal (Civil Division), Lord Justice Mummery, Lord Justice Wilson and Lord Justice Etherton, 28 July 2011   The full text of this judgment is available at:  [http://www.bailii.org/ew/cases/EWCA/Civ/2011/923.html](http://www.bailii.org/ew/cases/EWCA/Civ/2011/923.html" \t "_new)   **(a) Summary**   A director received for his personal use a free, undisclosed and unapproved loan of equipment from one of the company's customers. The plaintiff company joined the customer as a co-defendant in its proceedings against the director. The plaintiff claimed that the director was under a liability to account to the company for breaches of the loyalty, "no profit" and "no conflicts" duties.   At first instance, the director was held to have acted in breach of duty and ordered to make payment to the company accordingly. The director's appeal was unanimously dismissed by the Court of Appeal.   **(b) Facts**    **(i) Proceedings in outline**   Mr Philip Towers (the Director) was one of several directors of Premier Waste Management Limited (the Company) from June 2001 until December 2007.   In 2008 it came to light that the Director had in 2003 accepted from Mr Colin Ford, a customer of the Company (the Customer), a personal loan of plant and equipment free of charge. The Customer ran a small business supplying plant and machinery for sale and hire, with the Company being one of his customers. The Customer usually dealt with Mr Rafter, the Company's operation manager (the Operations Manager), who worked in the division of the Company headed by the Director.   The Director did not tell the Company's board about the transaction. The Director returned the plant and equipment in 2008 after the Customer invoiced the Company for the cost of the hire.   **(ii) Basis of appeal**   The appeal was brought by the Director in relation to an order made by HHJ Roger Kaye QC on 15 October 2010, that the Director pay to the Company within 28 days the sum of £5,200 with interest, totalling £7,977.31. This was less than the amount claimed by the Company for £48,525. The Director was also ordered to pay the costs of the action.   The award was based on:  the finding that the Director had acted in breach of duty and used the equipment for six months in 2003; and  the quantification of the benefit obtained by the Director using the rate which the Customer had sought to charge the Company.  The Director was granted leave to appeal on 8 December 2010 by Arden LJ. The Director sought to dismiss the Company's action with costs. The Company's cross-appeal was subsequently abandoned.   **(iii) Legal background**   Mummery LJ noted that a duty owed by a director is the duty to use his or her position in the company to promote its success and protect its interests. Equity creates fiduciary duties on the part of the director, being the duties of loyalty and of avoiding a conflict between the director's personal interests and his or her duty to the company. The events in this litigation occurred before these duties were codified in the Companies Act 2006, which expresses the essence of the same equitable rules and principles.   The duties were the basis of the Company's claim against the Director, who allegedly breached his duties by accepting personal benefits from the Customer, and not disclosing the benefits to his fellow directors or seeking the Company's approval.   **(c) Decision**    The lead judgment was delivered by Mummery LJ, with Etherton LJ and Wilson LJ concurring. The appeal was dismissed because the Director did not demonstrate that the Deputy Judge's decision was incorrect regarding liability for breach of fiduciary duty. The three broad grounds of appeal considered by Mummery LJ were as follows:   **(i) Scope of duty**   Counsel for the Director submitted that it was not established that the Director had obtained a valuable benefit, because:  the Director did not make a significant profit from the plant and equipment in poor condition, which would have been of no value to the Company; and  there was no evidence that the Director would have gone out into the market to hire equipment at commercial rates.  Mummery LJ held that these submissions "miss the point" in light of a director's loyalty to the Company and the duty to observe the no conflict principle, which embrace a duty not to make a secret profit. His Lordship clarified that the no conflict duty extends to preventing the Director from depriving the Company of the ability to consider whether or not it objects to the diversion of an opportunity offered by one of its customers away from itself to a director personally.    **(ii) Breach of duty**   Counsel for the Director submitted defences based on 'commercial reality, flexibility and fairness'. His Lordship again rejected these arguments on the basis that they "miss the point" that the Director breached the strict no loyalty and no conflict duties. His Lordship noted that none of the following supported the contention that there was no breach of the duty of loyalty or the no conflict duty:  the absence of evidence that the Company would have taken the opportunity, or had suffered any loss;  the absence of evidence that the Director or the Customer had any corrupt motive;  the absence of evidence that if there had been no free loan, the Director would have hired that sort of equipment in the market;  the fact that the value of the benefit to the Director was small and that the Customer received no benefit from it; and  the fact that the Operations Manager and not the Director dealt directly with the Customer.  **(iii) Relief from breach**   Counsel for the Director argued that the Deputy Judge had failed to take relevant circumstances into account in electing not to exercise his discretion to grant relief.    His Lordship held that the following factors did not justify relieving the Director from the consequences of his breach of fiduciary duty:  the absence of any finding of bad faith or of any actual conflict;  the reasonableness of reliance by the Director on the Operations Manager to "sort matters out";  the lack of direct contact between the Director and the Customer;  the fact that the Director and the Operations Manger were friends and colleagues; and  the absence of any quantifiable loss by the Company or the negligible profit to the Director.  Accordingly, the Director's appeal was unanimously dismissed.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h5)  **5.3 Liability for the lost profit and lost goodwill of a company arising from a breach of fiduciary duties or oppressive conduct**   (By Katrina Sleiman and Grant Mason, Corrs Chambers Westgarth)   Pastizzi Cafe Pty Ltd v Hossain (No 4) [2011] NSWSC 808, Supreme Court of New South Wales, Gzell J, 28 July 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/808.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/808.html" \t "_new)   **(a) Summary**   A dispute arose between the directors and business partners of the first plaintiff, Pastizzi Cafe Pty Ltd (Pastizzi), in relation to the control and ownership of Pastizzi and the control and possession of the premises leased by the business.    Ms Ross and Mr Ross (the second and third plaintiffs, respectively) alleged that Mr Hossain (the first defendant) had:  breached his fiduciary duty not to improperly use his position to gain an advantage for himself or someone else owed under section 182 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act); and  engaged in conduct which was oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member of Pastizzi, in contravention of section 233 of the Act.  The first defendant claimed that:  he had been shut out of the management of Pastizzi by the second and third plaintiffs;  he had been denied access to financial information of Pastizzi in contravention of section 290 of the Act; and  the third plaintiff had never been properly appointed as a director.  The Court found in favour of the plaintiffs and ordered the first defendant to pay damages and give possession of the property leased by the first defendant to the plaintiffs.    **(b) Facts**    On 1 September 2006, the first defendant executed a lease of premises at King St, Newtown (King Street premises) with the second plaintiff as guarantor. Pastizzi was registered on 23 April 2007 with the second plaintiff and the first defendant recorded as directors and shareholders. The third plaintiff was not recorded as a director or shareholder at his request as he wanted a two year period following the end of a relationship with another woman to elapse before doing so.    Pastizzi commenced operating as a "pastizzi café" from the King Street premises on 18 May 2007. There was a degree of informality in the way the business operated.  The third plaintiff was never registered as a director and did not have his share in Pastizzi formally issued to him.  However, a warehouse lease and the "GoGo Pastizzi" business name were registered in the name of the third plaintiff.    Sometime in 2010, the first defendant decided that he wanted to sell his share in the partnership. He sought access to the financial records of Pastizzi through his lawyer. A meeting was held between the parties on 12 November 2010 and the plaintiffs' accountant, Mr Paull, however, agreement could not be reached.    In around early February 2011, the first defendant claimed he issued a notice to the second plaintiff to vacate the King Street premises. The second plaintiff claimed she never received the notice.    In April 2011, the first defendant withdrew $17,450 from the bank account of the business to pay his lawyer, hired security guards to lock the plaintiffs out of the King Street premises and affixed a note to the door saying he was taking back the premises.    By early May 2011, the first defendant had caused Talukder Enterprises Pty Ltd (second defendant) to be incorporated, renamed the business operating at the King Street premises and registered the business name for that business through the second defendant. From that time he conducted the new business from the King Street premises.     The first defendant claimed he never intended to set up his own business after locking out the plaintiffs, however, that was the effect of his conduct.   **(c) Decision**    **(i) Was the third plaintiff a director?**   The Court found that despite the informality of the conduct of the business, the parties agreed that they would conduct the business in its original and expanded form as one-third partners and that they would become equal directors and shareholders of Pastizzi.     In determining that the third plaintiff was in fact a director of Pastizzi, Gzell J considered the definition of "director" in section 9 of the Act which includes a person who is not validly appointed as a director if they act in the position of a director. His Honour found that this situation applied to the third plaintiff.    **(ii) Did the plaintiffs deny the first defendant access to Pastizzi's records?**   Section 290 of the Act states that "a director of a company ... has a right of access to the financial records at all reasonable times". The Court found that the plaintiffs had not breached section 290. The first defendant could have had access to the financial records of Pastizzi but did not avail himself of that opportunity. He instead engaged lawyers to seek access to those records.    **(iii) Did the first defendant breach his fiduciary duties?**   His Honour made a finding that the lease of the King Street premises was held on trust by the first defendant for Pastizzi. As trustee, the first defendant owed fiduciary duties to the beneficiary company. By locking Pastizzi out of the King Street premises and using those premises for the benefit of himself and the second defendant, he breached those duties. The Court ordered the first defendant to assign the leasehold to Pastizzi and to restore Pastizzi to possession of the King Street premises.     The Court also found that the first defendant had breached the fiduciary duties he owed as a director of Pastizzi. Specifically, by paying money to his lawyer out of the company accounts, the first defendant had breached section 182 of the Act. Additionally, by locking the plaintiffs out of the King Street premises and diverting the use of that premises to a separate business, the first defendant breached the fiduciary duties he owed as a director of Pastizzi.    **(iv) Did the first defendant's conduct breach section 232 of the Act?**   The second plaintiff and the first defendant were the only registered shareholders (the third plaintiff's shares were found to be held on trust for him and therefore he took the benefit of them but was not a member). Gzell J found that the conduct of the first defendant was oppressive to, unfairly prejudicial to, or unfairly discriminatory against the second plaintiff. Gzell J noted that section 234 of the Act allowed the second plaintiff to bring an application for a court order under section 232 of the Act as she was a member of Pastizzi. His Honour also noted that the "company's affairs" within the meaning of section 232 included the losses of that company by virtue of the definition of 'affairs' contained in section 53 of the Act.   His Honour also noted that where the first defendant's conduct breached section 232 of the Act, section 233 of the Act gave the Court power to make "any order" it considers appropriate. As his Honour held that Pastizzi was a quasi-partnership of the kind recognised in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, his Honour ordered that the second plaintiff purchase the first defendant's one third share in the business.    **(v) What damages were available to the plaintiffs?**    His Honour relied on the  decision of *Jaques v Millar* (1877) 6 Ch D 153 which stands for the proposition that a court may order damages against a vendor who does not give possession at an agreed date for a purchaser's loss of the use of a property. His Honour stated that given the first defendant's fiduciary duties, his failure to give possession to Pastizzi entitled it to an order for the lost profits it might have earned during the period it was wrongly denied possession.    His Honour ordered that the first defendant should pay damages for the loss of business profits of Pastizzi and the loss of goodwill.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h5)  **5.4 Liquidator's lien over funds realised from company property ranks ahead of the secured creditor**   (By Tian Xu, Mallesons Stephen Jaques)   Re Newtronics Pty Ltd (in Liquidation) [2011] VSC 349, Supreme Court of Victoria, Davies J, 28 July 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2011/349.html](http://www.austlii.edu.au/au/cases/vic/VSC/2011/349.html" \t "_new)   **(a) Summary**   If a liquidator realises company property in the proper discharge of its duty, it is entitled to a first ranking lien ahead of the secured creditor over the funds realised.  The lien secures the liquidator's costs in caring, preserving and realising the particular property in question.  This is so even if the funds were realised by taking action against the secured creditor.   **(b) Facts**    Atco is the secured creditor of Newtronics.  When Newtronics went into liquidation, Atco appointed receivers to it.     The liquidator of Newtronics commenced proceedings against Atco and its receivers on the basis that Atco was contractually restrained from enforcing its security and that the receivers were, therefore, not validly appointed.   The liquidator was ultimately unsuccessful against Atco but received a settlement payment of $1.25 million from the receivers.  It paid the money to Seeley, which was an unsecured creditor of Newtronics and had funded the litigation against Atco.   Atco argued that, as secured creditor, it had first priority to the settlement money.   The liquidator asserted that, under the rule in *Re Universal Distributing Co Ltd (in liquidation)* (1933) 48 CLR 171, it had a prior ranking equitable lien over funds realised from company property to secure its costs in caring, preserving and realising that property.  In this case, the settlement money was realised from Newtronics' chose in action against the receivers.  Therefore, the lien applied to secure the liquidator's costs in the proceedings against Atco and its receivers.  As those costs exceeded $1.25 million, it was entitled to the entire sum.   Atco argued that the lien did not apply to this situation because:  This was not the typical case where the secured creditor was standing behind the liquidator in realising the company property.  To the contrary, the liquidator was acting against it.  It did not request the liquidator to take action against itself or the receivers to recover the money.  An equitable lien can only arise to secure an indebtedness.  Since the liquidator has already been indemnified by Seeley, there was not relevant indebtedness.  Under section 564 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), a court can adjust the distribution of property recovered from litigation to reflect a creditor's contribution in indemnifying the liquidator's costs.  As the liquidator already had a statutory remedy, it should be held to that remedy.  The lien only covered the cost of caring, preserving and realising the particular property in question (ie, the action against the receivers), not the liquidator's general costs.  Therefore, it was only entitled to that part of its costs representing the action against the receivers, not all of its costs in the proceedings against both Atco and the receivers.  **(c) Decision**    **(i) Lien issue**   Davies J considered that none of the reasons put forth by Atco justified not imposing the equitable lien in this case.  The rule in Re Universal Distributing is simply that if a liquidator realised company property in proper discharge of its duty, it is entitled to an equitable lien over the funds realised to secure its costs in realising the property.  It did not matter that Atco neither supported nor requested the liquidator to proceed against the receivers, or even that the liquidator had acted against Atco in realising the sum.  The fact that the liquidator had been indemnified by Seeley did not extinguish the indebtedness to the liquidator for its costs.  Rather, Seeley, as the indemnifier, would have a right of subrogation to claim the liquidator's costs.  The existence of an alternative statutory remedy under section 564 did not extinguish the equitable lien.  Although the lien was limited to the cost of realising the particular property in question, it would still cover all of the liquidator's costs in the proceedings against both Atco and the receivers.  This is because the two actions are closely related and it would be artificial to separate them.  **(ii) Extension of time issue**   A subsidiary issue was that Atco was outside the limitation period for bringing the proceedings against the liquidator of Newtronics.  However, Davies J thought the proceedings should be allowed:  The delay was due to the fact that Atco was waiting for the appeals in the original proceedings brought by the liquidator of Newtronics to settle and for funding to be secured for the present proceedings.  The delay was only four months  There was no prejudice to the liquidator.  The case put by Atco was arguable (although ultimately unsuccessful).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h5)  **5.5 Court validation of administrators' appointment - is it just and equitable?**   (By John O'Grady and Laura Gordon, Corrs Chambers Westgarth)   Keldane Pty Ltd (in Liquidation) [2011] VSC 337, Supreme Court of Victoria, Efthim AsJ, 20 July 2011    The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2011/337.html](http://www.austlii.edu.au/au/cases/vic/VSC/2011/337.html" \t "_new)   **(a) Summary**   Keldane Pty Ltd (the "Company") was wound up in insolvency, and Mr Horne was appointed as the liquidator. Mr Horne then appointed himself and his partner, Mr Vrsecky (the "Applicants"), as the administrators of the Company. This appointment was without creditor or court approval as required by section 436B of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the "Act"). The Applicants then sought orders that the appointment be validated pursuant to section 1322(4) of the Act, and an order that the wind-up of the company be terminated. It was held that an order that the wind-up be terminated was not in the interests of the Company shareholders, and was not in the public interest. Given that the company would remain in liquidation, Efthim AsJ did not consider that it would be just and equitable to validate the appointment of the Applicants as administrators of the Company.   **(b) Background**   On 9 February 2011, the Company was wound up in insolvency, and Mr Horne was appointed as the liquidator. On 18 April 2011, Mr Horne appointed himself and his partner, Mr Vrsecky, as the administrators of the Company pursuant to section 436B of the Act. This appointment was made without a resolution of approval of the creditors or leave of court, as required by section 436B of the Act.   The Applicants sought various relief pursuant to section 482(1) and section 1322(4) of the Act, including that the liquidation be terminated, declarations that neither the Deed of Company Arrangement nor the Deed of Charge are invalid, and a declaration that the Applicants in their capacity as administrators are not personally liable for any debt of the Company.   **(c) Issues**   Associate Justice Efthim considered the following issues:  whether a liquidator must seek the approval of creditors before he appoints himself and/or a partner as administrator or whether he can rely on a subsequent resolution of approval by the creditors;  if the Court is of the view that the above is a contravention of section 436B(2), then whether the applicants should be entitled to an order under section 1322(4)(a) to validate the appointment of the applicants as administrators; and  whether an order under section 482(1) of the Act, to stay the winding up of the Company, should be made.  **(d) Decision**   In regard to the first issue, Efthim AsJ held that section 436B(2) had been contravened. On a plain reading of the section, the liquidator must not appoint himself or a partner as administrator unless the company creditors pass a resolution approving the appointment, or there is leave of the court for such an appointment. Associate Justice Efthim considered that there was no room for ambiguity in this provision.  Secondly, in determining whether the appointment of the Applicants should be validated, Efthim AsJ considered whether such an order was just and equitable as required by section 1322(6)(a)(iii) of the Act to make an order that a matter is not invalid by reason of a contravention of a provision of the Act under section 1322(4)(a) of the Act. In the circumstances, this hinged on whether an order should also be made to terminate the winding up of the Company. Associate Justice Efthim considered that unless an order is made under section 481(1) of the Act, taking the company out of liquidation, there would be no point invoking section 1322(4) to validate the appointment of the Applicants as administrators. If an order should be made to terminate the winding up, then it would be just and equitable that an order to validate be made pursuant to section 1322(4).   Therefore, Efthim AsJ turned to consider whether an order to terminate the winding up of the Company should be made under section 482(1). In this decision, Efthim AsJ addressed the four factors discussed in *El-Fakri v Elfah Pty Ltd (in Liq)* [2002] FCA 1469, these being:  the interests of the creditors;  the interests of the liquidator;  the interests of the company members; and  the public interest.  In respect of the creditors, Efthim AsJ held that they were not provided with all relevant information regarding future trading of the Company prior to approving the Deed of Company Arrangement, and that their decision may have been different had they received all relevant information.   In respect of the members, the Company consisted of three shareholders, two of whom are directors, and one of whom, Mr Kaspar, is involved in litigation with the directors and the Company. As Mr Kaspar is being sued by the Company, Efthim AsJ held that termination of the winding up may not be in his interests, and that this factor was one preventing an order being made under section 482 of the Act.   In respect of the public interest element, the fact that Mr Horne ignored the operation of the Act in appointing himself and his partner was considered contrary to public interest. Additionally, there had been 'commercial immorality' by the Company, due to the strong possibility of insolvent trading, poor record keeping, meetings proceeding on the erroneous basis that the Company could not continue to trade, and an apparent failure to provide creditors with all relevant information.    Therefore, Efthim AsJ held that the application to terminate the wind-up must fail. As a result, Efthim AsJ would not validate the appointment of the administrators, as this would not be just and equitable.    Associate Justice Efthim ordered that the company remain in liquidation.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h5)  **5.6 Application for judicial advice regarding remuneration of trustees of a creditors' trust following a deed of company arrangement**  (By Gabrielle Metherall, Blake Dawson)   In the matter of Creditors' Trust of Jackgreen (International) Pty Ltd [2011] NSWSC 748, Supreme Court of New South Wales, Ward J, 18 July 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/748.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/748.html" \t "_new)  **(a) Summary**  The plaintiff trustees (Trustees), as Trustees of the Creditors' Trust of Jackgreen (International) Pty Ltd (Trust), sought ex-parte judicial advice under section 63 of the [Trustee Act 1925 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "Default) to declare that, under the terms of the Creditor Trust Deed, they were entitled to additional remuneration and expenses beyond the amount approved by the committee of creditors convened in accordance with a Deed of Company Arrangement (DOCA).  Alternatively, the Trustees sought orders permitting the additional remuneration out of Trust assets, under section 81 of the Trustee Act or the Court's inherent jurisdiction.  The Court held that the Trustees were entitled to additional remuneration under section 81 of the Trustee Act and its inherent jurisdiction to administer trusts.  The Court refused to provide the declaratory advice sought under section 63 of the Trustee Act because the mechanism for creditor approval of remuneration specified in the Trust Deed was no longer workable.  However Ward J held that the Trustees were entitled to payment for their work and as intended by the creditors.  This was consistent with the need to have the trust administered and its assets distributed prior to termination.  **(b) Facts**  The Trustees were appointed voluntary administrators of Jackgreen (International) Pty Ltd (Jackgreen), and then deed administrators when Jackgreen was placed under a DOCA.  The Trustees were subsequently appointed Trustees of the Trust.  The Trust Deed contained the following provisions relating to Trustee remuneration:  Clause 15.2(b) made the termination of the trust subject to the Trustees receiving "all remuneration and costs to which they are entitled pursuant to clause 18";  Clause 18.1 entitled the Trustees to be remunerated and reimbursed from the Trust  assets in respect of any work done by the Trustees, their partners and staff, in their former capacities as administrators or deed administrators of the DOCA (subject to clause 13 of the DOCA) or in connection with the Trust or their role as Trustees, in accordance with the hourly rates charged by the Trustee's firm;  Clause 18.2 of the Trust Deed allowed the Trustees to draw their remuneration from trust assets subject to clause 13 of the DOCA, up to the limits approved by creditors at a specified committee of creditors meeting; and  Clause 13.1 of the DOCA provided that the Trustee's remuneration would be at their usual hourly rate on a time basis, subject to the approval of the creditors.  Prior to the creation of the Trust, the Trustees provided an estimation of their fees for work as administrators, deed administrators and Trustees based on the date it was anticipated that the Trust would be terminated.  The estimation ($150,000) was approved as a maximum remuneration figure by the committee of creditors in accordance with the DOCA.  However a delay occurred in relation to the retirement of the receivers and completion of the DOCA, and additional, previously unanticipated tasks for the Trustees also arose.  The Trustees sought and were granted a further $150,000 in remuneration by the committee of creditors.  The extended remuneration sum covered a period up until a revised anticipated date for the termination of the Trust.  Further delays arose, and at the time of the application to the Court the Trust had still not been terminated, although the DOCA was no longer in effect.  The Trustees estimated that their approved remuneration needed to be extended by $50,000 to fully cover their past, current and remaining tasks.  The Trustees sought judicial advice because they were unable to seek the approval of the committee of creditors since the DOCA was completed.  They submitted that clauses 15.2(b) and clause 18.1 should be interpreted as not placing a cap on their remuneration, despite the specific sums and approval procedures provided.  If this was accepted as the true intention of the settlor, the Trustees submitted, then the Court could provide advice to the effect that the Trustees were entitled to additional remuneration without the approval of the committee of creditors.  The application did not require a consideration of any unequal effects on beneficiaries' interests because the Trust Deed provides for pro rata distribution of assets to beneficiaries.  **(c) Decision**  **(i) Entitlement to remuneration under the Trust Deed terms and section 63 of the Trustee Act**  Section 63 of the Trustee Act permits Trustees to apply to the Court "for an opinion, advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument".  Justice Ward construed the Trust Deed by ascertaining the settlor's intention and analysing the mechanics of the remuneration provisions.  Her Honour accepted that although the Trust Deed provided a specific sum as a remuneration limit, the intention of the creditors and Trust Deed was to allow full remuneration for the Trustees.  This was supported by the fact that it was possible for the creditors to approve additional sums, and this had occurred once in relation to unanticipated tasks and delays.  However, Ward J considered that the requirement for creditor approval of increases in remuneration was clear and prevented reliance on other clauses of the Trust Deed in isolation.  Her Honour held that although the Court must "strive to give [the Trust Deed] reasonable meaning in a commercial context", the remuneration provisions were "unworkable" in the absence of the committee of creditors.  To provide judicial advice that the Trust Deed otherwise permitted further remuneration would be to "impermissibly rewrite" the Trust Deed.  **(ii) Entitlement to remuneration under section 81 of the Trustee Act and the inherent jurisdiction of the Court**  Section 81 of the Trustee Act gives the Court power to order expenditure out of trust assets where it considers it expedient in the management or administration of any property vested in trustees, and such power does not exist in the trust instrument.  Ward J noted that the payment of remuneration to trustees has been considered to be "expenditure" for the purposes of the section, referring to *Cuesuper Pty Ltd* [2009] NSWSC 981 per Palmer J at [19] for authority.  Recourse to section 81 of the Trustee Act was expedient for the management and administration of the Trust since it was not practical to rely on the Trust Deed.  Her Honour stated she had "no doubt that the appropriate result (and that which must have been intended by creditors) is for the Trustees to be properly remunerated for their efforts on behalf of the creditors".  A further factor supporting this view was the need for the Trustees to be remunerated for their future task of distributing the trust property and enabling the trust to be terminated.  Her Honour also affirmed the Court's inherent power to order remuneration and expense reimbursement for a person administering a trust fund, as well as the "wider equitable principle" permitting allowances for expenses incurred in connection with the administration of trust property.  **(iii) Orders**  The Trustees were by order of the Court authorised to draw an additional $50,000 from Trust assets for their remuneration, costs and expenses of administering the Trust until terminated in accordance with the Trust Deed.  Her Honour also awarded costs incidental to the application, which she accepted was usual practice under section 93 of the Trustee Act.  The Court did not require the Trustees to formally notify the beneficiaries of the Trust of the remuneration increase.  The administrative expense of complex notification was deemed unnecessary given that the beneficiaries would be informed of the outcome of proceedings when their distribution is communicated to them.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h5)  **5.7 Defects in meeting notices cured by Federal Court**  (By Katherine Payne, Blake Dawson)   Cronin, in the matter of Cubbie Group Limited (Subject to Deed of Company Arrangement) v Cubbie Group Limited [2011] FCA 800, Federal Court of Australia, Reeves J, 18 July 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/800.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/800.html" \t "_new)  **(a) Summary**  The Federal Court cured defects in meeting notices that failed to set out the terms of resolutions proposing variations to Deeds of Company Arrangement (DOCAs) which were to be voted on at the meeting because of the drastic effect that not varying would have on the Group, its employees and creditors.  **(b) Facts**  The matter was an urgent application brought by the Administrators of the Cubbie Group (Group), a group of 11 companies with a number of rural land holdings in south west Queensland, largely dedicated to producing cotton.  The Plaintiffs were appointed joint and several voluntary administrators of the Group on 30 October 2009.  The Group's major secured creditor was the National Australia Bank Limited (NAB) and its other creditors were 21 employees and five trade creditors.  At the second meeting of creditors on 15 June 2010, the creditors resolved that the companies in the Group should execute DOCAs.  The DOCAs were executed on 6 July 2010 and were due to expire on 15 June 2011.  One of the purposes of the DOCAs was to investigate the sale of assets or shares in the Group and its restructuring.  The Administrators arranged for Goldman Sachs to identify parties internationally that may be interested and it was anticipated that some binding offers would be received in July 2011.  While looking for potential buyers, the Administrators were able to arrange finance to plant the 2011 cotton crop, which was harvested in April and May 2011 with an approximate value of $156 million.  Due to fortuitous rainfall in the area, the Group's water storage system collected enough water for the 2011, 2012 and 2013 crops.  The Administrators managed to secured finance to plant the 2012 crop.  A creditors' meeting was scheduled for 14 June 2011.  The meeting notices dated 3 June 2011 stated that the purpose of the meetings was 'to consider and vote on the resolutions to vary the Companies' Deeds of Company Arrangement and to approve the remuneration of the Deed Administrators'.  The DOCAs were due to expire on 15 June 2011 and so one of the purposes of the creditors' meetings was to consider the variation of the DOCAs to extend each administration until 31 October 2011.  **(c) Decision**  **(i) The defective notices**  The Administrators brought an urgent application on 14 June 2011 for orders to cure defects in the meeting notices.  The notices were defective because they failed to set out the terms of the resolutions proposing variations of the DOCAs which were to be voted on in the meetings.  This contravened the requirements of section 445F(3)(a) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act), which provides that: (3) The notice given to a creditor under subsection (2) [to convene a meeting of creditors to consider a variation of a deed of company arrangement] must:  (a) set out each resolution (if any) under section 445A or paragraph 445C(b) that the deed's administrator proposes that the meeting vote on.  Section 445A provides that: A deed of company arrangement may be varied by a resolution passed at a meeting of the company's creditors convened under section 445F, but only if the variation is not materially different from a proposed variation set out in the notice of the meeting.  Because of the urgency of the application, Reeves J made orders allowing for the variation and then subsequently delivered the reasons.  **(ii) Power to cure the defects**  The administrators relied on sections 447A(1) and 1322(4) of the Act to allow the Court to overcome the defects.  Section 447A(1) provides: The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company.  Section 1322(4)(a) provides: (4) Subject to the following provisions of this section but without limiting the generality of any other provision of the Act, the Court may, on application by an interested person, make all or any of the following orders, either unconditionally or subject to such actions as the Court imposes: (a) an order declaring that any act, matter or thing purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation; (b) an order directing the rectification of any register kept by ASIC under this Act; (c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of the kind referred to in paragraph (a); (d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding; And may make such consequential orders as the Court sees fit.  Citing the High Court decision *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270, Reeves J found that the Court had the power to cure the defects under either or both sections.  In this case there was little practical difference between the operation of the provisions because the relevant preconditions to section 1322(4) set out in section 1322(6)(a), "that the person or persons concerned in or party to the contravention or failure acted honestly" and "that it is just and equitable for the order to be made", are the same kind of factors a Court would ordinarily consider under s 447A.  **(iii) Just and equitable to cure the defects**  Justice Reeves noted that if the DOCAs were not extended, the Group may be placed in liquidation.  This would mean that the existing finance arrangements would fall through and the 2012 crop would not be planted.  Employees' and contractors' contracts would be terminated and the sale campaign would be delayed.  The value of the Group and any return to Creditors would be significantly reduced.  Justice Reeves also considered it important that some notice of the proposed deed variations was given.  Although the meeting notices did not contain the terms of the proposed variations, the Deed Administrators' Report to Creditors that was circulated with the notices on 3 June 2011 mentioned the proposed deed variations and provided some details about their purpose.  When Mr Cronin first became aware of the defects on 10 June, he arranged an amended notice of the meetings which complied with sections 445F and 445A of the Corporations Act and took steps to send it to creditors.  The amended notice was sent via email to the representatives of NAB, the managing director of the Group, and representatives of the employee creditors of the various groups.  It was also placed on the employee notice board.  In these circumstances, Reeves J considered it just and equitable to exercise his discretion and make orders to overcome the defects in the notices.  His Honour also would have had "no hesitation in finding that . the Deed Administrators had acted honestly".  Justice Reeves made orders to overcome the defects in the notices, with two conditions:  that the Administrators give notice to all of the creditors of the Group of the details of the orders and draw their attention to their rights under section  445B(1) of the Act (the right for creditors to apply to the Court to cancel a variation); and  that the Deed Administrators give notice to all creditors that they had sought to have the costs of the application paid out of the Deed Administration, and that if a creditor wished to object they need to file an application stating their objection by 1 July 2011.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h5)  **5.8 The circumstances in which a court will give directions to administrators in relation to a commercial decision**   (By Matthew Eglezos, Freehills)   Killer, in the matter of North Coast Wood Panels Pty Ltd (administrators appointed) [2011] FCA 776, Federal Court of Australia, Greenwood J, 12 July 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCA/2011/776.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/776.html" \t "_new)   **(a) Summary**   The administrators of North Coast Wood Panels Pty Ltd (the 'Company'), a financial planning advice company, sought directions from the Court, pursuant to section 447D of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the 'Act'), that it was proper and justifiable for them to enter into a sale of the Company's business to AXA. The administrators formed the commercial judgment that the value of the business could deteriorate quickly, and they sought to sell the Company's business in a short period of time without fully testing the market.   Greenwood J held that the role of the Court in such an application is not to second-guess the merits of the commercial decision of administrators. Greenwood J agreed with Goldberg J in *Re Ansett Australia Ltd* (No 3) (2002) 115 FCR 409 that the Court generally does not give directions where issues do not arise in relation to a legal matter or the propriety or reasonableness of the decision. Whether a Court exercises its discretion to give directions in relation to a business decision depends on the nature and novelty of the issues raised.   Greenwood J was nonetheless satisfied that, having regard to the matters considered by the administrators, it was proper and reasonable to enter into and perform the transaction.   **(b) Facts**    The Company had carried on the business of providing financial planning advice to clients as an authorised representative of a company within the AXA Group.   In 2009, National Australian Bank ('NAB') was granted a fixed and floating charge over all of the Company's assets. After judgment was obtained against the Company and its sole director in early 2011, and the parties were ordered to pay costs on an indemnity basis, NAB appointed Mr Graham Killer, pursuant to the charge, to investigate the affairs of the Company. On 8 June 2011, NAB appointed Mr Killer and Mr Michael McCann as administrators of the Company. Since the appointment of the administrators, the Company had not provided financial planning advice to its clients.   The financial planning business was the Company's sole material asset. The administrators became concerned that the business' value was deteriorating, as, following its administration, it was no longer a member of the AXA Group and advice was no longer being provided to clients. The administrators negotiated with AXA for the sale of the Company's client base to AXA, and the parties settled on a purchase price of $736,000 plus GST. The purchase price would be adjusted for matters including the loss of former clients within a certain period of time, and 80% of the purchase price would be payable on settlement.   The administrators sought advice from an experienced financial planning business valuer and broker, who confirmed that the Company ought to accept the AXA offer having regard to its present circumstances. On 21 June 2011, Mr Killer convened the first meeting of creditors of the Company and explained the commercial terms of the AXA offer, to which no objection was raised. Later that same day, Mr Killer caused the Company to enter into a client sale agreement with AXA and the Company's sole director.   Mr Killer formed the business judgment that the Company should enter into the agreement with AXA for the following reasons:  the Company's business was deteriorating because it was not providing financial advice to its clients;  Mr Killer understood that at least one client had been approached by one of the Company's competitors;  if the business was marketed for sale over a three month period, further clients would be lost;  AXA was providing 80% of the purchase price immediately;  the terms of the AXA offer were, according to the valuer, superior to those which might otherwise be secured;  AXA offered a greater purchase price for the business than the valuer had attributed in his valuation; and  the Company's director had agreed to sign a covenant preventing him from competing with the purchaser of the Company's business, but only on the basis that AXA was the purchaser.  The administrators sought directions to determine whether they could properly and justifiably enter into, and perform, the AXA agreement. Greenwood J noted that the administrators' application for directions was unusual in the sense that the administrators had not tested the market fully, and had brought about the sale in an extremely short period of time.   **(c) Decision**    Greenwood J ordered that the administrators may properly and justifiably enter into and perform the AXA agreement.   His Honour held that it is not the Court's role to second-guess the merits of the commercial decision of administrators. His Honour held that the 'character, scope and content of the commercial arrangements the administrators seek to perform and whether doing so is prudent in a business sense, is fundamentally, a matter for the administrators'.   His Honour noted, however, that this does not mean that the content of a commercial transaction is irrelevant to the question of the exercise of the Court's power to give directions. Under section 447D of the Act, the Court may give directions 'about a matter arising' in connection with the performance or exercise of any of the administrator's functions and powers. While the Court does not have an express power to approve an agreement proposed to be entered into by an administrator, Greenwood J agreed with the observations of Goldberg J in *Re Ansett Australia Ltd* *and Mentha* (2001) 39 ACSR 355 that the Court will act in an appropriate case to protect the administrators from claims they have acted unreasonably in entering into particular agreements.   Greenwood J also noted that in *Re Ansett Australia Ltd (No 3)* (2002) 115 FCR 409, Goldberg J commented that the Court had generally not given directions where no issue had arisen 'in relation to a legal matter or the propriety or reasonableness of the decision'. Greenwood J suggested that there are two reasons explaining the Court's reluctance to direct liquidators or administrators:  Part 5.3A of the Act expressly vests business decisions in the administrators; and  the Court is generally not qualified to approve such decisions where it has not investigated the 'contextual circumstances' involved in making the business decision.  Nevertheless, a Court's jurisdiction to give directions under section 447D of the Corporations Act 2001 is discretionary, and Goldberg J in *Re Ansett Australia Ltd (No 3)* (2002) 115 FCR 409 stated that its exercise will depend on the nature and novelty of the matters and issues brought before the Court.   The question in the present case was whether it was proper and reasonable for the administrators to enter into and perform the AXA agreement. Greenwood J considered that this question was a 'matter', in the language of section 447D of the Act, which properly went to the exercise of the Court's discretion to provide the administrators with protection. Greenwood J was satisfied that, having regard to the matters the administrators had identified, it was proper and reasonable for the administrators to enter into and perform the transaction.    [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h5)  **5.9 The running account defence explained**   (By Emily Stanton, Freehills)   Clifton (as Liquidator of Adelaide Fibrous Plasterboard Linings Pty Ltd (in Liq)) v CSR Building Products Pty Ltd [2011] SASC 103, Supreme Court of South Australia, Peek J, 5 July 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/sa/SASC/2011/103.html](http://www.austlii.edu.au/au/cases/sa/SASC/2011/103.html" \t "_new)   **(a) Summary**   The plaintiffs, the liquidators of Adelaide Fibrous Plasterboard Linings Pty Ltd ('AFPL'), sought a declaration pursuant to section 588FF of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), ('the Act') that five payments made by AFPL to the defendant, CSR Building Products Pty Ltd ('CSR') during the relation back period (the period between the date the liquidators were appointed and six months previous to that date) were unfair preferences and as such, voidable transactions. In response, CSR raised two defences. The first was the 'good faith' defence under section 588FG of the Act. The second defence was that some or all of the payments were part of a 'running account' as defined under section 588FA(3) of the Act. CSR argued that the value of the unfair preference during the period of the running account should be reduced to the value of the difference between the highest amount owing on the account during the relation back period, and the lower amount owing on the last day of the operation of the running account.    Peek J of the Supreme Court of South Australia found that CSR had not managed to prove the 'good faith' defence. However, CSR was entitled to have its liability partly reduced due to the operation of a running account between the parties from the commencement of the relation back period until 14 July 2006, when the running account ceased to operate as required by the Act.    **(b) Facts**    The plaintiffs were liquidators of AFPL, appointed as joint and several liquidators on 29 October 2006, after the creditors of the company resolved to wind up AFPL and appoint the plaintiffs as liquidators.    AFPL was a building contractor that supplied labour and materials for work on commercial properties. CSR is a large entity in the business of manufacturing and supplying building products to customers. It supplied gyprock plasterboard and accessories to AFPL.    In June 2005, AFPL applied for an account with CSR with a credit limit of $70,000. One of the terms of this account was that AFPL would settle all its accounts with CSR within 30 days. CSR witnesses gave evidence that although their standard terms of credit were 30 days, many customers failed to pay within that time frame, and CSR had a policy of allowing overdue accounts to approach 45 days before contacting the account holder.    The accounting department within CSR used an electronic accounting system that automatically put a block on an account when either the account was overdue by 45 days or it went over its credit limit. A block on an account was a flag to staff that a customer was over their credit limit, or their account was overdue, and that CSR staff would need to consider whether more product should be released to the customer. The accounting system also allowed CSR accounting staff to activate a manual big block on an account, which would freeze the whole account, preventing CSR staff from doing anything with that account, including doing a quotation. CSR policy was to place an account on big block where, inter alia, mail was returned or cheques bounced.    AFPL's account with CSR was placed on automatic block at numerous times, the first time in October 2005, and the last in August 2006 and continuing. The periods of time the block remained on the account lasted between six and 43 days. Also, once AFPL opened the credit account with CSR, they never paid their accounts within 30 days, and often after 45 days.    There were five payments made by AFPL to CSR during the relation back period, totalling $142,027.16. CSR would be required to repay these amounts to the plaintiffs if it could not make out one of the defences.    **(c) Decision**    **(i) Good faith defence**   The good faith defence is contained in section 588FG(1) of the Act, and required CSR to prove that CSR subjectively had no reasonable grounds for suspecting that AFPL was insolvent or would become insolvent. CSR was also required to prove that a reasonable person in CSR's circumstances would have had no such grounds for so suspecting. Peek J noted that this involved CSR proving a negative, and historically it has been a fairly demanding test.    After reviewing AFPL's trading history with CSR and the evidence of witnesses at trial, Peek J found that CSR had failed to establish that it had no reasonable grounds for suspecting that AFPL was insolvent at the time of the first impugned payment in April 2006. He stated that "whilst it is true that bounced and post-dated cheques do not necessarily mean per se that a company is insolvent, particularly where they are a practice in the industry, as at February 2006 there were other substantial indicators that the situation was serious and [the Regional Account Manager at CSR] conceded that this was so." He also disavowed any suggestion that CSR's continued supply of goods to AFPL after that date could be used to show that CSR did not have reasonable grounds to suspect insolvency. After considering the other payments made by AFPL to CSR during the relation back period, Peek J concluded that CSR had failed to prove that it had no reasonable grounds for suspecting insolvency in relation to any of those payments.    **(ii) Running account defence**   The running account defence is contained in section 588FA(3) of the Act. Peek J adopted the following description of the defence given by the High Court in *Air Services v Ferrier* (1996) 185 CLR 483, 502:   "If a payment is part of a wider transaction or a 'running account' between the debtor and the creditor, the purpose for which the payment was made and received will usually determine whether the payment has the effect of giving the creditor a preference, priority or advantage over other creditors. If the sole purpose of the payment is to discharge an existing debt, the effect of the payment is to give the creditor a preference over other creditors unless the debtor is able to pay all of his or her debts as they fall due. But if the purpose of the payment is to induce the creditor to provide further goods or services as well as to discharge an existing indebtedness, the payment will not be a preference unless the payment exceeds the value of the goods acquired."    Peek J concluded that despite there being reasonable grounds for CSR to suspect that AFPL was insolvent at the time of the first two payments, and notwithstanding the earlier problems CSR had had with AFPL regarding the payment of the account, there was still a relationship based on mutual benefit up to 13 July 2006. That relationship changed on 14 July 2006 however, when a legal letter of demand was issued. AFPL's account was also put on big block from 16 June to 28 July 206 and only one supply was permitted to AFPL during this period. This was only made after payment by way of bank cheque by AFPL and an urgent plea for supply from AFPL. Peek J considered that these circumstances were such that the running account was interrupted and there ceased to be a continuing business relationship of the type required by the running account defence.    In Peek J's view, on 14 July 2006, the inducement of supply became subordinated to CSR's predominant purpose of recovering the value of accounts from April and May. The payment of $20,000 demanded by CSR in return for the supply of $7,000 worth of product on 21 July 2006 was "not made in the context of a mutual assumption of a continuing business relationship, but was rather a tactic employed by CSR to obtain payment of at least part of a larger outstanding debt."    Counsel for AFPL submitted that section 588FA(3) required the existence of a running account during the whole six month relation back period, with the result being that because the running account ceased partway through that period, the defence should not be available to CSR at all. Peek J commented  that he was unaware of any authority for such a proposition, and dismissed this argument.    Peek J concluded that a running account existed for part of the relation back period, starting on 3 April 2006 and ending on 13 July 2006. During that period, two of the five payments occurred whilst a running account existed between the parties, and the defence had therefore been made out in relation to those payments.    Peek J therefore found that the final three payments made by AFPL to CSR were unfair preferences, and the plaintiffs were entitled to recover those payments. The plaintiffs were also entitled to the difference between the highest amount AFPL owed to CSR during the period of the running account and the amount that it owed on 13 July 2006, when the running account came to an end.    [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h5)  **5.10 The absence of a liquidator's power to assign a chose of action that is expressly unassignable**    (By Steven Grant, Minter Ellison)   Owners of Strata Plan 5290 v CGS & Co Pty Ltd [2011] NSWCA 168, New South Wales Court of Appeal, Giles JA, Campbell JA and Sackville AJA, 30 June 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWCA/2011/168.html](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2011/168.html" \t "_new)   **(a) Summary**   The case considers whether section 477(2)(c) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) authorises the liquidator of a company to assign a chose in action that, by its express terms, is not assignable to a third party.  Section 477(2)(c) provides that 'Subject to this section, a liquidator of a company may: (c) sell or otherwise dispose of, in any manner, all or any part of the property of the company.'  The Court of Appeal held that such a chose of action is not capable of assignment.   **(b) Facts**   The applicant for leave to appeal (Owners Corporation) contended that the primary Judge, Bryson AJ, erred in holding that section 477(2)(c) empowers the liquidator to assign such a chose in action without the consent of the debtor.  In this case the chose in action was a right to claim moneys under a building contract (Contract) between Owners Corporation and a builder (Cause of Action).  Clause 9 of the Contract provided that neither party could assign the contract or any payment thereunder.  The builder claimed to be owed moneys under the Contract and having gone into liquidation, the liquidator purported to assign the benefit of the builder's entitlement to the present respondent (CGS).  CGS commenced proceedings against the Owners Corporation seeking to recover the amount due to the builder.   The questions to be considered on appeal were:  If clause 9 of the Contract applied to prevent the assignment of the Cause of Action, did CGS have title to the Cause of Action on the grounds that there was a sale or disposal of the Cause of Action to CGS, by the liquidator pursuant to section 477(2)?  Was the Cause of Action assigned or sold to CGS?  At first instance, Bryson AJ held that CGS had title to the Cause of Action on the basis of an assignment by the liquidator under section 477(2) and the Cause of Action was assigned to CGS.   Neither party disputed the conclusions reached by Bryson AJ that the Cause of Action purportedly assigned by the liquidators was 'inherently incapable of being assigned' and that the rights of the builder 'do [sic] not have any existence on any other basis than that they are not assignable'.   Counsel for Owners Corporation submitted:  that in the absence of a clearly expressed intention to convert, for certain purposes, an unassignable chose in action into an assignable chose in action, section 477(2)(c) should be read as confined to choses in action that are in their nature assignable; and  in the alternative, that the right given to the builder under the Contract was purely personal and should not be classified as 'property' that could be disposed of pursuant to section 477(2)(c).  Counsel for CGS submitted that the language of section 477(2)(c) is broad enough to empower the liquidator to dispose of a chose in action that is otherwise unassignable.   **(c) Decision**   Sackville AJA delivered the decision of the New South Wales Court of Appeal with whom Giles JA and Campbell JA agreed.   Considering the historical legislative context of the provision, Sackville AJA found that the liquidator's statutory power under section 477(2) to sell or dispose of the company's choses in action does not extend to a chose in action which is not assignable by reason of an express agreement entered into by the company, where that agreement is valid and effective under the general law.  The contrary construction of section 477(2)(c) would authorise the liquidator not merely to sell or dispose of the company's choses in action, but to transform their character deriving from an express agreement entered into by the corporation.   This construction recognises that whilst the language of the section is broad, clearer words are required to interpret the liquidator's power to sell or dispose of the company's property so as to change the nature of the contractual liabilities undertaken by the obligor.  In this respect Sackville AJA noted that there are other powers available to the liquidator to enable the company's assets to be realised and the policy of facilitating realisation of those assets does not require the contractual rights of third parties who have dealt with the company to be overridden.   Accordingly, the court held that Owners Corporation should be granted leave to appeal against the decision of Bryson AJ, the appeal should be allowed and the answers to questions which were the subject of the appeal should be set aside and in lieu thereof, the questions should be answered as follows:  CGS did not have title to the Cause of Action; and  the Cause of Action was not assigned to CGS on the basis of a purported assignment by the liquidator under section 477(2).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/168%20August%202011.htm%23h5)  **5.11 Granting access to transcripts and documents from an examination by a liquidator**   (By Laura Loftus, DLA Piper Australia)   In the matter of Hunter Bulk Materials Pty Ltd (subject to deed of company arrangement) [2011] NSWSC 639, Supreme Court of New South Wales, Ward J, 24 June 2011   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/639.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/639.html" \t "_new)   **(a) Summary**   This case concerned access to transcripts and documents that formed part of the deed administrator's investigation into the examinable affairs of Hunter Bulk Materials Pty Limited ('Hunter Bulk').     As part of the administrator's investigations, the administrators examined two employees of Laing O'Rourke (BMC) Pty Limited ('BMC') pursuant to section 596B of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Act').  In May 2011, Ward J made orders that those examinations should be held in private.     In the current proceedings, Ward J was required to consider whether Wambo Coal Terminal Pty Limited ('Wambo') should be allowed access to the transcripts and documents from those examinations.     The Court ordered that Wambo should be provided with a copy of the transcript of the examinations of the BMC employees as well as copies of documents provided to each employee in the course of their examinations.  Additionally, Ward J directed that the examinations of the BMC employees be treated as if they had been held in public.     **(b) Facts**    In March 2005, Hunter Bulk entered into a subcontracting agreement with BMC for earthworks, drainage and roadwork construction to be carried out by Hunter Bulk in relation to the construction of the New Rail Spur from Mount Thorley to Wambo Coal Terminal.  These works formed part of works BMC was required to perform under a contract with Wambo ('the Head Contract') entered into in December 2004.     By late 2005, there was a dispute between Hunter Bulk and BMC in relation to the works performed under the subcontracting agreement.  On 6 December 2005, Hunter Bulk was placed into external administration under section 436A of the Act.  Following this, BMC assumed carriage of the construction under the subcontracting agreement and this led to a dispute between BMC and Hunter Bulk as to whether BMC had repudiated the subcontracting agreement.     Around that time, a dispute arose between BMC and Wambo as to the performance by BMC of its obligations under the Head Contract.     In January 2006, Hunter Bulk executed a deed of company arrangement and the administrators investigated the claims by Hunter Bulk against BMC and the prospects of success of those claims.  As part of their investigation, the administrators served examination summonses on two BMC employees (Mr Ryan and Mr Sheedy), seeking to examine them pursuant to section 596B of the Act.  The administrators obtained orders for the production of documents by BMC and the examination of those employees.   On 20 May 2011, Ward J made orders that the examinations of Mr Ryan and Mr Sheedy should be held in private.  The present proceedings concerned access to the transcripts and documents produced during those examinations, as Wambo sought access to the transcripts and documents produced to the BMC employees during the examinations by Hunter Bulk's administrators.     **(c) Decision**    Both parties accepted that the matters disclosed in the examinations would be relevant to the litigation between BMC and Wambo in relation to the Mount Thorley rail project.  Senior Counsel for Wambo contended that Wambo had a legitimate interest in inspecting the transcript and the documents because of Wambo's position as a party to litigation in which issues or evidence in the examinations relates or could be relevant.     BMC contended that the relevant test was whether Wambo had a sufficient interest to warrant a reconsideration of the finding that there were special circumstances making it desirable for the examination to be held in private and for the transcript to be kept confidential.     Justice Ward considered that given the circumstances surrounding the orders that the examinations be made in private (the application was heard in a very short timeframe, with the examinations fixed to commence the following day) and given that Wambo had not had an opportunity to contest the privacy orders before they were made, the relevant test was not whether Wambo could establish some 'particular' circumstance to cause a reconsideration of the orders, but rather whether the earlier orders should not have been made and therefore should be set aside or varied.     In determining whether the orders should be set aside or varied, Ward J considered the nature of the perceived forensic disadvantage which would be suffered by BMC if access to the transcripts was granted, and the public interest in conducting the examinations in public.   **(i) Forensic disadvantage to BMC**   In the reasons dated 20 May 2011, the forensic disadvantage was identified by reference to the forensic advantage that Wambo would obtain over BMC, namely, that Wambo would obtain advance knowledge of the evidence and the material on which BMC would rely in the litigation with Wambo.     Ward J considered the authorities that suggest an examination may, in some cases, be used to obtain a forensic advantage where other pre-trial procedures do not allow the production of that evidence.  To the extent that Wambo might gain an advantage by being privy to information at an earlier point in time than it would usually obtain that information in the ordinary course of litigation, BMC would suffer a forensic (even if only temporal) disadvantage if the transcript or documents were available to the public.     Wambo made three submissions in relation to the perceived disadvantage suffered by BMC, each of which was considered by the Court.     First, Wambo submitted that any temporal advantage could be removed by deferring access until the time in the litigation process at which it would ordinarily receive this information.  Ward J accepted that the temporal nature of any disadvantage could be met by a variation of the earlier orders that would permit Wambo to have access to the transcripts and documents at a later stage in the proceedings.     Secondly, Wambo submitted that the orders bestowed a forensic advantage on BMC because they permanently prevent disclosure of any admission made on oath by the BMC employees relevant to the proceedings between BMC and Wambo, and that the employees may provide evidence during the proceedings that differs from the evidence given during the examinations.  Ward J accepted that Wambo's inability to test any inconsistencies would be a forensic disadvantage to Wambo.     Thirdly, it was argued that any consequence of Wambo seeing part of BMC's evidence early would be "insignificant and not undesirable".  Given the Wambo proceedings were at a very early stage, Ward J considered the early disclosure could facilitate any dispute resolution procedures.  Ward J suggested that Wambo could be expected to reciprocate with an outline of the evidence it expects to give, thereby removing any forensic disadvantage suffered by BMC.     Ward J concluded that access to the transcripts and documents would only afford Wambo a temporal advantage and therefore the forensic disadvantage claimed by BMC should be given less weight than it was afforded at the time of making the orders in May 2011.     **(ii) Public interest in conducting the examinations in public**   The Court considered a number of authorities to the effect that it is only in rare cases that examinations pursuant to section 596B of the Act would be held in private.     Ward J held that the appropriate course was to make orders in effect converting the examinations into public examinations and permitting access to the transcripts as if the examinations had been held in public.     Although the examinations were not examinations of the directors of BMC, they did concern the examinable affairs of Hunter Bulk and therefore the forensic disadvantage was not sufficient to displace the statutory presumption that the examinations would be held in public.  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