|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|

|  |  |  |  |
| --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif | http://my.lawlex.com.au/alert/pic/spacer.gif | http://my.lawlex.com.au/alert/pic/spacer.gif | http://my.lawlex.com.au/alert/pic/spacer.gif |
|   | AI Global |   |  |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |  |  |  |
| --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif | 21 August 2012  | **>**  Regulatory Newsfeed | http://my.lawlex.com.au/alert/pic/spacer.gif |

 |
|   |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |  |  |
| --- | --- | --- |
|

|  |  |
| --- | --- |
| SAI Global Corporate Law Bulletin No. 180**>** |  |

 |

 | http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |
| --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |  |  |
| --- | --- | --- |
|

|  |  |
| --- | --- |
| **Index** | mail SAI Global info.regulatory@saiglobal.com |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |

 |

 | http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|

|  |  |  |
| --- | --- | --- |
|

|  |
| --- |
| **Bulletin No. 180**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, The University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Ashurst](http://www.ashurst.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Piper](http://www.dlapiper.com/Australia/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [King & Wood Mallesons](http://www.mallesons.com/%22%20%5Ct%20%22_new), [Minter Ellison](http://www.minterellison.com/%22%20%5Ct%20%22_new).1.     [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#h1)2.     [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#h2)3.     [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#h3)4.     [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#h4)5.     [Recent Research Papers](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#h5)6.     [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#h6)7.     [Contributions](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#7)8.     [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)  |

 | **Legislation Hotline**eview my Newsfeed selectionsiew past editions of Newsfeedsiew a list of related Standardsearch all Australian legislation from one websiteree trial our Lawlex Legislative Alertsree trial our other regulatory products and servicesovernance, risk and compliance solutions |
|

|  |
| --- |
| COPYRIGHT WARNINGUse of this product must be in accordance with our licence agreement and the relevant licence fee paid by your organisation. We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 131 242. |

 |  |

 |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|

|  |  |  |
| --- | --- | --- |
|

|  |  |
| --- | --- |
| **Detailed Contents**  | own |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |

 |
| [1. Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#1)[1.1 Release of final tranche of the Personal Liability for Corporate Fault Reform Bill](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#011) [1.2 Government releases framework for regulatory reform of cross-border FMIs](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#012)[1.3 APRA releases Discussion Paper, draft Prudential Standards and draft Reporting Standards on implementation of Basel III capital reforms: counterparty credit risk and other measures](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#013) [1.4 CAMAC releases report on managed investment schemes](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#014) [1.5 MAS implements enhanced regulatory regime for fund management companies](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#015) [1.6 UK Treasury consults on financial sector resolution proposals](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#016) [1.7 ASX releases report on ASX-listed companies' adoption of gender diversity recommendations](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#017) [1.8 China releases first integrity rules for capital market regulation](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#018)[1.9 BIS releases working paper on public recapitalisations and bank risk](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#019)[1.10 CPSS and IOSCO publish consultative report on FMIs](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#110) [1.11 US Federal Reserve Board announces final rule establishing risk-management standards for FMUs](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#111)[1.12 CSRC releases measures for securities investment by foreign institutional investors](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#112)[1.13 FSA consults on revised proportionality guidance for remuneration](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#113)[1.14 European Commission releases report on the Takeover Directive](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#114)[1.15 European Commission launches consultation on a future framework for investment funds](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#115)[1.16 Basel Committee issues interim rules for the capitalization of bank exposures to central counterparties](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#116)[1.17 Basel Committee releases final rule on regulatory treatment of valuation adjustments to derivative liabilities](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#117)[1.18 EU releases amendments on insider dealing and benchmark manipulation](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#118) [1.19 EIOPA publishes report on the role of Insurance Guarantee Schemes in the winding-up procedures of insolvent undertakings in the EU/EEA](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#119)[1.20 Women on boards: UK code of conduct one year on](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#120)[1.21 CFTC approves regulations to phase in compliance with clearing requirements of the Dodd-Frank Act](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#121)[1.22 The World Federation of Exchanges releases first half 2012 market highlights](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#122)[1.23 Recent US corporate governance trends](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#123)[1.24 Research study on employee participation in employee share plans](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#124)[1.25 Centre for Corporate Law email notification list for seminars and conferences](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#125)[2. Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#2)[2.1 Consultation on requirement to manage conflicts of interest in litigation schemes and proof of debt schemes](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#021)[2.2 Guidance on crowd funding](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#022) [2.3 Consultation on electronic trading and release of fourth market supervision report](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#023) [2.4 Consultation on FOFA reforms](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#024) [2.5 Review of asset consultants](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#025)[2.6  New financial requirements for issuers of over-the-counter derivatives](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#026)[3. Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#3)[3.1 Submission to ASIC consultation paper: Australian market structure: Draft market integrity rules and guidance](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#031)[3.2 Reports](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#032)[3.3 New Capital Raising and Admission Listing Rules](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#033)[3.4 Adoption by ASX-listed companies of the ASX Corporate Governance Principles and Recommendations on diversity](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#034)[3.5  ASX Equity Research Scheme trial commences](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#035) [4. Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#4)[4.1 Alesco Corporation Limited 01 & 02](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#041) [4.2 Austock Group Limited](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#042)[4.3 Hastings Diversified Utilities Fund 02](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#043)[5. Recent Research Papers](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#5) [5.1 Has insider trading become more rampant in the US? Evidence from takeovers](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#051) [5.2 Should outside directors have term limits? The role of experience in corporate governance](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#052)[5.3 Financial globalization and the rise of IPOs outside the US](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#053) [5.4 The market for independent directors](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#054) [6. Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#6) [6.1 Confirming the application of the ex turpi causa defence for effective one-man companies and determining the extraterritorial effect of the UK Insolvency Act 1986](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#061)[6.2 Capacity to enter transactions which may be categorised as hedging or speculative](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#062) [6.3 Unfairly prejudicial conduct under section 994 of the UK Companies Act 2006: The ability of shareholders to seek relief without having exercised diligence](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#063) [6.4 Ostensible authority and detrimental reliance](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#064) [6.5 Application to set aside resolution of creditors' meeting and to terminate deed of company arrangement: Whether Administrators' Report was misleading](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#065) [6.6 Remedying the failure to lodge a cleansing notice on time](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#066) [6.7 Extension of time for calling and holding a general meeting requested by members](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#067)[6.8 Director services contracts and removal from office by shareholders of listed companies](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#068) [6.9 No act of default necessary: Appointing receivers to realise the assets of a debenture trust](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#069)[6.10 Where the appointment of an administrator and liquidator is of no effect](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#610)[6.11 Decision to grant relief and wind up a company after unauthorised payments and property transactions](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#611) [6.12 Consideration of the just and equitable ground for winding up a company under section 461(1)(k) of the Corporations Act](http://www.law.unimelb.edu.au/bulletins/180-August-2012.html#612)   |

|  |  |  |  |
| --- | --- | --- | --- |
|

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

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |
| --- |
| **1.1** **Release of final tranche of the Personal Liability for Corporate Fault Reform Bill**On 14 August 2012, the Government announced the release of the third and final tranche of the Commonwealth's Personal Liability for Corporate Fault Reform Bill 2012 for public comment.The release follows circulation of the [first tranche](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Personal-liability-for-Corporate-Fault-Reform-Bill-2012%22%20%5Ct%20%22_new) of the Bill for exposure on 27 January 2012, and the [second tranche](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Personal-Liability-for-Corporate-Fault-Reform-Bill-2012-Tranche-2%22%20%5Ct%20%22_new) on 1 June 2012, which considered Treasury-portfolio non-tax legislation and the remaining Commonwealth non-tax legislation respectively. This third tranche consists of amendments to Commonwealth tax legislation.All Commonwealth legislation has now been assessed against the reform objectives and principles agreed to by the Council of Australian Governments (COAG), and the changes identified in the three tranches of the draft Bill will bring Commonwealth legislation in line with these principles.The reforms released for comment will amend several provisions which apply personal criminal liability for corporate fault in Commonwealth taxation legislation. The final (consolidated) Bill will comprise all proposed amendments to Commonwealth legislation, incorporating the proposed amendments from all three exposure draft tranches.The third tranche of the Personal Liability for Corporate Fault Reform Bill 2012 is available on the [Treasury website](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Personal-Liability-for-Corporate-Fault-Reform-Bill-Tranche-3%22%20%5Ct%20%22_new). etailed Contents**1.2** **Government releases framework for regulatory reform of cross-border FMIs**On 27 July 2012, the Government released a framework paper titled 'Ensuring Appropriate Influence for Australian Regulators over Cross-border Clearing and Settlement Facilities'.In October 2011, the Council of Financial Regulators (the Council) consulted on a broad package of reforms to the regulatory framework for financial market infrastructures (FMIs). The Council subsequently wrote to the Treasurer and Deputy Prime Minister outlining its final recommendations. The Deputy Prime Minister released the Council's letter in March 2012 along with an invitation for further stakeholder comment on implementation of the final framework.Among its proposed reforms, the Council recommended legislative change to underpin the imposition of graduated 'location requirements'. These may be more broadly defined as measures to be taken by the Reserve Bank of Australia (RBA) and the Australian Securities and Investments Commission (ASIC) to ensure they retain sufficient regulatory influence over cross-border FMIs that operate in Australia. Many of these measures could be implemented using existing powers under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), although Treasury is considering legislative change to strengthen these powers. The purpose of the paper is to elaborate on a framework within which such measures could be taken with respect to clearing and settlement facilities. Forthcoming consultations on revisions to the RBA's Financial Stability Standards and ASIC's Regulatory Guide 211 'Clearing and settlement facilities: Australian and overseas operators' will provide an opportunity for stakeholder feedback on use of these agencies' existing powers to implement this framework.The paper is available on the [Treasury website](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/~/media/Treasury/Consultations%20and%20Reviews/2012/cross%20border%20clearing/key%20documents/pdf/cross-border-provision.ashx%22%20%5Ct%20%22_new).etailed Contents**1.3** **APRA releases Discussion Paper, draft Prudential Standards and draft Reporting Standards on implementation of Basel III capital reforms: counterparty credit risk and other measures**On 10 August 2012, the Australian Prudential Regulation Authority (APRA) released for consultation a Discussion Paper, draft Prudential Standards and draft Reporting Standards outlining its proposed implementation of the Basel III counterparty credit risk measures and other capital amendments to implement the Basel III capital reforms. The discussion paper outlines proposals by APRA to strengthen the counterparty credit risk capital framework for authorised deposit-taking institutions (ADIs) in Australia. These proposals will allow for full implementation of the reforms announced by the Basel Committee on Banking Supervision in December 2010 to strengthen global capital rules so as to promote a more resilient global banking system. These reforms were set out in 'Basel III: A global regulatory framework for more resilient banks and banking systems' and are known as 'Basel III'.Since December 2010, the Basel Committee has made further refinements to its counterparty credit risk requirements, the latest being the interim rules set out in 'Capital requirements for bank exposures to central counterparties', released on 25 July 2012. The counterparty credit risk proposals set out in APRA's paper also reflect a commitment by G-20 countries (of which Australia is a member) to undertake significant reforms to the functioning of over-the-counter (OTC) derivatives markets, including the commitment to provide capital incentives to move OTC derivative contracts to central counterparties and increase capital requirements for uncleared transactions. As foreshadowed in its September 2011 discussion paper 'Implementing Basel III capital reforms in Australia' and its March 2012 response to submissions, and as outlined in this discussion paper, APRA is also releasing for public consultation draft prudential and reporting standards incorporating other measures to implement the Basel III capital reforms. APRA has also taken the opportunity to clarify some anomalies in these standards that are unrelated to the Basel III reforms.Copies of the package are available on the [APRA website](http://www.apra.gov.au/adi/PrudentialFramework/Pages/Basel-III-Counterparty-Credit-Risk-and-other-measures-August-2012.aspx%22%20%5Ct%20%22_new).etailed Contents**1.4** **CAMAC releases report on managed investment schemes**On 7 August 2012, the Corporations and Markets Advisory Committee (CAMAC) released a report titled 'Managed Investment Schemes'. The report is in response to a request from the Government for advice on various matters concerning the regulation of managed investment schemes ('schemes') under Chapter 5C of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), following the failure in recent years of a number of high profile schemes, particularly in the agribusiness sector. CAMAC has considered these matters within the broader context of significant developments that have occurred with the use of schemes in the decade since the current legislation was introduced, in particular the greater use of contract-based 'common enterprise' entrepreneurial schemes (such as horticultural or forestry schemes) alongside more traditional trust-based 'pooled' investment schemes (such as cash management trusts or property funds). Also, it has become more commonplace for responsible entities (REs) (who manage schemes) to operate a number of schemes or to have other business operations of their own (multi-function REs). This contrasts with REs whose only function is to operate one scheme (sole-function REs).  These developments have raised complex issues concerning the adequacy of the current legal framework, both for the regulation of on-going schemes as well as for schemes or their REs that experience financial stress.  In essence, CAMAC recommends:* a prohibition on the creation of new common enterprise schemes;
* a new regulatory structure for the operation of schemes, described as the Separate Legal Entity Proposal (SLE Proposal);
* a requirement that new schemes be operated only by sole function REs (unnecessary if the SLE Proposal is introduced); and
* a series of other reforms, including: - each scheme be required to have a definitive register of scheme agreements and a definitive register of scheme property; - various ways to overcome the disincentives for an entity to act as a temporary responsible entity;- facilitative provisions to permit a financially stressed scheme to be placed in voluntary administration; and - a liquidation procedure for insolvent schemes.

Further information is available on the [CAMAC website](http://www.camac.gov.au/camac/camac.nsf/byHeadline/Whats%2BNewManaged%2BInvestment%2BSchemes%2BReport%2BMedia%2BRelease%2BAug%2B2012?openDocument" \t "_new).etailed Contents**1.5** **MAS implements enhanced regulatory regime for fund management companies**On 6 August 2012, the Monetary Authority of Singapore (MAS) announced the implementation of an enhanced regulatory regime for fund management companies (FMCs) from 7 August 2012. Amendments have been made to the Securities and Futures (Licensing and Conduct of Business) Regulations, Securities and Futures (Financial and Margin Requirements) Regulations and Financial Advisers Regulations.Under the enhanced regulatory regime, all FMCs will have to meet enhanced business conduct and capital requirements. These include rules requiring independent custody and valuation of investor assets, as well as requirements for FMCs to undergo independent annual audits by external auditors and having an adequate risk management framework commensurate with the type and size of investments managed by the FMCs. A new category of Registered Fund Management Companies (RFMC) will replace the current Exempt Fund Manager (EFM) regime. RFMCs may serve up to 30 Qualified Investors and manage up to S$250 million in assets under management. All other FMCs will have to apply for a license.etailed Contents**1.6** **UK Treasury consults on financial sector resolution proposals**On 1 August 2012, UK's Treasury released a consultation paper titled 'Financial sector resolution: broadening the regime'. The paper sets out the Government's proposals regarding the mechanisms available to deal with the failure of systematically important investment firms and financial holding companies, 'central counterparties' that place themselves in between two parties to certain financial transactions, other financial market infrastructures (such as payments systems), and insurers. The consultation paper is available on the [UK Treasury website](http://www.hm-treasury.gov.uk/d/condoc_financial_sector_resolution_broadening_regime.pdf%22%20%5Ct%20%22_new).etailed Contents**1.7** **ASX releases report on ASX-listed companies' adoption of gender diversity recommendations**On 31 July 2012, the Australian Securities Exchange released a report prepared by KPMG, examining the adoption by a sample of 211 ASX-listed companies of the ASX Corporate Governance Council's recommendations relating to gender diversity.  The Council's diversity recommendations came into effect for financial years beginning on or after 1 January 2011. The ASX Education and Research Program commissioned KPMG to conduct an independent analysis of the diversity disclosures made by listed companies with a 31 December 2011 year end, being the first group of companies required toreport against the diversity recommendations. The Council's recommendations provide an industry-wide reporting framework for corporate governance. They are not mandatory, but ASX requires listed companies to disclose in their annual report the extent to which they have followed the recommendations during the relevant reporting period. Where companies have not followed all of the recommendations, they must provide an explanation as to why ('if not, why not' reporting). The report, titled 'ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of 31 December 2011 year end disclosures', includes statistics on the adoption of the Council's diversity recommendations and an overview of the types of activities undertaken by listed companies in the pursuit of diversity within their organizations. The report also provides an analysis of diversity policies, measureable objectives within those policies, and findings on gender diversity including board selection processes and remuneration reviews. From a sample of 211 ASX-listed companies, some of the report's findings include:* 98% (206 companies) reported they had established a diversity policy or had provided an explanation as to why not;
* 61% (129 companies) disclosed they had established a diversity policy. Of these 129 companies, 88% (114 companies) disclosed that their policies covered more than gender (for example, age, ethnicity, cultural background);
* there is a direct correlation between the size of a company and the adoption of a diversity policy;
* of the 129 companies with disclosed diversity policies, 59% (76 companies) reported they have established measureable objectives for obtaining gender diversity;
* the majority of companies disclosed statistics on women including senior level and board representation; and
* a common reason given by those companies not adopting the diversity recommendations was their 'size and stage'.

The report is available on the [ASX website](http://www.asxgroup.com.au/media/asx_diversity_report.pdf%22%20%5Ct%20%22_new).etailed Contents**1.8** **China releases first integrity rules for capital market regulation**On 31 July 2012, the China Securities Regulatory Commission (CSRC) released the Interim Measures on the Supervision and Management of 'Integrity of Securities and Futures Market' (the 'Measures'). Taking effect from September 2012, the Measures are not only the first integrity rules for China's capital market but also an important step by the CSRC to enhance public integrity information management and encourage integrity-based market behaviour in the course of developing a public and market integrity system.  According to the CSRC, the Measures comprise a major legal regime for the development of integrity in the capital market. It marks the official inclusion of integrity into the scope of regulation and creates an integrity supervision and management system that includes the following components: the definition and categorization of integrity information, public inquiry of integrity information, integrity supervision and management by regulatory authorities, integrity-based self-restraint for market institutions, punishment for and control of dishonest behaviour, as well as incentives and guidance to enhance integrity.  Further information is available on the [CSRC website](http://www.csrc.gov.cn/pub/csrc_en/newsfacts/release/201208/t20120803_213480.htm%22%20%5Ct%20%22_new).etailed Contents**1.9** **BIS releases working paper on public recapitalisations and bank risk**On 31 July 2012, the Bank for International Settlements (BIS) released a working paper titled 'Public recapitalisations and bank risk: evidence from loan spreads and leverage'.  A number of countries' authorities put in place bank rescue packages using public funds in response to the global financial crisis. The paper considers whether these public recapitalisations were followed by a reduction of risk in banks' loan books. The balance sheets and syndicated loan portfolios of 87 large internationally active banks, approximately half of which were rescued during the crisis, are analysed for the period 2000-10. Evidence is presented that banks that were later rescued took on higher risk in their loan books before the crisis than banks that were not, especially in their home markets.  Although the riskiness of loan signings started diminishing across the board in 2009, the paper does not find consistent evidence that rescued banks reduced their risk relatively more than non-rescued banks during the crisis. The working paper is available on the [BIS website](http://www.bis.org/publ/work383.pdf%22%20%5Ct%20%22_new).etailed Contents**1.10** **CPSS and IOSCO publish consultative report on FMIs**On 31 July 2012, the Committee on Payment and Settlement Systems (CPSS) and the International Organization of Securities Commissions (IOSCO) released for public comment a consultative report titled 'Recovery and resolution of financial market infrastructures'.  Financial market infrastructures (FMIs) play an essential role in the global financial system. The disorderly failure of an FMI can lead to severe systemic disruption if it causes markets to cease to operate effectively. Accordingly, all types of FMIs should generally be subject to regimes and strategies for recovery and resolution.  The CPSS-IOSCO 'Principles for financial market infrastructures' (Principles), published in April 2012, require that FMIs have effective strategies, rules and procedures to enable them to recover from financial stresses. The Financial Stability Board's 'Key Attributes of Effective Resolution Regimes for Financial Institutions' (Key Attributes), published in 2011, further require that jurisdictions establish resolution regimes to allow for the resolution of a financial institution in circumstances where recovery is no longer feasible. An effective resolution regime must enable resolution without systemic disruption or exposing the taxpayer to loss. To achieve this in the context of FMIs, relevant authorities must have powers to maintain an FMI's critical services.  The purpose of the consultative report is to outline the issues that should be taken into account for different types of FMIs when putting in place effective recovery plans and resolution regimes that are consistent with the Principles and Key Attributes. The report also seeks consultees' views on a number of technical points related to these issues. The report is available on the [BIS website](http://www.bis.org/publ/cpss103.pdf%22%20%5Ct%20%22_new).etailed Contents**1.11** **US Federal Reserve Board announces final rule establishing risk-management standards for FMUs**On 30 July 2012, the US Federal Reserve Board announced the approval of a final rule establishing risk-management standards for certain financial market utilities (FMUs) designated as systemically important by the Financial Stability Oversight Council. The final rule also establishes requirements for advance notice of proposed material changes to the rules, procedures, or operations of certain designated FMUs.  FMUs, such as payment systems, central securities depositories, and central counterparties, provide the infrastructure to clear and settle payments and other financial transactions.The final rule (Regulation HH) implements two provisions of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). It establishes risk-management standards governing the operations related to the payment, clearing, and settlement activities of designated FMUs, except those registered as clearing agencies with the Securities and Exchange Commission or as derivatives clearing organizations with the Commodity Futures Trading Commission. The risk-management standards are based on the recognized international standards developed by the Committee on Payment and Settlement Systems (CPSS) and the Technical Committee of the International Organization of Securities Commissions (IOSCO) that were in existence at the time of the proposed rulemaking, which were incorporated previously into the Board's Policy on Payment System Risk.The final rule also establishes requirements for advance notice of proposed material changes to the rules, procedures, or operations of a designated FMU for which the Board is the supervisory agency under Title VIII of the Dodd-Frank Act. The advance notice requirements set the threshold above which a proposed change would be considered material and thus require an advance notice to the Board, and also include provisions on the length of the review period. The final rule will be effective on 14 September 2012.Further information is available on the [Federal Reserve Board website](http://www.federalreserve.gov/newsevents/press/bcreg/20120730a.htm%22%20%5Ct%20%22_new).etailed Contents**1.12** **CSRC releases measures for securities investment by foreign institutional investors**On 27 July 2012, the China Securities Regulatory Commission (CSRC) released 'Provisions on Relevant Matters Concerning the Implementation of Measures for the Administration of Securities Investment within the Borders of China by Qualified Foreign Institutional Investors' (QFIIs) (the 'Provisions').In view of the need to open China's capital market to overseas long-term investors, the Provisions aim to reduce QFII eligibility requirements, streamline review and approval procedures, and relax restrictions on the establishment of securities accounts by QFIIs, their investment scope and shareholding ratio. Compared with the previously released 'Circular on Relevant Matters Concerning the Measures for the Administration of Securities Investment within the Borders of China by Qualified Foreign Institutional Investors', the Provisions have made the following revisions: * encouraging the entry of overseas long-term capital by reducing the eligibility requirements for QFIIs;
* increasing operational convenience by permitting QFIIs to select multiple brokers;
* expanding the scope of investment by permitting QFIIs to invest in the inter-bank bond market and private placement bonds issued by small and medium enterprises (SMEs); and
* increasing the shareholding ratio limit of all overseas investors from 20% to 30%.

The Provisions have also expressly recognized the method of electronic submission of QFII eligibility application documents and simplified the requirements for eligibility application documents.Further information is available on the [CSRC website](http://www.csrc.gov.cn/pub/csrc_en/newsfacts/release/201207/t20120731_213260.htm%22%20%5Ct%20%22_new).etailed Contents**1.13** **FSA consults on revised proportionality guidance for remuneration**On 26 July 2012, UK's Financial Services Authority released for consultation revised guidance on proportionality in respect of the Remuneration Code (SYSC 19A) and Pillar 3 disclosures on remuneration (BIPRU 11). The FSA proposes to amend the 'General Guidance on Proportionality', which sets out FSA's proportionate approach to implementing the Remuneration Code and the Pillar 3 remuneration disclosure rules. The aim is to further clarify how firms may comply with the Code and disclosure rules in a manner that takes account of their size, internal organisation and the nature, scope and complexity of their activities.The proposed new framework would replace the current four-tier structure (based on capital resources) with three new 'levels' (based on total assets).The proposed approach would allow the FSA to focus its resources on the most significant firms who pose risks to financial stability. The revised guidance is available on the [FSA website](http://www.fsa.gov.uk/static/pubs/guidance/gc12-10.pdf%22%20%5Ct%20%22_new).etailed Contents**1.14** **European Commission releases report on the Takeover Directive**On 27 July 2012, the European Commission released its report on the operation of the Takeover Directive (2004/25/EC). The report draws upon the results of an external study which considered, amongst other things, the implementation of the Directive.  The Takeover Bids Directive contains minimum guidelines for the conduct of takeover bids, including disclosure, involving securities with voting rights of companies governed by the laws of Member states, where all or some of these shares are admitted to trading on a regulated market. The objectives pursued by the Takeover Bids Directive are important to financial markets and stakeholders of listed companies. More specifically, the objectives of theDirective are:* Legal certainty on the conduct of takeover bids and community-wide clarity and transparency in respect of takeover bids;
* Protection of the interests of shareholders, in particular minority shareholders, and of employees and other stakeholders through transparency and informationrights, when a company is subject to a takeover bid or change of control;
* Facilitation of takeover bids, through reinforcement of the freedom to deal in and vote on securities of companies and prevention of operations which couldfrustrate a bid; and
* Reinforcing the single market, by enabling free movement of capital throughout the EU.

The Takeover Bids Directive is based on general principles, which should be complied with by Member States for the purpose of transposing the Directive. Theprinciples include:* Equal treatment of shareholders;
* Protection of minority shareholders in case of change of control;
* Prohibition of market manipulation or abuse; and
* Shareholders must have sufficient time and information to make a properlyinformed decision on the bid.

Any exemptions made by Member States to the rules of the Directive must still comply with these principles. The report describes the impact of the Directive and how it has been complied with; identifies the main issues emerging from the application of the Directive, and draws a number of conclusions. The Commission has concluded that, in general, the regime created by the Directive is working satisfactorily. Amendments are, however, suggested in order to improve legal certainty and the effective exercise of minority shareholder rights. It is, for example, suggested that the concept of 'acting in concert' could be further clarified and that a further investigation is needed to consider how minority shareholders are protected within the Member States where there has been a derogation in respect of the mandatory bid rule.  The report is available on the [European Commission's website](http://ec.europa.eu/internal_market/company/docs/takeoverbids/COM2012_347_en.pdf%22%20%5Ct%20%22_new).etailed Contents**1.15** **European Commission launches consultation on a future framework for investment funds**On 26 July 2012, the European Commission launched a consultation on issues arising in the area of investment funds. The consultation focuses on:* the issue of money market funds and how such funds should be regulated in future;
* the fund industry's involvement in securities lending and repurchase (repo) arrangements; and
* the fund industry's exposure to certain OTC derivatives that, in future, will be subject to central clearing and the fund industry's approach to investors' redemptions.

The consultation builds on and is complementary to the European Securities and Markets Authority's (ESMA) guidelines on ETF (exchange-traded funds) and other UCITS issues of 25 July 2012. The consultation raises a series of issues and policy options aimed at maintaining investor confidence in money market funds. Issues at the centre of the consultation are the role of money market funds in the management of liquidity for investors, their engagement in the securities lending and repo markets as well as their systemic involvement in the overall financial marketplace.Issues such as the various methods for calculating the net asset value (NAV) for money market funds are also addressed.An important focus for the consultation is also a UCITS fund manager's employment of so-called efficient portfolio management (EPM) techniques. The use of EPM techniques is widespread and, in the industry's view, they are an essential tool for generating additional revenue for the fund and its investors. EPM includes securities lending and repurchase transactions as well as the management of collateral that is received or granted to secure these transactions. The above-mentioned ESMA guidelines and the Commission's consultation on shadow banking has already raised the general issues that arise in this context and the current consultation aims to deepen the Commission's insight into the potential systemic and investor implications raised by a fund's use of EPM techniques. Finally, the consultation raises the more long-term policy challenge that arises in the area of investment funds: how to create a European investment culture where retail investors take a longer-term and strategic view when placing their savings with the providers of fund products and have access to products suited to this. This would also include exploring ways for UCITS to participate in social businesses.Further information is available on the [European Commission's website](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/853&format=HTML&aged=0&language=en&guiLanguage=en" \t "_new).etailed Contents**1.16** **Basel Committee issues interim rules for the capitalization of bank exposures to central counterparties**On 25 July 2012, the Basel Committee issued interim rules for the [capitalization of bank exposures to central counterparties](http://www.bis.org/publ/bcbs227.pdf%22%20%5Ct%20%22_new) (CCPs). The Committee's framework for capitalizing exposures to CCPs builds on the new CPSS-IOSCO Principles for Financial Market Infrastructures (PFMIs), which are designed to enhance the robustness of the essential infrastructure - including CCPs - supporting global financial markets. Where a CCP is supervised in a manner consistent with these principles, exposures to such CCPs will receive a preferential capital treatment. In particular, trade exposures will receive a nominal risk-weight of 2%. In addition, the interim rules allow banks to choose from one of two approaches for determining the capital required for exposures to default funds: (i)   a risk sensitive approach on which the Committee has consulted twice over the past years, or(ii)  a simplified method under which default fund exposures will be subject to a 1250% risk weight subject to an overall cap based on the volume of a bank's trade exposures. These rules also include provisions on indirect clearing that allow clients to benefit from the preferential treatment for central clearing. The interim rules allow for full implementation of Basel III, while still recognizing that additional work is needed to develop an improved capital framework. Further work in this area is planned for 2013.The interim rules are available on the [BIS website](http://www.bis.org/publ/bcbs227.pdf%22%20%5Ct%20%22_new).etailed Contents**1.17** **Basel Committee releases final rule on regulatory treatment of valuation adjustments to derivative liabilities**On 25 July 2012, the Basel Committee on Banking Supervision released a revised [paragraph 75](http://www.bis.org/publ/bcbs189.pdf%22%20%5Cl%20%22page%3D31%22%20%5Ct%20%22_new) of Basel III in regard to its application to derivatives. The Basel III rule in paragraph 75 is designed to ensure that an increase in the credit risk of a bank does not, via a reduction in the value of its liabilities, lead to an increase in its common equity. Further information is available on the [BIS website](http://www.bis.org/press/p120725b.htm%22%20%5Ct%20%22_new).etailed Contents**1.18** **EU releases amendments on insider dealing and benchmark manipulation** On 25 July 2012, the European Commission released amendments to the proposals published in October 2011 for a Regulation and Directive on insider dealing and market manipulation. The amendments explicitly prohibit the manipulation of benchmarks, making such manipulation a criminal offence. The Commission has adopted two amended proposals. The first is an amended proposal introducing the following changes to the proposal for a Regulation on insider dealing and market manipulation, adopted by the Commission on 20 October 2011:* Amendment to the scope of the proposed regulation to include benchmarks;
* Amendment to the definitions to include a definition of benchmarks, based on an expanded version of the definition used in the proposal for a Regulation on Markets in Financial Instruments (MiFIR); benchmarks such as interest rate and commodities benchmarks are included;
* Amendment to the definition of the offence of market manipulation (article 8) to capture manipulation of benchmarks themselves and attempts at such manipulation; and
* Amendment to the recitals to justify the extension of the scope and the market manipulation offence to benchmarks.

The Commission adopted at the same time an amended proposal introducing the following amendments to the proposal for a Directive on criminal sanctions for insider dealing and market manipulation:* Amendment to the definitions to include a definition of benchmarks;Amendment of the criminal offence of market manipulation to capture manipulation of benchmarks themselves; and
* Amendment of the criminal offence of "inciting, aiding and abetting and attempt" to include these behaviours in relation to the manipulation of benchmarks.

The Commission is not proposing to set the minimum types and levels of criminal sanctions at this stage, but wants to require each Member State to provide for criminal sanctions in its national laws to cover the manipulation of benchmarks. In its original proposal for a Directive, the Commission proposed to undertake a review on the appropriateness of introducing common minimum rules on types and levels of criminal sanctions within four years of the Directive's entry into force.  Further information on the amendment to the [Directive](http://ec.europa.eu/internal_market/securities/docs/abuse/20120725_directive_proposal_en.pdf%22%20%5Ct%20%22_new) and to the [Regulation](http://ec.europa.eu/internal_market/securities/docs/abuse/20120725_regulation_proposal_en.pdf%22%20%5Ct%20%22_new) is available on the European Commission website.etailed Contents**1.19** **EIOPA publishes report on the role of Insurance Guarantee Schemes in the winding-up procedures of insolvent undertakings in the EU/EEA**On 24 July 2012, the European Insurance and Occupational Pensions Authority (EIOPA) released a report on 'The role of insurance guarantee schemes (IGS) in the winding-up procedures of insolvent insurance undertakings in the EU/EEA'.The report has been prepared as part of EIOPA's input to the European Commission's policy making on IGS and as specified in the mandate of the Task Force on IGS. The purpose of the report is to summarise the findings of a mapping exercise on the role of the IGS in the winding-up procedures of insolvent insurance undertakings across the EU/EEA. For the purpose of the report, an IGS is a body that provides last-resort protection to consumers when insurance undertakings are unable to fulfill their contractual commitments. Motor insurance guarantee schemes are covered in this report only to the extent that they provide cover in such winding-up situations. An IGS may have a wide ranging scope, covering life, non-life or both types of insurance contracts. In the majority of Member States' jurisdictions, only certain classes of insurance contracts are covered. The findings of the report highlight the lack of harmonization in a number of areas such as:* which authority takes the decision to intervene when an insurance undertaking becomes insolvent;
* the ability to provide for portfolio transfer;
* a lack of pre-warning system when an insurance undertaking is in difficulty; and
* the role of the supervisory authority when an insurance undertaking becomes insolvent.

The report is available on the [EIOPA website](https://eiopa.europa.eu/fileadmin/tx_dam/files/publications/reports/Report_on_the_Role_of_Insurance_Guarantee_Schemes_in_the_Winding-Up_Procedures_of_Insolvent_Undertakings_in_the_EU-EEA.pdf%22%20%5Ct%20%22_new).etailed Contents**1.20** **Women on boards: UK code of conduct one year on**On 24 July 2012, the UK's Department for Business, Innovation and Skills (BIS) released new official statistics showing that the number of women in the boardrooms of the UK's top companies has increased in the past year. July 2012 sees the first year anniversary of the voluntary code of conduct for UK executive search firms. The code, developed by leading members of the industry in direct response to Lord Davies' review into 'Women on Boards', sets out seven key principles of best practice for executive search firms to abide by throughout the recruitment process. To date 34 leading Executive Search Firms in the UK have signed up to the Code of Conduct. Since Lord Davies' review and subsequent report released in February 2011, the number of women appointed to the boards of the UK's top companies has reached unprecedented levels, with women now making up 16.7% of FTSE 100, and 10.9% of FTSE 250 boards, up from 12.5% and 7.8% respectively in 2010. Since March 2012, women have made up 44% of newly appointed FTSE 100 board directors and 40% of those in the FTSE 250.  Further information on women on boards and the Lord Davies review is available on the [BIS website](http://www.bis.gov.uk/policies/business-law/corporate-governance/women-on-boards%22%20%5Ct%20%22_new).etailed Contents**1.21** **CFTC approves regulations to phase in compliance with clearing requirements of the Dodd-Frank Act**On 24 July 2012, the US Commodity Futures Trading Commission (CFTC) announced its approval of final regulations that establish a schedule to phase in compliance with new clearing requirements under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).  The final rule will phase in the clearing requirement based on the type of market participant entering into swaps subject to the clearing requirement. The compliance schedule does not prohibit any type of market participant from voluntarily complying with the clearing requirement sooner than the compliance deadline. Moreover, the compliance schedule will be used at the Commission's discretion when it believes that phasing is appropriate and needed by market participants. The Dodd-Frank Act amended the Commodity Exchange Act (CEA) to prevent any person from engaging in a swap that is required to be cleared unless that person submits the swap for clearing. The final regulations will phase in the clearing requirement based on the type of market participant entering into swaps subject to the clearing requirement. The compliance schedule identifies three categories of market participants and allots a compliance timeframe for each. Further information is available on the [CFTC website](http://www.cftc.gov/PressRoom/PressReleases/pr6312-12%22%20%5Ct%20%22_new).etailed Contents**1.22** **The World Federation of Exchanges releases first half 2012 market highlights**On 24 July 2012, the World Federation of Exchanges (WFE) published the first half 2012 market highlights. The total market capitalization of WFE exchanges increased by 5.3% in the first half of 2012, while global trading volumes continued their decline. The rise in market capitalization was mainly attributed to markets in the Americas and Asia-Pacific regions. In the first half of 2012, global equity market capitalization rebounded 5.3% from year end 2011, but still remains below the level from one year ago. The market capitalization in the Europe-Africa-Middle East region was flat during the sovereign debt crisis in Europe and appreciation of USD. The Americas and Asia-Pacific regions increased 9.1% and 4.8% respectively. Despite the higher market capitalization, the total value of share trading of WFE member exchanges continued to decrease significantly falling 14% in the first half of 2012 after an earlier drop of 4% in second half-year of 2011. The most notable decrease in share trading value was observed in the Americas region (-20%), where WFE exchanges account for only 49% of equities turnover according to Thomson Reuters Equity Market Share Reporter (20 July 2012). The decrease in trading volumes in the Americas region was further pronounced by a 25% drop in number of trades. Further information is available on the [WFE website](http://www.world-exchanges.org/node/3971%22%20%5Ct%20%22_new).etailed Contents**1.23** **Recent US corporate governance trends**In July 2012, Deloitte published a summary of recent US corporate governance trends. A number of recent US corporate governance trends are addressed, including board composition, leadership structure, political contributions, boardroom diversity and shareholder proposals. A summary of recent corporate governance trends includes: **(a) Shareholder proposals** Although the number of shareholder proposals has been relatively flat (1.5 proposals per company in 2012 compared to 1.4 in 2011), these is a change in the types of proposals, specifically those addressing political contributions. Some of the more significant differences include: shareholders proposals related to political spending or lobbying increased by 21% and executive compensation proposals decreased by 15%. **(b) Board composition**  There continues to be a significant focus on the topic of board composition. With increased emphasis on director qualifications and ongoing debate about proxy access, more companies are using a board skills matrix to confirm they have the right skills and to determine what type of skills and experience they will need to fill gaps.  According to the '2011 Board Practices Report: Design, Composition, and Function', a publication from the Deloitte Center for Corporate Governance and the Society of Corporate Secretaries and Governance Professionals, more boards were composed of directors with skills in operations (36%), followed by international business exposure (32%), mergers and acquisitions (27%), and lastly, industry knowledge (27%). Risk management and corporate governance skills totaled 26% and 24%, respectively.  From an experience perspective, the most common director qualifications was outside public-company board service (44%); other career and work experience included strategic planning (43%), outside nonprofit board service (42%), company chief executive officer (37%), and audit committee member (32%).  According to a survey of last year's proxy statements of 172 public companies, 20% had four to six independent directors, 41% had seven to nine, and 33% had ten to twelve on their boards. **(c) Leadership structure**  Board leadership structure continued to be a hot topic in the 2012 US proxy season. The issue of separating the roles of the chief executive officer and the board chairman continues to receive significant attention. According to ProxyMonitor.org, a website sponsored by the Manhattan Institute's Center for Legal Policy, at the end of May 2012 , board leadership structure proposals were in the top four among all types of proposals. In addition, the proxy season snapshot as of 1 July 2012, as reported by Institutional Shareholder Services (ISS), a provider of corporate governance solutions to the global financial community, showed that 48 board leadership proposals had been put forth with an approximate 36 percent support rate. This was up from 26 proposals in the prior year, although the support rate remained relatively constant. The majority (63%) of large-cap companies combine the CEO/chairman role, and 44% of small- and mid-cap companies follow the same practice.  Large-cap companies with an independent lead or presiding director totaled 68%; mid-cap and small-cap companies totaled 57% and 41%, respectively. Since 2008, the numbers have increased for large-cap and small-cap companies. In 2008, 41% of large-cap companies surveyed had independent or presiding directors, as opposed to 29% of small-cap companies. **(d) Other significant corporate governance trends**  Other trends include boardroom diversity, political contributions, executive compensation, orporate social responsibility, sustainability, whistleblower programs, and special meetings.  With regard to corporate social responsibility and sustainability, the '2011 Board Practices Report' survey revealed that 57% of large-cap companies and 10% of mid-cap companies surveyed received a shareholder proposal related to corporate social responsibility for 2011. Further information is available on the [Deloitte website](http://www.corpgov.deloitte.com/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/USEng/Documents/Deloitte%20Periodicals/Hot%20Topics/2012%20Proxy%20season_Deloitte%20Hot%20Topics_July%202012.pdf%22%20%5Ct%20%22_new).etailed Contents**1.24** **Research study on employee participation in employee share plans**The latest research study of the Centre for Corporate Law and Securities Regulation at the University of Melbourne has been published. It is titled 'Employee Participation in Employee Share Ownership Plans: The Law, Company Objectives and Employee Motives'. The authors are Michelle Brown, Rowan Minson, Ann O'Connell and Ian Ramsay. Although Employee Share Ownership Plans ('ESOPs') are widely used in Australian companies, little is known about why employees participate in these plans. Yet understanding employee motivations for share ownership has significant implications for corporate governance, human resource practice and public policy. The authors first review the history of ESOP regulation in Australia in order to identify Federal Government policy rationales for ESOPs. They then identify employee motives for participating in employee share plans. Two hypotheses, using data from both employee shareholders and non shareholders in Australia are investigated: that employees participate because they are motivated by financial considerations or they participate because they believe share ownership is a way of increasing their involvement in decision-making at work. The authors then compare employee motivations for participating in ESOPs, with the policy rationales advanced by the government for its support of ESOPs. They find, based on this comparison, that there is a mismatch between the employee motivations and the government's policy.  The article is available on the [Social Science Research Network](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2095800" \t "_new).etailed Contents**1.25** **Centre for Corporate Law email notification list for seminars and conferences**The Centre for Corporate Law and Securities Regulation at the University of Melbourne has an active seminar and conference program. Information about previous seminars and conferences is available [here.](http://cclsr.law.unimelb.edu.au/go/centre-activities/past-seminars/index.cfm%22%20%5Ct%20%22_new) If you would like to receive an email notification about forthcoming seminars and conferences please register [here.](http://cclsr.law.unimelb.edu.au/go/subscribe-to-cclsr-news/index.cfm%22%20%5Ct%20%22_new)etailed Contents |

 |

|  |  |  |  |
| --- | --- | --- | --- |
|

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

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |
| --- |
| **2.1** **Consultation on requirement to manage conflicts of interest in litigation schemes and proof of debt schemes** On 17 August 2012, ASIC released a consultation paper outlining its proposals on how it believes funders, insolvency practitioners and lawyers can satisfy the new obligation to have adequate arrangements for managing conflicts of interest that may arise in relation to a litigation scheme or a proof of debt scheme. The obligation was introduced by the [Corporations Amendment Regulation 2012 (No. 6) (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=134183" \t "_default). The new regulation exempts litigation schemes and proof of debt schemes from the definition of 'managed investment scheme' in section 9 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Corporations Act). In order to clarify that these arrangements are not 'financial products' as defined in Chapter 7 of the Corporations Act, the regulation provides exemptions from the licensing, conduct and disclosure requirements. The proposals in Consultation Paper 185 'Litigation schemes and proof of debt schemes: Managing conflicts of interest' (CP 185) are intended to apply to funders, lawyers and insolvency practitioners involved in schemes for making a claim which may be pursued by participating in, conducting and funding legal proceedings or proving in the winding up of an insolvent company. ASIC expects that each funder and lawyer relying on the exemptions in the regulations will be responsible for determining their own arrangements to manage conflicts of interest but must be able to demonstrate that they have adequate arrangements.Under the proposals, a funder and lawyer relying on the exemptions in the regulations should have written processes and procedures to manage conflicts of interest that, as a minimum, address the following: * effective disclosure of conflicts of interest to members of the scheme;
* controlling situations where interests may diverge or conflict (including identifying divergent interests, assessing and evaluating those interests and implementing an appropriate response);
* recruitment of prospective members (including designating a senior person to oversee recruitment practices and ensure they are not misleading and deceptive);
* the situation where the lawyer acts for both the funder and the members (including ensuring that the members' interests are adequately protected);
* the situation where there is a pre-existing relationship between the funder, lawyers and members (including disclosure of any pre-existing relationship);
* review of the terms of the funding agreement in light of the law on unfair contracts and unconscionability; and
* approval of the terms of settlement of a litigation scheme where proceedings have not been commenced by an independent panel or counsel.

CP 185 is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp185-published-17-August-2012.pdf/%24file/cp185-published-17-August-2012.pdf%22%20%5Ct%20%22_new).etailed Contents**2.2** **Guidance on crowd funding**  On 14 August 2012, ASIC released guidance to promoters of 'crowd funding' to clarify arrangements which may be regulated by ASIC under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Corporations Act) and [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default) (ASIC Act). ASIC has also highlighted some risks for operators of crowd funding websites and people considering participating in crowd funding projects.'Crowd funding' involves the use of the internet and social media to raise funds in support of a specific project or business idea. Project sponsors or pledgers typically receive some reward in return for their funds. In some cases, the reward expected may be of minor value and is merely incidental rather than the purpose of the contribution. ASIC has been monitoring increasing use of crowd funding for investment purposes to identify any arrangements, or aspects of those arrangements, that may be regulated by ASIC.Depending on the particular crowd funding arrangement, ASIC's view is that some types of crowd funding could involve offering or advertising a financial product, providing a financial service or fundraising through securities requiring a complying disclosure document. These activities are regulated by ASIC under the Corporations Act and ASIC Act and may impose legal obligations on operators of crowd funding sites and on people using those sites to raise funds.Along with other factors, depending on the type of 'reward' offered by the project creator to those giving funding, crowd funding could involve a managed investment scheme under Chapter 5C of the Corporations Act, provision of a financial services requiring an Australian financial services (AFS) licence or a fundraising under Chapter 6D of the Corporations Act. Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-196MR%2BASIC%2Bguidance%2Bon%2Bcrowd%2Bfunding?openDocument" \t "_new).etailed Contents**2.3** **Consultation on electronic trading and release of fourth market supervision report** On 13 August 2012, ASIC released proposed rules and guidance on automated trading and released its fourth report on the supervision of Australian financial markets and market participants.**(a) Electronic trading** Consultation Paper 184 'Australian market structure: Draft market integrity rules and guidance on automated trading' proposes draft rules and guidance on participant level controls for automated trading. ASIC foreshadowed this release when it published Consultation Paper 179 'Australian market structure: Draft market integrity rules and guidance' in June 2012.ASIC's proposed rules and guidance include:* draft new market integrity rules requiring direct control over filters and automated controls to suspend orders and/or systems;
* draft rules that revise the process for certifying systems and reviewing changes at least yearly; and
* draft regulatory guidance on automated trading, covering issues consulted on in CP 168, consolidated with updated guidance currently contained in ASX guidance notes. This includes guidance on testing of systems and filters/controls - the ability to manage highly automated trading, and stress testing of order flow.

**(b) Market supervision report** Report 296 'ASIC supervision of markets and participants: January to June 2012' is ASIC's fourth report on the supervision of Australian financial markets and market participants. It identified that during the reporting period: * There were 22,225 trading alerts with 114 matters requiring further consideration during the reporting period. ASIC continues its calibration of alert parameters introduced in October 2011.
* 36 matters were referred for investigation, a significant jump on the previous period (23). These matters involved potential insider trading (13), market manipulation (5), possible breaches of the market integrity rules (15) and of the continuous disclosure obligations (3). Eight of the referrals for possible breaches of the market integrity rules were from ASIC's WholesaleMarkets team, relating to conduct in the ASX 24 market.
* Two people agreed to plead guilty to insider trading and ASIC issued four infringement notices for breaches of the continuous disclosure provisions of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).

**(c) Securities dealers**For the first time, the report includes information on ASIC's reviews of securities dealers - Australian financial services (AFS) licence holders who are not market participants, but sell securities products through a market participant. ASIC found some securities dealers that were not taking adequate steps to ensure their advisers were giving appropriate advice to clients. ASIC also found instances of mis-selling of securities and other financial products as a result of misleading advertising. ASIC proposes to include this information on securities dealers in future reports, separately from market participants.Consultation Papers [CP 184](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp184" \t "_new), [CP 179](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp179" \t "_new) and [CP 168](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp168" \t "_new) and [Report 296](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep296" \t "_new) are available on the ASIC website.etailed Contents**2.4** **Consultation on FOFA reforms** On 9 August 2012, ASIC released consultation papers containing proposed guidance for two aspects of the Future of Financial Advice (FOFA) reforms - scaled advice and the best interests duty.ASIC's proposed guidance on the best interests duty covers the following areas: * acting in the best interests of the client;
* satisfying the 'safe harbour' for the best interests duty - including providing guidance on each element of the safe harbour;
* providing appropriate personal advice; and
* prioritising the interests of the client.

The proposed guidance is in the form of an update to Regulatory Guide 175 'Licensing: Financial product advisers - conduct and disclosure'. ASIC's proposed guidance on scaled advice will apply to all industry sectors, including super, financial planners, and banks and insurers, and includes practical guidance and examples about giving scaled personal advice, as well as practical examples about giving factual information and general advice to clients.ASIC's proposed guidance in this area indicates:* All advice is scaled to some extent - advice is either less complex or more complex along a continuous spectrum (ie there are not two categories of advice 'scaled' and 'holistic').
* In general, the same rules, including the best interests duty, apply to all personal advice, regardless of the scope.
* It is possible to provide less complex advice in a way that is consistent with the best interests duty and the law generally.

[Consultation Papers 182 and 183](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp183" \t "_new) and [Regulatory Guide 175](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg175" \t "_new) are available on the ASIC website. etailed Contents**2.5** **Review of asset consultants**On 9 August 2012, ASIC announced that it had conducted a review to consider the role of asset consultants in the superannuation and managed investments sectors.The review's aim was to increase ASIC's understanding of this sector by considering compliance by participants with the conditions of their Australian financial services (AFS) licences, as well as other financial services laws. The review focused on business models, the associated risks and risk management. The roles that asset consultants play in ensuring compliant behaviour by others in the financial services industry, such as responsible entities and super trustees, was also considered.For this review, 'asset consultants' were defined as entities which provide financial product and investment advice to wholesale clients in return for some financial benefit.ASIC found that while there were no apparent significant or systemic issues of concern warranting an immediate regulatory response, it did identify conflicts of interest present in the business models reviewed which need to be managed appropriately.These conflicts included fee structures based on preferring services and in-house funds as well as other products of related parties of the asset consultant. In some circumstances, asset consultants had to recommend products to multiple clients where capacity to participate in these products might be limited.Regulatory Guide 181 'Licensing: Managing conflicts of interest' provides guidance for controlling, avoiding and disclosing interests in order for asset consultants to comply with their statutory obligation to manage conflicts of interest. ASIC intends to include conflict of interest examples for asset consultants in updates of RG 181 shortly, to provide guidance to the asset consulting industry on these key issues.Significantly, asset consultants communicated a change in thinking post-GFC regarding the allocation of certain asset classes and their diversification. A continuing challenge for the industry was being able to identify growth assets over different time periods and substantially divergent views were presented by the entities which ASIC consulted.Asset consultants also expressed a concern regarding the short term focus of some clients, including superannuation trustees, and encouraged clients to consider the longer term objectives and performance of their portfolios, and avoid being overly concerned with month to month peer surveys. Regulatory Guide 181 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "181" \t "_new). etailed Contents**2.6** **New financial requirements for issuers of over-the-counter derivatives** On 31 July 2012, ASIC released new financial requirements for Australian financial services licensees who issue over-the-counter (OTC) derivatives to retail clients, including contracts for difference and margin foreign exchange. The changes aim to ensure these AFS licensees have adequate financial resources to operate their business in compliance with the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) and to carry out supervisory arrangements. The increase to the minimum financial requirements for retail OTC derivative issuers also brings Australia in line with comparable jurisdictions, such as the United Kingdom and Singapore.The requirements, implemented through Class Order [CO 12/752] 'Adequate financial resources for financial services licensees that issue OTC derivatives to retail clients' and outlined in Regulatory Guide 239 'Retail OTC derivative issuers: Financial requirements' build on the general guidance in Regulatory Guide 166 'Licensing: Financial requirements', by addressing the particular operational risks and characteristics of the retail OTC derivatives sector. Under the changes, retail OTC derivatives issuers must meet a net tangible asset (NTA) requirement, which will require them to hold NTA the greater of:* From 31 January 2013: $500,000 or 5% of average revenue
* From 31 January 2014: $1,000,000 or 10% of average revenue.

Issuers will also be required to, each quarter, prepare projections of cash flows over at least a 12 month period based on their reasonable estimate of revenues and expenses over that term. These projections must be certified as reasonable by the issuer's directors. To ensure financial resources can be used effectively to meet unexpected losses and expenses as they arise, there is also an NTA liquidity requirement. Under this requirement, issuers must hold 50% of the required NTA in cash or cash equivalents and 50% in liquid assets. Financial trigger point reporting obligations will also be modified to enable issuers to temporarily draw down on the required NTA to meet unanticipated costs and contingencies. However, if issuers hold inadequate NTA for more than two months, they will be required to report this to clients. If NTA falls too low, issuers will be forbidden from taking on new client liabilities. ASIC released Consultation Paper 156 'Retail OTC derivative issuers: Financial requirements' in 2011 to seek feedback on the financial requirements for issuers of OTC derivatives to retail investors. The new financial requirements for retail OTC derivative issuers follow ASIC's enhancement of the financial requirements for responsible entities of managed investment schemes (see Appendix 1 to Report 259 'Response to submissions on CP 140 Responsible entities: Financial requirements'). [RG 239](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg239" \t "_new), [RG 166](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg166" \t "_new), [CP 156](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp156" \t "_new), and [REP 259](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep259" \t "_new) are available on the ASIC website.etailed Contents |

 |

|  |  |  |  |
| --- | --- | --- | --- |
|

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

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |
| --- |
| **3.1** **Submission to ASIC consultation paper: Australian market structure: Draft market integrity rules and guidance** On 6 August 2012, ASX provided a submission to the ASIC consultation paper 'Australian market structure: Draft market integrity rules and guidance' (CP179).   CP 179 raises important issues for Australian financial markets that, if not acted on quickly, could result in the undermining of the integrity of Australia's markets and long term investor confidence. ASX believes ASIC should act now with a comprehensive set of measures to protect the quality of the Australian cash equity market rather than risk an incremental approach that may not achieve its objective. The submission is available on [ASXGroup.com.au](http://www.asxgroup.com.au/media/PDFs/asx-submission-to-asic-cp-179-august-2012.pdf%22%20%5Ct%20%22_new).etailed Contents**3.2** **Reports** On 3 August ASX released:* the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Group_Monthly_Activity_Report_-_July_2012.pdf%22%20%5Ct%20%22_new);
* the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2012/notice2012_186.pdf%22%20%5Ct%20%22_new); and
* the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Compliance_Monthly_Activity_Report_-_July_2012_.pdf%22%20%5Ct%20%22_new)

for July 2012.etailed Contents**3.3** **New Capital Raising and Admission Listing Rules** On 1 August 2012, as part of a range of initiatives to improve the competitiveness of Australia's financial markets, ASX amended the listing rules to help make it easier for small to medium size companies to raise capital for investment. The new listing rules follow extensive industry consultation and incorporate several changes from the feedback to the original proposals released in April. ASX believes the new rules strike a balance between protecting the interests of shareholders and facilitating timely capital raisings by listed companies. The key elements of the new capital raising rules are:* Companies that are outside the S&P/ASX 300 and that also have a market capitalisation of $300 million or less can issue a further 10% of share capital in 12 months on a non-pro rata basis (ie by placement).
* The additional 10% requires a special resolution (at least 75% in favour) to be passed by shareholders at an annual general meeting.
* There is a maximum discount of 25% to market price at which the additional 10% can be issued.
* Additional disclosure obligations are imposed - when the special resolution is proposed, when securities are issued and when any further approval is sought - to explain matters including the purpose of the issue, impact on current shareholders, allocation policy, why the issue is via a placement and not as or in addition to a rights issue, and the fees and costs involved.

The new rules will be reviewed after two years. ASX has also updated the admission requirements, by amending and liberalising the 'spread test' (number of shareholders and value invested) and increasing the net tangible assets test for admission from $2 million to $3 million. A three-month transition period has been provided for the new admission requirements, which will be effective from 1 November 2012. The media release is available on [ASXGroup.com.au](http://www.asxgroup.com.au/media/PDFs/Mid_to_Small_Cap_Capital_Raising_Rules.pdf%22%20%5Ct%20%22_new). The Listed Entities Update is available on [ASX.com.au](http://www.asx.com.au/resources/newsletters/companies_update/archive/CompaniesUpdate_20120725_0712_HTML.html%22%20%5Ct%20%22_new).etailed Contents**3.4** **Adoption by ASX-listed companies of the ASX Corporate Governance Principles and Recommendations on diversity** On 31 July 2012, ASX Compliance released an independent report from KPMG on the adoption by ASX-listed companies of the ASX Corporate Governance Council's recommendations relating to gender diversity. The report is discussed in Item 1.7 of this Bulletin.3.5 ASX Equity Research Scheme trial commences On 23 July 2012, ASX announced the commencement of a 12-month trial of the ASX Equity Research Scheme, an initiative to fund high-quality, independent research for ASX-listed companies with a market capitalisation below $1 billion (around 92% of all listed companies) that may not have been covered by research before. ASX is contributing $1 million to fund the trial. By improving the quality and availability of research in the small to mid-cap sector, the Scheme will provide a broader range of opportunities for investors. Over time, this will assist the investor relations activities of small to mid-cap companies and improve their ability to raise capital. The media release is available on [ASXGroup.com.au](http://www.asxgroup.com.au/media/PDFs/Equity_Research_Scheme_Trial_Start_Final.pdf%22%20%5Ct%20%22_new).etailed Contents**3.5** **ASX Equity Research Scheme trial commences**On 23 July 2012, ASX announced the commencement of a 12-month trial of the ASX Equity Research Scheme, an initiative to fund high-quality, independent research for ASX-listed companies with a market capitalisation below $1 billion (around 92% of all listed companies) that may not have been covered by research before. ASX is contributing $1 million to fund the trial. By improving the quality and availability of research in the small to mid-cap sector, the Scheme will provide a broader range of opportunities for investors. Over time, this will assist the investor relations activities of small to mid-cap companies and improve their ability to raise capital. The media release is available on [ASXGroup.com.au](http://www.asxgroup.com.au/media/PDFs/Equity_Research_Scheme_Trial_Start_Final.pdf%22%20%5Ct%20%22_new).etailed Contents |

 |

|  |  |  |  |
| --- | --- | --- | --- |
|

|  |  |  |
| --- | --- | --- |
| **4. Recent Takeovers Panel Developments** |  | ext Section |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |
| --- |
| **4.1** **Alesco Corporation Limited 01 & 02**On 17 August 2012, the Takeovers Panel announced that it had declined to make a declaration of unacceptable circumstances in response to an application dated 24 July 2012 from Alesco Corporation Limited and an application dated 1 August 2012 from DuluxGroup (Nominees) Pty Ltd and DuluxGroup Limited.Alesco is currently the subject of an off-market bid by DuluxGroup.The application by Alesco concerned whether an announcement on 23 July 2012 by Dulux was misleading and deceptive because:* it overstated the amount of dividends that Alesco could pay and the value to shareholders of the franking credits to which it referred; and
* it should not have added the amount of the franking credits to the cash amount of the bid, at least without qualification.

Dulux agreed to provide supplementary disclosure in a supplementary bidder's statement, which was released to the market on 17 August 2012 and is to be dispatched to its shareholders.The application by DuluxGroup concerned whether a letter that Alesco sent on 27 July 2012 to its shareholders referring to DuluxGroup paying shareholders $1.90, and statements to the media that DuluxGroup had now decreased its offer to $1.90, were misleading. Alesco agreed to provide supplementary disclosure in a supplementary target's statement, which was released to the market on 15 August 2012 and is to be dispatched to its shareholders.On the basis of the above, the Panel decided not to make a declaration of unacceptable circumstances. The Panel considered that this resolved the disclosure questions, which were the only matters before the Panel. etailed Contents**4.2** **Austock Group Limited** On 10 August 2012, the Takeovers Panel announced that it had made a declaration of unacceptable circumstances and final orders in relation to the application dated 12 July 2012 by Mariner Corporation Limited, in relation to the affairs of Austock Group Limited.**(a) Background**On 25 June 2012, Mariner announced an intention to make a takeover offer for all the shares in Austock at 10.5 cents per share. Mariner also announced that it intended to stand in the market and acquire up to 20% of the issued share capital of Austock at 10.5 cents per share. On 29 June 2012, Mariner announced that it had increased its proposed offer to 11 cents per share and that 'due to regulatory issues' it had decided to stand in the market at 11 cents per share for up to 15%.On 2 July 2012, Austock announced that it had invited Mariner to withdraw its proposed bid, given that (among other things) Mariner had not made its bid subject to obtaining a number of necessary regulatory approvals and the offer price of 10.5 cents breached the minimum bid price rule.On 3 July 2012, Mariner confirmed that it was proceeding with the proposed bid. On 4 July 2012, Mariner announced (among other things) a new condition to its proposed bid relating to regulatory approvals.On 9 July 2012, Austock and Folkestone Limited announced that they had reached agreement for Folkestone to acquire all of Austock's shares in its subsidiary, Austock Property Funds Management Pty Ltd, and related entities in the property management business. The transaction was conditional on shareholder approval by Austock shareholders. On 11 July 2012, Mariner announced that it had decided to make an application to the Panel regarding the agreement with Folkestone and that that it would not be bidding on-market for any Austock shares while the Panel was reviewing the matters set out in the application.On 12 July 2012, Mariner made an application to the Panel. Mariner submitted that the Folkestone transaction was intended to frustrate its bid and that the break fees which Austock had agreed to pay were excessive, so that shareholders did not have a fair opportunity to choose between the Mariner bid and the Folkestone transaction. The Panel accepted from Folkestone an undertaking not to enforce the break fee of $500,000 so that the break fee will be a maximum of $250,000 in all circumstances in which any break fee is payable. Given that the application by Mariner submitted that the bid would be frustrated, the Panel looked at the proposed bid and had some concerns.The proposed bid was not subject to a funding condition. Despite requests from the Panel, Mariner provided no evidence to the Panel of any written agreement in relation to funding of its proposed bid. Previously, in response to an ASIC notice to produce, Mariner had confirmed that the only written document regarding the proposed funding arrangements was a Mariner board paper. The paper did not record any satisfactory funding arrangements for the bid. The Panel infers that Mariner did not have funding arrangements that had been formally documented, or sufficiently detailed binding commitments in place, when it announced its proposed bid.The proposed bid was also subject to a number of conditions that were written in such a way that there was uncertainty regarding their triggers.On 24 July 2012, Mariner announced that it had decided to invoke a 'No material acquisitions, disposals or changes to capital' condition in the proposed bid (which had been triggered by the Folkestone transaction) and withdraw the proposed bid. Mariner submitted to the Panel that, depending on the outcome of the Panel proceedings, it may consider making another bid for Austock. The Panel declined to consent to Mariner withdrawing its application to the Panel. The market needs to know whether Mariner intends to stand in the market to buy up to 15% of Austock after the conclusion of the Panel proceedings, and Austock shareholders need to know the circumstances surrounding the proposed bid when they vote on the Folkestone transaction. **(b) Declaration**The Panel has declared that the following circumstances are unacceptable:* Mariner did not have a reasonable basis to expect that it would have the funding in place to pay for all acceptances when its proposed bid became unconditional;
* the market is uninformed as to the circumstances relating to the making of the proposed bid and its withdrawal; and
* in the context of the vote to be undertaken on the Folkestone transaction, Austock shareholders do not have sufficient information regarding Mariner's proposed bid to assess the merits of the purported alternative of an offer by Mariner (ie Mariner has not given Austock shareholders sufficient information).

**(c) Orders**The Panel has made orders to the effect that:* Mariner immediately advise the market, in a form approved by the Panel, whether or not it intends to stand in the market to buy up to 15% of Austock at 11 cents per share after the conclusion of the Panel proceedings and, if so, whether it has sufficient funding to do so; and
* Mariner not announce or make another bid for Austock unless it obtains independent verification acceptable to ASIC as to its funding of the bid.

The Panel also sought submissions from the parties on costs. It has made a costs order in favour of Austock, Folkestone and ASIC. It ordered only part of the costs involved in the proceedings for reasons including that Mariner's application resulted in a modification of the break fee. etailed Contents**4.3** **Hastings Diversified Utilities Fund 02**On 31 July 2012, the Takeovers Panel announced that it had declined to conduct proceedings on an application dated 19 July 2012 from Australian Foundation Investment Company Limited (AFI), a unit holder in Hastings Diversified Utilities Fund (HDF), in relation to the affairs of HDF.The application concerned the provision of a proper and full independent evaluation of the internalisation of management of HDF in the context of a takeover bid for HDF by Pipeline Partners Australia Pty Ltd (PPA). HDF is also currently the subject of a competing bid by APT Pipelines Limited.The Panel considered that the application was premature given that the target's statement, and a proposed independent expert report, had not yet been provided in response to PPA's bid. Accordingly, the Panel considered that there was insufficient material on which to determine that the information for unit holders will be deficient. The Panel concluded that there was no reasonable prospect that it would at this stage make a declaration of unacceptable circumstances, and declined to conduct proceedings. If the information in the target's statement or independent expert report appears inadequate, AFI (or others) could make a fresh application. The reasons for the decision are available on the [Takeovers Panel website.](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=reasons_for_decisions/2012/011.htm&doctype=" \t "_new)etailed Contents |

 |

|  |  |  |  |
| --- | --- | --- | --- |
|

|  |  |  |
| --- | --- | --- |
| **5.** **Recent Research Papers**  |  | ext Section |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |
| --- |
| **5.1** **Has insider trading become more rampant in the US? Evidence from takeovers** The authors investigate whether the recent increase in enforcement action against insider trading by the SEC and the Department of Justice correspond to increased illegal insider trading activity. They examine the pricing of common stocks and options around the announcement of tender offers to detect the presence of illegal insider trading. Their objective is to determine whether illegal insider trading occurs before tender offers and whether illegal insider trading has become more rampant over time. Their evidence indicates that the pre-takeover announcement run-up in stock prices has become larger over time. During the 2006-2011 sub-period, the pre-bid run-up is 50% higher than in the pre-2006 period. They also find that toehold investments by bidders do not explain the time-series variation in stock price behaviour around takeovers. In contrast, increases in implied volatility of the options on target stock are consistent with increasing illegal insider trading. The paper is available on the [SSRN website.](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103673" \t "_new)etailed Contents**5.2** **Should outside directors have term limits? The role of experience in corporate governance** In a sample of S&P 1500 firms from 1998-2009, the author finds firms with a higher proportion of outside directors with extended tenures exhibit superior monitoring and advising outcomes. These firms have lower excess CEO pay, higher CEO turnover sensitivity to poor performance and a smaller likelihood of restating earnings. Contrary to theory that suggests intense monitoring weakens advising quality, these firms are more likely to pay dividends, less likely to make acquisitions and make higher quality acquisitions. The results are robust to concerns regarding endogeneity and selection bias. Efforts by regulators to impose term limits may, therefore, be short-sighted.  The paper is available on the [SSRN website.](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089175" \t "_new)etailed Contents**5.3** **Financial globalization and the rise of IPOs outside the US** During the past two decades, the fraction of the world's initial public offerings (IPOs) accounted for by US firms has fallen sharply. This decrease is attributed to higher IPO activity outside the US and lower IPO activity in the US. The authors show that financial globalization has played a major role in the growth of IPOs outside the US.  The paper is available on the [SSRN website.](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118624" \t "_new)etailed Contents**5.4** **The market for independent directors** The authors study the market for independent directors within a demand-supply framework and find that, in parallel with new governance reforms, directors have generally reduced their board seats since 2000. While adjusting their directorship portfolio during the period when the scrutiny is high, incumbent directors are more likely to depart the firms that are costly to monitor and advise. Despite shrinking supply from the incumbent director pool, a substantial number of new directors enter the market to satisfy demand. These new directors are more likely to be financial experts (audit committee member) and are more likely to be recruited by riskier firms.  The paper is available on the [SSRN website.](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117058" \t "_new)etailed Contents |

 |

|  |  |  |  |
| --- | --- | --- | --- |
|

|  |  |  |
| --- | --- | --- |
| **6.** **Recent Corporate Law Decisions** |  | ext Section |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |
| --- |
| **6.1** **Confirming the application of the ex turpi causa defence for effective one-man companies and determining the extraterritorial effect of the UK Insolvency Act 1986** (By Andrew Kim, Ashurst) Bilta (UK) Ltd (in liquidation) v Nazir [2012] EWHC 2163, England and Wales High Court (Chancery Division), The Chancellor (Sir Andrew Morritt), 30 July 2012 The full text of this judgment is available at:[http://www.bailii.org/ew/cases/EWHC/Ch/2012/2163.html](http://www.bailii.org/ew/cases/EWHC/Ch/2012/2163.html%22%20%5Ct%20%22_new)**(a) Summary** This case considers a claim by Bilta (UK) Ltd (liq) (Bilta), a company in liquidation, and the liquidators of Bilta, against a number of persons and entities who, according to Bilta's claim, attempted to defraud Bilta. The defendants to the claim applied to have the claim summarily dismissed on three grounds: 'ex turpi causa non oritur actio', lack of extraterritorial application of the Insolvency Act 1986 (UK) and that Bilta and its liquidators' claim sought to enforce a revenue claim that was beyond the High Court's jurisdiction.  The Chancellor rejected all three grounds submitted by the defendants and dismissed the application, concluding that:* 'ex turpi causa' was not available where the company was a victim of the fraud and its directors breached their duties to the company's creditors;
* section 213 of the Insolvency Act 1986 had extraterritorial effect; and
* the claim advanced by Bilta and its liquidators were within jurisdiction.

**(b) Facts**  Bilta traded in European Emissions Trading Scheme Allowances (EUAs, or 'carbon credits') between 22 April and 21 July 2009. The trades took place on the Danish Emissions Trading Agency, with more than 5.7 million EUAs being traded for some ?294m. The trades were highly unusual in that Bilta bought EUAs from outside the UK then sold them in the UK, at a loss, incurring a VAT tax liability of some £38 million. On 29 September 2009, Bilta was placed into provisional liquidation for its inability to meet the VAT obligations.  Bilta's liquidators (Liquidators) commenced proceedings in Bilta's name and later added claims in their capacity as liquidators under section 213 of the Insolvency Act 1986. The nine defendants (Defendants) included the two directors of Bilta and the buyers and sellers of EUAs. The claim sought to recover £38.7 million with compound interest and costs. Bilta and the Liquidators argued that the Defendants conspired to injure and defraud Bilta and its creditors by way of fraudulent EUA trades between April and July 2009, with an intention to disable Bilta from meeting its VAT obligations. Two of the Defendants advanced the following arguments in their defence: * under the 'ex turpi causa non oritur actio' principle (discussed below), Bilta was barred from making a claim;the claim under section 213 of the Insolvency Act 1986 must fail because section 213 has no extraterritorial effect; and
* the claims were outside the High Court's jurisdiction because the claims involved enforcement of a revenue debt of a foreign state.

**(c) Decision**  The Chancellor rejected all three arguments put forward by the Defendants as discussed below. **(i) Is the claim against the defendants made by Bilta barred by the principle of 'ex turpi causa non oritur actio'?** 'Ex turpi causa non oritur action' is a principle that 'the court will not assist a claimant to recover compensation for the consequences of his own illegal conduct'. The Defendants relied on the 'ex turpi causa' defence, quoting the decision in *Stone & Rolls v Moore Stephens* [2009] 1 AC 1391 (Stone). In Stone, auditors who failed to detect fraud within a company's financial report successfully defended against a negligence claim that was subsequently brought in the company's name by the company's creditors, on the basis that Stone was a one-man company and the fraudulent conduct of the director was attributable to the company itself. This being the case, the decision in Stone was that the company could not initiate proceedings with respect to 'its own' wrongs. Similarly, the Defendants argued that Bilta was effectively a one-man company as it was under the full control of its two Defendant directors, and hence the directors' fraudulent conduct was directly attributable to Bilta, barring Bilta from making a claim pursuant to the 'ex turpi causa' principle. The Chancellor rejected this argument, distinguishing Bilta from Stone's case in two ways. First, the Chancellor accepted Bilta's submission that Bilta was a victim of the Defendants' fraud (unlike in Stone, where the company was a vehicle for fraud). Second, the Chancellor found the directors of Bilta had breached their duties toward creditors under section 172 of the Companies Act 2006, given Bilta was close to insolvency. Under section 172 of the Companies Act, the director's duty to promote the success of the company for the benefit of its members is subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company, and the Chancellor confirmed that one such instance would be where the company is close to becoming insolvent. The Chancellor also noted that Stone was not applicable where a claim arises from a breach of duty, the scope of which encompasses persons or interests other than the fraudsters in corporate form. Since there were duties owed to creditors in this case which were found to have been breached, the Chancellor concluded that 'ex turpi causa' does not apply to protect the Defendant directors. By extension, the Chancellor concluded the defence could not be available to any of the other Defendants. **(ii) Extraterritorial effect of section 213 of the Insolvency Act 1986** Section 213 of the Insolvency Act 1986 provides that, in the course of the winding up of a company, if it appears that 'any business' of the company has been carried on with intent to defraud creditors or for any fraudulent purpose, the court (on the application of the liquidator) may declare that 'any persons' who were knowingly parties to the carrying on of the fraud are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.  The Liquidators sought orders under section 213 on the basis of the Defendants' fraud. The Defendants argued that, under the principles of statutory construction, section 213 would not have extraterritorial effect so as to cover the Defendants' activities outside the UK; namely the trading of EUAs on the Danish Emissions Trading Agency. The Liquidators argued that the context of insolvency and the unqualified references in section 213 to 'any business' and 'any person' gave section 213 extraterritorial effect. The Chancellor agreed with the Liquidators, concluding that section 213 does have extraterritorial effect. Drawing an analogy with the decision in *Re Paramount Airways* [1993] Ch 223 where it was considered that section 238 of the Insolvency Act 1986 had extraterritorial effect having regard to the term 'any person' expressed in the section (a term which was also contained in section 213), the Chancellor contended that the term 'any person' could not be interpreted in a manner that would limit its application, especially where a company is involved in interstate trade that is designed to defraud the company's creditors.  **(iii) Jurisdictional issues for enforcement of a revenue debt** The Defendants also argued that the claims were outside jurisdiction as they sought to enforce HMRC's claim for VAT duly assed on Bilta under the VAT Act. The Chancellor rejected this submission, noting that the claim was not the enforcement of a revenue claim, but rather action to recover compensation for a conspiracy to defraud, where the compensation may provide a fund from which HMRC and any other creditor may be paid a dividend with respect to their debts. The Chancellor also noted that even if the claim was a revenue claim, it was the claim of HMRC not of the revenue authorities of some foreign state, and there was no basis for refusing the claim. The Chancellor added that even if the claim was seeking to enforce HMRC's claim, no question of comity (for example, by recognising the laws in the jurisdiction where one of the Defendants were based) arose because the claimants were not seeking to enforce any foreign revenue laws. On the above bases, the Chancellor dismissed the Defendants' application.etailed Contents**6.2** **Capacity to enter transactions which may be categorised as hedging or speculative**  (By Rhys Ryan, King & Wood Mallesons) Standard Chartered Bank v Ceylon Petroleum Corporation [2012] EWCA Civ 1049, England and Wales Court of Appeal (Civil Division), Rix, Moore-Bick and Rimer LJJ, 27 July 2012  The full text of this judgment is available at:[http://www.bailii.org/ew/cases/EWCA/Civ/2012/1049.html](http://www.bailii.org/ew/cases/EWCA/Civ/2012/1049.html%22%20%5Ct%20%22_new)  **(a) Summary** This case considered whether the appellant, a statutory corporation, had the capacity to enter transactions which were alleged to be speculative in nature. In that context, the England and Wales Court of Appeal considered the difference between hedging transactions and speculative transactions, and the capacity for the statutory corporation to enter transactions of each type. The court attempted to articulate the difference between speculation and hedging, but concluded that the distinction could not be found solely objectively and that transactions will often have elements of both categories. The court held that the real issue at hand was whether the transactions in question, by their nature, fell within the scope of business that the appellant was formed, and legislatively prescribed, to undertake. After considering the provisions of the legislation incorporating the appellant, the court concluded that the appellant had capacity to enter into the whole range of transactions that a commercial organisation acting in that field of business would ordinarily undertake, and that the empowering legislation should be interpreted as giving the appellant capacity to enter into any transaction that could fairly be said to be incidental or conducive to its statutory objects. The transactions were deemed to be within the appellant's capacity and the appeal was therefore dismissed. **(b) Facts** CPC is a corporate body established under the Ceylon Petroleum Corporation Act 1961 (CPC Act) primarily for the purposes of supplying crude oil and petroleum products to the internal market of Ceylon (now Sri Lanka). In an attempt to protect itself from the rise in the oil price (which began in 2003 and continued until mid-2008), CPC entered multiple transactions with SCB, including two oil derivative contracts in May 2008 and July 2008, respectively. These contracts essentially required SCB to make payments to CPC when oil prices were high, and for CPC to make payments to SCB if the price of oil fell below an agreed 'floor'.  When the world oil price collapsed in late 2008, CPC's payment obligations under the two derivative contracts were triggered and when CPC failed to make these payments in full, SCB instituted proceedings to recover them. CPC resisted the claim on a number of grounds, all of which were rejected at trial. The only ground pursued by CPC on appeal was that the two contracts on which SCB sued were not binding on CPC because CPC did not have capacity to enter transactions of a speculative nature. **(c) Decision** The court addressed two issues as part of the broader question of whether CPC had capacity to enter the contracts. The two issues were:(i) whether the two derivative transactions were properly to be regarded as hedging transactions (and therefore within CPC's corporate capacity) or simply as speculations (and therefore outside CPC's corporate capacity); and(ii) whether the two derivative transactions, by their nature, fell within the scope of business that CPC was formed, and legislatively prescribed, to undertake.**(i) Hedging versus speculation** The trial court focused its attention on whether the two derivative transactions were properly to be regarded as hedging transactions or simply as speculations. CPC accepted that it had capacity to enter into derivative contracts insofar as they constituted hedging, but maintained that it did not have capacity to do so insofar as they constituted speculation. Although the Court of Appeal held that determination of this issue was ultimately immaterial, the judges made several comments on the distinction between hedging and speculation.  The court held that 'the term 'hedging' is generally used to describe in broad terms steps taken to reduce existing exposure to risks, usually the risk of market fluctuations, and increase certainty of outcome, usually of price, whereas 'speculation' is used to describe the act of entering into a new obligation in the hope of making a profit as a result of favourable movements in the market and thereby at the same time incurring the risk of adverse market movements' (at paragraph 14). However, the court held that the distinction between speculation and hedging cannot be found solely objectively, and that it is difficult to exclude all subjective elements when determining which side of the line a transaction falls. In the present case, the dichotomy which CPC sought to draw between hedging and speculation was 'unsatisfactory' and to some extent 'illusory'; there were aspects of the two derivative transactions that had both hedging and speculative elements. On balance, the Court of Appeal categorised the two transactions in favour of hedging due to the fixed and limited nature of the 'upside' (ie the potential commercial gain by CPC). But in the court's judgment, the question of hedging or speculation was, in the context of an issue of capacity, ultimately a false question. The real question was simply whether the two transactions were within CPC's capacity. **(ii) CPC's capacity to enter the transactions** Counsel for CPC relied on the House of Lords decision in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 in which it was held that local authorities had no power to enter into interest rate swap agreements because, whatever the circumstances under which they were entered into, they were designed to produce a profit which would increase the funds available to the council and were therefore essentially speculative in nature. In distinguishing Hazell, the Court of Appeal in the instant case determined that a clear parallel could not necessarily be drawn between 'English local authorities, whose functions and powers are carefully defined by statute, and a body such as CPC, which was incorporated for a different purpose to carry out a different function in a different context' (at paragraph 28). CPC's capacity to enter the derivative transactions was a matter to be determined by reference to the terms of its empowering legislation.  As a statutory power, the scope of CPC's capacity is determined by the legislation under which it is established, in this case section 5 of the CPC Act, which provides as follows: '5. The general objects of the Corporation shall be-(a) to carry on the business as an importer, exporter, seller, supplier or distributor of petroleum;(b) to carry on the business of exploring for, and exploiting, producing, and refining of petroleum; and(c) to carry on such other business as may be incidental or conducive to the attainment of the objects referred to in paragraphs (a) and (b).' The Court of Appeal held that the purpose of section 5 is to define the commercial field in which CPC is to operate. Citing the well-established House of Lords decision in *Attorney-General v Great Eastern Railway Co* (1880) LR 5 App Cas 473 (which is authority for the principle that whatever is fairly incidental to the carrying out of a company's objects should be regarded as falling within them), the Court of Appeal in the instant case determined that CPC 'should have the capacity to enter into the whole range of transactions that a commercial organisation acting in that field of business would ordinarily undertake and that the [CPC] Act should be interpreted as giving it capacity to enter into any transaction that could fairly be said to be incidental or conducive to its statutory objects' (at paragraph 31). The two derivative contracts in question were incidental and conducive to the pursuit of CPC's objects because, while market prices remained high, 'the contracts could be expected to produce payments from SCB and thereby a modest degree of protection in relation to its requirement for foreign exchange, as well as a positive flow of cash which the business urgently needed' (at paragraph 37). In conclusion, the Court of Appeal held that CPC had always had the capacity to enter into oil-based derivative contracts, such as the two in question, because they are transactions that may properly be regarded as incidental or conducive to its objects. CPC's capacity to enter a transaction should be determined by whether in anticipation, and not in retrospect, the transaction is ordinarily part of, ancillary or conducive to the business of a commercial, if public, corporation. etailed Contents**6.3** **Unfairly prejudicial conduct under section 994 of the UK Companies Act 2006: The ability of shareholders to seek relief without having exercised diligence** (By Andrew Kim, Ashurst) Maidment v Attwood [2012] EWCA Civ 998, England and Wales Court of Appeal (Civil Division), Arden, Aikens and Kitchin LJJ, 19 July 2012 The full text of this judgment is available at:[http://www.bailii.org/ew/cases/EWCA/Civ/2012/998.html](http://www.bailii.org/ew/cases/EWCA/Civ/2012/998.html%22%20%5Ct%20%22_new) **(a) Summary** Tobian Properties Ltd (Tobian), a real estate company which conducted business under the trading name 'Oliver Jaques', entered into creditors' voluntary liquidation in October 2008. Maidment, a 25% shareholder of Tobian, petitioned for Court orders under section 994 of the Companies Act (UK), on the grounds that Tobian's affairs had been conducted in a manner unfairly prejudicial to the interests of shareholders.  At first instance, the following conduct was found to have taken place:* excessive remuneration paid to the sole director of Tobian;
* permitting the use of Tobian's trading name by another company without payment; and
* sale of Tobian's trading name at an undervalue on the eve of Tobian's liquidation.

However, the trial judge rejected the application on the basis that: * Maidment failed to exercise diligence as a shareholder of Tobian to find out about the excessive remuneration;
* the company which used Tobian's trading name did not trade profitably under the trading name; and
* the amount of undervalue attributable to the sale of the trading name could not exceed the deficiency in Tobian's accounts as regards its creditors.

This decision was reversed on appeal. The Court of Appeal noted that imposing a 'requirement for diligence' on a shareholder was wrong in principle, as it introduced a new restriction on the manner in which shareholders can enforce the liability of directors for wrongs to their company. The Court of Appeal also found that the other two elements of conduct amounted to breaches of director's duties and were unfairly prejudicial, and confirmed that section 994 should be approached flexibly to achieve a fair and just outcome for shareholders, even where shareholders' losses are not immediately quantifiable, for example due to the company's insolvency. **(b) Facts**  Tobian conducted a real estate business under the trading name 'Oliver Jaques'. At all relevant times between 2001-2008, Tobian had two main shareholders, Maidment (the appellant) and Attwood (the respondent), holding 25% and 75% respectively. While Attwood was the sole director of Tobian, Maidment took no part in the running of Tobian, and neither received nor requested copies of Tobian's annual accounts. Maidment and Attwood's business relationship turned sour in August 2001. No contact between Maidment and Attwood occurred between December 2003 and December 2008. In October 2008, Tobian entered into creditors' voluntary liquidation, with an estimated deficiency as regards creditors of up to £259,000. Soon thereafter, Maidment commenced a petition under section 994 of the Companies Act. Maidment claimed there were three elements of unfairly prejudicial conduct:* remuneration received by Attwood as a director of Tobian that was excessive;
* use of Tobian's trading name by another company without payment; and
* the sale of Tobian's trading name at an undervalue to the other company, on the eve of Tobian's liquidation.

**(c) Decision**  Under section 994(1)(a) of the Companies Act (UK), a member of a company may apply to the court by petition for an order (being any order the court thinks fit, under section 996(1) of the Companies Act), on the ground that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself). The trial judge found that all three elements of conduct claimed by Maidment had in fact occurred (some of which were considered to be breaches of a director's duties). However, the trial judge did not find that the conduct was 'unfairly' prejudicial because:* in relation to the excessive director's remuneration, Maidment could have found out about the conduct by exercising diligence to inspect Tobian's annual accounts which he was entitled to as shareholder;
* in relation to the use of Tobian's trading name, the company using the trading name had not been able to trade profitably in this period; and
* in relation to the sale of Tobian's trading name, the undervalue of the trading name could not in any event exceed the amount of the deficiency in Tobian's liquidation (and hence did not indicate a quantifiable shareholder's loss).

The Court of Appeal, upon consideration of the same facts, found that the three elements of conduct were unfairly prejudicial. Arden LJ expressed the following views, with which Aikens and Kitchins LJJ agreed. **(i) Payment of excessive remuneration** The trial judge's conclusion was rejected. Arden LJ considered that the trial judge's approach in taking the view that Maidment could have found the information about the excessive remuneration by inspecting Tobian's annual accounts (as filed with the Companies House) was wrong in principle, as it involved a new restriction on the manner in which shareholders can enforce the liability of directors for wrongs to their company. Arden LJ noted that this approach would place minority shareholders at risk of losing their rights if they do not read their company's filed accounts; a requirement for diligence that has no basis in the statutory provisions or in principle or authority. Arden LJ also confirmed that section 994 should be approached flexibly to achieve a fair and just outcome for shareholders, even where shareholders' losses are not immediately quantifiable, for example due to the company's insolvency. In this regard, Arden LJ noted that for the purposes of ascertaining whether there had been unfair prejudice as regards the remuneration, it was sufficient that enough has been shown to justify a further hearing in which a claim based on excessive remuneration could lead to the grant of relief, even if no expert evidence as to how Tobian's loss should be quantified had been adduced before the current court. In this case, Arden LJ noted, the quantification exercise would be done at the quantum hearing as a step in establishing the price payable under any buyout order. **(ii) Use of Tobian's trading name** The trial judge's conclusion was rejected. Arden LJ considered that, by not negotiating a licence fee from the company that sought to use the trading name, Attwood failed to protect the interests of Tobian. This amounted to a breach of director's duty, and the fact that the other company did not trade profitably while using the trading name did not constitute a good defence. **(iii) Sale of Tobian's trading name at an undervalue** The trial judge's conclusion was rejected. Arden LJ considered that Attwood had a duty to fix the price of Tobian's trading name by reference to the best interests of Tobian, but instead fixed the price by reference to the sum needed to be injected into Tobian so that a meeting of creditors could be called and to put Tobian into voluntary liquidation. This amounted to a breach of duty and was unfairly prejudicial. Arden LJ also noted that it was not a defence to say that the liquidator later confirmed that no further payment for Tobian's assets (including the trading name) was needed. On the above grounds, Maidment's appeal was allowed. An order under section 994, however, was not given at the time because it was considered that the value (if any) of Maidment's shares needed to be determined first.etailed Contents**6.4** **Ostensible authority and detrimental reliance**  (By Stephanie De Vere, Minter Ellison) Kelly v Fraser [2012] UKPC 25, Privy Council, Hale, Mance, Wilson, Sumption and Carnwath LJJ,12 July 2012 The full text of this judgment is available at: [http://www.bailii.org/uk/cases/UKPC/2012/25.html](http://www.bailii.org/uk/cases/UKPC/2012/25.html%22%20%5Ct%20%22_new) **(a) Summary** This case provides a useful summary of the principles of ostensible authority and detrimental reliance in the law of estoppel by representation. In particular, the Privy Council provided guidance on the burden of establishing detriment in such cases. The Privy Council reaffirmed the decision of the Court of Appeal of Jamaica and held that Fraser suffered detriment as a result of reliance on the representation. **(b) Facts**  Michael Fraser (Fraser) was the President and Chief Executive of the Island Life Insurance Company (Company) and became a member of the Salaried Staff Pension Plan (Plan) in March 2000. Under the terms of the trust deed governing the Plan, the management and administration of the Plan was vested in the trustees and the trustees were required to exercise the discretions vested in them personally. The trustees delegated the day to day administration of the Plan to the Employee Benefits Division of the Company (EBD). Fraser was previously employed by Life of Jamaica Ltd and had made contributions to its pension scheme (LJ Plan). The trust deed provided that a transfer of funds from a pension scheme outside the Company into the Plan would need to be approved by the trustees.  Fraser discussed transferring the accrued value of his entitlement under the LJ Plan to the Plan with Clive Masters (Masters),Vice-President of the EBD. A letter was sent to the trustees of the LJ Plan requesting the transfer of Fraser's accrued entitlements under the LJ Plan to the Plan. The letter was signed by two trustees of the Salesman Pension Plan (a different pension scheme operated by the Company) as trustees of the 'Island Life Pension Plan'.  Life of Jamaica Ltd sent a cheque representing Fraser's accrued contributions under the LJ Plan to the trustees of the Plan. The money was credited to the trustees of the Plan and was invested with the other funds of the Plan. Masters wrote to Fraser confirming that Life of Jamaica Ltd had transferred Fraser's accrued entitlement to the Plan and gave him details of how the money had been invested. Fraser received periodical statements from EBD recording the accumulated value of his units and also included the transferred funds as an additional contribution.  The Company merged with Life of Jamaica Ltd and it was resolved to discontinue the Plan and wind it up. The trustees resolved to distribute a surplus of J$65,000,000 to the contributors of the Plan on a pro rata basis. The trustees also decided that because the transfer from Life of Jamaica Ltd had not been approved by the trustees, Fraser's share of the surplus should be calculated without regard to any benefit entitlement attributable to it. Fraser was paid his gross entitlement on this basis. In 2006 the trustees commenced proceedings for a declaration that they were entitled to distribute the fund on this basis. Fraser claimed that he was entitled to a share of the surplus based on his full entitlement which included the funds from the LJ Plan.  At first instance, Mangatal J found that the way in which the trustees allowed the Company to operate the Plan made it reasonable for Fraser to conclude that Mr Masters had authority to confirm this to him. Mangatal J held that Fraser was led to believe by persons who had the ostensible authority of the trustees, that the transfer had occurred and had been approved in the appropriate way. However, Fraser's claim was rejected on the basis that there was no evidence of detrimental reliance because there was no evidence that had he not been induced to think that his funds were properly in the Plan, that he would have earned greater returns on his money if invested elsewhere. The Court of Appeal of Jamaica affirmed Mangatal J's decision on the question of authority to make the representation but overruled Mangatal J's decision on detriment. The Court of Appeal held that detriment was shown as the trustees used Fraser's money for the purposes of the pension plan and then denied him the appropriate benefits due to him as a result of such use. The issue considered by the Privy Council was whether the trustees were estopped by Masters' letter and the statements from relying on the fact that they did not approve it.  **(c) Decision**  The Privy Council dismissed the appeal and held that the trustees should pay Fraser's costs of the appeal to the Privy Council with an indemnity from the funds of the Plan.  The Privy Council held that it was beyond argument that Masters' letter and the statements unequivocally represented that all of the necessary internal approvals had been obtained. The Privy Council considered whether Masters or anyone else in EBD had ostensible authority to tell Fraser that whatever steps needed to be taken to carry out his transaction regularly had been duly performed, if they had no authority to perform those steps themselves.  Based on the principles of *Armagas Ltd v Mundogas SA* [1986] AC 717, the Privy Council stated that an agent cannot be said to have authority purely on the basis that he has held himself out as having it. However, it is possible for the proper authorities of a company to arrange its affairs so that subordinates who would not have authority to approve a transaction are held out as the persons who are to communicate to third parties the fact that it has been authorised by those who are authorised to approve it. It was held that these are representations which, if made by someone held out by the company to make representations of that kind, may give rise to an estoppel.  The Privy Council determined that the trustees of a pension fund are the ultimate source of authority for the conduct of its affairs and there will be some functions which they will perform personally and others which they may delegate. Further, the Privy Council noted that pension fund trustees hardly ever communicate personally with beneficiaries. Rather, the trustees make decisions which are then communicated and applied by managers. Here, the trustees of the Plan delegated to the Company administrative functions, which must have included communication with contributors confirming the entitlements which resulted from their contributions. The Privy Council determined that even without the trustee's approval, the transferred funds were in fact accepted, and accruals to the transferred funds were notified to Fraser in successive benefit statements. Consequently, the trustees could not disclaim the authorisation of the transfer and also treat the transferred funds for some purposes as if they had been received and others as if they had not been received. The trustees argued that Fraser's evidence of reliance was insufficient. Fraser had put forward as evidence purely that he relied on Masters' letter and the statements. The trustees argued that Fraser had the burden of proving detriment and that he did not satisfy that burden in the absence of evidence that without the representation he would have behaved differently, and been better off in consequence. The Privy Council rejected this argument. While the Privy Council confirmed that detriment is not presumed and must be proved, it may be proved by establishing facts from which it can be inferred. Further, the Privy Council noted that 'where a person has been led to assume that no issue arises as to the regularity of his transaction, he is unlikely at that time to apply his mind to alternative possibilities... [t]he question of what he would have done and with what results is a matter for retrospective and hypothetical reconstruction.' The Privy Council determined that the mere fact that Fraser had not engaged in this process in the evidence submitted at trial will not prevent the court from doing so if there is some other proper evidential basis for the reconstruction.  The Privy Council held that if Fraser was told that the trustees had not accepted the transfer, he would have responded in one of three ways: either, do nothing; have persuaded the trustees to approve the transfer; or transferred his fund to another pension provider. The Privy Council dismissed the first option as it was inconceivable that after having specifically asked for the transfer of his funds that he would have done nothing after being informed that the funds had not been properly transferred. It was held in respect of options two and three that it was a sufficient detriment that Fraser was, without realising, at risk of having no legal entitlement in respect of substantial funds that ought to have been held in trust for him and either option would have protected him from that position. The Privy Council determined that the only realistic hypothesis was that Fraser would have asked the trustees to give their approval and that they would have done so. There was no evidence that the trustees would not have given their approval. Also, the Privy Council noted that rule 15 did not empower the trustees to reject a transfer from an existing contributor's former pension scheme.  The Privy Council concluded that Mangatal J asked the wrong question in respect of Fraser's case on detriment. Mangatal J considered whether Fraser was worse off by asking for the transfer in the first place than he would have been by leaving his pension fund where it was. The Privy Council held that the relevant question was whether Fraser was worse off by being led to believe that his transferred fund had been duly invested in the terms of the Plan, than he would have been if he had not been told that and had raised the issue with the trustees at the time.etailed Contents**6.5** **Application to set aside resolution of creditors' meeting and to terminate deed of company arrangement: Whether Administrators' Report was misleading**(By Natasha Koravos, DLA Piper Australia) TNT Building Trades Pty Limited v Benelong Developments Pty Limited (administrators appointed) [2012] NSWSC 766, Supreme Court of New South Wales, Black J, 9 July 2012The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/766.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/766.html%22%20%5Ct%20%22_new) **(a) Summary**The court found that although the Administrators' Report of Benelong Developments Pty Limited was misleading and contained material omissions, it was not proven that liquidation would provide a more favourable outcome to creditors, and therefore the proposed deed of company arrangement would not be set aside if executed.**(b) Facts** TNT Building Trades Pty Limited (TNT) sought an order under section 600A(2)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Corporations Act) that a resolution passed at a creditors' meeting of Benelong Developments Pty Limited (in administration) (Benelong) on 20 January 2012 be set aside. The resolution had approved a proposed Deed of Company Arrangement (DOCA). TNT also sought orders that Benelong be wound up under section 461(k) of the Corporations Act.Benelong had been appointed trustee of the Benelong Crescent Unit Trust (Trust) on 21 July 2006. Its shareholders were Mr Desmond Lee (one share) and Benelong Montague Pty Limited (Burbank Montague), an entity associated with Mr Lee (three shares). Benelong was the registered proprietor of land at Bellevue Hill as equal tenant-in-common with Gornoa Pty Ltd (Gornoa), and as partners they were developing townhouses. TNT had a judgment debt against Benelong for unpaid construction work totalling $243,532.76 and sought a declaration that Benelong was entitled to be indemnified from the Trust assets in respect of this debt. Burbank Montague, the Second Defendant, of which Mr Lee was the sole director, became trustee of the Trust in September 2011. In November 2011, Benelong transferred its property interest to Burbank Montague for $1 consideration. TNT sought an order that Burbank Montague pay TNT's liquidator the judgment debt and the costs of the current proceedings from the Trust's assets. This was not pressed in submissions and therefore not determined.Mr Lee had:* Advanced $1,208,630.13 by instalments to Benelong (as trustee) and Gornoa.
* Agreed to advance a further $1.5m on the terms and conditions of a Loan Agreement with interest payable at 20% per annum.

The properties were subject to:* A first registered mortgage securing a substantial loan by a third party lender.
* A second unregistered mortgage dated 5 December 2007 (Mortgage) in favour of Mr Lee. This secured payment to Mr Lee of 'all money owing now or at any time in the future' by Benelong and Gornoa.

The Report dated 10 January 2012 recommended that creditors approve the proposed DOCA. The DOCA provided for a one-off contribution of $35,000 by Mr Lee within 14 days of the DOCA being executed. That amount would be distributed in the order of: 1.  Creditors who would be entitled to payment in priority to ordinary unsecured creditors (as occurs in a winding up) excluding Mr Lee or people related to Mr Lee.2.  A pari passu distribution in respect of all other admitted claims of creditors.The Report estimated that the DOCA would return 8 cents in the dollar at most to ordinary unsecured creditors. It stated that there would be no return in the event of liquidation. This analysis occurred on the basis that Mr Lee was a secured creditor of Benelong for at least $9,010,499.**(c) Decision**The court stated that a DOCA may be terminated under section 445D of the Corporations Act if an administrator's report to creditors contained false or misleading information or a material omission.**(i) The assumption that the Mortgage was a valid security**The Report identified that the Mortgage granted to Mr Lee was not registered. Under the [Duties Act 1997 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4450" \t "_default), a mortgage was unenforceable to the extent of the amount secured if no duty was paid on it. The Report did not identify that at the time the Report was made, the Mortgage was unstamped and therefore unenforceable. It was only unstamped before the hearing.The administrators mentioned that the creditors could fund an extension of the administration period and obtain legal advice regarding the Mortgage's enforceability. However, they expressed views that the Mortgage was enforceable, unsecured creditors would be unlikely to realise a dividend in liquidation, and the proposed DOCA was a better alternative. The Court held that:* The Mortgage was now enforceable at least to the amount of the principal of $2.7 million for which it was stamped.
* The Report's assumption as to the 'prima facie' validity of the Mortgage and its assessment of the likelihood of a successful challenge to the Mortgage, was misleading and contained material omissions. The Report did not consider that the Mortgage was unstamped and unenforceable at the time.
* The analysis of financial outcomes assumed the validity of Mr Lee's Mortgage despite the administrators not having received any advice as to its enforceability. This was materially misleading.

**(ii) The allegation of inconsistencies in the information provided by Mr Lee concerning the loan**Mr Lee's proof of debt in respect of the loan was supported by ledger records. However, the recorded advances made by him and his associated entities were greater than the amount claimed in proof of debt.The court held that there were significant inconsistencies in the amounts contained in Mr Lee's calculations but these were largely explained by his evidence regarding the bases of the calculations. Mr Lee (or his associated entities) had advanced at least the amount in the Loan Agreement.**(iii) The allegation that the interest rate of 20% did not reflect market rates**The court held that there was no evidence that the interest rate was disproportionate to the risk which Mr Lee assumed in lending on a second unregistered mortgage.**(iv) Other allegations regarding the Report and proposed DOCA**TNT alleged that the Report was misleading or contained a material omission as the administrators failed to consider Benelong's right of indemnity in respect of debts incurred in its capacity as trustee of the Trust. TNT also alleged that the Report did not consider any right Benelong had to contribution against Gornoa. The court did not accept these arguments because the administrators had made it clear they did not receive legal advice and they were under a time limit to prepare the Report. TNT alleged that the administrators wrongly proceeded on the basis that Benelong's investment in the development was an asset, whereas money advanced to the project by related creditors should be treated as advances to the Trust. The court did not accept this argument, stating that a debt incurred by Benelong as a trustee was enforceable against it, with it having a right of indemnity against the Trust assets.**(v) The exercise of the court's discretion**The court stated that if it was satisfied that a ground under section 445D(1) was established, it had a discretion as to whether to terminate the proposed DOCA. The discretion was to be exercised having regard to the interests of the creditors as a whole and the public interest.The court compared the likely outcome of a DOCA and liquidation and found that: * Subject to the prior registered mortgage, on dissolution of the Benelong and Gornoa partnership, Mr Lee would have security over the partnership assets.
* The two mortgage securities would need to be satisfied before Benelong (as trustee) received any payment on dissolution of the partnership and sale of partnership assets.
* Benelong (as trustee) was personally liable for any debt it incurred to Mr Lee. It had a right of indemnity out of the Trust assets if it became liable under the Loan Agreement to Mr Lee.
* Burbank Montague, as transferee of the properties, was under an equitable obligation to indemnify Benelong for its personal liability under the Loan Agreement and Mortgage.

After considering various property valuations, calculations regarding the loans, mortgages and interest, and despite the fact that the Report was misleading and contained material omissions in respect of the Mortgage enforceability, TNT had not established that a winding up would allow a more favourable outcome to creditors than the proposed DOCA. The court said it would not set aside the DOCA if it was executed.**(vi) Other claims to set aside the proposed DOCA**TNT claimed that the provision in the proposed DOCA to limit creditors' recovery to $35,000 was oppressive or unfairly prejudicial, would unfairly discriminate against TNT, was contrary to public interest and commercial reality and was contrary to the interests of creditors as a whole under section 445D(1)(f). The court again considered the return to creditors in the proposed DOCA and in winding up, and held that TNT had not satisfied the court that the proposed DOCA was less favourable. TNT also made claims for relief under sections 447A and 600A of the Corporations Act, however the court refused relief under these provisions.etailed Contents**6.6** **Remedying the failure to lodge a cleansing notice on time**  (By Steven Grant, Minter Ellison) In the matter of Strike Energy Ltd [2012] FCA 725, Federal Court of Australia, Gilmour J, 6 July 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2012/725.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/725.html%22%20%5Ct%20%22_new) **(a) Summary** This case considers the circumstances in which an order under section 1322(4) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) can address the failure of a listed company to lodge a cleansing notice with the Australian Securities Exchange (ASX) within the required timeframe. **(b) Facts** The applicant, Strike Energy Ltd, was listed on the ASX. On 19 December 2011, the applicant entered into an agreement to raise new equity in the company by way of a placement of 25 million fully paid ordinary shares in the applicant to institutional and sophisticated investors (Placees). The shares were issued and allotted to the Placees on 23 December 2011 (Placement). On 26 March 2012, the applicant became aware that it had inadvertently failed to lodge a notice pursuant to section 708A(5)(e) of the Act in respect of the Placement.  Section 707(3) of the Act restricts the on-sale of shares issued without disclosure under Chapter 6D of the Act, unless the sale offer is exempt under sections 708 or 708A. Where a sale offer is exempt under section 708A, as was the case with the Placement, section 708A(5)(e) requires a company to lodge a notice which complies with section 708A(6). Such a notice is commonly referred to as a 'cleansing notice'. Pursuant to section 1322 of the Act, any interested person may apply to the Court for orders, including orders to declare that any act, matter or thing purporting to have been done under the Act or in relation to a corporation is not invalid by reason of any contravention of a provision of the Act, orders to extend the period for doing any act, matter or thing under the Act or in relation to a corporation (section 1322(4)(d)), and consequential or ancillary orders. The applicant sought curative orders under section 1322(4) of the Act to remedy the applicant's non-compliance with section 708A(5)(e) of the Act. In particular, the applicant sought the following orders:* An order that the period of five business days referred to in section 708A(6) of the Act be extended to the second business day after the day on which the orders made following this application were entered (Order 1).
* An order that the notice under section 708A(5)(e) of the Act be given to the ASX within the period provided for in Order 1 be deemed to take effect as if it had been given to ASX within five business days of 23 December 2011 (Order 2).

**(c) Decision** Gilmour J made the orders as requested and also ordered that a sealed copy of those orders be served on ASIC, ASX, and each Placee within two business days of the date of these orders and a copy be placed on the applicant's website as soon as practicable and remain there for at least 28 days. A summary of Gilmour J's reasoning follows. **(i) Relief under section 1322 generally** The applicant was an interested person under section 1322 because the applicant's material legal rights or pecuniary or other economic interests were or may be substantially affected by the matter in issue.  The relief sought by the applicant under Order 1 was also consistent with previous cases where section 1322(4)(d) had been used to extend the period for giving a cleansing notice to the market, in circumstances where a person has inadvertently failed to give the notice and, in the Court's view, no substantial injustice would be caused by the notice having effect as though it had been given within the relevant time. The relief under Order 2, to the effect that a cleansing notice given within the extended period be deemed to take effect as if it had been given within five business days of 23 December 2011, was also consistent with relief granted in those cases.  The grant of the relief was appropriate in the circumstances, as it would provide clarity and certainty for the Placees who have sold Placement shares prior to the lodgement of a cleansing notice, and the purchasers of those shares. **(ii) Discretionary factors** Gilmour J considered two discretionary factors, namely the promptness within which the applicant sought to remedy the irregularity, and whether the applicant could have given the cleansing notice in compliance with section 708A(6), and concluded that:* the applicant took immediate action to inquire into the matter and take steps to remedy the non-compliance with section 708A(5)(e); and
* the applicant could have issued a cleansing notice at the time when the notice ought to have been issued.

**(iii) Conditions for making orders under section 1322(4)** Section 1322(4) also requires the Court to be satisfied that at least one of the three conditions prescribed by section 1322(6)(a) has been satisfied, namely:* that the act, matter or thing, or the proceeding, was essentially of a procedural nature; that the person or persons concerned in or party to the contravention or failure acted honestly; or
* that it is just and equitable that the order be made; and
* pursuant to section 1322(6)(c), that no substantial injustice has been or is likely to be caused to any person.

Although, the Court need only be satisfied of one of the three alternative conditions, Gilmour J considered that all three conditions were satisfied in this case:* Failure to lodge a cleansing notice is of a procedural nature. The irregularity relates to the offer of shares, which was accompanied by a procedure that required a cleansing notice to be filed. The irregularity did not change the substance of what was done, as the offer of shares was still made and the Placement shares issued, it is therefore procedural in nature.
* The applicant acted honestly at all material times. The mistake was an inadvertent omission and was not made through any act of dishonesty or wilful intention. Since discovering the mistake, the applicant acted honestly, expeditiously and prudently to remedy the applicant's non-compliance.
* Without the relief sought pursuant to section 1322, those Placees who have on-sold their shares will have done so in inadvertent breach of section 707(3) of the Act. Accordingly, it was just and equitable that relief be granted so that the Placees are relieved from contravention of the Act.

In relation to the question of 'substantial injustice', Gilmour J noted that it was unlikely that substantial injustice would have been caused to any person since compliance with the Act would not have improved the position of the Placees or the market generally. In this respect, a cleansing notice was lodged by the applicant with the ASX on 21 December 2011 for a separate pro-rata rights issue, which contained essentially the same information which would have been contained within the required cleansing notice which was not lodged by the applicant. In addition, any potential for injustice was diminished by the proposed orders because the proposed orders required copies to be provided to each Placee and on the applicant's website. Finally, it was also likely that Placees who had on-sold their Placement shares would suffer substantial injustice if the orders were not made, as any purported on-sales of their shares would be affected as a result of the applicant's non-compliance with section 708A(5)(e) of the Act and those Placees would be in inadvertent breach of the Act.  It should also be noted that ASIC advised that they neither supported nor opposed the applicant's application and that they did not intend to appear at the hearing.etailed Contents**6.7** **Extension of time for calling and holding a general meeting requested by members**  (By Rebekah Winsor, Clayton Utz) Woolworths Ltd v GetUp Ltd [2012] FCA 726, Federal Court of Australia, Yates J, 6 July 2012  The full text of this judgement is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2012/726.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/726.html%22%20%5Ct%20%22_new) **(a) Summary** The plaintiff requested an extension under section 1322(4)(d) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Corporations Act) of the time to call and hold an extraordinary general meeting requested by members under section 249D of the Corporations Act. It also requested an extension for issuing a members' statement under section 249P of the Corporations Act. The defendant, GetUp Ltd, was appointed as a representative for all the members who opposed the extension. The plaintiff requested this extension because it wanted to hold the extraordinary general meeting on the same day as its annual general meeting. The court allowed this extension of time because the plaintiff could substantially avoid considerable costs and inconvenience by calling and holding the meeting within timeframes that were different to those provided by the Corporations Act, but which would be sufficiently proximate to those timeframes so as to cause no prejudice, let alone substantial injustice, to any person.  The court also held that holding the requested meeting on the same day as the annual general meeting would not prevent the business of the requested meeting being attended to properly and with due consideration.  **(b) Facts**  On 25 June 2012, the plaintiff received notices from several of its members requesting the directors to call a general meeting under section 249D of the Corporations Act. Section 249D provides that directors of a company must call and arrange to hold a general meeting on the request of members with at least 5% of the votes that may be cast at the general meeting, or at least 100 members who are entitled to vote at the general meeting.  The members also requested that the plaintiff issue a members' statement pursuant to section 249P of the Corporations Act. Section 249P provides that the members requesting the meeting may also request the company give to all its members a statement provided by these members about a resolution that is proposed to be moved at the general meeting, or any other matter that may properly be considered at the meeting.  The purpose of the requested meeting was to alter the plaintiff's constitution to prevent it owning or deriving income or revenue from electronic gaming machines. This alteration would have effect from 1 January 2016.  Section 249D(5) of the Corporations Act provides that the directors of the company must call the requested meeting within 21 days after the request is given to the company. It also provides that the meeting is to be held no later than 2 months after the request is given to the company. Therefore the meeting would need to called on or before 16 July 2012 and held no later than 25 August 2012. Additionally, section 249P(6) provides that the company must distribute to all its members a copy of the members' statement at the same time, or as soon as practicable afterwards, and in the same way as it gives notice of the general meeting.  The plaintiff wanted to delay the meeting by approximately 3 months so it could be held on the same day as its annual general meeting, 22 November 2012. The plaintiff applied to the court under section 1322(4)(d) of the Corporations Act for an order extending the time to call and hold the requested meeting and issue the members' statement.  The plaintiff sought this delay because there would be substantial costs involved in calling and holding the general meeting separately from the annual general meeting. The approximate cost of calling and holding the meeting independently of the annual general meeting would be $550,000.  **(c) Decision**  The court's power to extend time periods under section 1322(4)(d) of the Corporations Act is wide. In this case it is conditioned only by the requirement that no substantial injustice is likely to be caused to any person. Yates J considered the meaning of 'injustice' and was not satisfied that a delay of the requested meeting would likely result in any substantial injustice. If the extension of time was granted, then the delay in holding the meeting would be fairly short, considering the object of the requested meeting was to bring about a change with effect from 1 January 2016.  Yates J was satisfied that the plaintiff had made out a case. The case did not simply stand on the fact that convening and holding the meeting would cost a substantial amount of money and put the plaintiff to considerable inconvenience. The additional fact was that it could substantially avoid this cost and inconvenience by calling and holding a meeting within timeframes that were different to those provided by the Corporations Act, but which would be sufficiently proximate to those timeframes so as to cause no prejudice, let alone substantial injustice, to any person.  Yates J also held that there was no material before him which would lead him to conclude that the business of the requested meeting could not be attended to properly and with due consideration, if held on the same day as the annual general meeting.  Therefore the court ordered an extension of time under section 1322(4)(d) of the Corporations Act for the calling and holding of the meeting under section 249D of the Corporations Act, and the issuing of a members' statement under section 249P of the Corporations Act. This could allow the requested meeting to be held on the same day as the annual general meeting. etailed Contents**6.8** **Director services contracts and removal from office by shareholders of listed companies** (By Matthew Eglezos, Freehills) Dalkeith Resources Pty Ltd v Regis Resources Limited [2012] VSC 288, Supreme Court of Victoria, Macaulay J, 29 June 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2012/288.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/288.html%22%20%5Ct%20%22_new) **(a) Summary** David Walker, a former managing director of Regis Resources Limited (Regis) was removed from office by Regis' shareholders. His company, Dalkeith Resources Pty Ltd (Dalkeith) had entered into a services contract with Regis (Services Contract), pursuant to which Dalkeith agreed to provide Mr Walker's services as managing director. Mr Walker was removed as a director of Regis on 4 May 2009. Mr Walker alleged that:* his removal as a director of Regis was a repudiation of the Services Contract;
* he was entitled to be paid a $100,000 bonus upon acceptance by Regis' board of a 'definitive feasibility study' (DFS) for the Duketon Gold Project. This bonus was allegedly payable pursuant to an oral agreement between Mr Walker and at least one other Regis' board member (Bonus Agreement); and
* he did not receive the 520,000 options for each of the 2007/2008 and 2008/2009 financial years that Regis was obliged to grant him under the Services Contract.

Macaulay J held that Dalkeith failed to make out any of its claims in relation to the Services Contract or the Bonus Agreement. His Honour:* held that the Services Contract was terminated in accordance with its terms, because Mr Walker vacated the office of director pursuant to a clause of Regis' constitution;
* was not persuaded, on the balance of probabilities, that the Bonus Agreement was made, or that, in the relevant circumstances, Regis' chairman had authority to enter into any such agreement independently of the board; and
* held that Regis' obligation under the Services Contract to grant Mr Walker options was subject to an implied term that the grant was conditional upon obtaining shareholder approval.

No such approval had been obtained, and consequently, no obligation arose for Regis to grant the options to Mr Walker. **(b) Facts**  In August 2004, Mr Walker was appointed managing director of Regis, a publicly listed company which was then a gold exploration company. Mr Walker provided his services as managing director pursuant to the Services Contract, which ran for a two year period until 30 June 2007, and was extended until 30 June 2009 by amendment. Pursuant to the amended Services Contract, Regis agreed to appoint Dalkeith's representative (Mr Walker) as managing director for the term of the Services Contract. Clause 4.4 of the Services Contract also provided that Regis would grant 'no less than 5,200,000 options per annum (adjusted for any re-organisation of Regis's shares and options) to Dalkeith's representative'. Regis' shares were consolidated in November 2007 on a 10 for 1 basis (with the effect that Regis would grant no less than 520,000 options per annum to Mr Walker, pursuant to clause 4.4). Regis was able to terminate the Services Contract, among other grounds, on 9 months' notice, or immediately if Dalkeith or its shareholders (including Mr Walker) vacated office as a director of Regis under a provision of Regis' constitution. Relevantly, article 16.9(b)(iv) of Regis' constitution provided that the office of a director would be vacated if a constitutional procedure in article 16.7 was followed; namely that Regis convened a meeting on prescribed notice and passed an ordinary resolution to remove a director. Article 16.9(b)(vii) of the constitution also provided that the office of a director would be vacated if that director otherwise ceased to be, or became prohibited from being, a director by virtue of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act). On 4 May 2009, at the general meeting, Mr Walker was removed as a director of Regis by the shareholders under section 203D of the Corporations Act. On 14 May 2009, Mr Walker wrote to Regis asserting that Regis had repudiated the Services Contract. On 20 May 2009, Regis wrote to Mr Walker rejecting the allegation of repudiation, and purported to terminate the Services Contract on the basis that Mr Walker was no longer a director of Regis. Dalkeith commenced proceedings in relation to a number of claims. It claimed that:* it was entitled to damages because Regis did not give 9 months' notice of termination of the Services Contract, or pay 9 months' remuneration in lieu of notice;
* Regis failed to make a bonus payment of $100,000 on acceptance by the Regis board of a DFS for the Duketon Gold Project, which was allegedly owed to Dalkeith pursuant to an oral Bonus Agreement; and
* Regis failed to grant 1,040,000 options (being 520,000 options for each of the 2007/2008 and 2008/2009 financial years) to Mr Walker pursuant to clause 4.4 of the Services Contract.

Regis denied that it had any obligation to give Dalkeith notice of termination or make any payment in lieu of that notice. It argued that Mr Walker was removed pursuant to one of articles 16.9(b)(iv) or 16.9(b)(vii) of the Regis constitution. In relation to the alleged Bonus Agreement, it denied that any agreement was ever reached to pay a bonus, and also denied that the DFS was accepted by the Regis board. Regis also argued that if any Bonus Agreement did exist, it would contravene the related party provisions of the Corporations Act and could not be enforced. In relation to the grant of options, Regis argued that its obligation to grant Mr Walker options was subject to an implied term that any grant would be conditional upon obtaining shareholder approval. This argument was based on the fact that Regis' employee share option plan (ESOP) rules incorporated by reference the ASX Listing Rules, and Listing Rule 10.14.1 prohibited a listed entity from permitting a director to acquire securities under an employee share incentive scheme without the approval of ordinary shareholders. Regis also argued that in relation to the 2007/2008 financial year, it had already granted Mr Walker 650,000 options and there was no entitlement to further options. Dalkeith alleged that this grant was independent of the Services Contract. Regis also alleged that if the obligation to grant options was not subject to shareholder approval, the Services Contract would have been in breach of the related party provisions of the Corporations Act and could not have been enforced. **(c) Decision**  Macaulay J held that Dalkeith failed to make out any of its claims in relation to the Services Contract or the Bonus Agreement. His Honour considered that Regis terminated the Services Contract in accordance with its terms because Mr Walker vacated the office of director under a provision of Regis' constitution. His Honour did not accept Regis' argument that Mr Walker was removed pursuant to the constitutional procedure outlined in article 16.7. Mr Walker was removed pursuant to section 203D of the Corporations Act, a concurrent alternative source of authority for Regis to remove a director. However, Macaulay J considered that, by being removed pursuant to section 203D, Mr Walker otherwise ceased to be a director by virtue of the Corporations Act. This brought Mr Walker's removal within article 16.9(b)(vii) of Regis constitution, and Regis therefore had the right immediately to terminate the Services Contract. Regis did so on 20 May 2009. Macaulay J was not satisfied, on the balance of probabilities, that an oral Bonus Agreement arose between Regis and Dalkeith. The precise terms of any such agreement lacked precision, and the alleged agreement was not supported by contemporaneous documents. For instance, the allegation that the bonus was payable on acceptance of the DFS was not supported by board minutes, which appeared to suggest that communication between Regis' Melbourne and Perth offices should be a key performance indicator for the payment of any bonus. There were also inconsistent recollections as to which of Regis' directors participated in the alleged discussion. As a result, there was no Bonus Agreement for Regis to have breached. In any case, his Honour considered that, in the circumstances, the chairman of Regis, Dr Folie, would not have had authority to make any such oral agreement on behalf of Regis independently of the board. Macaulay J also considered that Regis' obligation to grant options to Mr Walker was impliedly subject to obtaining shareholder approval. His Honour accepted that any grant of options must comply with the ESOP rules, which required compliance with the ASX Listing Rules, including the requirement that grants of securities to directors be subject to shareholder approval. His Honour also agreed with Regis that such a term could be implied on the basis that it was necessary to give business efficacy to the Services Contract. In any case, his Honour considered that for the 2007/2008 financial year, the 650,000 options granted to Mr Walker were referable to the Services Contract, and so no obligation to issue further options would have arisen. Given shareholders did not give any approval for the grant of options for 2008/2009, no obligation to grant options arose for that year. His Honour did not need to consider the application of the related party provisions of the Corporations Act. This was because no Bonus Agreement was made, and because the obligation to grant options under the Services Contract was subject to the requirement to obtain shareholder approval.etailed Contents**6.9** **No act of default necessary: Appointing receivers to realise the assets of a debenture trust**  (By Nicholas Whittington, DLA Piper Australia) Australian Executor Trustees Limited v Provident Capital Limited [2012] FCA 728, Federal Court of Australia, Rares J, 29 June 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2012/728.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/728.html%22%20%5Ct%20%22_new)  **(a) Summary** The Trustee of a debenture scheme sought orders under section 283HB(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Corporations Act) to have receivers appointed and requiring distributions to be paid to debenture holders despite there being no event of default. Rares J favoured protecting the interests of the debenture holders and appointed a receiver notwithstanding that there had not yet been an act of default.  **(b) Facts**  From 1999 onwards, Provident Capital Limited (Provident) had been issuing debentures to members of the public. At the time of the hearing, Provident owed about $128 million to its more than 3000 debenture holders. All debentures ranked equally in priority of security in proportion to their face value if not paid in full. In late 2011, ASIC became concerned about Provident's debenture prospectus. Some concerns related to the state of loans in the fixed term interest portfolio (FTI portfolio) which formed the security for the debenture trust deed. Concerns were raised with the level of arrears provisioning and the non-accrual of interest for those loans, as well as the lack of current 'as is' valuations for the distressed security properties.  In response to ASIC's concerns, Provident stated that it had withdrawn the prospectus. It also informed ASIC that it would not go ahead with the lodgement of a draft prospectus which had been the subject of discussions with ASIC, but instead proposed to prepare an information booklet to give to all existing investors. The first information booklet was released in January 2012.  After considering concerns raised by ASIC, the trustee engaged PPB Advisory to undertake an independent solvency review of the debenture-funded loans. In response to a PPB draft report, the trustee asked that Provident immediately undertake regular impairment testing of its FTI portfolio.  In its report of 27 March 2012, PPB found that Provident was solvent and was expected to remain so until at least 31 December 2012. However, this was due, in part, to the fact that Provident was able to, under the terms of the deed, defer debenture redemptions for up to 365 days. The key risk was that during this period the value of the underlying assets to meet the debenture holders' claims would continue to erode.  A second information booklet was issued on 4 April 2012. The monthly balances given for FTI portfolio loans in arrears in this information booklet were inconsistent with balances given in the January 2012 booklet, though there was no explanation of how that discrepancy arose.  The trustee commenced proceedings on 8 June 2012.  **(c) Decision**  **(i) Unsatisfactory disclosures by Provident** The Court found that the two information booklets 'painted a confusing and incomplete picture of the state of arrears in the FTI funded loan portfolio'. One particular issue was the fact that the first information booklet did not disclose Provident's largest single outstanding loan in arrears. The second information booklet did disclose this loan in arrears, but did not provide any additional explanation.  During the course of the proceeding, it also emerged that Provident's managing director, Mr Michael O'Sullivan (Mr O'Sullivan) had applied for an Australian Financial Services Licence through a related company of Provident, Provident Funds Management Australia Ltd (Provident Funds Management). As this was revealed only in the course of Provident's counsel's final address, Mr O'Sullivan was recalled for re-examination.  Mr O'Sullivan's concern that a receiver would be appointed to Provident actuated the application for a licence. It was conceded in cross-examination that if the licence was granted, the new responsible entity for the monthly income and high yield funds, Provident Funds Management, would be quarantined from the effects of a receiver being appointed to Provident.  Rares J found that these failures of disclosure cast considerable doubt over Provident's integrity to obtain, manage or hold money from the public.  **(ii) Consequences of appointing a receiver**  It was argued on behalf of Provident that there would be very serious consequences if the Court made an order for the appointment of a receiver.  The Court acknowledged that the experience of commercial external administrations is that properties are generally sold for less than would be the case if realised by an interested owner. Further, the appointment of a receiver would impose an extra layer of costs and likely trigger events of default in Provident's other security arrangements.  In light of these considerations, Provident sought a Court order for a 365 day moratorium on principal and interest repayments on the debentures to allow Provident to devote itself to the realisation of the distressed loan book on behalf of debenture holders.  **(iii) Application of the statutory provisions**  It was left to Rares J to balance the consequences of appointing a receiver against the inconclusive future prospects of Provident combined with its lack of candour in disclosure to investors and to the Court.  Rares J emphasised the general duties applicable to a borrower such as Provident under section 283BB, in particular the duty under 283BB(a) that 'the borrower must carry on and conduct its business in a proper and efficient manner'.  Part 2L.8 of the Corporations Act gives the Court power to give any direction or make any declaration or determination in relation to any matter on which the trustee applies to the Court for a direction in relation to the interests of debenture holders. This includes a power under section 283HB(1)(d) to appoint a receiver.  Rares J found that Provident would not be able to pay the amounts deposited or lent to it as and when they become due in the next 12 months. Accordingly, the decision to be made was whether Mr O'Sullivan or an independent third person should be trusted to carry out the management of Provident in realising its assets. Rares J found that the latter should be preferred. Thus, the proper course to protect the interests of Provident's debenture holders and creditors was to appoint a receiver, notwithstanding that there had not yet been an act of default. etailed Contents**6.10** **Where the appointment of an administrator and liquidator is of no effect** (By John O'Grady and Kathryn Arnett, Corrs Chambers Westgarth) Sheahan in the matter of Gemhall Holdings Pty Ltd (in liquidation) v Lo Pilato [2012] FCA 700, Federal Court of Australia, Mansfield J, 29 June 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2012/700.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/700.html%22%20%5Ct%20%22_new) **(a) Summary** The plaintiff is the trustee of the bankrupt estate of Stephen Donovan (Donovan). Donovan was ordered to pay Patrick Rafferty (Rafferty) $1.7 million plus interest and costs following proceedings that occurred in 2010 (judgment debt). Gemhall Holdings Pty Ltd (in liquidation) (Gemhall) has been subject to a freezing order and a number of variation orders incidental to the Rafferty action. Gemhall is the trustee of the Stephen Donovan Family Trust (Trust), a discretionary trust of which Donovan is one of the beneficiaries. Donovan is the sole shareholder of Gemhall and therefore controls the Trust. Rafferty and the plaintiff believed that Gemhall had control of significant assets, which should be available to Donovan's creditors (including Rafferty). On 2 March 2012, Frank Lo Pilato (Lo Pilato) was appointed by Ms Donovan (who at the time was the sole director of Gemhall) as administrator of Gemhall. Lo Pilato was later appointed as liquidator. The plaintiff claims that Lo Pilato was appointed as administrator and liquidator of Gemhall to achieve the outcome of having Gemhall removed as trustee of the Trust, thereby removing the Trust assets from the plaintiff's reach.  The plaintiff sought an order that the appointment of Lo Pilato as administrator and liquidator of Gemhall was void ab initio (ie void from the beginning). It was imperative that the appointments be declared void ab initio as opposed to terminated, because if terminated, Gemhall would be treated as having been in liquidation up until the date of the termination. Consequently, Gemhall would cease as trustee of the Trust, and the plaintiff's right to control the Trust would be lost. Mansfield J was satisfied that Ms Donovan's appointment of Lo Pilato as administrator was done for the purpose of attempting to avoid the freezing order placed on Gemhall, and so on the Trust property. His Honour made the following declarations:* the resolution of Gemhall by Ms Donovan as sole director appointing Lo Pilato as its administrator was invalid;
* the resolution of the creditors of Gemhall that Gemhall be wound up was also invalid; and
* the appointment of Lo Pilato, as the administrator and then as the liquidator of Gemhall was void and of no effect.

**(b) Facts** The plaintiff is the joint and several trustees of the bankrupt estate of Donovan. The defendant, Lo Pilato, was purportedly appointed as administrator and then as liquidator of Gemhall. Between May 2007 and May 2008, Donovan and Rafferty entered into a joint business venture, which subsequently failed. It was found that Donovan engaged in misleading and deceptive conduct during the negotiations prior to entering into the joint venture, and on 19 August 2010 was ordered to be jointly and severally liable (along with three companies associated with him) to pay Rafferty the judgment debt. Gemhall was not a party to the Rafferty action but is closely related to the financial affairs of Donovan. Both Rafferty and the plaintiff believed that Gemhall had control of significant assets, which should be available to Donovan's creditors (including Rafferty). Consequently, Gemhall was subject to a freezing order made on 19 December 2008 and variation orders incidental to the Rafferty action to hold Donovan's financial position. The freezing order remains in place. Gemhall is the trustee of the Trust, a discretionary trust of which Donovan is one of the beneficiaries. Donovan is the sole shareholder of Gemhall and therefore controls the Trust. Donovan's shares in Gemhall now vest with the plaintiff; therefore the plaintiff can direct payments solely to Donovan that would contribute toward satisfying the judgment debt. Gemhall applied for the freezing order and variation orders to be discharged. The application was dismissed. Rafferty then made a further application for orders restraining Ms Donovan from replacing Gemhall as trustee of the Trust. Ms Donovan unsuccessfully contested the application. Ms Donovan had stated during her application that she was aware that if a new trustee was appointed over the Trust, the trustee in bankruptcy could not have access to the funds presently standing to the creditor of Gemhall. On 21 December 2011 an order was made restraining Ms Donovan from dealing with the shares held by any person, appointing any other director and changing the trusts, powers and terms or conditions of the Trust (the Orders). On 2 March 2012, Ms Donovan passed a resolution appointing Lo Pilato as administrator of Gemhall. On 1 April 2012, Lo Pilato called a meeting of Gemhall's creditors. It was resolved that Gemhall would be wound up, and that Lo Pilato be appointed as liquidator. The plaintiff claims that Lo Pilato was appointed as administrator and liquidator of Gemhall, in order to achieve the outcome of having Gemhall removed as trustee of the Trust, thereby removing the Trust assets from its reach (as a new trustee would not be caught by the existing freezing order). The plaintiff submitted that the appointment of Lo Pilato as administrator and liquidator was void ab initio, and relied on section 1322 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act). Section 1322(2) states that the Court may make an order to declare a proceeding affected by a procedural irregularity invalid when it is of the opinion that the irregularity has caused or may cause substantial injustice and that cannot be remedied by any order of the Court. The onus is on the party seeking to invalidate the act because of any procedural irregularity to establish a case for an order under section 1322(2). Under section 1322(1)(b)(i), a procedural irregularity includes the absence of a quorum at a meeting of directors. The plaintiff also submitted that allowing the appointment and liquidation to stand would cause an injustice to the plaintiff and Donovan's creditors. At the time the resolution to appoint Lo Pilato was made, Ms Donovan was the sole director of Gemhall. The plaintiff submitted that she acted in breach of the Articles of Association of Gemhall (Articles) which required a quorum of two directors for any meeting of directors. In Lo Pilato's affidavit he annexed a copy of a minute of meeting (minute of 8 June 2011) that states that Donovan, as sole shareholder, passed a special resolution to amend the Articles to the effect that a quorum of only one director is required. The plaintiff successfully claimed that the appointment of Lo Pilato as administrator and then as liquidator was void, as the appointment was not made by a valid resolution of the directors, and that the winding up of Gemhall was also void. In the current application, the plaintiff sought orders that the appointment of Lo Pilato as administrator and the subsequent winding up of Gemhall was void ab initio. **(c) Decision** The key issue for the Court to decide was whether the appointment of Lo Pilato as administrator and then as liquidator was void ab initio under section 1322 of the Act. Mansfield J did not accept the minute of 8 June 2011 as an accurate record of the minutes of Gemhall and noted that the timing of the document was suspicious, as it was only produced after Lo Pilato raised concerns that the Articles required a quorum of two directors. His Honour considered the minute of 8 June 2011 to be a sham. Therefore, the appointment of Lo Pilato as administrator was a procedural irregularity under section 1322. His Honour considered that the irregularity caused or may cause substantial injustice that could not otherwise be remedied by any order of the Court.  The plaintiff did not request orders for termination of the appointment, because if terminated, Gemhall would be treated as having been in liquidation up until the date of the termination. Consequently, Gemhall would cease as trustee of the Trust and the plaintiff's right to control the Trust would be lost. It was therefore imperative that the appointments be declared void and of no effect from the beginning. Despite the technical breach, his Honour stated that he was satisfied that Ms Donovan's appointment of Lo Pilato as administrator was done for the purpose of attempting to avoid the freezing order placed on Gemhall, and so on the Trust. Furthermore, there was no apparent reason for the appointment of an administrator and liquidator as Gemhall was apparently solvent.  His Honour found that the appointment of Lo Pilato as administrator was in clear breach of the Orders, and described Ms Donovan's actions as a 'backdoor' attempt to do what the Orders precluded, thus confirming her desire to avoid the freezing order. His Honour stated that it showed a wilful disregard of the Orders of the Court. His Honour made the following declarations:* the resolution of Gemhall by Ms Donovan as sole director appointing Lo Pilato as its administrator was invalid;
* the resolution of the creditors of Gemhall that Gemhall be wound up was also invalid; and
* the appointment of Lo Pilato, as the administrator and then as the liquidator of Gemhall is void and of no effect.

etailed Contents**6.11** **Decision to grant relief and wind up a company after unauthorised payments and property transactions**(By Nicole Parlee, King & Wood Mallesons)In the matter of Wan Ze Property Development (Aust) Pty Ltd [2012] NSWSC 722, Supreme Court of New South Wales, Black J, 29 June 2012The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/722.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/722.html%22%20%5Ct%20%22_new) **(a) Summary**These proceedings concerned unauthorised payments and transfers of property. The plaintiffs applied for leave to bring derivative proceedings in the name of the company, and sought relief in respect of oppression and an order that the company be wound up.Black J granted leave to bring derivative proceedings under section 237 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act), finding that it was likely the Company would not bring proceedings itself, the Plaintiffs were acting in good faith, the proceedings were in the best interests of company and there was a serious question to be tried. Summary judgment was given based upon the evidence filed by the plaintiffs due to the defendants' serious and prolonged non-compliance with court orders. Black J found that there had been a breach of statutory duties, directors' duties and fiduciary duties and oppression was established. The associated property was held on trust for the Company and the Company was to be wound up on just and equitable grounds.**(b) Facts**An agreement was made between the first plaintiff (HJ) (who is also a director of the Company) and the first defendant (KQR), second defendant (PX) and third defendant (YCJ) to buy and develop land. HJ was excluded from the management of the Company, and was not shown receipts or invoices relating to the project.By December 2010, the construction of townhouses on the land was completed and the Company had entered into contracts for the sale of several townhouses. HJ and the third plaintiff (YX) requested access to the Company's accounts and financial reports but were not provided with statements for the period of December 2010, the period when the Company started to receive money from the sale of the townhouses. KQR wrongly advised HJ and YX about the balance of the Company's account and provided misleading advice about substantial withdrawals from the account.From January 2011, KQR and PX refused to add HJ or YX as signatories to the Company accounts, purporting that YCJ did not approve. YCJ, however, had already resigned as director by that time.In January and February 2011, the Company transferred one townhouse to each of YCJ and PX without consideration. Multiple withdrawals were also made from the Company's account which were not authorised and unauthorised payments were made to YCJ. **(c) Decision****(i) Application for leave to bring derivative proceedings**Under section 237(2) of the Act, five elements must be established before leave to bring derivative proceedings will be granted: first, that it is likely the Company would not bring proceedings itself; second, that the plaintiffs are acting in good faith; third, that the proceedings are in best interests of company; fourth, that there is a serious question to be tried; and fifth, that written notice has been given of the intention to apply for leave or that it is appropriate to grant leave even if notice has not been given.Black J held that each of the five elements was made out and leave was granted.**(ii) Application to strike out defence**The plaintiffs applied under rule 12.7(2) of the [Uniform Civil Procedure Rules 2005 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "_default) (UCPR) or section 61 of the [Civil Procedure Act 2005 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=85461" \t "_default) (CPA) for the defence to be struck out.Black J referred to various cases which discussed the severity of dismissing proceedings altogether under these provisions. Here, Black J found that there had been 'serious and prolonged non-compliance' by the defendants with Court orders and a failure to explain these defaults. Black J inferred that the default was likely to continue and that there was 'no useful purpose to be served' in making further orders against the defendants. Accordingly, Black J held that this justified the defence being struck out under section 61 CPA and rule 12.7(2) of the UCPR.Black J then turned to consider the claim for summary judgment under UCPR rule 13.1, which provides for summary judgment in respect of a plaintiff's claim for relief, in relation to each claim by the plaintiffs.**(iii) Breach of statutory and fiduciary duties by KQR and PX**The plaintiffs alleged that the transfer of two townhouses and unauthorised payments made by the Company were breaches by KQR and PX of sections 181 - 182 of the Act, and breaches of fiduciary duties owed to the Company. Section 181 of the Act requires a director or other officer of a corporation to exercise his or her powers and discharge his or her duties in good faith in the best interests of the corporation, and for a proper purpose. Section 182 of the Act prohibits a director, secretary, officer or employee of a corporation from improperly using his or her position to gain an advantage for himself or herself or someone else, or cause detriment to the corporation. Both sections impose an objective test. Black J held that the withdrawals were made without the Company's authority and without a proper purpose and therefore both sections 181 and 182 were contravened by KQR and PX. Black J also held that YCJ had breached sections 181 and 182 of the Act in relation to one unauthorised withdrawal made while YCJ was still a director for the same reasons.**(iv) Claim for knowing assistance against YCJ**The Plaintiffs pleaded that YCJ knew or ought to have known that the payments were made without authority or in breach of a fiduciary duty, and that YCJ assisted and participated in those breaches. However, Black J held that the Barnes v Addy (1874) LR 9 Ch App 244 proposition that a third party may be liable as constructive trustee if he or she knowingly assists a trustee in a dishonest and fraudulent design was not established in this case. It was not shown that YCJ actually assisted KQR and PX in their breaches. Further, Black J upheld the current Australian application of the test, requiring that a fiduciary needs to have engaged in dishonest and fraudulent design to be liable as a constructive trustee; it is not enough that they knew of the dishonesty. While knowledge of the dishonesty may have given rise to a claim for knowing receipt, this was not pleaded in this case.**(v) Unjust enrichment**Black J stated that he was bound by the High Court's decision in Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22, which found that a claim in unjust enrichment should not be permitted in substitution for a claim for knowing receipt of monies. Accordingly, summary judgment was not granted in respect of this claim.**(vi) Compensation and accounting**The Plaintiffs sought orders that KQR and PX pay the Company the amount of the unauthorised payments (and that YCJ pay for the once off unauthorised payment that was made in his time as director). Black J held that an order be made consequential upon the declarations made in respect of the breaches by KQR, PX and YCJ. However, Black J will hear further submissions on whether the defendants should be required to account for what was actually received and disposed of, or what would have been received if they had discharged their duties.**(vii) Proprietary remedies**The plaintiffs also sought orders that YCJ and PX do all things necessary to transfer title to the townhouses back to the Company. Black J found that the transfers of the townhouses, in breach of fiduciary duty, for no consideration, fell within the principles of fraud as discussed in *Black v S Freedman & Co* [1910] HCA 58; (1910) 12 CLR 105. Black J therefore found that a trust existed and the townhouses were held on constructive trust for the Company. Black J held that the plaintiffs were therefore entitled to orders that PX and YCJ do all things necessary to transfer title to the townhouses back to the Company.**(viii) Oppression**Black J also found that the exclusion of HJ from management decisions and the unauthorised payments and transfers of property was deemed to be oppressive, as it involved an unfair dealing and violated the conditions of fair play. However, as an order for winding up had been sought and made, relief for oppression was not necessary.**(ix) Winding Up**Black J made an order for winding up of the Company on the just and equitable ground under section 461(1)(k) of the Act, on the basis that the defendants excluded HJ from the Company's management and made unauthorised payments and unauthorised transfers of property.etailed Contents**6.12** **Consideration of the just and equitable ground for winding up a company under section 461(1)(k) of the Corporations Act** (By Katrina Sleiman and Ben Williams, Corrs Chambers Westgarth) In the matter of Catombal Investments Pty Ltd [2012] NSWSC 775, Supreme Court of New South Wales, Brereton J, 26 June 2012 The full text of this judgment is available at:[http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=159585](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=159585" \t "_new) **(a) Summary** Brian Munro and Graham Munro (together, the plaintiffs) and their brother Royce Munro (the second defendant) were equal shareholders in the first defendant company, Catombal Investments Pty Ltd (the Company). The Company is the land owning entity for the brothers' sheep, cattle and cropping business. The brothers, who are all aged 65 and over, had tried, unsuccessfully, to agree on an arrangement for the future management of the business. By their application, the plaintiffs sought the winding up of the Company on the just and equitable ground. Brereton J found that the just and equitable ground was established, notwithstanding that the circumstances of the case do not strictly fit a recognised class of 'just and equitable' for the purposes of section 461(1)(k) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Corporations Act), and ordered the winding up of the Company. **(b) Facts**The Munro brothers run a sheep, cattle and cropping business near Cumnock in central western New South Wales. The Company is the land owning entity of that business and owns property worth in excess of $10 million, subject to mortgages securing about $4.25 million. The three brothers are equal shareholders and the directors of the Company. Brian Munro, aged 71, wishes to retire from the business and pass on his interest to his two sons, so that they can purchase some of the land to run their own separate businesses. Graham Munro, aged 65, retired from the business in 2005 and wishes to realise his equity in the business. Royce Munro, aged 68, still works on one of the properties and wishes to continue to do so. The brothers have sought for over 20 years to reach an agreement as to succession and the future management of the business. On 30 June 2011, a deed was executed providing for Brian Munro to retire from the business and his equity be realised, subject to Royce Munro and Graham Munro agreeing on a price to pay out Graham. As no agreement as to that price could be reached, the brothers held a mediation on 16 December 2011. Still unable to agree on a price, the brothers agreed to wind up the Company and appoint a liquidator as agreed between their solicitors. At the end of December 2011, the brothers agreed, at Royce Munro's request, to defer the liquidation, subject to certain terms which were ultimately not satisfied by Royce. The plaintiffs' solicitors issued a series of written warnings to Royce Munro that a winding up application was imminent.  At a final board meeting on 5 April 2012, the brothers were still unable to reach any agreement. As the plaintiffs together formed a majority, a number of resolutions were passed relating to the Company and other related entities including a resolution that, absent unanimous approval for the winding up of the Company, an application would be filed in the Court seeking that the Company be wound up. That application was filed on 18 April 2012.  **(c) Decision** The plaintiffs sought an order that the Company be wound up, relying on the just and equitable ground under section 461(1)(k) of the Corporations Act.  Brereton J considered the scope of the just and equitable ground, stating that although 'just and equitable' is incapable of exhaustive definition, the decided cases are recognised as falling into a number of categories, including the failure of the substratum of the company and a deadlock or disagreement in the management of the company's affairs. His Honour recognised that the circumstances of the case did not fall strictly within any of the conventional categories. However, relying on a number of authorities, his Honour made the following observations:* the enquiry is a question of fact;
* the Court is not confined to exercising its discretion only where particular factual categories are made out;
* the words 'just and equitable' are general;
* a plaintiff is entitled to rely on any circumstances that affect him or her in his or her relations with the company or shareholdings so long as those circumstances have a direct bearing upon the management of the company or its business.

Brereton J said that 'the rationale behind many of the grounds referred to in the decided cases, particularly in the context of corporate quasi-partnerships, is that a shareholder who has invested in a company on the basis that it will undertake a certain activity is entitled to recover his or her contribution if the activity becomes impossible'. Brereton J found that the substratum of the Company had not strictly failed as it could continue to hold properties for the family business. However, the Company was in the nature of a quasi-partnership, formed for the purpose of holding property for the family's farming business. The nature of that business was that is was jointly owned and managed by the three brothers. The majority of the brothers no longer wish to be involved in the business so 'the idea of tripartite management, and benefit, structure is no longer feasible'. Therefore, his Honour held, the purpose of the Company was at an end. Brereton J held that in that context, and in circumstances where attempts to achieve a sale to Royce Munro had failed, it was not just or equitable that the assets of the Company remain unavailable to the plaintiffs and that they remain locked into the Company where the majority no longer wish to carry on the business. Accordingly, his Honour ordered that the Company be wound up. On the issue of costs, his Honour considered that it was relevant that the brothers had agreed to wind up the Company in December 2011, that Royce Munro failed to consent to the winding up after the April 2012 meeting and that he opposed the application after originally filing no grounds of opposition. Accordingly, his Honour ordered costs against Royce Munro. Finally, Royce Munro also objected to the plaintiffs' choice of liquidator on the ground that he was also the trustee of related trust entities, appointed pursuant to the recent resolutions of the directors. Brereton J did not accept the objection, observing that a common liquidator tended to facilitate, rather than obstruct, the liquidation of related entities.etailed Contents |

 |

|  |  |  |  |
| --- | --- | --- | --- |
|

|  |  |  |
| --- | --- | --- |
| **7. Contributions** |  |   |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |
| --- |
| If you would like to contribute an article or news item to the Bulletin, please email it to: "cclsr@law.unimelb.edu.au".etailed Contents |

 |

 | http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |  |  |  |
| --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |
| --- |
| **DISCLAIMER**This email alert is not intended to be and is not a complete or definitive statement of the law on the relevant subject matter. No person should take any action or refrain from taking any action in reliance upon the contents of this alert without first obtaining advice from a qualified practitioner. SAI Global expressly disclaims liability for any loss or damage suffered howsoever caused whether due to negligence or otherwise arising from the use of this information. For further information or if you have received this notice in error or believe that the email has been forwarded to you in breach of our licence terms, please notify SAI Global immediately by telephone on 131 242 or email info.regulatory@saiglobal.com. |

 | http://my.lawlex.com.au/alert/pic/spacer.gif |
|   |
|

|  |  |  |
| --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif | Copyright © 2012, Anstat Pty Ltd an SAI Global Company ACN 115 133 152. All rights reserved.  | http://my.lawlex.com.au/alert/pic/spacer.gif |

 |

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